

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Membership of the committee

Current members

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

Secretariat

Mr Ivan Powell, Secretary
Ms Toni Dawes, Secretary
Ms Jessica Strout, Acting 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

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

The committee's 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 Correspondence:** contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation:** includes the committee's guideline on addressing the consultation requirements of the *Legislation Act 2003*.³

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 Register 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 in the Senate, and their progress and eventual outcome.⁶

Senator John Williams (Chair)

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 22 April 2016 and 18 August 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	Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016 [F2016L00619]
Purpose	Establishes by-laws pursuant to the <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i> to conserve biodiversity and control activities on Aboriginal Land in the Jervis Bay Territory
Last day to disallow	9 November 2016
Authorising legislation	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(c)

Availability of merits review

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do 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.

With reference to the above, the committee notes that section 71 of the instrument provides for consideration and review of administrative decisions made by the Wreck Bay Aboriginal Community Council (the council) under Part 7 of the instrument. Subsection 71(7) states:

1 The committee has deferred its consideration of Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672].

The Council's decision following a reconsideration of the initial decision is final.

However, the explanatory statement (ES) does not provide information as to whether decisions made under Part 7 of the instrument possess characteristics that would justify the exclusion of such decisions from merits review.

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

Instrument	Agricultural and Veterinary Chemicals Code (Notifiable Variations) Instrument 2016 [F2016L01233]
Purpose	Determines types of variations that can be made by notice rather than by application
Last day to disallow	21 November 2016
Authorising legislation	<i>Agricultural and Veterinary Chemicals Code Act 1994</i>
Department	Agriculture and Water Resources
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 Part 1, item 4, paragraph (d) of the instrument incorporates the Agricultural Labelling Code and the Veterinary Labelling Code made by the Australian Pesticides and Veterinary Medicines Authority (the labelling codes). However, neither the text of the instrument nor the ES expressly state the manner in which the labelling codes 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.

Instrument	Australian Crime Commission (National Policing Information Charges) Determination 2016 [F2016L00678]
Purpose	Determines the charges payable to the Australian Crime Commission for conducting criminal history checks
Last day to disallow	21 November 2016
Authorising legislation	<i>Australian Crime Commission (National Policing Information Charges) Act 2016</i>
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The determination sets various charges that the Australian Crime Commission may impose for conducting a criminal history check. The charge for a criminal history check is \$21.00 when conducted for police; \$23.00 when conducted for an accredited body; and \$7.00 when conducted in relation to a volunteer. However, while noting that the determination 'preserves existing charging arrangements and amounts', the ES does not explicitly state the basis on which the charges have been calculated.

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

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

Instrument	Australian Prudential Regulation Authority instrument fixing charges No. 2 of 2016 [F2016L01043]
Purpose	Fixes charges for models-based capital adequacy requirements for authorised deposit-taking institutions for 2015-16
Last day to disallow	21 November 2016
Authorising legislation	<i>Australian Prudential Regulation Authority Act 1998</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

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 instrument states:

The annual levies consultation process explicitly adopts the Wallis Inquiry recommendations that direct services be met by specific user charges, resulting in a compensating reduction of the total general levies to be collected from industry participants [1].

Before making the instrument, APRA informed the affected ADIs of the proposed charges.

[1] See the Consultation Paper *Proposed Financial Industry Levies for 2015–16* at The Treasury website.

However, 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 general statement that the 'annual levies consultation process explicitly adopts the Wallis Inquiry recommendations' with reference to a consultation paper, is sufficient to meet the requirement that the ES describe the *nature* of any consultation undertaken.

Where consultation has taken place, the committee considers that a best-practice approach is for the ES to an instrument to set out the method of the consultation; the bodies, groups and/or individuals consulted; and the issues raised in and outcomes of the consultation process.

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

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

Instrument	Biosecurity Charges Imposition (Customs) Regulation 2016 [F2016L00723] Biosecurity Charges Imposition (General) Regulation 2016 [F2016L00727]
Purpose	These regulations prescribe the charges for certain matters connected with the administration of the <i>Biosecurity Act 2015</i>
Last day to disallow	21 November 2016
Authorising legislation	<i>Biosecurity Charges Imposition (Customs) Act 2015</i> ; and <i>Biosecurity Charges Imposition (General) Act 2015</i>
Department	Agriculture and Water Resources
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 section 10 of each of these regulations incorporates the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 (the movements declaration), which is made under subsection 618(2) of the *Biosecurity Act 2015* (the Biosecurity Act). However, neither the text of the regulations nor the ESs expressly states the manner in which the movements declaration is incorporated.

The committee further notes that subsection 618(7) of the Biosecurity Act provides that the movements declaration is a legislative instrument that is not subject to disallowance (an exempt instrument). Subsection 14(3) of the *Legislation Act 2003* provides that only disallowable legislative instruments may be incorporated as in force from time to time. The committee therefore understands that the movements declaration may only be incorporated as in force at the commencement of the regulations, unless authorising or other legislation alters the operation of section 14.

However, the committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which exempt instruments 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.

Instrument	Biosecurity (Human Health) Regulation 2016 [F2016L00719]
Purpose	Sets requirements for preventing and managing biosecurity risks to human health
Last day to disallow	21 November 2016
Authorising legislation	<i>Biosecurity Act 2015</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a) and (b)

Incorporation of documents²

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 various sections of the regulation incorporate the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 (the movements declaration), which is made under subsection 618(2) of the *Biosecurity Act 2015* (the Biosecurity Act). However, neither the text of the regulation nor the ES expressly states the manner in which the declaration is incorporated.

The committee further notes that subsection 618(7) of the Biosecurity Act provides that the movements declaration is a legislative instrument that is not subject to disallowance (an exempt instrument). Subsection 14(3) of the *Legislation Act 2003* provides that only disallowable legislative instruments may be incorporated as in force from time to time. The committee therefore understands that the movements

2 The committee notes that this comment raises an identical issue to that raised in relation to Biosecurity Charges Imposition (Customs) Regulation 2016 [F2016L00723]; and Biosecurity Charges Imposition (General) Regulation 2016 [F2016L00727]. See p. 5 of this monitor.

declaration may only be incorporated as in force at the commencement of the regulation, unless authorising or other legislation alters the operation of section 14.

However, the committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which exempt instruments 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 sets requirements for taking and storing body samples. It requires that samples 'must be taken in a manner consistent with appropriate medical samples' and 'must be stored, transported, labelled and used in a manner consistent with appropriate professional standards that are relevant to managing the risks to human health of listed human diseases.' Failure to comply with these requirements is an offence under subsection 10(5) of the regulation.

The committee is concerned that the terms 'appropriate medical standards' and 'appropriate professional standards' are insufficiently precise, such that it may be difficult for a person to know what standards must be complied with to ensure that they do not commit an offence under the regulation. This uncertainty in the application of the offence is problematic in terms of the committee's task of ensuring that the exercise of the Parliament's delegated legislative powers does not trespass unduly on personal rights and liberties (scrutiny principle 23(3)(b)).

Further, the taking and storing of body samples must be subject to clear and appropriate safeguards in order to avoid undue trespass on personal rights and liberties (namely the right to privacy). Without more specific information regarding the medical or professional standards with which officers must comply when taking or storing body samples, the committee is unable to satisfy itself that the regulation will not trespass unduly on an individual's rights and liberties.

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

Instrument	Biosecurity Regulation 2016 [F2016L00756]
Purpose	Prescribes information relating to the exercise of powers by officials under the <i>Biosecurity Act 2015</i> and sets information and reporting requirements for those regulated by the <i>Biosecurity Act 2015</i>
Last day to disallow	21 November 2016
Authorising legislation	<i>Biosecurity Act 2015</i>

Department	Agriculture and Water Resources
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:

- section 5 of the regulation states that the term *health certificate* has the same meaning as in the Biosecurity (Prohibited and Conditionally Non-prohibited Goods) Determination 2016 (the goods determination), which is made under subsection 174(1) of the *Biosecurity Act 2015* (the Biosecurity Act); and
- subsections 107(4) and 118(1) and (2) of the regulation incorporate the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 (the movements declaration), which is made under subsection 618(2) of the Biosecurity Act.

However, neither the text of the regulation nor the ES expressly states the manner in which the goods determination and the movements declaration are incorporated.

The committee further notes that subsections 174(5) and 618(7) of the Biosecurity Act provide that the goods determination and the movements declaration are legislative instruments that are not subject to disallowance (exempt instruments). Subsection 14(3) of the *Legislation Act 2003* provides that only disallowable legislative instruments may be incorporated as in force from time to time. The committee therefore understands that the goods determination and the movements declaration may only be incorporated as in force at the commencement of the regulation, unless authorising or other legislation alters the operation of section 14.

However, the committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which exempt instruments 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.

Instrument	Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853]
Purpose	Specifies the events that are reportable biosecurity incidents in relation to goods that are subject to biosecurity control
Last day to disallow	21 November 2016
Authorising legislation	<i>Biosecurity Act 2015</i>
Department	Agriculture and Water Resources
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:

- section 4 of the Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853] (the incidents determination) incorporates Biosecurity (Prohibited and Conditionally Non-Prohibited Goods) Determination 2016 (the non-prohibited goods determination), which is made under subsection 174(1) of the Biosecurity Act; and
- the ES to the incidents determination states that the non-prohibited goods determination is incorporated as in force from time to time.

However, the committee notes that subsection 174(5) of the Biosecurity Act provides that the non-prohibited goods determination is a legislative instrument that is not subject to disallowance; and that subsection 14(3) of the *Legislation Act 2003* provides that only disallowable legislative instruments may be incorporated as in force from time to time. As the committee is unaware of any legislation altering the operation of subsection 14(3), the committee therefore understands that the non-prohibited goods determination may only be incorporated as in force at the commencement of the incidents determination.

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

Instrument	Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016 [F2016L01148] Building Energy Efficiency Disclosure Determination 2016 [F2016L01276]
Purpose	The determinations specify buildings, and areas of buildings, that are disclosure affected for the purposes of the <i>Building Energy Efficiency Disclosure Act 2010</i> ; and set assessment methods and standards for building energy efficiency
Last day to disallow	21 November 2016
Authorising legislation	<i>Building Energy Efficiency Disclosure Act 2010</i>
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated 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 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 on 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 section 4 of the determinations incorporate, as in force at the commencement of the determinations, the document *Method of Measurement for Lettable Area* (the measurement method). A note to section 4 states:

The document *Method of Measurement for Lettable Area* is available from the Property Council of Australia Limited's website at <http://www.propertyoz.com.au>.

However, the committee notes that the measurement method is only available for a fee of \$210 from the Property Council of Australia Limited, and the ESs do not provide any information as to whether the measurement method is otherwise freely available.

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

Instrument	Charter of the United Nations (Sanctions—Iran) (Export Sanctioned Goods) List Determination 2016 [F2016L01208]
Purpose	Determines what goods are export sanctioned goods for the purposes of the Charter of the United Nations (Sanctions —Iran) Regulation 2016 [F2016L01181]
Last day to disallow	21 November 2016
Authorising legislation	Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181]
Department	Foreign Affairs and Trade
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 section 3 of the determination incorporates ISO 230-2: 1988, *Acceptance code for machine tools – Part 2: Determination of accuracy and repeatability of positioning of numerically controlled machine tools* (ISO 230-2:1998) and IEEE standard 528-2001. However, neither the text of the determination nor the ES expressly states the manner in which these documents 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.

Description of and access to incorporated 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 on 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 section 3 of the determination incorporates ISO 230-2:1998 and IEEE standard 528-2001. However, neither the text of the determination nor the ES provides a description of ISO 230-2:1998 and IEEE standard 528-2001 or indicates how they may be freely obtained.

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

Instrument	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 1) [F2016L01209]
Purpose	Makes a consequential amendment to the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to reflect the making of the Charter of the United Nations (Sanctions – Iran) Regulation 2016 [F2016L01181]
Last day to disallow	21 November 2016
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 1) [F2016L01209] (the amendment declaration) amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2016C00782] (the principal declaration) to reflect the making of the Charter of the United Nations (Sanctions – Iran) Regulation 2016 [F2016L01181].

The amendment declaration replaces Schedule 1 of the principal declaration and specifies the provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to the *Charter of the United Nations Act 1945*. However, the committee

notes that the following regulations declared in replacement Schedule 1 to be UN sanction enforcement laws no longer exist:

- Schedule 1, Item 4, regulation 11 of Charter of the United Nations (Sanctions — Côte d'Ivoire) Regulations 2008; and
- Schedule 1, Item 19, regulation 4N of Customs (Prohibited Imports) Regulations 1956.

It is unclear to the committee why these regulations have been included in the amendment declaration.

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

Instrument	Comptroller-General of Customs Directions (Use of Force - Norfolk Island) 2016 [F2016L01033]
Purpose	Sets out directions relating to the deployment and use of approved firearms and other approved items of personal defence equipment, and the use of force in the performance of duties, that apply to officers of Customs exercising powers on Norfolk Island
Last day to disallow	21 November 2016
Authorising legislation	<i>Customs Act 1901</i>
Department	Immigration and Border Protection
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 sections 3 and 4 of the directions incorporate Operational Safety Order (2015) (the safety order). However, neither the text of the directions nor the ES expressly states the manner in which the safety order is 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.

Description of and access to incorporated 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 on 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 sections 3 and 4 of the directions incorporate the safety order, neither the text of the instrument nor the ES provides a description of the safety order or indicates how it 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 the safety order is available for free online.³ 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.

3 See Australian Government, Department of Immigration and Border Protection, <http://www.border.gov.au/about/access-accountability/plans-policies-charters/policies/practice-statements/border> (accessed 9 September 2016).

Instrument	Defence Determination 2016/19, Conditions of service [F2016L00643]
Purpose	Sets conditions of Australian Defence Force service and preserves accrued rights and liabilities under Defence Determination 2005/15, Conditions of Service
Last day to disallow	21 November 2016
Authorising legislation	<i>Defence Act 1903</i>
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.

With reference to the above, the committee notes that section 14.4.4 of the determination defines the term *international best fare* as having the meaning given in the Department of Finance Resource Management Guide No. 405 (the guide). However, neither the text of the determination nor the ES expressly states the manner in which the guide is 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.

Instrument	Defence Trade Controls Act 2012 - Foreign Country List [F2016L00548]
Purpose	Provides exemptions to brokering offences under the <i>Defence Trade Controls Act 2012</i> to allow certain goods and technology to be brokered without a permit
Last day to disallow	8 November 2016
Authorising legislation	<i>Defence Trade Controls Act 2012</i>
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Subsection 15G(1) of the *Legislation Act 2003* requires rule-makers to lodge legislative instruments for registration as soon as practicable after the instrument is made.

With reference to this requirement, the committee notes that the Defence Trade Controls Act 2012 - Foreign Country List [F2016L00548] (the list) was made by former Defence Minister Kevin Andrews on 12 May 2015. However, as the list was not registered until 20 April 2016, it is unclear to the committee whether the list was registered in accordance with subsection 15G(1) of the *Legislation Act 2003*.

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

Instrument	<p>Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Mallee Emu-Wren, Red-lored Whistler, Western Whipbird) (02/05/2016) [F2016L00655]</p> <p>Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Spotted-tailed Quoll) (02/05/2016) [F2016L00657]</p> <p>Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Mountain Pygmy-Possum) (02/05/2016) [F2016L00658]</p> <p>Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Orange-bellied Parrot) (02/05/2016) [F2016L00662]</p>
Purpose	These instruments adopt national recovery plans for certain listed species
Last day to disallow	21 November 2016
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

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, under subsection 277(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), the minister must not adopt a recovery plan unless he or she is satisfied that an appropriate level of consultation was undertaken in the preparation of the plan. The ESs to the instruments state that the minister was satisfied that an appropriate level of consultation was undertaken in the preparation of the adopted plans.

However, 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 general statement that the minister was satisfied that an appropriate level of consultation had occurred is

sufficient to meet the requirement that the ES describe the *nature* of any consultation undertaken.

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

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

Instrument	Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulation 2016 [F2016L00686]
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	21 November 2016
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
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*,⁴ 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. 3) Regulation 2016 [F2016L00686] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New

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

table item 162 establishes legislative authority for the Commonwealth government to fund the Biomedical Translation Fund.

The objective of the Biomedical Translation Fund is:

To invest in promising biomedical discoveries and assist in their commercialisation, and to encourage the development of companies that are commercialising biomedical research and development, as measures:

- (a) with respect to the provision of medical and dental services; or
- (b) to give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Articles 2 and 12; or
- (c) that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative 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 social welfare power (section 51(xxiiiA));
- the external affairs power (section 51(xxix)); and
- the Commonwealth executive power and express incidental power (section 61 and section 51(xxxix)).

The regulation thus appears to rely on the social welfare power, the external affairs power and the Commonwealth executive power and express incidental power as the relevant heads of legislative power to authorise the addition of the items to Schedule 1AB (and therefore the spending of public money under them).

However, in relation to the social welfare power, it is unclear to the committee how the funding of a venture capital program directed to the commercialisation of biomedical research is sufficiently connected to the provision of medical and dental services so as to be authorised by this head of legislative power.

In relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.⁵ The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the instrument or the ES. However, while the regulation states that it is giving effect to Australia's obligations under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights, it does not explain how the regulation is appropriately adapted to implement specific obligations under these articles.

With respect to the Commonwealth executive power and express incidental power, it is unclear to the committee how the funding of the initiative may be regarded as an

5 *Victoria v Commonwealth* (1996) 187 CLR 416.

activity that is 'peculiarly adapted to the government of a nation' and as not able to otherwise be 'carried on for the benefit of the nation'.⁶

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

Instrument	Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2016 - GRS 001 - Reporting Requirements [F2016L01225]⁷
Purpose	Determine various reporting standards relating to financial or accounting data of Level 2 insurance groups
Last day to disallow	21 November 2016
Authorising legislation	<i>Financial Sector (Collection of Data) Act 2001</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Inadequate 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 shared ESs for the determinations state:

APRA has consulted with the Office of Best Practice Regulation (OBPR) and the OBPR has confirmed that the changes implemented by the instrument are of a minor nature. The OBPR has confirmed that a Regulatory Impact Statement (RIS) is not required.

The committee's guideline on addressing consultation requirements under the *Legislation Act 2003* (the Act) states:

It is...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

⁶ *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

⁷ The committee notes that the issue raised here also applies to Financial Sector (Collection of Data) (reporting standard) determination Nos 2 to 15 of 2016: [F2016L01226]; [F2016L01227]; [F2016L01228]; [F2016L01229]; [F2016L01230]; [F2016L01231]; [F2016L01222]; [F2016L01223]; [F2016L01216]; [F2016L01217]; [F2016L01218]; [F2016L01219]; [F2016L01220]; and [F2016L01221].

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.

Noting that the ES for the instrument appears to address only the consultation requirements in relation to the RIS process, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003*.

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

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

Instrument	Greenhouse and Energy Minimum Standards (Incandescent Lamps for General Lighting Services) Determination 2016 [F2016L00659]
Purpose	Establishes energy efficiency, labelling and product performance requirements, and requirements for conducting tests, for incandescent lamps for general lighting services
Last day to disallow	21 November 2016
Authorising legislation	<i>Greenhouse and Energy Minimum Standards Act 2012</i>
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated 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 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 on 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 section 3 of the determination incorporates the following documents as they existed on the day the determination came into force:

- Australian/New Zealand Standard 4934.1:2014 – Incandescent lamps for general lighting services – Part 1: Test methods – Energy performance;
- Australian Standard 4934.2-2011 – Incandescent lamps for general lighting services – Part 2: Minimum Energy Performance Standards (MEPS) requirements; and
- IEC 60630 Edition 2.5 International Electrotechnical Commission - Maximum lamp outlines for incandescent lamps.

While the ES to the determination provides a description of these standards and how they may be obtained, the committee notes that the standards are only available for sale from Standards Australia Limited and SAI Global, and neither the determination nor the ES provides information about whether the documents are otherwise freely and readily available.

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

Drafting

Section 3 of the determination contains the following definition:

IEC 60630 Edition 2.5 means International Electrotechnical Commission - Maximum lamp outlines for incandescent lamps, as it existed on the day this Determination came into force.

However, the committee notes that the the product class characteristics for product class 1 in the table set out in subsection 5(1) of the determination refers to IEC 60630 Edition 2. It is therefore unclear to the committee whether the reference in subsection 5(1) should be to IEC 60630 Edition 2 or Edition 2.5.

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

Instrument	Health Legislation Amendment (eHealth-Governance Restructure Day) Proclamation 2016 [F2016L00732]
Purpose	Specifies 1 July 2016 as 'governance restructure day', the day on which changes to the governance of the My Health Record system take effect
Last day to disallow	21 November 2016
Authorising legislation	<i>Health Legislation Amendment (eHealth) Act 2015</i>
Department	Health
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 proclamation 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*.

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 proclamation does not include a statement of compatibility.

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

Instrument	Legal Services Amendment (Solicitor-General Opinions) Direction 2016 [F2016L00645]
Purpose	Amends the Legal Services Directions 2005 to insert new provisions about seeking opinions on questions of law from the Solicitor-General
Last day to disallow	28 November 2016
Authorising legislation	<i>Judiciary Act 1903</i>
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(d)

Matter more appropriate for parliamentary enactment

Section 12 of the *Law Officers Act 1964* prescribes the functions of the Solicitor-General. The functions prescribed in subsections 12(a)(viii) and 12(c) are performed by the Solicitor-General at the request of the Attorney-General, however, the functions of the Solicitor-General prescribed in subsections 12(a)(i)–(a)(vii) do not involve the Attorney-General, and include the function of the Solicitor-General to act as counsel for a minister (subsection 12(a)(iv)) or an officer of the Commonwealth (subsection 12(a)(v)).

The direction operates to preclude persons or bodies listed in 12(a)(i)–(a)(vii) from seeking the advice of the Solicitor-General on questions of law without the consent of the Attorney-General, unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel.

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to ensure that instruments do not contain matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation which fundamentally changes the law.

The ES to the direction states that its purpose is to:

...clarify the circumstances in which an opinion on a question of law may be sought from the Solicitor-General pursuant to paragraph 12(b) of the *Law Officers Act 1964* and regularise the process by which referrals to the Solicitor-General for opinions are made.

However, the committee notes that, in effect, this direction appears to narrow the scope of the Solicitor-General's functions prescribed under subsections 12(a)(i)–(a)(vii) of the *Law Officers Act 1964* because, for example, ministers or officers of the Commonwealth can no longer seek the advice of the Solicitor-General on questions of law without the consent of the Attorney-General, unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel.

Given this, the committee considers that the changes effected by the direction may be regarded as more appropriate for parliamentary enactment.

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

Instrument	Marine Order 12 (Construction - subdivision and stability, machinery and electrical installations) 2016 [F2016L01049] Marine Order 21 (Safety and emergency arrangements) 2016 [F2016L01076] Marine Order 27 (Safety of navigation and radio equipment) 2016 [F2016L01077]
Purpose	These orders prescribe standards for the structure, subdivision, stability, machinery and electrical installations for vessels; and safety measures, including emergency procedures and radio equipment; and danger, urgency and distress signals
Last day to disallow	21 November 2016
Authorising legislation	<i>Navigation Act 2012</i>
Department	Infrastructure and Regional Development
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 with respect to these marine orders:

- Marine Order 12 (Construction - subdivision and stability, machinery and electrical installations) 2016 [F2016L01049], section 1.4 incorporates AS 1735.1:2003; and paragraphs 22(b)(i)-(iii) incorporate ISO 5488:2015; ISO 7061:2015 and ISO 7364:2016;
- Marine Order 21 (Safety and emergency arrangements) 2016 [F2016L01076], subsections 4(2) and 25(4), and section 4 of Schedule 2 incorporates AS/NZS 60079.29.1:2008; and subsection 25(4) incorporates AS/NZS60079.29.2:2008 and IEC 60079-29-2 Ed 1.0; and

- Marine Order 27 (Safety of navigation and radio equipment) 2016 [F2016L01077], subsection 19(1) incorporates IEC 60533:2015 and subsection 26(4) incorporates IEC 60945:2002.

However, neither the text of the orders nor the ESs expressly state the manner in which the documents 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 incorporated 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 on 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 various sections of the marine orders incorporate a number of documents by reference. While the ESs to the orders provide a description of the documents and information about how they can be obtained, a number of the documents are only available to purchase. The ESs do not contain information as to whether the documents are otherwise freely accessible, other than to state that 'persons having difficulty obtaining a copy of any standard mentioned in the Order[s] can contact AMSA.'

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

Instrument	Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679]
Purpose	Defines certain non-citizen persons as fast track applicants
Last day to disallow	Exempt
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a) and (d)

Background

The Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679] (the instrument) is made under Part 1, paragraph 5(1AA)(b), of the *Migration Act 1958* (the Migration Act), and defines a class of persons who are fast track applicants for the purpose of paragraph 5(1)(b) of that Act. The committee understands the instrument to be exempt from disallowance by virtue of table item 20 in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (the exemption regulation), which exempts particular instruments made under the Migration Act from disallowance (including Part 1 under which the instrument is made).

The exemption regulation replaced the former Legislative Instruments Regulations 2004, and implemented a number of changes to the regime governing legislative instruments by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*).

In its report on the exemption regulation, the committee noted that the item description of section 10 in the ES to the regulation provided justifications for the exemption of particular instruments from disallowance, explaining why their particular nature or character required them to be exempt from disallowance.⁸

However, no such justification was provided for item 20 of the table in section 10, which applies to the present instrument as described above. Accordingly, the committee sought a response from the Attorney-General in relation to this question.

In response, the Attorney-General advised:

It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty

⁸ See *Delegated legislation monitor* 14 of 2015 (11 November 2015), pp 8–9.

for the rights and obligations of individuals with regard to visa and migration status.

Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act...⁹

The Attorney-General also provided the following examples of the nature and purpose of instruments commonly made under Part 1 of the Migration Act:

- authorisation of officers for certain purposes;
- approved places of immigration detention; and
- appointment of ports.

In concluding the matter, the committee noted the Attorney-General's advice that exempting such instruments from disallowance ensures certainty in operational matters and provides for administrative matters to support the machinery of the migration program.

Exemption of instrument from disallowance¹⁰

As noted above, the purpose of the instrument is to define a class of persons as fast track applicants for the purposes of paragraph 5(1)(b) of the Migration Act.

Paragraph 6 of the ES to the instrument states:

Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance...

However, as set out above, the instrument is made under Part 1 of the Migration Act, and the committee therefore understands it to be exempt from disallowance by virtue of section 10 of the exemption regulation.

With reference to the Attorney-General's previous advice about the nature of instruments made under Part 1 of the Migration Act, and the examples provided of the nature and purpose of such instruments, the committee notes that the instrument provides a substantive definition relating to classes of persons who are fast track

9 *Delegated legislation monitor* 16 of 2015 (2 December 2015), pp 30–33 and Appendix 1.

10 The committee notes that the issue raised here also applies to three recent exempt instruments that were reported on in *Delegated legislation monitor* 5 of 2016 (3 May 2016): Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/010 [F2016L00377]; Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455]; and Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456].

applicants for the purposes of the Migration Act. In this respect, it is unclear to the committee that the instrument is properly characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify its exemption from disallowance (and thereby being effectively removed from the effective oversight of the Parliament).

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

Instrument	<p>Migration Regulations 1994 - Working Holiday Visa - Definitions of Specified Work and Regional Australia 2016/041 [F2016L00757]</p> <p>Migration Regulations 1994 - Specification of Designated Areas - IMMI 16/044 [F2016L00777]</p> <p>Migration Regulations 1994 - Specification of Regional Certifying Bodies and Regional Postcodes - IMMI 16/045 [F2016L00778]</p> <p>Migration Regulations 1994 - Specification of Arrangements for Resident Return Visa Applications 2016/042 - IMMI 16/042 [F2016L00785]</p> <p>Migration Regulations 1994 - Specification of Arrangements for Other Visas 2016/043 - IMMI 16/043 [F2016L00786]</p> <p>Migration Regulations 1994 - Specification of Visa Subclass for the Purposes of the Health Requirement - IMMI 16/067 [F2016L01126]</p>
Purpose	These regulations specify various requirements relevant to the transition of Norfolk Island permit holders and foreign national residents to the Australian visa regime
Last day to disallow	21 November 2016
Authorising legislation	<i>Migration Regulations 1994</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Classification as a disallowable instrument

These regulations specify various requirements relevant to the transition of Norfolk Island permit holders and foreign national residents to the Australian visa regime.

The committee understands these instruments to be exempt from disallowance because they are made under certain schedules or parts of the Migration Regulations 1994 (the Migration Regulations) that are specified in item 20 of the table

in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (the exemption regulation). The relevant schedules or parts under which the regulations are made are as follows:

- Migration Regulations 1994 - Working Holiday Visa - Definitions of Specified Work and Regional Australia 2016/041 [F2016L00757]: Schedule 1 of the Migration Regulations;
- Migration Regulations 1994 - Specification of Designated Areas - IMMI 16/044 [F2016L00777]: Part 1 of the Migration Regulations;
- Migration Regulations 1994 - Specification of Regional Certifying Bodies and Regional Postcodes - IMMI 16/045 [F2016L00778]: Part 5 of the Migration Regulations;
- Migration Regulations 1994 - Specification of Arrangements for Resident Return Visa Applications 2016/042 - IMMI 16/042 [F2016L00785] and Migration Regulations 1994 - Specification of Arrangements for Other Visas 2016/043 - IMMI 16/043 [F2016L00786]: Part 2 of the Migration Regulations; and
- Migration Regulations 1994 - Specification of Visa Subclass for the Purposes of the Health Requirement - IMMI 16/067 [F2016L01126]: Schedule 4 of the Migration Regulations.

However, notwithstanding the apparent exemption of the regulations from disallowance, the ESs for the regulations state that they are disallowable under section 42 of the *Legislation Act 2003*.

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

Instrument	Minister's Road User Charge Determination 2016 (No. 1) [F2016L00556]
Purpose	Specifies the rate of the Road User Charge
Last day to disallow	8 November 2016
Authorising legislation	<i>Fuel Tax Act 2006</i>
Department	Infrastructure and Regional Development
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 legislative instrument is compatible with human rights, and must be included in the ES for the legislative instrument.

With reference to this requirement, the committee notes that the ES for this determination does not include a statement of compatibility.

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

Instrument	National Disability Insurance Scheme (Becoming a Participant) Rules 2016 [F2016L00544]
Purpose	Sets eligibility requirements relating to age, residence and disability or early intervention to become a participant in the National Disability Insurance Scheme
Last day to disallow	8 November 2016
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents¹¹

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 section 8.4 of the National Disability Insurance Scheme (Becoming a Participant) Rules 2016 [F2016L00544] (the becoming a participant rules) contains the following definition:

2016 NDIS early transition areas means the areas specified in Schedules 1 and 2 of the Local Government Regulation 2012 (Qld) as:

- (a) Townsville City Council;
- (b) Charters Towers Regional Council;
- (c) Palm Island Aboriginal Shire Council.

¹¹ The committee notes that the issue raised here also applies to National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2016 [F2016L00545] which incorporates Schedules 1 and 2 of the Local Government Regulation 2012 (Qld) at item 2.

The committee further notes that subsection 209(2) of the *National Disability Insurance Scheme Act 2013* provides that, despite section 14 of the *Legislation Act 2003*, the National Disability Insurance Scheme Rules ‘may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time’. However, neither the text of the becoming a participant rules nor the ES expressly states the manner in which the relevant parts of schedules 1 and 2 of Local Government Regulation 2012 (Qld) are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which State regulations 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.

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 becoming a participant rules states:

Consultation

The Commonwealth and each host jurisdiction have agreed to the making of the Becoming a Participant Rules.

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, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In the committee's view, the general statement that the Commonwealth and host jurisdictions have agreed to the making of the rules is not sufficient to meet the requirement that the ES describe the *nature* of any consultation undertaken.

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

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

Instrument	National Disability Insurance Scheme (Prescribed Programs—New South Wales) Rules 2016 [F2016L00792]
Purpose	Provides for people in New South Wales currently receiving certain disability services to be supported as participants in the National Disability Insurance Scheme, irrespective of whether they meet the residence requirements
Last day to disallow	21 November 2016
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Department	Social Services
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 ES for this instrument does not include a statement of compatibility.

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

Instrument	National Health Determination under paragraph 98C(1)(b) Amendment 2016 (No. 4) (PB 44 of 2016) [F2016L00855]
Purpose	Rectifies a typographical error in PB 119 of 2008
Last day to disallow	21 November 2016
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
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 determination 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*.

Instrument	Norfolk Island Customs Ordinance 2016 [F2016L00736]
Purpose	Applies the <i>Customs Act 1901</i> , the Customs Regulation 2015 and the Customs (International Obligations) Regulation 2015 in Norfolk Island, as modified by the Norfolk Island Customs Ordinance 2016
Last day to disallow	21 November 2016
Authorising legislation	<i>Norfolk Island Act 1979</i>
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

Section 9 of the Norfolk Island Customs Ordinance 2016 [F2016L00736] (the ordinance) provides that the Comptroller-General of Customs may delegate any

of their functions or powers under an applied customs law (other than section 179 of the *Customs Act 1901* (NI)) to the secretary of the relevant department or to 'another officer of Customs'. Subsection 9(3) of the ordinance further provides that the secretary may sub-delegate powers delegated by the Comptroller-General of Customs to 'another officer of Customs'.

The ordinance 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.¹²

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 ordinance provides no justification for the broad delegation and sub-delegation of the Comptroller-General of Customs' powers under the ordinance to an 'officer of Customs'.

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

Instrument	Part 21 Manual of Standards Instrument 2016 [F2016L00915]
Purpose	Prescribes standards for classes of light sport aircraft and for articles for use on civil aircraft; and requirements for special certificates of airworthiness and persons carrying out approved design activities for approved design organisations
Last day to disallow	21 November 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Description of and access to incorporated 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.

¹² See *Customs Act 1901*, s 4.

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 on 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 section 1.10 of the instrument incorporates, as in force from time to time, various international airworthiness requirements, certification specifications and standards. However, neither the text of the instrument nor the ES provides a description of these documents or indicates how they may be 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*.

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

Instrument	Primary Industries (Customs) Charges Amendment (Fodder) Regulation 2016 [F2016L00760]
Purpose	Authorises the imposition of a new export charge on fodder products to fund research and development activities
Last day to disallow	21 November 2016
Authorising legislation	<i>Primary Industries (Customs) Charges Act 1999</i>
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulation authorises the imposition of a new export charge on certain fodder products to fund research and development activities. Funds raised by the export charge will be collected by the Department of Agriculture and Water Resources, and

passed on to the Rural Industries Research and Development Corporation for the administration of fodder industry research.

Clause 5.2 of the regulation sets the rate of the charge at 50 cents per tonne of fodder. However, the ES does not explain the basis on which the new export charge has been calculated or set.

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

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

Instrument	Primary Industries (Customs) Charges Amendment (Citrus) Regulation 2016 [F2016L00708] Primary Industries (Excise) Levies Amendment (Citrus) Regulation 2016 [F2016L00716]
Purpose	These regulations increase the statutory charge and levy rates on citrus in the Primary Industries (Customs) Charges Regulations 2000 and Primary Industries (Excise) Levies Regulations 1999
Last day to disallow	21 November 2016
Authorising legislation	<i>Primary Industries (Customs) Charges Act 1999</i> ; and <i>Primary Industries (Excise) Levies Act 1999</i>
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulations increase the statutory charge and levy rates on citrus in the Primary Industries (Customs) Charges Regulations 2000 and Primary Industries (Excise) Levies Regulations 1999.

The rates for research and development have increased from \$1.97 per tonne or 3.94 cents per box to \$3.20 per tonne or 6.4 cents per box; and the Plant Health Australia membership charge and levy rates have increased from 3 cents per tonne or 0.06 of a cent per box to 30 cents per tonne or 0.6 of a cent per box. However, the ESs for the regulations do not explicitly state the basis on which the charges have been calculated.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge,

fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Instrument	Primary Industries (Excise) Levies Amendment (Forest Growers) Regulation 2016 [F2016L00715]
Purpose	Introduces an Emergency Plant Pest Response levy on growers of certain plantation trees
Last day to disallow	21 November 2016
Authorising legislation	<i>Primary Industries (Excise) Levies Act 1999</i>
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulation amends the statutory levies for forest growers to replace the category of leviable logs processed from trees felled in a plantation with two new categories; and introduces an Emergency Plant Pest Response levy on growers of certain plantation trees.

Schedule 1 of the regulation provides for growers of certain plantation trees to pay an Emergency Plant Pest Response levy of 5 cents per cubic metre of logs felled in those plantations. However, the ES does not explicitly state the basis on which the levy has been calculated.

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

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

Instrument	Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016 [F2016L00651]
Purpose	Amends the Private Ancillary Fund Guidelines 2009 and the Public Ancillary Fund Guidelines 2011
Last day to disallow	21 November 2016
Authorising legislation	<i>Taxation Administration Act 1953</i>
Department	Treasury
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 legislative instrument is compatible with human rights, and must be included in the ES for the legislative instrument.

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

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

Instrument	Public Lending Right Scheme 1997 (Modification No. 1 of 2016) [F2016L00610]¹³
Purpose	Modifies the Public Lending Right Scheme 1997 to increase the creator rate of payment for 2015–16 from \$2.02 to \$2.11 and the publisher rate of payment from 50.5 cents to 52.75 cents
Last day to disallow	9 November 2016
Authorising legislation	<i>Public Lending Right Act 1985</i>
Department	Communications and the Arts
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 instrument 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*.

Unclear basis for determining fees

Items 2 and 3 of the instrument increase the creator of books rate of payment for 2015–16 from \$2.02 to \$2.11; and the publisher of books rate of payment from 50.5 cents to 52.75 cents. However, the ES does not explain the basis on which the new rates have been calculated or set.

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

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

13 The committee previously raised the same issues in relation to Public Lending Right Scheme 1997 (Modification No. 1 of 2015) [F2015L00694] (see *Delegated legislation monitor* 7 and 9 of 2015).

Instrument	Quality Agency Principles Amendment Principle 2016 [F2016L00830]
Purpose	Removes the methods for calculation and indexation of application fees for accreditation from the Quality Agency Principles 2013 [F2016C00652]
Last day to disallow	21 November 2016
Authorising legislation	<i>Australian Aged Care Quality Agency Act 2013</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Removing fees from a disallowable legislative instrument

This Quality Agency Principles Amendment Principle 2016 [F2016L00830] (the amendment principle) removes from the Quality Agency Principles 2013 [F2016C00652] (the 2013 principles) the details of how application fees for accreditation of certain aged care services are calculated and indexed. As such, the fees will no longer be set out in a disallowable legislative instrument, and instead will be determined by the Chief Executive Officer of the Australian Aged Care Quality Agency and published on that agency's website.

The committee acknowledges that the *Australian Aged Care Quality Agency Act 2013* (Quality Agency Act) does not require these fees to be included in a disallowable legislative instrument. However, the committee notes that, when considering the bill that became the Quality Agency Act, the Scrutiny of Bills committee sought a justification from the minister for including important matters relating to the accreditation of care services in the 2013 principles. The minister's response advised that the information to be included in the quality agency principles, such as application fees, was not appropriate for inclusion in primary legislation as the information needed regular updating. The minister further justified this approach by noting that the 2013 principles would be subject to oversight by this committee.¹⁴

The amendment principle removes the details of how application fees for accreditation of certain aged care services are calculated and indexed from the 2013 principles (a disallowable legislative instrument), and therefore from direct parliamentary oversight (including consideration by this committee).

The committee is concerned that the ES for the amendment principle does not provide a justification for the removal of the calculation and indexation of application fees for accreditation of certain aged care services from the Quality Agency Principles; nor

14 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2013* (19 June 2013), Australian Aged Care Quality Agency Bill 2013 (see p. 4 of the correspondence from the minister, The Hon Mark Butler, MP, attached to the report).

information on whether it is appropriate to remove this process from a disallowable legislative instrument (thereby removing the process from the effective oversight of the Parliament).

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

Instrument	Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294]
Purpose	Revokes and replaces the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2006 [F2012C00581]
Last day to disallow	21 November 2016
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated 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 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 on 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 section 6 of Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294] (the Class Licence) incorporates as in force from time to time 'AS/NZS IEC 62287.1: 2007: Maritime navigation and radiocommunication equipment and systems—Class B shipborne equipment of the automatic identification

system (AIS), Part 1: Carrier-sense time division multiple access (CSTDMA) techniques, published by Standards Australia' (AS/NZS IEC 62287.1:2007).

However, the committee notes that AS/NZS IEC 62287.1: 2007, published by Standards Australia, appears to be only available for a fee of \$228.34 from SAI Global, and the ES does not provide any information as to whether AS/NZS IEC 62287.1: 2007, published by Standards Australia, is otherwise freely available.

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

Instrument	Radiocommunications (Spectrum Access Charges - 2 GHz Band) Determination 2016 [F2016L01021]
Purpose	Fixes the spectrum access charges payable by various licensees for the re-issue of specified licences in the 2 GHz band; and specifies the times when those charges are payable
Last day to disallow	21 November 2016
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications and the Arts
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 section 4 of the determination incorporates Radiocommunications (Spectrum Access Charges) Direction 2012 (the direction), which is made under subsection 294(2) of the *Radiocommunications Act 1992* (Radiocommunications Act). However, neither the text of the determination nor the ES expressly states the manner in which the direction is incorporated.

The committee further notes that subsection 294(5) of the Radiocommunications Act provides that the direction is a legislative instrument that is not subject to disallowance (an exempt instrument). Subsection 14(3) of the *Legislation Act 2003* provides that only disallowable legislative instruments may be incorporated as in force from time to time. The committee therefore understands that the direction may only be incorporated as in force at the commencement of the determination, unless authorising or other legislation alters the operation of section 14.

However, the committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which exempt instruments 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.

Instrument	Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 [F2016L00720]
Purpose	Repeals and substitutes section 10 of the <i>Social Security (International Agreements) Act 1999</i> , setting out the terms of the Agreement between Australia and the Republic of Austria on social security
Last day to disallow	21 November 2016
Authorising legislation	<i>Social Security (International Agreements) Act 1999</i>
Department	Social Services
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 Schedule 1 to the Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 [F2016L00720] (the regulation) contains the text of the Agreement between Australia and the Republic of Austria on Social Security, and incorporates at Article 14(2), Regulation (EC) No. 883/2004 (the EC Regulation). However, neither the text of the regulation nor the ES expressly states the manner in which the EC Regulation is 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.

Description of and access to incorporated 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 on 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 that Schedule 1 to the regulation contains the text of the Agreement between Australia and the Republic of Austria on Social Security, and incorporates at Article 14(2), the EC Regulation. However, neither the text of the regulation nor the ES provides a description of the EC Regulation or indicates how it 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*.

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

Instrument	Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016 [F2016L01078]
Purpose	Provides for the fees payable for applications for registration and renewal of registration under the <i>Education Services for Overseas Students Act 2000</i>
Last day to disallow	21 November 2016
Authorising legislation	<i>Tertiary Education Quality and Standards Agency Act 2011</i>
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016 [F2016L01078] (the determination) amends the Determination of Fees No. 3 of 2013 to provide that the fee for applications for

registration and renewal of registration under the *Education Services for Overseas Students Act 2000* is \$5000.

The ES to the determination states:

The amendment made by this instrument provides that the same fee will be payable for applications for registration or renewal of registration as is currently payable under the ESOS Act for the equivalent applications to TEQSA in its capacity as a designated authority.

The Australian Government has previously decided that TEQSA is to function on a cost recovery basis for certain activities. The 2016-17 Budget includes a measure for the Department of Education and Training to undertake a review of TEQSA's cost recovery arrangements. Accordingly, the fee amended by this instrument will be considered as part of that review.

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

With reference to this expectation, the committee notes that, while the ES for the determination suggests that the revised fee relating to registration will be considered as part of a forthcoming review of cost-recovery arrangements, it provides no indication as to the basis on which the fee has been calculated for the purposes of the making of the determination.

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

Instrument	Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2016 [F2016L01253]
Purpose	Revokes Therapeutic Goods (Permissible Ingredients) Determination No.1 of 2016 [F2016L00588] and specifies ingredients and related requirements for medicines listed on the Australian Register of Therapeutic Goods
Last day to disallow	21 November 2016
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
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 Schedule 1 of the determination incorporates at:

- Items 1700 and 1701: the *Animal Products Act 1999* (NZ) and the *Animal Welfare Act 1999* (NZ) (the NZ Acts); and
- Items 2328, 2349 and 3921: the relevant FCC monograph and ICH/BP/USP requirements for residual solvents and catalysts (the FCC and ICH/BP/USP).

However, neither the text of the determination nor the ES expressly states the manner in which the NZ Acts, the FCC and ICH/BP/USP 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.

Description of and access to incorporated 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 on 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 1700, 1701, 2328, 2349 and 3921 of the determination incorporate NZ Acts, the FCC and ICH/BP/USP. However, neither the text of the determination nor the ES provides a description of the FCC and ICH/BP/USP, or indicates how the NZ Acts, the FCC and ICH/BP/USP 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*.

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

Instrument	Water Efficiency Labelling and Standards Amendment (WELS Standard) Determination 2016 [F2016L01293]
Purpose	Amends the Water Efficiency Labelling and Standards Determination 2013 (No. 2) [F2013L01574] to incorporate a new standard, modify existing standards and provide for transitional arrangements
Last day to disallow	21 November 2016
Authorising legislation	<i>Water Efficiency Labelling and Standards Act 2005</i>
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated 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 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 on 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, item 1 of the determination incorporates:

- Australian Standard AS 3662:2013 Performance of showers for bathing, as in force on 1 July 2016 and as modified by subsection 5B(2) of the determination (AS 3662:2013); and
- Australian/New Zealand Standard AS/NZS 6400:2016 Water efficient products—Rating and labelling published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force on 1 July 2016

and as modified by subsection 5B(1) of the determination (AS/NZS 6400:2016).

However, the committee notes that, while the standards are described in the ES and AS/NZS 6400:2016, as published by Standards Australia, is available for free from SAI Global; AS 3662:2013, as published by Standards Australia, appears to only be available for a fee of \$123.44 from SAI Global, and the ES does not provide any information as to whether AS 3662:2013 as published by Standards Australia, is otherwise freely available.

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

Advice only

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

Instrument	Comptroller-General of Customs (Places of Detention - Norfolk Island) Directions 2016 [F2016L01036]
Purpose	Identifies places which a Customs officer is permitted to detain a person and specifies other matters relating to the detention of person under paragraph 219JE(1)(a) of <i>Customs Act 1901</i> (NI)
Last day to disallow	21 November 2016
Authorising legislation	<i>Customs Act 1901</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)

Undue trespass on personal rights and liberties

The Comptroller-General of Customs (Places of Detention - Norfolk Island) Directions 2016 [F2016L01036] (the directions) specify, for Norfolk Island, places where an officer of Customs is permitted to detain a person; and other matters relating to the detention of persons under subsection 219ZJE(1) of the *Customs Act 1901* (NI) (the NI Customs Act).

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

Scrutiny principle 23(3)(b) requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. The committee previously raised a concern, in relation to Comptroller-General of Customs (Places of Detention) Directions 2015 [F2015L00891] (the previous directions),¹⁵ that the requirement to allow a detainee as much privacy 'as the circumstances of the search allow' lacks definition, and would appear to provide a broad discretion to an officer conducting a

¹⁵ See *Delegated legislation monitor* 8 and 11 of 2015.

search in relation to the extent of privacy afforded to a person subject to a search. The minister's response in that case advised that officers of Customs receive extensive training in relation to personal search powers, and stated:

This training includes the procedures that must be followed and provides guidance on officers' obligations to ensure the highest standards of care, wellbeing and privacy considerations of the person.¹⁶

The committee notes that the ES to the directions does not address the issue of the apparently broad discretion of an officer in relation to the extent of privacy afforded to a person subject to a search, and whether in this respect the directions unduly trespass on personal rights and liberties. However, taking into account the advice provided by the minister with respect to the previous directions, the committee considers that the directions are unlikely to give rise to any undue trespass on a person's right to privacy.

The committee draws this matter to the minister's attention, and highlights its expectation that scrutiny matters raised or identified previously by the committee are taken into account in the making of subsequent instruments, as applicable.

Instrument	Export Market Development Grants (Change in Ownership of Business) Guidelines 2016 [F2016L01090] Export Market Development Grants (Made in Australia) Guidelines 2016 [F2016L01094] Export Market Development Grants (Close Relationships - General) Determination 2016 [F2016L01095] Export Market Development Grants (Significant Net Benefit) Guidelines 2016 [F2016L01097] Export Market Development Grants (Grants Entry Requirements) Determination 2016 [F2016L01108]
Purpose	Details guidelines to be complied with by the Chief Executive Officer of Austrade
Last day to disallow	21 November 2016
Authorising legislation	<i>Export Market Development Grants Act 1997</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Consultation

¹⁶ *Delegated legislation monitor* 11 of 2015 (2 December 2015), Appendix 1.

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 to each of the instruments states:

Austrade conducted extensive stakeholder consultations before remaking this instrument. All stakeholder responses supported this instrument being remade, unchanged.

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 ESs for the instruments, while stating that consultation occurred in relation to the making of the instrument, do not describe the *nature* of the consultation undertaken (such as, for example, the manner and purpose of the consultation; the parties to the consultation; 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 2.

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

Instrument	Income Tax Assessment Act – Cents per kilometre deduction rate for motor vehicle expenses [F2016L01157]
Purpose	Sets the rate at which work-related motor vehicle expense deductions may be claimed in an income year when using the cents per kilometre method
Last day to disallow	21 November 2016
Authorising legislation	<i>Income Tax Assessment Act 1997</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Commencement before registration on the Federal Register of Legislation

The Income Tax Assessment Act – Cents per kilometre deduction rate for motor vehicle expenses [F2016L01157] (the instrument) sets a rate for taxpayers to claim work-related motor vehicle expense deductions in an income year. The instrument commenced on 1 July 2016 but was registered on the Federal Register of Legislation on 4 July 2016.

Subsection 12(2) of the *Legislation Act 2003* provides that a provision of an instrument is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation where an instrument commences before it is registered is that its ES explicitly address the question of whether the instrument would disadvantage any person other than the Commonwealth.

However, in this case the committee notes that the instrument appears to be beneficial in its effect as it allows eligible taxpayers to elect to use the cents per kilometre method when calculating relevant income tax deductions.

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

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	
	Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016 [F2016L00619]
	Aged Care (Subsidy, Fees and Payments) Amendment (Short-term Restorative Care) Determination 2016 [F2016L00674]
	Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Short-term Restorative Care) Determination 2016 [F2016L00663]
	Aged Care Legislation Amendment (Short-term Restorative Care) Principles 2016 [F2016L00670]
	ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2016/0688 [F2016L01280]
	Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2016 [F2016L01159]
	Biosecurity (Consequential Amendments and Transitional Provisions) Regulation 2016 [F2016L00717]
	Biosecurity Charges Imposition (Customs) Regulation 2016 [F2016L00723]
	Biosecurity Charges Imposition (General) Regulation 2016 [F2016L00727]
	General Insurance Supervisory Levy Imposition Determination 2016 [F2016L01155]
	Health Insurance (General Medical Services Table) Regulation 2016 [F2016L00769]

	Life Insurance Supervisory Levy Imposition Determination 2016 [F2016L01164]
	National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016 [F2016L00791]
	National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Victoria) Rules 2016 [F2016L00794]
	National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016 [F2016L00795]
	National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—South Australia) Amendment Rules 2016 [F2016L00796]
	National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2016 [F2016L00545]
	National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2016 (No. 1) [F2016L00809]
	National Health (Epworth and Cabrini Private Hospitals Paperless Prescribing and Claiming Trial) Special Arrangement 2016 (PB 28 of 2016) [F2016L01234]
	National Health (Multiple Hospitals Paperless Claiming Trial) Special Arrangement 2016 (PB 59 of 2016) [F2016L01106]
	Superannuation Supervisory Levy Imposition Determination 2016 [F2016L01156]
	Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2016 [F2016L01253]
	Therapeutic Goods Order No. 91 - Standard for labels of prescription and related medicines [F2016L01285]
	Therapeutic Goods Order No. 92 - Standard for labels of non-prescription medicines [F2016L01287]
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 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 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). 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 4(2) of the *Acts Interpretation Act 1901*

Instruments	
	Australian Crime Commission (National Policing Information Charges) Determination 2016 [F2016L00678]
	Biosecurity (Acceptable Ballast Water Exchange Area) Declaration 2016 [F2016L00860]
	Biosecurity (Entry Requirements) Determination 2016 [F2016L00811]
	Biosecurity (Exposed Conveyances—Exceptions from Biosecurity Control) Determination 2016 [F2016L00851]
	Biosecurity (Human Health) Regulation 2016 [F2016L00719]
	Biosecurity (Methods of Ballast Water Management) Approval 2016 [F2016L00858]
	Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853]
	Biosecurity Regulation 2016 [F2016L00756]
	Defence (Payments to ADF Cadets) Determination 2016 [F2016L01098]
	Parliamentary Injury Compensation Scheme Instrument 2016 [F2016L00652]
	Part 21 Manual of Standards Instrument 2016 [F2016L00915]

	Part 45 Manual of Standards Instrument 2016 [F2016L00850]
	Social Security (New Apprentice) Determination 2016 [F2016L00772]
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 subsection 33(3) of the *Acts Interpretation Act 1901*

Instruments	Admiralty Amendment Rules 2016 (No. 1) [F2016L00726]
	ASIC Class Rule Waiver [16-0352] [F2016L00594]
	ASIC Corporations (Amendment) Instrument 2016/351 [F2016L00575]
	ASIC Corporations (Amendment) Instrument 2016/476 [F2016L01170]
	ASIC Corporations (Amendment) Instrument 2016/513 [F2016L01084]
	ASIC Corporations (Amendment) Instrument 2016/566 [F2016L01178]
	ASIC Corporations (Repeal) Instrument 2016/452 [F2016L01005]
	ASIC Credit (Amendment) Instrument 2016/632 [F2016L01171]
	Australian Meat and Live-stock Industry (Beef Export to the USA—Quota Years 2016-2022) Repeal Order 2016 [F2016L01089]
	Australian Meat and Live-stock Industry (High Quality Beef Export to the European Union) Repeal Order 2016 [F2016L00807]

Australian Meat and Live-stock Industry (Standards) Amendment Order 2016 [F2016L00839]

Australian Prudential Regulation Authority (Commonwealth Costs) Determination 2016 [F2016L01150]

Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2016 [F2016L01159]

Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 2016 [F2016L01158]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 3) [F2016L01100]

Aviation Transport Security (Prohibited Cargo—Bangladesh) Amendment Instrument 2016 [F2016L00766]

Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016 [F2016L01148]

Building Energy Efficiency Disclosure Determination 2016 [F2016L01276]

CASA EX98/16 - Exemption - Cessna Supplemental Inspection Document requirements [F2016L01053]

CASA EX123/16 - Repeal – exemption – from standard landing minima – Boeing 737 fail passive aircraft – Virgin Australia Airlines Pty Ltd [F2016L01278]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 1) [F2016L01209]

Commonwealth price (Pharmaceutical benefits supplied by approved pharmacists) Amendment Determination 2016 [F2016L01042]

Declared Hearing Services Amendment Determination 2016 (No. 1) [F2016L00806]

Defence Home Ownership Assistance Scheme (Average House Price and Median Interest Rate) Amendment Determination 2016 [F2016L00970]

Export Control (Plants and Plant Products) Amendment (Re-export Certificates) Order 2016 [F2016L00640]

Export Market Development Grants (Change in Ownership of Business) Guidelines 2016 [F2016L01090]

Export Market Development Grants (Close Relationships - Events Promoters) Amendment Instrument 2016 (No. 1) [F2016L01096]

Export Market Development Grants (Close Relationships - General) Determination 2016 [F2016L01095]

Export Market Development Grants (Grants Entry Requirements) Determination 2016 [F2016L01108]

Export Market Development Grants (Made in Australia) Guidelines 2016 [F2016L01094]

Export Market Development Grants (Significant Net Benefit) Guidelines 2016 [F2016L01097]

Family Tax Benefit (Meeting the Health Check Requirement) Amendment Determination 2016 [F2016L00572]

Federal Circuit Court Amendment (Costs and Other Measures) Rules 2016 [F2016L00818]

General Insurance Supervisory Levy Imposition Determination 2016 [F2016L01155]

GST—free Supply (National Disability Insurance Scheme Supports) Amendment Determination 2016 (No. 1) [F2016L00618]

High Court Amendment (2016 Measures No. 1) Rules 2016 [F2016L01029]

Legal Services Amendment (Solicitor-General Opinions) Direction 2016 [F2016L00645]

Life Insurance Supervisory Levy Imposition Determination 2016 [F2016L01164]

Marriage (Celebrancy qualifications or skills) Amendment Determination 2016 (No. 2) [F2016L00798]

Military Rehabilitation and Compensation (Lump Sum Rate of Interest) Determination 2016 [F2016L01010]

National Capital Plan – Amendment 86 – Revised National Capital Plan [F2016L00669]

National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016 (No. 2) [F2016L01122]

National Disability Insurance Scheme (Becoming a Participant) Rules 2016 [F2016L00544]

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—South Australia) Amendment Rules 2016 [F2016L00796]

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016 [F2016L00791]

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Victoria) Rules 2016 [F2016L00794]

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016 [F2016L00795]

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Queensland) Amendment Rules 2016 [F2016L01119]

National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2016 [F2016L00545]

National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2016 (No. 1) [F2016L00809]

National Health (Claims and under co-payment data) Amendment (Medication Chart Prescriptions) Rule 2016 (PB 60 of 2016) [F2016L01127]

National Health (Subsection 84C(7)) Amendment Determination 2016 (No.1) (PB 51 of 2016) [F2016L00978]

National Health (Weighted average disclosed price – October 2016 reduction day) Determination 2016 [F2016L01182]

Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016 [F2016L00651]

Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 2) [F2016L00589]

Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 3) [F2016L00979]

Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 4) [F2016L01101]

Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 2) [F2016L00985]

Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 3) [F2016L01102]

Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 1) [F2016L00812]

Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 2) [F2016L01039]

Private Health Insurance (Prudential Supervision) Rules 2016 [F2016L01060]

Public Governance, Performance and Accountability Amendment (Commonwealth Company Annual Reporting) Rule 2016 [F2016L00696]

Public Governance, Performance and Accountability Amendment (Corporate Commonwealth Entity Annual Reporting) Rule 2016 [F2016L00693]

Public Governance, Performance and Accountability Amendment (Non-corporate Commonwealth Entity Annual Reporting) Rule 2016 [F2016L00691]

Quarantine Service Fees Repeal Determination 2016 [F2016L00637]

Remuneration Tribunal Determination 2016/03 - Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2016L00840]

Remuneration Tribunal Determination 2016/05 - Remuneration and Allowances for Holders of Public Office and Official Travel by Office Holders [F2016L01041]

Remuneration Tribunal Determination 2016/06 - Judicial and Related Offices - Remuneration and Allowances [F2016L01160]

Remuneration Tribunal Determination 2016/07 – Official Travel by Office Holders [F2016L01266]

Remuneration Tribunal Determination 2016/09 – Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2016L01269]

Retirement Savings Account Providers Supervisory Levy Imposition Determination 2016 [F2016L01147]

Safety, Rehabilitation and Compensation (Principal Officer of the ACT) Declaration 2016 [F2016L00573]

Superannuation Supervisory Levy Imposition Determination 2016 [F2016L01156]

Tertiary Education Quality and Standards Agency (Information) Guidelines 2016 [F2016L00993]

Therapeutic Goods (Permissible Ingredients) Determination No. 1 of 2016 [F2016L00588]

Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2016 [F2016L01253]

Vehicle Standard (Australian Design Rule - 43/04 - Vehicle Configuration and Dimensions) 2006 Amendment 3 [F2016L00574]

Vehicle Standard (Australian Design Rule - Definitions and Vehicle Categories) 2005 Amendment 9 [F2016L00790]

Scrutiny principle	Water Efficiency Labelling and Standards Amendment (WELS Standard) Determination 2016 [F2016L01293]
	Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2016 – 2017 Amendment No.1 [F2016L01261]
	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.¹⁷

The committee draws this matter to the attention of ministers.

¹⁷ For more extensive comment on this issue, see *Delegated legislation monitor* 8 of 2013, p. 511.

Chapter 2

Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	Broadcasting Services (International Broadcasting) Guidelines 2016 [F2016L00393]
Purpose	Sets arrangements for proposed and operational international broadcasting services, matter in programs, and the conduct of international broadcasting licensees
Last day to disallow	13 October 2016
Authorising legislation	<i>Broadcasting Services Act 1992</i>
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 5 of 2016</i>

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth legislative material may be incorporated as in force from time to time or at a particular date. Non-legislative material may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the definition of 'intellectual property rights' in section 1.5 of the instrument relies on 'Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 197 concluded at Stockholm, to which Australia is a party.' The committee also notes that the explanatory statement (ES) to the instrument states:

Documents incorporated in the Guidelines by reference

...The Guidelines also refer to Article 2 of the Convention Establishing the World Intellectual Property Organisation [WIPO] [1972] ATS 15

(the Convention). The Convention can be found in the Australian Treaties Library collection at <http://www.austlii.edu.au>.

However, notwithstanding the above, as the definition of 'intellectual property rights' could be said to affect the operation of the instrument, the Convention appears to be incorporated and neither the text of the instrument nor the ES expressly state the manner in which it is incorporated.

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

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

Minister's response

The Minister for Communications and the Arts advised:

The ACMA has advised that it agrees with the Committee's view that the timing of the material incorporated by reference in the definition of 'intellectual property rights' in the Guidelines should be made plain on the face of the Guidelines. The ACMA further advises that it adopted the definition of 'intellectual property rights' from WIPO Convention because that definition is very broad and stable (not having been amended since it was first adopted), which should minimise the risk of scope for any confusion by anticipated end users about which version of the definition might apply at a given time.

The ACMA has remedied this oversight by amending the Guidelines to make clear that the incorporated material (namely, the definition from the WIPO Convention) is expressed to be incorporated as in force at the time of the commencement of the Guidelines.

Committee's response

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

Instrument	Excise (Volume of LPG - Temperature and Pressure Correction) Determination 2016 (No. 1) [F2016L00130] Excise (Mass of CNG) Determination 2016 (No. 1) [F2016L00131] Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2016 (No. 1) [F2016L00133]
Purpose	These instruments specify methods for determining the volume or mass of particular excisable substances
Last day to disallow	30 August 2016; 30 August 2016; 1 September 2016
Authorising legislation	<i>Excise Act 1901</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 3 of 2016</i>

Incorporation of extrinsic material

The committee commented as follows:

These instruments remake earlier instruments in response to the committee's previous inquiries as to the manner of incorporation of extrinsic material. The committee had sought this information from the Assistant Treasurer in keeping with its expectation that ESs clearly state the manner of incorporation of extrinsic material.¹

The committee's examination of the remade instruments raises the following issue with respect to the incorporation of extrinsic material in the revised instruments.

Section 14 of the *Legislative Instruments Act 2003* provides for the incorporation of extrinsic material into instruments. Legislative material may be incorporated as in force from time to time or at a particular date. Non-legislative material may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation alters the operation of section 14.

¹ The earlier instruments were the Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732]; the Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733]; and the Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745]; see *Delegated legislation monitor 15 of 2015*; and 1 and 2 of 2016.

With reference to the above, the committee notes that the first instrument refers to the:

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

The second instrument refers to the:

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

The third instrument refers to the:

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII*; and
- *Practical Alcohol Tables*.

The instruments also seek to incorporate the 'current version [of these documents] as they exist at the time of commencement of the determination or any version that comes into existence thereafter.' The committee understands this to mean that the documents are incorporated 'as in force from time to time' (to use the language of section 14 of the *Legislative Instruments Act 2003*).

However, the committee has not been able to identify any provision in the *Excise Act 1901* or any other Act that expressly allows for the incorporation of these documents, which are non-legislative in character, as in force from time to time.

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

Minister's response

The former Assistant Treasurer advised:

The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instruments and register new determinations and corresponding explanatory statements in order to address the concerns of the Committee. The new legislative instruments will contain directions on the manner of incorporation of the extrinsic material, namely that the edition of the standard set out in the Legislative Instrument is to be used on the commencement of the respective determinations, at that particular date.

The new legislative instruments and explanatory statements will be forwarded to the tabling officers prior to the last day of disallowance as specified in the legislation monitor.

Committee's response

The committee thanks the former Assistant Treasurer for her response and has concluded its examination of the instruments.

The committee notes the former Assistant Treasurer's undertaking that the Australian Taxation Office will repeal and remake the instruments to address the committee's concerns by incorporating the extrinsic material as at their commencement.

Instrument	Export Control (Prescribed Goods—General) Amendment (Official Marks) Order 2016 [F2016L00432]
Purpose	This order updates provisions relating to official marks and seals and removes marks and seals that are no longer required
Last day to disallow	13 October 2016
Authorising legislation	Export Control (Orders) Regulations 1982
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 5 of 2016</i>

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth legislative material may be incorporated as in force from time to time or at a particular date. Non-legislative material may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation alters the operation of section 14.

The committee notes that subsection 25(5) of the *Export Control Act 1982* may operate to allow the Order to incorporate non-legislative material as in force at a particular date or as in force from time to time.

With reference to the above, the committee notes that the instrument requires that official marks comply with certain requirements, including at sections 13.10A and 13.11A of the instrument, those set out in ISO 17712:2013 *Freight containers – Mechanical seals* published by the International Organisation for Standardization. However, neither the text of the instrument nor the ES expressly states the manner in which ISO 17712:2013 is incorporated.

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

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

Department's response

The Secretary of the Department of Agriculture and Water Resources advised:

As the issue raised by the Committee is of a technical nature and does not relate to matters of policy, it is appropriate that I respond on behalf of the Deputy Prime Minister during the caretaker period.

The department advises that references in the Order to ISO 17712:2013 *Freight containers - Mechanical seals* be read as 'International Standards ISO 17712:2013 *Freight containers - Mechanical seals* as in force at the commencement of the Order'.

I note that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic material. My department will, where possible, seek to include all necessary information in explanatory statements to address the incorporation of any extrinsic material.

Committee's response

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

The committee also thanks the secretary for his advice that future ESs to instruments will state how documents are incorporated.

Instrument	Marriage Amendment Regulation 2016 (No. 1) [F2016L00303]
Purpose	Amends the Marriage Regulations 1963 to update the definition of the Certificate IV in Celebrancy qualification
Last day to disallow	11 October 2016
Authorising legislation	<i>Marriage Act 1961</i>
Department	Attorney-General's s
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 5 of 2016</i>

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 instrument states:

The Office of Best Practice Regulation was consulted about the Regulation and advised that a Regulatory Impact Statement is not necessary, as the amendments are minor and machinery in nature.

The committee's guideline on addressing the consultation requirements under the *Legislation Act 2003* relevantly states:

It is...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.

Noting that the ES for the instrument appears to address only the consultation requirements in relation to the RIS process, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003*.

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 Attorney-General advised:

The former Community Services and Health Industry Skills Council undertook significant consultation in the development of a revised qualification, including with subject matter experts such as celebrant organisations, registered training organisations and the department. The department regularly discussed the progress of the qualification review and the need for consequential amendments with marriage celebrant associations, registrars of births, deaths and marriages and registered training organisations. The amendment to the Regulations reflects the revised qualification.

The Explanatory Statement has been amended to include this information.

Committee's response

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

Instrument	Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016 [F2016L00396]
Purpose	This regulation is made under section 12 of the <i>Remuneration Tribunal Act 1973</i> , relating to members fees and allowances and replaces the 2005 Regulation
Last day to disallow	13 October 2016
Authorising legislation	<i>Remuneration Tribunal Act 1973</i>
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 5 of 2016</i>

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 instrument 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*.

No statement of compatibility

The committee commented as follows:

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

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

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

Departmental response

The Assistant Secretary of the Department of the Prime Minister and Cabinet advised:

I am replying to your letter as the Government is now in caretaker mode pending the outcome of the election on 2 July 2016.

The attached draft revised Explanatory Statement has been amended so it now includes a note on consultation and a Statement of Compatibility with Human Rights. While not requested, explanatory notes on each of the individual regulations has been added to assist readers of the Explanatory Statement.

The draft revised Explanatory Statement will be provided to the responsible Minister for approval as soon as possible after the election. Once the Explanatory Statement is considered and approved by the responsible Minister, the Department will arrange for its immediate registration on the Federal Register of Legislation.

Committee's response

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

The committee also notes that a replacement ES has been registered and received, and as amended it includes a statement of compatibility with human rights in accordance with Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the following description of consultation:

The Remuneration Tribunal Secretariat was consulted in the making of the 2016 Regulation.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* 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 Act. In this case, the committee considers that the replacement ES for the regulation, while stating that consultation occurred in relation to the making of the regulation, does not describe the *nature* of the consultation undertaken.

Where consultation has taken place, the committee considers that a best-practice approach is for the ES to an instrument to set out the method and purpose of consultation, the bodies, groups and/or individuals consulted and the issues raised in consultations and the outcomes of the consultation process.²

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

2 The committee also notes that the standard description of consultation used in ESs to Remuneration Tribunal Determinations: 'In making this Determination the Tribunal has informed itself through consultation in accordance with established practice', does not meet the committee's expectations. See for example: Remuneration Tribunal Determination 2016/07 - Official Travel by Office Holders [F2016L01266] and Remuneration Tribunal Determination 2016/09 - Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2016L01269].

Appendix 1

Correspondence



SENATOR THE HON MITCH FIFIELD

MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

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

Broadcasting Services (International Broadcasting) Guidelines 2016

Dear Chair

Thank you for your letter dated 4 May 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) concerning the issue identified in the *Delegated legislation monitor* No. 5 of 2016 (the Report), which was published by the Committee on 3 May 2016 regarding the Broadcasting Services (International Broadcasting) Guidelines 2016 (the Guidelines).

I refer to the Committee's comments on the definition of 'intellectual property rights' in section 1.5 of the Guidelines which refers to Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967 (WIPO Convention). As the Guidelines were made by the Australian Communications and Media Authority (ACMA) under subsection 121FP(1) of the *Broadcasting Services Act 1992*, I have sought its comments on the issue raised by the Committee.

The ACMA has advised that it agrees with the Committee's view that the timing of the material incorporated by reference in the definition of 'intellectual property rights' in the Guidelines should be made plain on the face of the Guidelines. The ACMA further advises that it adopted the definition of 'intellectual property rights' from WIPO Convention because that definition is very broad and stable (not having been amended since it was first adopted), which should minimise the risk of scope for any confusion by anticipated end users about which version of the definition might apply at a given time.

The ACMA has remedied this oversight by amending the Guidelines to make clear that the incorporated material (namely, the definition from the WIPO Convention) is expressed to be incorporated as in force at the time of the commencement of the Guidelines.

Thank you for bringing this issue to my attention.

Yours sincerely

MITCH FIFIELD



**Minister for Small Business
Assistant Treasurer**

The Hon Kelly O'Dwyer MP

05 MAY 2016

Ref: MS16-000057

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

Dear Senator Williams

A handwritten signature in blue ink that reads 'John'.

The Senate Standing Committee on Regulations and Ordinances has requested further information in relation to the issues identified in the *Delegated legislation monitor* No. 3 of 2016 concerning the *Excise (Mass of CNG) Determination 2016 (No. 1)* [F2016L00131], *Excise (Volume of Liquid Fuels – Temperature Correction) Determination 2016 (No. 1)* [F2016L00133] and *Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2016 (No. 1)* [F2016L00130] for which I am the responsible minister.

The legislative instruments provide the rules for how fuel is to be measured for the purposes of paying excise duty. These three instruments were registered in February 2016 and replaced the former instruments in order to seek to address concerns raised by the Committee regarding the manner of incorporation of certain extrinsic material.

The Committee has sought further information on the renewal of these instruments. The Committee has commented that the non-legislative material incorporated within the instruments may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation specifically provides otherwise. The Committee has indicated that contrary to this rule, the language used in the Legislative instruments seeks to incorporate the documents 'as in force from time to time' and that there are no provisions in the *Excise Act 1901* that expressly allow for the incorporation of these documents, which are non-legislative in character, in that manner.

The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instruments and register new determinations and corresponding explanatory statements in order to address the concerns of the Committee. The new legislative instruments will contain directions on the manner of incorporation of the extrinsic material, namely that the edition of the standard set out in the Legislative Instrument is to be used on the commencement of the respective determinations, at that particular date.

The new legislative instruments and explanatory statements will be forwarded to the tabling officers prior to the last day of disallowance as specified in the legislation monitor.

Yours sincerely

Kelly O'Dwyer



Australian Government
**Department of Agriculture
and Water Resources**

SECRETARY

Ref: MC16-004723

Mr Ivan Powell
Committee Secretary
The Senate Standing Committee on Regulations and Ordinances
Parliament House
Canberra
ACT 2600
Australia

Dear Committee Secretary,

Thank you for your correspondence of 4 May 2016, requesting advice in relation to the Export Control (Prescribed Goods-General) Amendment (Official Marks) Order 2016 (the Order) [F2016L00432] for which the Deputy Prime Minister and the Minister for Agriculture and Water Resources has portfolio responsibility.

The Senate Standing Committee on Regulations and Ordinances (the Committee) has requested the Deputy Prime Minister's advice in relation to incorporating extrinsic material, specifically International Standard ISO 17712:2013 *Freight containers – Mechanical seals* into the Order.

As the issue raised by the Committee is of a technical nature and does not relate to matters of policy, it is appropriate that I respond on behalf of the Deputy Prime Minister during the caretaker period.

The department advises that references in the Order to ISO 17712:2013 *Freight containers – Mechanical seals* be read as 'International Standards ISO 17712:2013 *Freight containers – Mechanical seals* as in force at the commencement of the Order'.

I note that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic material. My department will, where possible, seek to include all necessary information in explanatory statements to address the incorporation of any extrinsic material.

Thank you again for your letter.

Yours sincerely

Daryl Quinlivan

25 May 2016



ATTORNEY-GENERAL

CANBERRA

MC16-005645

13 SEP 2016

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

Dear Chair

Wacka

Thank you for your letter dated 4 May 2016 requesting advice about the nature of any consultation conducted in relation to the Marriage Amendment Regulation 2016 (No. 1) [F2016L00303]. The former Committee, in the report *Delegated legislation monitor* No. 5 of 2016, asked that the Explanatory Statement to the Regulations explain what consultation has been carried out or, if there has been no consultation, to explain why none was undertaken.

The former Community Services and Health Industry Skills Council undertook significant consultation in the development of a revised *Certificate IV in Celebrancy* qualification, including with subject matter experts such as celebrant organisations, registered training organisations and the department. The Department regularly discussed the progress of the qualification review and the need for consequential amendments with marriage celebrant associations, registrars of births, deaths and marriages and registered training organisations. The amendment to the Regulations reflects the revised qualification.

The Explanatory Statement has been amended to include this information. It is enclosed for your information.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: ~~Replacement~~ Explanatory Statement
CC: <regordsen@aph.gov.au>

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Marriage Act 1961

Marriage Amendment Regulation 2016 (No. 1)

The *Marriage Act 1961* (the Act) establishes the Marriage Celebrants Programme.

Section 120 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed or are necessary or convenient to be prescribed for carrying out and giving effect to the Act.

The purpose of the Regulation is to amend the *Marriage Regulations 1963*, to update the definition of the Certificate IV in Celebrancy qualification arising from the release of a revised Certificate IV in Celebrancy in December 2015. The Certificate IV in Celebrancy is part of a broader training package developed by the former Community Services and Health Industry Skills Council (Skills Council).

The definition of *Certificate IV in Celebrancy* in regulation 37F is amended by removing the reference to the qualification's release date and the reference to the Skills Council which was abolished at the end of 2015. To ensure the definition remains current, the reference to the *Marriage (Celebrancy qualification or skills) Determination 2009* is also removed.

Consequential amendments to subparagraph 37G(1)(a)(ii) remove the reference to the *Marriage (Celebrancy qualification or skills) Determination 2009* from the definition of Certificate IV in Celebrancy. The amendment to subparagraph 37G(1)(a)(ii) continues the requirement that the Certificate IV in Celebrancy includes all the units the Registrar of Marriage Celebrants determines to be necessary for registration as a marriage celebrant.

The Office of Best Practice Regulation was consulted about the Regulation and advised that a Regulatory Impact Statement is not necessary, as the amendments are minor and machinery in nature. The former Community Services and Health Industry Skills Council undertook significant consultation in the development of a revised qualification, including with subject matter experts such as celebrant organisations, registered training organisations and the department. The department regularly discussed the progress of the qualification review and the need for consequential amendments with marriage celebrant associations, registrars of births, deaths and marriages and registered training organisations.

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

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation will commence the day after the instrument is registered on the Federal Register of Legislative Instruments.

Authority: Section 120 of the *Marriage Act 1961*.

Statement of Compatibility with Human Rights

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

Marriage Amendment Regulation 2016 (No. 1)

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

Overview of the Regulation

The Regulation amends the *Marriage Regulations 1963* (the Principal Regulations) to update the definition of the Certificate IV in Celebrancy qualification by removing the reference to the qualification's release date and the reference to the Community Services and Health Industry Skills Council which was abolished at the end of 2015. To ensure the definition remains current, the reference to the *Marriage (Celebrancy qualification or skills) Determination 2009* is also removed.

Human rights implications

The Regulation does not engage any of the applicable rights or freedoms.

Conclusion

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

Attorney-General Senator the Hon George Brandis QC

UNCLASSIFIED



Australian Government

Department of the Prime Minister and Cabinet

ANDREW FISHER BUILDING
ONE NATIONAL CIRCUIT
BARTON

Reference: MC16-051605

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

Dear Mr Powell

Thank you for your letter dated 4 May 2016 to the Senior Advisor to the Assistant Cabinet Secretary regarding the *Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016*. I am replying to your letter as the Government is now in caretaker mode pending the outcome of the election on 2 July 2016.

The attached draft revised Explanatory Statement has been amended so it now includes a note on consultation and a Statement of Compatibility with Human Rights. While not requested, explanatory notes on each of the individual regulations has been added to assist readers of the Explanatory Statement.

The draft revised Explanatory Statement will be provided to the responsible Minister for approval as soon as possible after the election. Once the Explanatory Statement is considered and approved by the responsible Minister, the Department will arrange for its immediate registration on the Federal Register of Legislation.

Yours sincerely

Peter Rush
Assistant Secretary
Parliamentary and Government Branch
10 June 2016

UNCLASSIFIED

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Cabinet Secretary,
Parliamentary Secretary to the Cabinet Secretary

Remuneration Tribunal Act 1973

Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016

The *Remuneration Tribunal Act 1973* (the Act) establishes the Remuneration Tribunal (the Tribunal) as an independent statutory authority responsible for reporting on and determining the remuneration, allowances and entitlements of key Commonwealth office holders. These include members of the Parliament, Judges of Federal Courts and Territory Supreme Courts, most full-time and part-time holders of public offices and Principal Executive Offices.

The Tribunal advises boards and Ministers on the remuneration of Chief Executive Officers of certain Government Business Enterprises. It also advises Ministers on the remuneration of Heads of Executive Agencies and the Prime Minister on the remuneration of Secretaries of Departments.

Section 17 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Under Section 4 of the Act, the Tribunal consists of three members appointed by the Governor-General on a part-time basis, one of whom is also appointed as President of the Tribunal. Section 12 of the Act provides that a member of the Tribunal shall be paid such fees and allowances as are prescribed. These fees and allowances were prescribed in the *Remuneration Tribunal (Members Fees and Allowances) Regulations 2005* (the 2005 Regulations).

The 2005 Regulations sunsetted on 1 April 2016. The *Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016* (the 2016 Regulation) replicates the 2005 Regulations. The 2016 Regulation increases the fees for the three part-time members of the Tribunal as follows:

- from \$87,343 to \$89,090 per year for the President (paragraph 6(a)); and
- from \$42,250 to \$43,095 per year for Members (paragraph 6(b)).

The 2016 Regulation also ensures that the definition of 'member' is consistent with the definition of 'member' in section 3 of the Act. This ensures that the fees and allowances prescribed by the 2016 Regulation also apply to individuals appointed temporarily in the place of a member under subsection 33(4) of the *Acts Interpretation Act 1901*. The 2016 Regulation also prescribes travelling allowances payable to members when travelling on official business by reference to determinations made under section 61 of the *Public Service Act 1999*. The 2016 Regulation does not affect other allowances currently paid to members.

The 2016 Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Remuneration Tribunal Secretariat was consulted in the making of the 2016 Regulation.

The 2016 Regulation commenced on 1 April 2016.

Explanation of provisions

Regulation 1 – Name of the Instrument

Regulation 1 provides that the name of the instrument is the *Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016*.

Regulation 2 – Commencement

Regulation 2 provides that the instrument commences on 1 April 2016.

Regulation 3 – Authority

Regulation 3 provides that the making of the instrument is authorised by section 12 of the *Remuneration Tribunal Act 1973* (the Act).

Regulation 4 – Schedules

Regulation 4 provides that the instrument set out in the Schedule is repealed in accordance with the Schedule.

Regulation 5 – Definitions

Regulation 5 notes that the terms 'President' and 'Tribunal' are defined in the Act and defines the terms 'Act' and 'member'.

Regulation 6 – Fees

Regulation 6 provides that remuneration for the President of the Tribunal is \$89,090 per year and that for other members is \$43,095.

Regulation 7 – Allowances

Regulation 7 provides that the travel allowances for members and persons appointed by the Minister to assist the Tribunal in an inquiry are the same as for a Secretary of a Department.

Schedule 1 – Repeals

Schedule 1 provides that the *Remuneration Tribunal (Members' Fees and Allowances) Regulations 2005* are repealed.

Statement of Compatibility with Human Rights

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

Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016

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

Overview of the Disallowable Legislative Instrument

This Disallowable Legislative Instrument replaces the *Remuneration Tribunal (Members Fees and Allowances) Regulations 2005* (the 2005 Regulations), which sunsetted on 1 April 2016. The 2005 Regulations prescribed the fees and allowances to members of the Remuneration Tribunal.

This Disallowable Legislative Instrument increases the fees for the members (all part-time) of the Tribunal as follows:

- from \$87,343 to \$89,090 per year for the President; and
- from \$42,250 to \$43,095 per year for members.

This Disallowable Legislative Instrument also ensures that the definition of 'member' is consistent with the definition of 'member' in section 3 of the Act. This ensures that the fees and allowances prescribed by the Disallowable Legislative Instrument also apply to individuals appointed temporarily in the place of a member under subsection 33(4) of the *Acts Interpretation Act 1901*. This Disallowable Legislative Instrument also prescribes travelling allowances payable to members when travelling on official business by reference to determinations made under section 61 of the *Public Service Act 1999*. This Disallowable Legislative Instrument does not affect other allowances currently paid to members.

Human rights implications

This Disallowable Legislative Instrument engages the right to the enjoyment of just and favourable conditions of work, which includes a right to fair wages and equal remuneration, in Article 7 of the *International Covenant on Economic, Social and Cultural Rights*. The Disallowable Legislative Instrument promotes the realisation of this right by increasing the respective fees of the Tribunal president and members and ensuring that the fees and allowances prescribed also apply to individuals appointed temporarily in the place.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because it promotes the right to the enjoyment of just and favourable conditions of work.

Appendix 2

Guideline on consultation

Purpose

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

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *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.

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.

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 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