The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

The committee's 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]

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

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

Structure of the monitor

The monitor is comprised of the following parts:

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

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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 19 August 2016 and 15 September 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	**AD/GAS/1 Amdt 11 - Inspection, Test and Retirement [F2016L01364]**
Purpose	Corrects an unsafe situation on compressed gas cylinders and clarifies the applicability of the airworthiness directive
Last day to disallow	23 November 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
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:

- subsections 1(a), 1(d) and section 4 of the instrument incorporate AS 2030;

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

- subsection 1(e) of the instrument incorporates the USA Compressed Gas Association Pamphlet C-8 (*Standards for Visual Inspection of Compressed Gas Cylinders* (1972); and
- section 2 of the instrument incorporates paragraph 10.2.2 of AS2337.1-2004.

However, neither the text of the instrument nor the explanatory statement (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.

Access to and description of documents

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

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

With reference to the above, the committee notes that the instrument incorporates AS 2030; the USA Compressed Gas Association Pamphlet C-8 (Standards for Visual Inspection of Compressed Gas Cylinders (1972); and paragraph 10.2.2 of AS2337.1-2004. However, neither the text of the determination nor the ES provides a description of these documents or indicates how they may be freely obtained.

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

Instrument	**Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No. 1) [F2016L01378]**
Purpose	Prescribes additional kinds of information that may be national policing information and provides an expanded list of bodies, other than Board agencies, that are able to receive national policing information
Last day to disallow	24 November 2016
Authorising legislation	*Australian Crime Commission Act 2002*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(b)

Retrospective commencement

Items 3, 5 and 6 of the regulation amend the Australian Crime Commission Regulations 2002 to expand the definition 'national policing information' and commence retrospectively on 1 July 2016.

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

In this respect, the ES to the regulation states:

> Subsection 12(2) of the Legislation Act 2003 would only limit the application of the retrospective provisions and is unlikely to be engaged by the relevant provisions operating retrospectively.

However, the committee considers that the statement that subsection 12(2) of the *Legislation Act 2003* is 'unlikely to be engaged by the relevant provisions operating retrospectively' does not adequately address the question of whether the regulation would disadvantage any person other than the Commonwealth.

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

Instrument	**Banking, Insurance and Life Insurance (prudential standard) determination No. 1 of 2016 [F2016L01428]** **Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2016 [F2016L01429]**
Purpose	Determine Prudential Standard 3PS 001 Definitions and Prudential Standard 3PS 221 Aggregate Risk Exposures
Last day to disallow	30 November 2016
Authorising legislation	*Banking Act 1959*; *Insurance Act 1973*; and *Life Insurance Act 1995*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

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 these requirements, the committee notes that the shared ES for the two determinations does not contain a statement of compatibility. The shared ES states:

> A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

However, no attachment to the shared ES is provided.

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	**CASA 100/16 - Instructions — V.F.R. flights conducted by CGG Aviation (Australia) Pty Ltd [F2016L01407]**
Purpose	Sets out instructions relating to the use of GPS navigation equipment
Last day to disallow	24 November 2016
Authorising legislation	Civil Aviation Regulations 1988
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 schedule 1 to the instrument incorporates 'TSO-C129a', 'TSO-C145a' and 'TSO-C146a'. However, neither the text of the instrument 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.

Access to and description of documents

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

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

With reference to the above, the committee notes that that Schedule 1 to the instrument incorporates 'TSO-C129a', 'TSO-C145a','TSO-C146a', and 'Advisory Circular 21-36, as published by CASA from time to time'. However, neither the text of the instrument nor the ES provides a description of these documents or indicates how they may be freely obtained.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of 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	**Coastal Trading (Revitalising Australian Shipping) Act 2012 - Section 11 Exemption for cruise vessels 2018 extension [F2016L01308]**
Purpose	Exempts certain cruise ships from applying for a licence under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* when engaging in coastal trading
Last day to disallow	21 November 2016
Authorising legislation	*Coastal Trading (Revitalising Australian Shipping) Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)

Matter more appropriate for parliamentary enactment

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

Coastal Trading (Revitalising Australian Shipping) Act 2012 - Section 11 Exemption for cruise vessels 2018 extension [F2016L01308] (the instrument) exempts certain cruise ships from applying for a licence for the carriage of passengers between ports in the Commonwealth or in the Territories (other than between Victoria and Tasmania) under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT (RAS) Act). The committee notes that the instrument extends, until 31 December 2018, an exemption that has been in place since 1998 and continues a longstanding exemption that was previously provided under subsection 286(6) of the *Navigation Act 1912*. The ES to the instrument states that the exemption will:

> provide certainty for industry in long term planning and positioning of large cruise vessels.

The committee also notes that the statement of compatibility to the instrument states:

> The purpose of the exemption is to promote tourism activity within Australia, recognising that Australia does not currently have any Australian registered vessels in this category.

Given the duration and purpose of the exemption, it appears the instrument may be addressing an unintended consequence of the operation of the licensing provisions of the CT (RAS) Act. The committee's general preference is that exemptions are not used or do not continue for such a time as to operate as de facto amendments to principal legislation (in this case the CT (RAS) Act). However, no information is provided in the ES as to why the series of exemptions have been used in favour of an amendment to the relevant licensing provisions of the CT (RAS) Act.

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

Instrument	**Consular Fees Amendment (Fees and Indexation) Regulation 2016 [F2016L01379]**
Purpose	Amends the Consular Fees Regulations 1990 to increase consular fees and index them annually in line with the Consumer Price Index
Last day to disallow	24 November 2016
Authorising legislation	*Consular Fees Act 1955*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a) and (b)

Unclear basis for determining fees

The regulation amends the Consular Fees Regulations 1990 to increase consular fees and index them annually in line with the Consumer Price Index (CPI).

The ES to the regulation states:

> Notarial fees have not increased since the current regulations came into effect on 1 July 2000. The new fee structure simplifies the current fee structure to facilitate a move to online payment options in the future and better align with notarial fees charged by commercial providers…The new fees also account for inflation (with annual increases based on the latest annual CPI published by the Australian Bureau of Statistics).

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 regulation states that the new fees account for inflation, it provides no indication as to the basis on which the fee has been calculated for the purposes of the making of the regulation.

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

Retrospective effect

Item 6 of the regulation inserts a transitional provision into the Consular Fees Regulations 1990 to provide that that the increased fees will apply to consular acts performed on or after 1 January 2017, even if an application or request relating to the consular act was made before that day.

The committee notes that, although the commencement of the regulation is not retrospective, it prescribes fees for the future based on antecedent facts (that is, the existence of an earlier request or application). As a consequence, it appears that a person who makes an application or request for a consular service prior to the commencement of the regulation on 1 January 2017 may be required to pay a higher fee than that which applied at the time that they made the request or application. In this regard, the committee notes that the Australian Government, Department of Foreign Affairs and Trade website sets out the current fees for consular acts. However, it does not appear to alert people to the increased fees that will apply from 1 January 2017, other than to state:

> Please note that fees are reviewed from time to time and may vary to the above table when you present your application. A full listing of fees is available in the *Consular Fees Regulations 1990*.[2]

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee notes that the ES for the regulation does not address this issue.

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

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2 Australian Government, Department of Foreign Affairs and Trade, *Notarial services and document legalisation overseas*, http://smartraveller.gov.au/services/legalising-documents/pages/overseas.aspx (accessed 11 October 2016).

Instrument	**Health Insurance (Diagnostic Imaging Services Table) Regulation 2016 [F2016L01303]** **Health Insurance (Pathology Services Table) Regulation 2016 [F2016L01304]**
Purpose	The regulations prescribe diagnostic imaging and pathology services and the benefits payable for such services
Last day to disallow	21 November 2016
Authorising legislation	*Health Insurance Act 1973*
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 Australian Standard Geographical Classification (ASGC) (ABS catalogue number 1216.0), published by the Australian Statistician in July 2010, is incorporated in the regulations at:

- Schedule 1, Part 3 of the Health Insurance (Diagnostic Imaging Services Table) Regulation 2016 [F2016L01303] (the diagnostic imaging regulation); and
- subclause 2.12.1(3) of Health Insurance (Pathology Services Table) Regulation 2016 [F2016L01304] (the pathology services regulation).

The diagnostic imaging regulation includes a note that: 'The ASGC could in 2015 be viewed on the Australian Bureau of Statistics (ABS) website (http://www.abs.gov.au)'. However, neither the text of the regulations nor the ESs expressly states the manner in which the ASGC is incorporated. Further, the committee notes that that the version of ASGC that can be viewed on the ABS website is dated July 2011.

The committee also notes that paragraph 2.4.4(b) of the diagnostic imaging regulation incorporates the NEMA Standards Publication NU 2-2007, *Performance Measurements of Positron Emission Tomographs*, published by the National Electrical Manufacturers Association (USA) (NU 2-2007). However, neither the text of the regulation nor the ES expressly states the manner in which NU 2-2007 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.

Access to documents

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

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

With reference to the above, the committee notes that paragraph 2.4.4(b) of the diagnostic imaging regulation incorporates NU 2-2007 and provides a description of this document. However, the committee also notes that NU 2-2007, published by the National Electrical Manufacturers Association (USA), appears to only be available online for a fee of $95, and the ES does not provide any information as to whether NU 2-2007 is otherwise freely available.

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

Instrument	**Marine Safety (Domestic Commercial Vessel) National Law Amendment (Cost Recovery) Regulation 2016 [F2016L01307]**
Purpose	Prescribes fees for accreditation of marine surveyors and other services carried out by Australian Maritime Safety Authority
Last day to disallow	21 November 2016
Authorising legislation	*Marine Safety (Domestic Commercial Vessel) National Law Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

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 these requirements, the committee notes that a statement of compatibility to the regulation is published on the Federal Register of Legislation as supporting material. However, the committee's concern with respect to a statement of compatibility is to ensure that an ES is technically compliant with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The committee considers that an ES that does not contain a statement of compatibility falls short of these requirements.

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	**Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 [F2016L01391]**
Purpose	Amends the Migration Regulations 1994 to implement the 'Supporting Innovation through Visas' initiative
Last day to disallow	24 November 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Schedule 1, items 4 and 7 of the regulation set first instalment application charges for Subclass 888 and 188 visas in the new entrepreneur stream. The regulation sets a base application charge for these visas of $3,600, and additional applicant charges of $1,800 and $900 for applicants who are at least 18 years old, and less than 18 years old, respectively. Schedule 1, item 4 of the regulation also sets the first instalment application charge for a Business Skills Class EC visa. The regulation sets a base application charge for this visa of $2,305, and additional applicant charges of $1,155 and $575 for applicants who are at least 18 years old, and less than 18 years old, respectively.

However, while noting that the regulation 'maintains the previous rates' for Business Skills Class EC visa application charges, the ES does not explicitly state the basis on which these charges have been calculated, nor the basis on which the Subclass 888 and 188 entrepreneur stream visa application 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	**Private Health Insurance (Data Provision) Rules 2016 (No. 1) [F2016L01406]**
Purpose	Specifies information that private health insurers must give to the Secretary of the Department of Health under section 172-10 of the *Private Health Insurance Act 2007*
Last day to disallow	24 November 2016
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The committee notes that section 4 of the Private Health Insurance (Data Provision) Rules 2016 (No. 1) [F2016L01406] (the rules) contains the following definitions:

- ***GT-Dental Data from Insurers to the Department*** means the protocol set out in the document approved by the Assistant Secretary of the Health System Financing Branch of the Department of Health on 25 April 2015 which consists of "Data Specifications (GT-Dental)" and "Explanatory Notes (GT-Dental)";
- ***HCP1 Data from Insurers to the Department*** means the protocol set out in the document approved by the Assistant Secretary of the Health System Financing Branch of the Department of Health on 31 March 2016 which consists of "Data Specifications (HCP1)" and "Explanatory Notes (HCP1)"; and
- ***HCP2 Data from Insurers to the Department*** means the protocol set out in the document approved by the Assistant Secretary of the Health System Financing Branch of the Department of Health on 25 April 2015 which consists of "Data Specifications (HCP2)" and "Explanatory Notes (HCP2)".

The committee understands the above referenced documents to be incorporated as existing on the date approved by the Assistant Secretary. However, with respect to this date, the committee notes that the ES to the rules states:

> The information required by the Rules is specified in the following documents, which were approved by the Assistant Secretary of the Health System Financing Branch of the Department on the dates indicated:
>
> GT-Dental Data from Insurers to the Department, approved 25 April 2016;
>
> HCP1 Data from Insurers to the Department, approved 31 March 2016; and
>
> HCP2 Data from Insurers to the Department, approved 25 April 2016.

It is therefore unclear to the committee whether the documents 'GT-Dental Data from Insurers to the Department' and 'HCP2 Data from Insurers to the Department' are intended to be incorporated into the rules as the documents existed on 25 April 2015 or 25 April 2016.

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

Instrument	**Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]**
Purpose	Authorises the operation of a range of emergency locating devices that are categorised as satellite distress or emergency position indiciating radio beacons, or locating aids
Last day to disallow	24 November 2016
Authorising legislation	*Radiocommunications Act 1992*
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 subsection 5(1) of the Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399] (the licence) states:

> ***radar*** has the meaning given to it in the *Radio Regulations Articles*, published by the International Telecommunication Union.

The committee further notes that subsection 314A(2) of the *Radiocommunications Act 1992* alters the operation of section 14 of the *Legislation Act 2003*, such that the licence may incorporate documents, either as in force at a particular date or as in force

from time to time. However, neither the text of the licence nor the ES expressly state the manner in which the Radio Regulations Articles 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 and description of 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 for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that in addition to incorporating the Radio Regulations Articles, published by the International Telecommunication Union, subsection 5(1) of the licence incorporates the following documents, published by Standards Australia International, as in force from time to time:

- AS/NZS 4280.1:2003, *406 MHz satellite distress beacons Part 1: Marine emergency position‑indicating radio beacons (EPIRB) (IEC 61097‑2:2002, MOD)*;
- AS/NZS 4280.2:2003, *406 MHz satellite distress beacons Part 2: Personal locator beacons (PLBs)*;
- AS/NZS 4869.1:2006 (R2015) *Maritime Survivor Locating Systems (MSLS) – Operating on 121.5 MHz*;
- AS/NZS 4869.2:2010 *Stand alone maritime survivor locating systems (MSLS) – Operating on frequencies other than 121.5 MHz*;
- AS/NZS 4869.3:2015 *Maritime survivor locating systems (MSLS) – Maritime survivor locating devices (MSLD) – Operating on frequencies of 156.575 MHz and/or 161.975 MHz/162.025 MHz (RTCM 11901.1:2012, MOD)*; and
- AS/NZS 4869.4:2015 *Maritime survivor locating systems (MSLS) – Maritime low power personal locating devices employing Automatic Identification System*.

With respect to the Radio Regulations Articles, the committee notes that neither the text of the licence nor the ES provides a description of the Radio Regulations Articles,

or indicates how they may be freely obtained. While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*. Notwithstanding this, in this case the committee notes that the Radio Regulations Articles, published by the International Telecommunication Union, are 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.

With respect to the documents published by Standards Australia International, the committee notes that they are only available for sale from SAI Global[4], and neither the licence 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.

Instrument	**Remuneration Tribunal Determination 2016/10 - Remuneration and Allowances for Holders of Public Office [F2016L01360]**
Purpose	Removes references to a previous office holder and provides increased remuneration for the Chief Executive Officer of the National Disability Insurance Scheme Launch Transition Agency
Last day to disallow	23 November 2016
Authorising legislation	*Remuneration Tribunal Act 1973*
Department	Prime Minister and Cabinet
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

3 See International Telecommunication Union, http://www.itu.int/dms_pub/itus/oth/02/02/S02020000244501PDFE.PDF (accessed 4 October 2016).

4 The committee notes that AS/NZS 4280.1:2003 is available for a fee of $176.88; AS/NZS 4280.2:2003 is available for a fee of $91.09; AS/NZS 4869.1:2006 is available for a fee of $103.66; AS/NZS 4869.2:2010 is available for a fee of $91.09; AS/NZS 4869.3:2015 is available for a fee of $228.34; and AS/NZS 4869.4:2015 is available for a fee of $176.88.

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 states:

> In making this determination the Tribunal has informed itself through consultation in accordance with established practice.

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 tribunal has informed itself through consultation is not 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 and purpose of consultation, the bodies, groups or individuals consulted, the issues raised in consultations, and the outcomes of the consultation process.

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

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

Further response required

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	**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	*Biosecurity Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(a) and (b)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

Minister's response

The Minister for Health and Aged Care advised:

> In regard to your request for advice on the incorporation of documents into this instrument, it is intended that the reference to the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 (the Movements Declaration) be read as in force on commencement of the Biosecurity (Human Health) Regulation 2016. I note that the Deputy Prime Minister and Minister for Agriculture and Water Resources, the Hon Barnaby Joyce MP, will also be advising on a similar matter regarding incorporation of the Movements Declaration.

Committee's response

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

Drafting

The committee commented as follows:

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 tresspass 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.

Minister's response

The Minister for Health and Aged Care advised:

> In regard to your request for advice on whether the terms 'appropriate medical standard' and 'appropriate professional standard' are sufficiently precise, an individual operating under section 10 of the Biosecurity (Human Health) Regulation 2016 will always be a qualified medical professional. The reference to 'appropriate professional standards' captures all standards and requirements that apply to medical professionals in their care and treatment of patients, such as codes of conduct set by colleges to which medical professionals belong, as well as standards for laboratories in the storage, transportation and labelling of body samples, including those established by the National Association of Testing Authorities. Adherence to these quality assurance systems is regulated by multiple bodies outside of my Department.
>
> I consider that adherence to existing professional medical standards and requirements, appropriately manages human rights concerns, including privacy and respect for personal rights and liberties.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that adherence to existing professional medical standards and requirements appropriately manages human rights concerns, including privacy and respect for personal rights and liberties. However, in the absence of information regarding specific requirements for the taking and storage of body samples, the committee remains concerned 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)). The committee also notes that body samples can contain very personal information, and the taking of body samples without appropriate safeguards that are readily apparent and understood, may unduly intrude on a person's bodily integrity.

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

Instrument	**Commonwealth Electoral (Logo Requirements) Determination 2016 [F2016L00376]**
Purpose	Specifies the technical requirements that must be complied with when making an application to include a party logo on the Register of Political Parties
Last day to disallow	13 October 2016
Authorising legislation	*Commonwealth Electoral Act 1918*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the 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*.

Minister's response

The Special Minister of State advised:

> Consultation was undertaken for the *Commonwealth Electoral Amendment Act 2016* (the Amendment Act) and the Commonwealth Electoral (Logo Requirements) Determination 2016 through the Joint Standing Committee on Electoral Matters (JSCEM).
>
> The Amendment Act was the culmination of an extensive inquiry into the 2013 Federal Election by JSCEM where a number of recommendations were made into improving the Senate voting system. In particular, in its inquiry into the 2013 Federal Election, JSCEM noted that the use of logos on ballot papers should be investigated:
>
> *The Committee is conscious of the merits of the proposal to permit the inclusion of party logos on ballot papers. The potential to limit confusion amongst voters, especially with complex ballot papers, is an argument for the adoption of logos.*

> Following the Committee's report, and prior to the introduction of the Amendment Act, the then Special Minister of State met extensively with representatives from the Labor Party, the Greens and all Independent Senators, when developing the changes to the Electoral Act, including the proposal to include logos on ballot papers.
>
> After the Bill was introduced to Parliament, it was subject to a specific inquiry from JSCEM, which included the opportunity for the public to make submissions. The JSCEM inquiry received 107 submissions about the proposed changes, a number of which commented favourably on the proposal of using political party logos on ballot papers.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that consultation was undertaken for the determination.

However, the committee's concern with respect to consultation is to ensure that an ES is technically compliant with the requirements of the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The committee considers that an ES that does not contain a description of consultation falls short of these requirements.

The committee therefore requests the further advice of the minister; and reiterates its request that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Access to extrinsic material

The committee commented as follows:

The instrument requires that a logo in an application for the registration of an eligible political party must meet certain requirements, including that it be a PDF file that complies with International Standard ISO 32000-1:2008 as in force at the time the instrument commences.

The committee notes that this standard is published by and available for sale from the International Organization for Standardization for a fee. However, neither the instrument nor the ES provides information about whether the standard is otherwise freely and readily available.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

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

Minister's response

The Special Minister of State advised:

> In response to your second question regarding the Determination and the incorporation of the International Standard ISO 32000-1:2008, I am advised that the Standard is the universal format which is used to produce portable document formats (PDFs). The Standard was produced by the International Organisation for Standardisation in 2008 so as to ensure that products, for example PDFs, were consistent and reliable.
>
> The Standard was incorporated into the Determination to ensure that an industry standard proprietary format was used so that the logos submitted would be compatible with industry hardware and software. The use of the Standard (ISO 32000-1:2008) also ensures that the files will contain stable and reliable graphic files which can be reproduced reliably when resized for reproduction on ballot papers.
>
> Given the industry-wide use of the Standard in producing PDFs, the incorporation of the Standard into the Determination was not considered a disadvantage to the public. Further, we note that while the Standard can be purchased from ISO for a fee, ISO has also allowed Adobe Systems to provide and host an unofficial ISO 3200-1 document, available as a free download from Adobe Systems.
>
> The Standard can be accessed at the following web address: http://www.adobe.com/content/dam/Adobe/en/devnet/acrobat/pdfs/PDF32000_2008.pdf.

Committee's response

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

The committee also notes that 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.

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 the minister's advice that an unofficial International Standard ISO 32000-1:2008 is available for free online. 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.

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	*Greenhouse and Energy Minimum Standards Act 2012*
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Access to incorporated documents

The committee commented as follows:

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

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee 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.

Minister's response

The Minister for the Environment and Energy advised:

> The Committee has identified that the Australian Standards referenced in the instrument are published by SAI Global Limited. The standards are readily available, but a fee applies.
>
> The Greenhouse and Energy Minimum Standards Act 2012 (GEMS Act) and associated governmental agreements enable the Commonwealth, states and territories and New Zealand to set out specific energy performance and labelling requirements with the aim of reducing energy use for regulated products.
>
> GEMS product determinations, including the instrument noted above and its predecessors, reference industry standards that provide the technical detail for the requirements. The Australian and joint Australian/New Zealand standards were developed via a Standards Australia committee. The committee is made up of a diverse range of stakeholders, including industry representatives, consumer advocates and government representatives. The committee members provide their expertise freely, but the intellectual property developed resides with Standards Australia and SAI Global.
>
> The IEC standard used in the instrument is developed by the International Electrotechnical Commission (IEC), which is the international standards and conformity assessment body for all fields of electrotechnology. SAI Global manages copyright permissions and licensing on behalf of Standards Australia and the IEC.
>
> While the referenced standards are available for a fee, it should be noted the legislative instruments do not apply to the general public, but rather manufacturers and importers of the regulated products. The stakeholders using these determinations are likely to already have access to the standards via participation in the committee process. However, there are no restrictions preventing interested parties from purchasing the standards and in the case of new entrants the Australian Government does not consider the fees as unreasonable or an access barrier for industry. Industry stakeholders have broadly supported the Standards Australia process in developing new determinations under the GEMS Act. The Government also views it as a well-functioning practice to ensure effective regulation for the end benefit of Australian consumers.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that he does not consider the fees imposed to access the incorporated standards as unreasonable or an access barrier for industry.

However, the minister's response does not directly address the committee's concern about access to the incorporated standards.

In this regard, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for industry members, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

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

Drafting

The committee commented as follows:

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.

Minister's response

The Minister for the Environment and Energy advised:

> The Committee has correctly noted that there is a discrepancy in section 3 of the instrument which refers to IEC 60630 Edition 2.5 and the table set out in subsection 5(1) of the instrument which refers to IEC 60630 Edition 2. The reference to IEC 60630 Edition 2 in subsection 5(1) is a drafting error.
>
> The instrument is currently being reviewed as part of the consideration of whether to regulate LED products under the GEMS Act, and this error will be corrected in any new instrument arising as part of that process.

Committee's response

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

The committee also thanks the minister for his advice that the drafting error identified by the committee will be corrected in any new instrument.

Instrument	**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]** **Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456]** **Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679]**
Purpose	These instruments define certain non-citizen persons as fast track applicants
Last day to disallow	13 October 2016; 13 October 2016; 13 October 2016; and 21 November 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a) and (d)
Previously reported in	*Delegated legislation monitor* 5 and 6 of 2016

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.[5]

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 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...[6]

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

With reference to each instrument the committee commented as follows:

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.

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

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

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 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.

Minister's response

The Minister for Immigration and Border Protection advised:

> The Committee noted that Instruments F20l6L00377 and F20l6L00679[7] are made under Part 1 of the *Migration Act 1958* (the Migration Act) and should thus be exempt from disallowance, according to section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation). The Explanatory Statement to both instruments states however, that "under section 42 of the *Legislation Act 2003,* the instrument is subject to disallowance."
>
> However, Instruments F2016L00377 and F2016L00679 are made under paragraph 5(1AA)(b) of the Migration Act, which states that the Minister may make a legislative instrument for the purposes of paragraph (b) of the definition of "fast track applicant" in subsection 5(1) of the Act. Subsection 5(1AD) of the Migration Act stipulates that despite subsection 44(2) of the *Legislation Act 2003* (the Legislation Act), section 42 of the Legislation Act (which deals with the disallowance of legislative instruments) applies to an instrument made under subsection 5(1AA). Consequently, regardless of the provision in section 10 of the Exemption Regulation (which creates an exemption for instruments made under Part 1 of the Migration Act) Instruments F2016L00377 and F2016L00679 are subject to disallowance. This is consistent with the Explanatory Statements associated with the instruments.

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7 The committee notes that the minister's response is also relevant to the issues raised in *Delegated legislation monitor* 5 of 2016 (3 May 2016) concerning 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].

Committee's response

The committee thanks the minister for his response.

However, the committee is concerned that when these instruments were received by both the Parliament and the committee they had been classified as exempt from disallowance, and thereby tabled as exempt from disallowance.

In this respect, the incorrect classification of these instruments as exempt from disallowance may have hindered the effective oversight of the instruments by Parliament. Therefore, the committee has resolved to place protective notices of motion on each of the instruments to extend the disallowance period by 15 sitting days.

The committee is concerned that these instruments were improperly classified and that it is unable to determine how this occurred. The committee is also interested in whether there is any further action that needs to be taken to correct the situation, both for these particular instruments and for the classification process generally.

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

Instrument	**Quality Agency Principles Amendment Principle 2016 [F2016L00830]**
Purpose	Removes the methods for calculation and indexation of application fees for accrediation from the Quality Agency Principles 2013 [F2016C00652]
Last day to disallow	21 November 2016
Authorising legislation	*Australian Aged Care Quality Agency Act 2013*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Removing fees from a disallowable legislative instrument

The committee commented as follows:

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.[8]

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 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.

Minister's response

The Minister for Health and Aged Care advised:

> In regard to your query regarding removing fees from the instrument, the *Quality Agency Act 2013* does not give the Minister authority to set fees for accreditation services in the instrument. Instead, section 15 of the *Quality Agency Act 2013* authorises the Chief Executive Officer of the Quality Agency to publish a document setting out accreditation fees and re-accreditation fees. This allows a transparent approach to the setting of such fees for accreditation services which is also consistent with the legislative authority in the *Quality Agency Act 2013*.

Committee's response

The committee thanks the minister for her response.

The committee agrees that the Quality Agency Act authorises the Chief Executive Officer of the Quality Agency to publish a document setting accreditation and re-accreditation fees. However, the minister's response provided to the Scrutiny of Bills committee with respect to the Quality Agency Act indicated that these fees would be included in a disallowable legislative instrument and subject to

8 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).

Parliamentary oversight. Therefore, the committee remains concerned that the minister's response does not provide a justification for removing from a disallowable legislative instrument the process for calculating and indexing fees for the accreditation of certain aged care services (thereby removing the process from the effective oversight of the Parliament).

The committee requests the further 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	*Radiocommunications Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Access to incorporated documents

The committee commented as follows:

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

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee 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.

Minister's response

The Minister for Communications advised:

> In respect to the request for advice in relation to the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294] (the Class Licence), the ACMA noted that the Class Licence replaced an equivalent legislative instrument (the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2006) made by the ACMA, which also incorporated the Standard, and which had been in place since 2006.
>
> The ACMA has advised that Australian Standards published by Standards Australia (including the Standard) are distributed, under licence, by SAI Global. The ACMA understands that various standards published by Standards Australia are also made available by certain public libraries for their borrowers, free of direct charge. The ACMA notes, however, that the beneficiaries of the grant of rights given by the Class Licence, and so the key end-users of the Standard, are, for the most part, large commercial entities, including major airlines. The amount charged for the Standard is not unreasonable for these end-users.
>
> The ACMA will continue to monitor the cost of, and availability of access to, standards set by Standards Australia (and any other relevant standard-setting body) when making legislative instruments that adopt such standards. This will ensure, so far as is possible, that costs of access to those standards are contained and reasonable, and that access to them is readily and reasonably assured.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that he does not consider the amount charged to access the incorporated standard as unreasonable for key users of the instrument and that that various standards published by Standards Australia are made available by certain public libraries.

However, the minister's response does not directly address the committee's concern about access to the incorporated standard, namely AS/NZS IEC 62287.1: 2007.

In this regard, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for industry members, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

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

Advice only

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

Instrument	**National Health (Originator Brand) Amendment Determination 2016 (No. 6) [F2016L01329]**
Purpose	Amends the National Health (Originator Brand) Determination 2015 (PB 100 of 2015) by determining an orginator brand of a pharmaceutical item for an existing F2 formulary drug
Last day to disallow	21 November 2016
Authorising legislation	*National Health Act 1953*
Department	Health
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 to the determination states:

> The responsible person for the brand recommended to be the originator in the Amending Determination was not asked for comments in relation to the potential originator brand determination. The responsible person made the application for a variant to their brand name, and made no comment seeking that this variant to an already determined originator brand be treated any differently.

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, it appears that consultation (within the general meaning of public consultation or consultation with relevant stakeholders) was considered unnecessary due to the machinery nature of the request from the sponsor company of the relevant listed drug. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that consultation was considered unnecessary (or

inappropriate) for this reason. 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	**Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318]**
Purpose	Revoke and replace previous rules, add new prostheses to the schedule and change and remove some items
Last day to disallow	21 November 2016
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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 the Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318] (the rules) includes a statement of compatibility which contains errors. Specifically, the statement of compatibility states:

> The Rules differ from the Previous Rules by:
>
> adding X new items to Part A of the Schedule as no gap prostheses;
>
> changing the current listing of X existing products in Part A of the Schedule including:
>
> amending the descriptions of products; and
>
> changing the grouping and minimum benefit of products; and
>
> deleting X items from Part A;
>
> Adding one new human tissue item to Part B of the Schedule; and
>
> changing the current listing of X existing products in Part B of the Schedule including
>
> 16 billing codes with increased benefits; and
>
> X billing codes with changes to details.

However, the committee notes that the errors are confined to the description of how the rules differ from the previous rules, and not the substantive human rights analysis.

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	ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 [F2016L01299] Australian Public Service Commissioner's Directions 2016 [F2016L01430] Banking, Insurance and Life Insurance (prudential standard) determination No. 1 of 2016 [F2016L01428] Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2016 [F2016L01426] Financial Sector (Collection of Data) (reporting standard) determination No. 22 of 2016 - HRS 601.0 Statistical Data by State [F2016L01394] Marine Order 508 (National law amendment) 2016 [F2016L01317] Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318] Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386] Torres Strait Fisheries Management Instrument No. 13 [F2016L01393] Torres Strait Fisheries Management Instrument No. 14 [F2016L01395]
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 33(3) of the *Acts Interpretation Act 1901*

Instruments	CASA EX128/16 - Repeal - exemption - from standard take-off and landing minima - Japan Airlines [F2016L01302] Currency (Perth Mint) Amendment Determination (No. 1) 2016 [F2016L01311] Export Quotas Legislation Amendment Order 2016 [F2016L01423] Health Insurance (Eligible Collection Centres) Approval Amendment (Duration of Approvals) Principles 2016 [F2016L01314] Income Tax Assessment (Infrastructure Project Designation) Amendment Rule 2016 [F2016L01359] Private Health Insurance (Data Provision) Rules 2016 (No. 1) [F2016L01406] Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318] Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386] Remuneration Tribunal Determination 2016/10 - Remuneration and Allowances for Holders of Public Office [F2016L01360] Vehicle Standard (Australian Design Rule 76/00 – Daytime Running

	Lamps) 2006 Amendment 1 [F2016L01315] Woomera Prohibited Area Rule 2014 Determination of an Exclusion Period for the Green Zone for Financial Year 2016-2017 Amendment No.1 [F2016L01300]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[9]

The committee draws this matter to the attention of ministers.

9 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	**AD/RAD/47 Amdt 4 - Periodic Testing of ATC Transponders [F2016L00368]**
Purpose	Clarifies and updates regulatory references and repeals and replaces AD/RAD/47 Amdt 3 [F2016L00150]
Last day to disallow	13 October 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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 instrument states:

> Requirement:
>
> 1. For all transponders, perform a system test in accordance with the requirements of United States of America 14 CFR (Federal Aviation Regulations) Part 43, Appendix F.

However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which United States of America 14 CFR (Federal Aviation Regulations) Part 43, Appendix F 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.

Minister's response

The acting Minister for Infrastructure and Transport advised:

> CASA has advised that in future it will ensure that legislative instruments that reference another instrument or document, will reference it as in force from time to time, unless it is intended that the reference only be to the version of the document in force at the time of the making of the new instrument.

Committee's response

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

The committee understands the minister's advice to mean that United States of America 14 CFR (Federal Aviation Regulations) Part 43, Appendix F is incorporated as in force at the commencement of the instrument.

Instrument	**ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 [F2016L00328]**
Purpose	Modifies various sections of the *Corporations Act 2001* in relation to requirements for disclosure documents
Last day to disallow	13 October 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Insufficient information regarding strict liability offences

The committee commented as follows:

The instrument modifies sections 723 and 724 of the *Corporations Act 2001*. In doing so, the instrument inserts three strict liability offences relating to minimum subscription and quotation conditions for disclosure documents under which securities or issues for sale may be offered.

Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions, the committee generally requires a detailed

justification for the inclusion of any such offences (particularly strict liability offences) in delegated legislation. The committee notes that in this case the ES provides no explanation of or justification for the framing of the offence.

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

Minister's response

The Minister for Revenue and Financial Services advised:

> ASIC notes that the strict liability provisions imposed by the Instrument are directly modelled on section 724(1A) of the *Corporations Act 2001* (the Act). Section 724 provides a series of procedural choices that are open to issuers if they have failed to satisfy, among other things, a minimum subscription condition, a quotation admittance condition or a quotation application condition.
>
> These choices are essentially a choice to (1) refund application monies; (2) offer withdrawal rights; or (3) issue/transfer the securities and offer withdrawal rights. If an issuer fails to implement at least one of these choices, this is a contravention which can be prosecuted as a strict liability offence. Under section 724 of the Act, the choices available to an issuer are the same set of choices, irrespective of which condition (i.e. minimum subscription condition, quotation admittance condition or quotation application condition) has not been satisfied within the timeframes.
>
> The effect of the ASIC legislative instrument is to give issuers greater flexibility in satisfying the conditions by allowing them to "refresh/reset" the timeframes by which the conditions must be satisfied. This greater flexibility is achieved through a new "refresh timeframes and offer withdrawal rights" procedure. However, if an issuer chooses not to take advantage of this "refresh timeframes and offer withdrawal rights" procedure, then the remaining procedural choices open to an issuer are more limited and more specific to the condition that has not been satisfied, namely:
>
> - where a minimum subscription condition is not satisfied within the required timeframe by the issuer, the issuer must follow a procedure of refunding application monies;
> - where the quotation admittance condition is not satisfied within the required timeframe by the issuer, the issuer must follow a procedure of refunding application monies;
> - where the quotation application condition is not satisfied by the issuer within the required timeframe, the issuer must either refund application monies or follow the required "refresh and offer withdrawal rights" procedure.
>
> A failure to follow these procedures will be a contravention which can be prosecuted as an offence of strict liability. Technically, there are three new offences of strict liability because different procedural requirements/choices will apply depending on which kind of condition has not been satisfied. The separation of the different procedural requirements/choices, with three new offences of strict liability, was purely a matter of drafting convenience.

> However, in substance, there is still only a single strict liability offence for a failure to follow the required procedure and so, to that extent, the instrument replicates the existing position under section 724(1A) of the Act.
>
> ASIC have stated that in future, where delegated legislation includes offences (particularly strict liability offences), ASIC will commit to providing a detailed explanation of and justification for the framing of such offences in the explanatory material that accompanies the delegated legislation.

Committee's response

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

The committee also thanks the minister for her advice that future ESs to instruments which include offences will provide a detailed explanation of and justification for the framing of such offences. However, while noting the minister's advice that the strict liability offences included in the instrument are modelled on an existing offence provision in the *Corporations Act 2001*, the committee reiterates its expectations that, where an instrument makes provision for offences, the ES should provide a full justification for the need, scope and framing of those offences. This is particularly so in cases of strict liability.

The committee further draws the minister's attention to the discussion of strict and absolute liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers,*[1] as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

1 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf (accessed 12 October 2016).

Instrument	**Australian Consumer Law Interim Ban on Hoverboards that do not meet Specific Safety Requirements [F2016L00357]**
Purpose	Prohibits the supply of hoverboards that do not meet certain specific safety requirements set out in International Electrotechnical Commission and Underwriters Laboratories Inc. standards
Last day to disallow	13 October 2016
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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 instrument requires that components of hoverboards meet certain requirements as specified in the following standards:

- *IEC 62133 Edition 2.0 2012-12 - Secondary Cells and Batteries containing Alkaline or other Non-acid Electrolytes - Safety Requirements for Portable Sealed Secondary Cells, and for Batteries made from them, for use in Portable Applications* (IEC 62133);
- *IEC 60335-1 Edition 5.1 2013-12 Household and similar Electrical Appliances - Safety - Part 1: General Requirements* (IEC 60335-1) or *AS/NZS 60335.1:2011 (incorporating amendment Nos 1, 2 and 3)*; and
- *UL 2272 – Outline of Investigation for Electrical Systems for Self-balancing Scooters* (UL 2272).

However, neither the text of the instrument nor the ES expressly states the manner in which these standards are 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.

Access to extrinsic material

The committee commented as follows:

As noted above, the instrument sets out requirements that incorporate various parts of three standards.

The committee notes that the above referenced standards are available for sale for a fee. However, neither the instrument nor the ES provides information about whether the standards are otherwise freely and readily available.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. In this respect, the committee recognises that the implementation of the instrument appears to occur in a specific regulatory environment; and that it may be unlikely that persons outside this regulatory sphere would require access to the standards incorporated by the instrument. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to have in place arrangements for users outside of the particular commercial or regulatory sector to access such material on a fee-free basis.

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

Agency's response

The Australian Competition and Consumer Commission (ACCC) advised:

> **Extrinsic material**
>
> The instrument did not expressly state that the standards specified were the versions that applied at its commencement. However, the titles of the specified International Electrotechnical Commission (IEC) standards are unique identifiers that reflect the publication date for that particular version of the standard. That is, the instrument incorporates the standards IEC 62133 Edition 2.0 2012-12, IEC 60335-1 Edition 5.1 2013-12 and AS/NZS 60335.1:2011. The underlined sections (added) specify the edition of the standard incorporated by the instrument. In each case, this was the standard as it applied at the date of commencement.

The instrument also incorporates the UL 2272 standard that Underwriters Laboratories Inc. developed earlier this year and that applied at the date of commencement. When the Minister made the instrument, there was only one version of this standard.

Access to extrinsic material

…In this case, as the Committee has commented, it is likely that access to these standards would primarily be sought by testing laboratories and by hoverboard designers and manufacturers.

Where practicable, product safety legislative instruments are complete, self-contained instruments that do not reference extrinsic material. However, many product safety legislative instruments need to incorporate extrinsic technical standards. For this reason, the ACCC has over several years attempted to negotiate free public access to those extrinsic standards with Standards Australia. Unfortunately, those negotiations have been unsuccessful.

Product safety standards tend to be long, complex and technical in nature, and people outside the specific regulatory or commercial sphere to which they relate are highly unlikely to seek them. In practice, consumers and retailers cannot verify compliance with standards themselves and only need to identify the standards so they can specify them in purchasing agreements and when they submit goods for assessment by test laboratories.

Safety standard instrument

On 5 July 2016, the Minister made a safety standard for self-balancing scooters, previously known as hoverboards [F2016L01180] that started on 17 July 2016 and is in force for two years. It effectively replaced the interim ban and has the same technical requirements. The safety standard instrument addresses the issues raised by the Committee:

• The safety standard instrument expressly specifies the versions of the referenced standards including the dates of publication and purchasing instructions.

• The explanatory statement advises that we can make copies of the referenced standards available for viewing free of charge at ACCC offices in all state and territory capital cities and in Townsville.

To date, no member of the public has approached the ACCC for access to any of the standards incorporated in any of these legislative instruments.

Committee's response

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

The committee notes ACCC's advice that it had previously undertaken to negotiate free public access to extrinsic standards with Standards Australia but that the negotiations have been unsuccessful.

The committee also thanks ACCC for its advice that copies of incorporated standards are available for viewing free of charge at ACCC offices in all state and territory capital cities and in Townsville.

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	*Australian Crime Commission (National Policing Information Charges) Act 2016*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Unclear basis for determining fees

The committee commented as follows:

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.

Minister's response

The Minister for Justice advised:

> The Determination was intended to continue the pricing structure used by the former CrimTrac Agency, prior to its merger with the ACIC. This continuity in pricing was intended to provide certainty to stakeholders throughout the transition process associated with the merger.
>
> The former CrimTrac Board considered and endorsed for implementation the current pricing structure as part of the 2013-14 budget, with effect from 1 January 2014. The costs for accredited agencies and police were calculated to recover the full costs of all CrimTrac services at the time, whereas the volunteer checks were set at a level that only recovered the cost of the national police checking service. This also reflected CrimTrac's policy to provide checks relating to volunteers at a discounted rate. The difference in the cost of the charge between accredited agencies and

> police was due to the calculated cost of the additional administrative process involved in accrediting and auditing the accredited agencies. The pricing structure was considered and reconfirmed by the former CrimTrac Board annually.

Committee's response

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

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

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	*Australian Prudential Regulation Authority Act 1998*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

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 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*.

Minister's response

The Treasurer advised:

> I have raised the Committee's concerns with the Australian Prudential Regulation Authority (APRA), who are responsible for making the Instrument. APRA notes that the charges imposed by the Instrument are fully expected, as APRA has been imposing fixed charges on certain members of the financial industry for the accreditation and assessment of models-based capital adequacy for over 10 years. Nevertheless, APRA conducts a simple consultation for each set of fixing charges annually.
>
> For the charges imposed in 2015-16 by the Instrument, the relevant officers at all of the entities specified in the Instrument (see table below) were contacted, advised of APRA's intention to continue to charge for this accreditation work, and invited to raise any questions or concerns, prior to the charging occurring. In the cases of Bendigo and Adelaide Bank Limited and Suncorp-Metway Limited, who received the charges for the first time, prior contact was made by the relevant APRA supervisor with these entities to ensure the correct contact person was identified.

Consulted entity	**Consulted person**
Australia and New Zealand Banking Group Limited	Chief Risk Officer
Commonwealth Bank of Australia	Chief Risk Officer
National Australia Bank Limited	Group Chief Risk Officer
Westpac Banking Corporation	Chief Risk Officer
Macquarie Bank Limited	Executive Director - Risk Management Group
ING Bank (Australia) Limited	Chief Financial Officer

Bendigo and Adelaide Bank Ltd	Chief Risk Officer
Suncorp-Metway Limited	Chief Risk Officer Banking & Wealth

No questions (or other comments) in regards to the charges were received by APRA from the entities in question. Therefore, the outcome of the consultation process was that no objections against the charges were received, and charging commenced. All entities have subsequently paid the charges in full.

APRA has also indicated that, in response to the Committee's query, it will update the Explanatory Statement for the Instrument with a description of the consultation process outlined above, and will arrange for its approval and registration on the Federal Register of Legislation as soon as practicable. APRA will also commit to providing appropriate and fuller descriptions of its consultation process in subsequent explanatory material it issues in relation to these charges.

Committee's response

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

The committee notes the Treasurer's undertaking that APRA will amend the ES to include a description of consultation.

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 *Building Energy Efficiency Disclosure Act 2010*; and set assessment methods and standards for building energy efficiency
Last day to disallow	21 November 2016
Authorising legislation	*Building Energy Efficiency Disclosure Act 2010*
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Access to incorporated documents

The committee commented as follows:

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

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee 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.

Minister's response

The Minister for the Environment and Energy advised:

> The Committee has identified that the measurement standards for Net Lettable Area (NLA) referenced in the instrument are published by the Property Council of Australia Limited (PCA). The standard is readily available from the PCA, but a fee applies.
>
> The *Building Energy Efficiency Disclosure Act* (the BEED Act) establishes the Commercial Building Disclosure (CBD) Program, which requires the public disclosure of energy efficiency information relating to large commercial office spaces. The aim of the CBD Program is to improve the energy efficiency of Australia's large office buildings, ensuring prospective buyers and tenants have access to consistent and accurate energy efficiency information about office spaces to better inform sale and leasing decisions.
>
> The CBD Program incorporates and makes use of the pre-existing National Australian Built Environment Rating System (NABERS) program. NABERS is managed nationally by the NSW Office of Environment and

Heritage (OEH), on behalf of Commonwealth, state and territory governments and provides a framework for rating and comparing the sustainability performance of buildings. The CBD Program requires building owners and lessors to display a certified NABERS rating when advertising commercial office buildings for sale or lease.

A key component of the NABERS rating system is the measurement of relevant building floor area, a significant moderating factor when comparing building sustainability performance. The *PCA Method of Measurement for Lettable Area 1997* is the accepted industry standard for measuring the floor area of commercial office space in the Australian property market, and has been used as the standard for measuring building floor area from the inception of the NABERS program in 1998.

While the referenced NLA method is available only for a fee, it should be noted the BEED Act does not apply to the general public, but rather it applies to building owners and lessors of large commercial office spaces. Further, building owners and lessors do not need to purchase the method. It is used by CBD Assessors to provide NABERS ratings for the owners and lessors. There are currently 180 accredited CBD assessors.

CBD Assessors must undertake a CBD training course and associated accreditation exams to achieve CBD accreditation and be allowed to participate in the program. These accreditation processes help to maintain the high quality standards required for the CDB program. It is a prerequisite to becoming a CBD Assessor that the person holds NABERS accreditation. NABERS accreditation is used for a range of purposes beyond the CBD program. The assessor will, therefore, need to have purchased the NLA method prior to seeking CBD accreditation.

While there are various costs for CBD Assessors associated with training courses and accreditation, the additional cost of procuring the NLA method is a once-off, minimal cost in comparison to other accreditation costs. Accordingly, the Australian Government does not consider the fee to be an unreasonable impost on persons affected by the law.

Committee's response

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

The committee also welcomes the minister's additional advice that the incorporated measurement method is used by Commercial Building Disclosure Assessors (of which there are currently 180) to provide National Australian Built Environment Rating System ratings for the owners and lessors of large commercial buildings; and that the Government does not consider the fee for accessing the measurement method to be an unreasonable impost on persons affected by the law.

However, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to

the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for industry members, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

Instrument	**CASA 27/16 - Instructions — use of Global Navigation Satellite System (GNSS) [F2016L00475]**
Purpose	Contains instructions for the use of GNSS in certain flight navigation under the Instrument Flight Rules
Last day to disallow	13 October 2016
Authorising legislation	Civil Aviation Regulations 1988
Department	Infrastructure and Transport
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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 98(5D) of the *Civil Aviation Act 1988* operates to allow the instrument to incorporate non-legislative material as in force at a particular date or as in force from time to time.

Section 1 of Schedule 1 of the instrument defines key terms used in the instrument, including the following:

- ***NAT Doc 007*** means the ICAO document titled *Guidance concerning Air Navigation in and above the North Atlantic MNPS Airspace*, Edition 2011, or later edition, published on behalf of the North Atlantic Systems Planning Group (NAT SPG) by the European and North Atlantic Office of ICAO; and
- ***Type 1 LOA*** has the meaning given by CAO 20.91.

However, neither the text of the instrument nor the ES expressly state the manner in which the ICAO document titled *Guidance concerning Air Navigation in and above the North Atlantic MNPS Airspace* (ICAO document) and CAO 20.91 are incorporated.

Regarding ***Type 1 LOA***, 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 external documents which are Commonwealth disallowable instruments (such as the CAO 20.91) can be taken to be references to versions of those instruments as in force from time to time.

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

The committee 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 anticipated users, instruments (and, ideally, their accompanying ESs) should clearly state the manner of incorporation of extrinsic material.

Regarding ***NAT Doc 007***, as the ICAO document is not a Commonwealth legislative instrument, the above construction does not apply. The manner of incorporation of this document is therefore unclear to the committee.

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

Minister's response

The acting Minister for Infrastructure and Transport advised:

> CASA has advised that in future it will ensure that legislative instruments that reference another instrument or document, will reference it as in force from time to time, unless it is intended that the reference only be to the version of the document in force at the time of the making of the new instrument.
>
> The Committee also noted that regarding *NAT Doc 007,* as this International Civil Aviation Organization document is not a Commonwealth legislative instrument, the manner of incorporation of this document is unclear. CASA has advised that the basis of incorporation is subsection 98(5D) of the *Civil Aviation Act 1988,* which operates to allow the instrument to incorporate non-legislative material as in force at a particular date or as in force from time to time. The definition of *NAT Doc 007* in the instrument makes it clear that it is the edition of that publication in force at a particular time that must be considered.

Committee's response

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

The committee understands the minister's advice to mean that *Nat Doc 007* is incorporated as in force at the commencement of the instrument.

Instrument	**CASA EX50/16 - Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders [F2016L00373]**
Purpose	Exempts foreign aircraft air operator's certificate holders engaged in international air navigation in Australia from the requirement to have a drug and alcohol management plan
Last day to disallow	13 October 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Matter more appropriate for parliamentary enactment

The committee commented as follows:

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

The instrument exempts foreign aircraft air operator's certificate (AOC) holders from the requirement to have a drug and alcohol management plan (DAMP) prescribed in Part 99 of Civil Aviation Safety Regulations 1998 (the regulations) provided that certain conditions are met. The committee also notes that the instrument extends, until 22 March 2019, the previous:

- three-year relief provided by CASA EX33/13 [F2013L00542];
- one-year relief provided by CASA EX 146/12 [F2012L01936];
- one-year relief provided by CASA EX 37/11 [2011L00463];
- one-year relief provided by CASA EX 12/10 [F2010L00379]; and
- one-year relief provided by CASA EX 09/09 [F2009L00847].

The ES for this instrument states:

> CASR Part 99 effectively came into operation with the implementation of DAMPs and preliminary testing [on 23 September 2008].
>
> At that time, CASA considered that it was not realistically possible for many of the foreign AOC holders, for whom Australian international operations are only a component of their broader international operations,

> to make a full conversion of their existing drug and alcohol control policies to CASR Part 99 DAMP requirements.

In light of the purpose and significant duration of the exemption, the committee notes its general preference that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation (in this case the regulations). However, no information is provided in the ES as to why the exemption continues to be used in favour of an amendment to the relevant DAMP provisions of the regulations.

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

Minister's response

The acting Minister for Infrastructure and Transport advised:

> CASA provided drafting instructions to the Office of Parliamentary Counsel in February 2016, for proposed amendments to Part 99, which include changing requirements for foreign aircraft AOC holders, which are currently being progressed.

Committee's response

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

Instrument	**CASA EX57/16 - Exemption — for seaplanes [F2016L00466]**
Purpose	Exempts the pilot in command of a seaplane that is landing on, or taking-off from, water from compliance with specific requirements in the Civil Aviation Regulations 1988
Last day to disallow	13 October 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Matter more appropriate for parliamentary enactment

The committee commented as follows:

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

legislation). This may include instruments which extend relief from compliance with principal legislation.

The instrument exempts a pilot in command of a seaplane from compliance with three requirements in regulation 166 of Civil Aviation Regulations 1988 (the regulations), provided certain conditions are met. The committee also notes that that the instrument extends, until 31 March 2019, the previous:

- three-year relief provided by CASA EX37/13 [F2013L00571];
- six-month relief provided by CASA EX49/10 [F2010L01534];
- eighteen-month relief provided by CASA EX01/09 [F2009L00105];
- three-year relief provided by CASA EX 61/05 [F2005L04295]; and
- three-year relief provided by CASA EX 09/2003 [F2005B00525].

The ES for this instrument states:

> …the exemption has been issued and reissued at least as far back as exemption EX61/05. It is required because there are some circumstances in which strict adherence by the pilot in command of a seaplane to the rules the subject of the exemption may be inappropriate.

In light of the purpose and significant duration of the exemption, the committee notes its general preference that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation (in this case the regulations). However, no information is provided in the ES as to why the exemption continues to be used in favour of an amendment to the relevant provisions of the regulations.

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

Minister's response

The acting Minister for Infrastructure and Transport advised:

> Proposed Part 91 of the CASR will negate the need for an exemption. A draft of Part 91 has been the subject of public consultation. CASA has published a regulatory program timeline at https://www.casa.gov.au/files/new-regulatory-timeline-2016jpg which indicates Part 91 is scheduled to be brought forward in September 2017 and commence in September 2018.

Committee's response

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

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	*Customs Act 1901*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

The committee commented as follows:

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

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

Minister's response

The Minister for Immigration and Border Protection advised:

> As the safety order is not a legislative instrument, it is incorporated as in force at the commencement of the Direction. In future, the circumstances in which a document is incorporated in a legislative instrument will be clearly set out in the legislative instrument and in its Explanatory Statement.
>
> The Committee also noted that although sections 3 and 4 of the Directions incorporate the safety order, there is no description of the safety order or an indication of how it may be freely obtained. This would normally fail to satisfy the requirements of section 15J(2) of the *Legislation Act 2003,* however in this case the Explanatory Statement does state that the safety order may be obtained from the Department, while the Committee noted that the safety order is accessible online. This is not expressly stated in the Explanatory Statement but in future will also be included.

Committee's response

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

The committee also thanks the minister for his advice that where future instruments incorporate documents the manner of incorporation and information about where incorporated documents can be accessed online will be clearly stated in the ES.

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2 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 2016/8, Field allowance–amendment** **Defence Determination 2016/10, Additional recreation leave–amendment**[3]
Purpose	These instruments amend Defence Determination 2005/15 in relation to field allowances and additional recreation leave
Last day to disallow	10 October 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Incorporation of extrinsic material

The committee commented as follows:

By virtue of former section 58B of the *Defence Act 1903* (Defence Act) and section 7 of the former *Legislative Instruments Act 2003*, these determinations are disallowable non-legislative instruments.[4] Section 58B of the Defence Act provided that paragraph 46AA(1)(a) of the *Acts Interpretation Act 1901* applied to these determinations such that the provisions of a determination made by the Defence Force Remuneration Tribunal (DFRT) under section 58H of the Defence Act may be incorporated as in force at a particular time or as in force from time to time.

With reference to the above, the committee notes that the instruments substitute the following definitions into Defence Determination 2005/15:

> Field service: The same meaning as in DFRT Determination No. 11 of 2013, *ADF allowances*.
>
> Special service: Means service performed in either of the following circumstances.
>
> a. For the purposes of Division B.12 in DFRT Determination No. 11 of 2013, *ADF Allowances*.

3 The committee notes that the issue raised also applies to Defence Determination 2016/16, Recruit instructors and ADF gap year - educational bonus – amendment [F2016L00543].

4 These provisions apply to these instruments as they were made before the commencement of the *Acts and Instruments (Framework Reform) Act 2015* on 5 March 2016. Following the commencement of this Act, Defence Determinations are now legislative instruments and are registered on the Federal Register of Legislation.

> b. For the purposes of Division B.14 in DFRT Determination No. 11 of 2013, *ADF Allowances*.

However, neither the text of the instruments nor the ESs expressly states the manner in which DFRT Determination No. 11 of 2013, *ADF Allowances* (which were made by DFRT under section 58H of the Defence Act) 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.

Minister's response

The Minister for Defence advised:

> With the amendments made to the *Legislation Act 2003* in March 2016, Defence was required to remake its principal determination for Australian Defence Force conditions of service to comply. The new principal determination, Defence Determination 2016-19, Conditions of service, commenced on 1 July 2016 and repealed the previous principal determination. Any changes to amending determinations made between March and June 2016 would be of no effect because they related to a repealed principal determination.
>
> Therefore, instead of remaking the amending instruments identified by the committee, Defence is reviewing the new principal Defence determination, and will make any necessary amendments to the principal instrument so that the manner of incorporation is clearly specified in both the instrument itself and the explanatory statement as desired by the committee. This will enable users to understand its operation without the need to rely on specialist legal knowledge or advice, or to consult extrinsic material.
>
> Defence has also reviewed its legislative instrument templates and made the required adjustments in order to ensure the issues the committee raised in the monitor are not repeated in the future.

Committee's response

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

The committee also thanks the minister for her advice that the Department of Defence has reviewed its legislative instrument templates and made adjustments to ensure that where future instruments incorporate documents the manner of incorporation will be clearly specified.

The committee also notes the minister's undertaking that the Department of Defence is reviewing the new principal determination, and will make any necessary amendments to address the committee's concerns about the manner of incorporation of DFRT Determination No. 11 of 2013.

Instrument	**Defence Determination 2016/15, Dependants - amendment [F2016L00509]**[5]
Purpose	Amends Defence Determination 2005/15 to revise and restructure the definitions relating to a member's dependants and categorisation
Last day to disallow	7 November 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

No description of consultation

The committee commented as follows:

Prior to 5 March 2016 determinations made under section 58B of the *Defence Act 1903* (Defence Act) were disallowable non-legislative instruments by virtue of former section 46B of the *Acts Interpretation Act 1901*. However, following the commencement of the *Legislation Act 2003*, determinations made under section 58B are now disallowable legislative instruments and therefore subject to the provisions of the *Legislation Act 2003,* including section 17.

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.*

5 The committee notes that the issue raised also applies to a number of recent instruments: Defence Determination 2016/12, Post indexes – amendment [F2016L00427]; Defence Determination 2016/14, Hardship allowance – amendment [F2016L00487]; Defence Determination 2016/13, Deployment allowance – amendment [F2016L00488]; Defence Determination 2016/15, Dependants – amendment [F2016L00509]; and Defence Determination 2016/16, Recruit instructors and ADF gap year - educational bonus – amendment [F2016L00543].

Minister's response

The Minister for Defence advised:

> The Department of Defence has submitted revised explanatory statements for each of the determinations, which did not include a description of consultation. The revised statements include information about the relevant consultation processes in accordance with section 17 of the *Legislation Act 2003*.

Committee's response

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

The committee also notes that a replacement ES has been registered on the Federal Register of Legislation and received by the committee. The replacement ES includes a description of consultation in accordance with the requirements of the *Legislation Act 2003*.

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	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

Minister's response

The Minister for Defence Personnel advised:

> The committee raised a similar issue in relation to Defence Determinations identified in its previous *Delegated Legislation Monitor* No. 5 of 2016. The Minister for Defence, Senator the Hon Marise Payne, responded to the committee's previous concern on 22 September 2016.
>
> The Department of Defence is reviewing Defence Determination 2016/19, as amended, and will amend this instrument so that the manner of incorporation of all extrinsic material is clearly specified in both the instrument itself and the explanatory statement as requested.
>
> This will enable users to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material. This work is in progress.

Committee's response

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

The committee notes the minister's undertaking that the Department of Defence will amend the determination to specify the manner of incorporation of extrinsic material.

Instrument	**Defence Trade Controls Act 2012 - Foreign Country List [F2016L00548]**
Purpose	Provides exemptions to brokering offences under the *Defence Trade Controls Act 2012* to allow certain goods and technology to be brokered without a permit
Last day to disallow	8 November 2016
Authorising legislation	*Defence Trade Controls Act 2012*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Drafting

The committee commented as follows:

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.

Minister's response

The Minister for Defence advised:

> The delay in registering the instrument was an administrative oversight by the Department of Defence, which was identified earlier this year during preparations for the commencement of the offence provisions in the *Defence Trade Controls Act 2012*. Additionally, Defence had omitted to seek ministerial approval of the supporting documentation required for registration of the instrument.
>
> Following my approval of the supporting documentation, the instrument was promptly registered on the Federal Register of Legislative Instruments. While the instrument was not registered immediately after being made by the then Minister for Defence, the Hon Kevin Andrews MP, steps were taken to have it registered as soon as practicable after the oversight was identified.
>
> The Defence Export Controls Branch, which administers the *Defence Trade Controls Act 2012* within Defence, has now established a process where all

legislative instruments will be coordinated with Defence Legal Division to assist the proper approval and registration of legislative instruments in accordance with the *Legislation Act 2003*.

Committee's response

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

The committee also understands that the list commenced on 21 April 2016 (the day after it was registered).

Instrument	**Electoral and Referendum Regulation 2016 [F2016L00399]**
Purpose	Provides for an electronically assisted voting method for electors who are sight-impaired, provision of electoral roll information to prescribed Commonwealth agencies for specified purposes, and provision of electoral roll information to entities that have reporting obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Last day to disallow	13 October 2016
Authorising legislation	*Commonwealth Electoral Act 1918*; *Referendum (Machinery Provisions) Act 1984*
Department	Finance
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Insufficient information regarding strict liability offences

The committee commented as follows:

Sections 23 and 24 of the regulation set out strict liability offences relating to the handling and scrutiny of ballot papers. These offences each carry a penalty of 5 penalty units.

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

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

Minister's response

The Special Minister of State advised:

> The Regulation was made to repeal and replace the Electoral and Referendum Regulations 1940 (the 1940 Regulation) which was due to sunset on 1 April 2016. The Regulation was based on the 1940 Regulation and no substantive changes were made. In particular, there were no changes to sections 23 and 24 (formerly regulations 50 and 51 of the 1940 Regulation) which were included in the Regulation as a result of the introduction of electronically assisted voting in 2007 (see Electoral and Referendum Amendment Regulations 2007 (No.3); *Electoral and Referendum Legislation Amendment Act 2007*).
>
> I note that the provisions introduced in 2007 were modelled off the pre-poll voting regime in the Electoral Act and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) and as a result the offence provisions set out in the Regulation are consistent with the offence provisions set out in section 200J of the Electoral Act and section 73H of the Referendum Act.
>
> In addition to the harmonisation of offences across the electoral framework, it was considered important that the failure to follow the requirements for the scrutiny of ballot papers should be considered a serious offence which should be accompanied by a prescribed penalty commensurate to the offence. As such the electoral legislative framework provides that offences such as those set out in section 200J of the Electoral Act, section 73H of the Referendum Act and sections 23 and 24 of the Regulation are offences of strict liability.

Committee's response

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

The committee notes the minister's advice that the strict liability offences included in the regulation are identical to those included in the previous regulation and comparable to offence provisions set out in the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*. However, the committee reiterates its expectation that, where an instrument makes provision for offences, the ES provide a full justification for the need, scope and framing of those offences. This is particularly so in cases of strict liability.

The committee further draws the minister's attention to the discussion of strict and absolute liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers*,[6] as providing

6 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf (accessed 12 October 2016).

useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

Instrument	**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]** **Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Spotted-tailed Quoll) (02/05/2016) [F2016L00657]** **Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Mountain Pygmy-Possum) (02/05/2016) [F2016L00658]** **Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Orange-bellied Parrot) (02/05/2016) [F2016L00662]**
Purpose	These instruments adopt national recovery plans for certain listed species
Last day to disallow	21 November 2016
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

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, 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*.

Minister's response

The Minister for the Environment and Energy advised:

> These instruments adopt national recovery plans for listed threatened species under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Section 269A(7) allows the Minister to adopt, by written instrument, a plan made by a State or Territory government or agency as a national recovery plan for a listed threatened species or ecological community.
>
> All four instruments adopt, as national recovery plans, plans prepared by the Victorian Department of Environment, Land, Water and Planning (Victorian Department). The Department of the Environment and Energy, then the Department of Sustainability, Environment, Water, Population and Communities, facilitated consultation on the plans before they were finalised by the Victorian Department.
>
> Details of the consultation that took place for each draft plan are set out below. Section 277 of the EPBC Act provides that the Minister may only adopt a plan if he or she is satisfied that an appropriate level of consultation took place in making the plan. The Minister was satisfied that an appropriate level of consultation occurred for each plan prior to making.
>
> The Department will ensure that future plans more clearly address the nature of the consultation that was undertaken.
>
> *a. Recovery Plan/or the Mallee Emu-Wren, Red-lored Whistler, Western Whipbird*
>
> The Department sought public comments on this plan between 7 March 2012 and 4 May 2012. The plan was placed on the Department's external website, and notices inviting comments were placed in the Commonwealth of *Australia Government Notices Gazette* and The Australian newspaper. No submissions were received. South Australia and NSW were also consulted during the drafting of the recovery plan, as the species covered by the plan occurs within their jurisdictions.
>
> *b. Recovery Plan for the Spotted-tailed Quoll*

The Department sought public comments on this plan between 19 March 2010 and 19 May 2010. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper. No submissions were received. Tasmania, Queensland, NSW and the ACT were also consulted during the drafting of the recovery plan, as the spotted-tailed quoll occurs within their jurisdictions.

c. Recovery Plan for the Mountain Pygmy-Possum

The Department sought public comments on this plan between 18 June 2010 and 20 August 2010. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper.

The Department received eight submissions on the plan, which were provided to the Victorian Department and taken into account when the plan was finalised. NSW and the ACT were also consulted during the drafting of the recovery plan, as the mountain pygmy-possum occurs within their jurisdictions.

d. Recovery Plan for the Orange-bellied Parrot

The Department sought public comments on this plan between 30 July 2014 and 7 November 2014. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper.

The Department received 38 submissions. These were provided to the Victorian Department and considered by the Department's Orange-bellied Parrot Recovery Team before the plan was finalised. Tasmania, South Australia and NSW were also consulted, as the orange-bellied parrot occurs within their jurisdictions, as were affected Commonwealth agencies.

Committee's response

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

The committee also thanks the minister for his advice that future ESs to instruments that adopt national recovery plans for listed threatened species under section 269A of the Act will more clearly address the nature of the consultation that was undertaken.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Industry, Innovation and Science
Last day to disallow	7 November 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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

The committee commented as follows:

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

The instrument adds eight new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997. New table item 142 establishes legislative authority for the Commonwealth government to fund quantum computing research, and new table item 145 establishes legislative authority for the Commonwealth government to fund the provision of Prime Minister's Prizes.

The committee notes that, in *Williams No. 1*,[7] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[8] 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.

First, the committee notes that the objective of the 'Funding for quantum computing' initiative is to fund 'world leading quantum computing research to develop a silicon

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

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

quantum integrated circuit'. The ES for the instrument 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 Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution).

Therefore, the instrument appears to rely on the executive nationhood power (coupled with the express incidental power) as the relevant head of legislative power to authorise the making of this provision (and therefore the spending of public money under it). In this regard, the instrument states that '[t]his objective also has the effect it would have if it were limited to funding measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation'.

However it is unclear to the committee how the funding of the initiative may be regarded as an 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'.

The committee therefore seeks the minister's advice in relation to this matter.

Second, the committee notes that the objective of the 'Prime Minister's Prizes' initiative is to 'provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation'.

The ES 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)); and
> - the external affairs power (section 51(xxix)).

In relation to the social welfare power and its authorisation of the Commonwealth funding the provision of 'benefits to students', the committee understands that the word 'benefits' in section 51(xxiiiA) 'is used more precisely than as a general reference to (any and every kind of) advantage or good';[9] and that, for an initiative to provide 'benefits to students' the benefit should encompass 'material aid provided against the human wants which the student has by reason of being a student'.[10]

However, it is unclear to the committee how the 'Prime Minister's Prizes' initiative may be regarded as providing 'benefits to students' within the scope of the social welfare power.

In relation to the external affairs power, the instrument states that the objective of the initiative 'also has the effect it would have if it were limited to providing support:

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9 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [46].

10 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [47].

(a) to provide benefits to students; or (b) by engaging in measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation'.

However it is unclear to the committee how the funding of the initiative may be regarded as an 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'.

The committee therefore seeks the minister's advice in relation to this matter.

Minister's response

The Minister for Finance advised:

> *Response to the Committee's question about the 'Funding for quantum computing' initiative*
>
> CQC2T requires around $100 million in funding over five years to undertake the next phase of their research – specifically, the development of a 10 qubit silicon chip, which is the first step in building a functional silicon-based quantum computer. As these activities are large-scale, capital intensive, and ultimately unproven, they carry a level of risk which is not otherwise commercially viable. Without Commonwealth support, this critical and internationally significant research would either be forced off-shore, or simply would not happen at all.
>
> Quantum computers are expected to provide substantial benefits for issues of national significance such as defence (particularly encryption, cyber security and pattern recognition), medical research, healthcare, economic forecasting, communications infrastructure and other areas. If successful, the development of a silicon-based quantum computer, and associated high-tech ecosystem, has the potential to solve national challenges and generate significant social and economic benefits for the Australian people.
>
> This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.
>
> *Response to the Committee's question about the 'Prime Minister's Prizes for Science' initiative*
>
> Following review of the Explanatory Statement, it became apparent that a transcription error occurred when entering the references for the constitutional heads of power for the following programmes:
>
> - item 145 - Prime Minister's Prizes for Science;
> - item 146 - Science and Mathematics Olympiads;
> - item 147 - The Asian Physics Olympiad; and
> - item 148 - International Science Competitions.
>
> The typographical errors will be resolved in a Replacement Explanatory Statement, which will set out the corrected references to the relevant constitutional heads of power for these items.

> In relation to the Committee's query about the social welfare power regarding the programme specified at item 145, the Prime Minister's Prizes for Science programme originally contemplated the inclusion of two new prize categories: one for early career innovators, and the other a national-level youth excellence in science award.
>
> The programme was subsequently revised such that it will not include the youth prize as part of the suite of Prime Minister's Prizes for Science. The programme no longer includes any expenditure which would rely on the student benefits power. The programme will only include spending activities supported by the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution). However, as the revised programme is within scope of what would be supported by item 145, it is not necessary to further amend the item.
>
> The Prime Minister's Prizes for Science programme provides national-level prizes and awards to recognise the nation's most outstanding scientists and science teachers. The programme has national significance as part of the Commonwealth's science strategy.
>
> This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Committee's response

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

The committee notes that a replacement ES has been registered on the Federal Register of Legislation and received by the committee.

The committee also notes the minister's advice that the revised Prime Minister's Prizes programme does not include any expenditure that would rely on the student benefits power. However, the replacement ES references this constitutional head of power as providing authority for this initiative.

In this regard, the committee's preference is that an ES to a regulation include a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative. Similarly, in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, the committee notes its preference that only the relevant supporting heads of legislative power are referred to in ESs to these regulations.

Instrument	**Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134]**
Purpose	Revokes the Health Insurance (Section 19AB Exemptions) Guidelines 2015 and provides guidance for applying district of workforce shortage determinations
Last day to disallow	1 September 2016
Authorising legislation	*Health Insurance Act 1973*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 3 and 5 of 2016

Sub-delegation

The committee commented as follows:

Subsection 13(1) of the instrument provides that the minister may delegate some or all of his or her powers or functions under the instrument, other than the delegation power, to an 'officer'. Subsection 13(2) provides that 'officer' has the same meaning as in subsection 131(4) of the *Health Insurance Act 1973*, which defines this as an officer of the Department of Health; a person performing the duties of an office in the Department of Health; the Chief Executive of Medicare; or an Australian Parliamentary Service employee within the Department of Human Services.

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

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers under the instrument to an 'officer'.

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

Minister's first response

The Minister for Health advised:

> I note and understand the committee's expectations in relation to sub-delegation and that they should accord with the Senate Standing Committee for the Scrutiny of Bills' approach of ensuring that delegations are not provided to a relatively large class of persons, with little or no specificity as to their qualifications or attributes.

> I confirm that I have limited the powers delegated and the categories of people to whom these powers are delegated. For consistency my Department has replicated the delegations as provided in the *Health Insurance Act 1973* for the administration of s19AB when making the 2016 Guidelines. My Department will consider removing these provisions when the Guidelines are next remade.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that she has 'limited the powers delegated and the categories of people to whom these powers are delegated'; and undertaking to consider the removal of the sub-delegation provisions from the Guidelines when they are next remade.

However, the committee's preference for specific limits to be set on the delegations generally envisages that the necessary and intended limits on a delegation are defined on the face of legislation, rather than in administrative or policy guidelines or practices (as the committee assumes the minister's reference to limiting the delegation refers).

Similarly, the committee regards an undertaking to merely consider the removal of the provisions to properly limit the delegation to a necessary class of persons or officers as falling short of a specific limit on the delegation provided for on the face of the legislation.

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

Minister's second response

The Minister for Health and Aged Care advised:

> I note and understand the committee's position that the delegation powers in the Guidelines should be limited to accord with the Senate Committee for the Scrutiny of Bills' approach of ensuring delegations are not provided to a relatively large class of persons, with little or no specificity as to their qualification or attributes.
>
> I confirm that my Department is amending the Guidelines and will remove the delegation provisions as part of this process. It is expected that the amended Guidelines will be completed and signed into effect before 1 March 2017.

Committee's second response

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

The committee notes the minister's undertaking that the guidelines will be amended to remove the delegation provisions.

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	*Health Legislation Amendment (eHealth) Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the 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

The committee commented as follows:

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*.

Minister's response

The Minister for Health and Aged Care advised:

> As requested, the Explanatory Statement for this instrument has been updated and registered on the Federal Register of Legislation to include information regarding appropriate consultation and to include a Statement of Compatibility with Human Rights.

Committee's response

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

The committee notes that a replacement ES for this instrument has been registered on the Federal Register of Legislation, and that the replacement ES includes a description of consultation and a statement of compatibility that meet the committee's expectations.

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	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

The committee commented as follows:

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.

Minister's response

The acting Minister for Infrastructure and Transport advised:

> The Australian Maritime Safety Authority (AMSA) has advised that when these Marine Orders are amended, they will clearly state the policy intention – which was to incorporate the identified standards as in force at the time of the Marine Order's commencement.
>
> The Committee further raised concerns about the adequacy of the Explanatory Statements regarding free access to the incorporated documents. Each of the Marine Orders includes a note that directs users to an AMSA website page giving access [to] information for documents incorporated by reference in the Marine Orders. I am informed that the Marine Order webpage provides information about where industry standards can be sourced for free and, for other incorporated documents, how to navigate the web to download them for free. The explanatory statements summarised the access information set out in the Marine Order webpage.
>
> While the possible sources of free access to hard copies of industry standards, in particular Australian libraries, are set out in the Marine Order webpage link, AMSA has advised that in future it will make it clearer in its Explanatory Statements how to access any free sources of standards. A free access option for a stakeholder or member of the public is to contact AMSA for assistance with accessing material that is not copyright protected.
>
> AMSA is currently considering imposing a service fee for requests for access to any standard incorporated by reference into a Marine Order that is copyright protected. This service fee will cover the copyright licence fees and royalties for which AMSA becomes liable as a result of downloading and providing public access to copyright protected material. If it is determined that a fee will be charged, AMSA will make this clear in Explanatory Statements for Marine Orders that incorporate industry standards that are subject to copyright.
>
> It should be noted there are certain International Maritime Organization (IMO) published industry manuals and codes for which carriage by vessels is mandated for operational safety in Marine Order 27. Publications in book format are available for purchase through the IMO and electronic versions can be downloaded at no cost. In future, AMSA will clarify this in the Explanatory Statements for the relevant Marine Orders.

Committee's response

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

The committee also thanks the minister for her advice that future ESs to instruments will state how documents are incorporated and how they can be freely accessed.

The committee notes the minister's advice that AMSA is considering the introduction of a service fee for access to standards protected by copyright and reiterates its concerns that where incorporated documents are not publicly and freely available, persons interested in or affected by the law may have inadequate access to its terms. In addition to access for industry members, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

Instrument	**Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016 [F2016L00295]**
Purpose	Amends the Migration Regulations 1994 to create a priority consideration of visa application service for specified kinds of visas and specified passport holders
Last day to disallow	11 October 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Unclear basis for determining fees

The committee commented as follows:

The regulation creates a priority consideration of visa application service for certain visas and passport holders. Subsection 2.21N(1) of the regulation sets the fee for a request for priority consideration of a visa application at $1000. However, the ES does not explicitly state the basis on which the fee has been calculated.

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

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

Minister's response

The Minister for Immigration and Border Protection advised:

> The fee is only charged to applicants who choose the priority service, as opposed to the VAC, which is payable by all applicants. In order for the Department to successfully deliver the enhanced priority service, it is critical for the priority service to be adequately resourced, without any reduction in the level of resources given to ordinary visa processing. In

practice, therefore, processing times for Visitor visas more generally will not be affected by this service. Further, the applicant may avoid paying the priority service fee by using ordinary processing arrangements.

In calculating the amount of the priority service fee, the Department had regard to a number of factors, including the Department's resourcing costs to implement the priority service over the forward estimates. This included Information Communications Technology (ICT) investment and supporting costs required to implement the priority service across multiple locations in China.

Committee's response

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

The committee accepts the minister's advice that the priority service fee was calculated with regard to resourcing costs to implement the priority service over the forward estimates, including costs required to implement the priority service across multiple locations in China.

The committee notes the minister's advice that in calculating the amount of the priority service fee, the Department of Immigration and Border Protection has considered fees for similar products imposed by other nations. However, the committee's general practice in its scrutiny of instruments of delegation legislation that impose or change fees, is that the existence of similar fees in other national contexts is not considered to be, of itself, a sufficient explanation of the specific basis on which an individual fee has been calculated for the purposes of a particular instrument.

Instrument	**Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L00523]**
Purpose	Amends the Migration Regulations 1994 relating to Subclass 457 visas, provision of evidence of English language proficiency, special consideration for granting Subclass 202 visas and the international student visa framework
Last day to disallow	7 November 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Unclear basis for determining fees

The committee commented as follows:

Item 23 repeals and substitutes item 1222 (Student (Temporary)(Class TU) in Part 2 of Schedule 1 of the Migration Regulations 1994 (the regulations). Subitem 122(2) sets out visa application charges as follows: $550 base application charge; $410 additional applicant charge for any other applicant who is at least 18; and $135 additional applicant charge for any other applicant who is less than 18.

While the committee notes that subparagraph 504(1)(a)(i) of the *Migration Act 1958* (the Act) provides that regulations may make provision for the charging and recovery of fees in respect of any matter under the Act or the regulations, neither the instrument nor the ES states the basis on which the relevant charges are calculated. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Minister's response

The Minister for Immigration and Border Protection advised:

> The current VAC amounts were introduced on 1 July 2015 by the Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 (2015 Amendment Regulation) and have not increased since that time. The VAC amounts in the 2015 Amendment Regulation gave effect to the Government's decision as part of the 2015-16 Budget to adjust the price of a number of VAC amounts, including relevantly, Student visas, which were increased by an inflation rate of 2.3 per cent. These changes were made in lieu of indexation of all VACs for 2015.

Prior to the Student VAC amount increase in 1 July 2015, the VAC prices decreased by 5 per cent in 2012 and had not changed since. This was in contrast to other visas, with base charges increased up to 35 per cent from 2010 to 2014 as a result of the Visa Pricing Transformation and subsequent Budget and Mid-Year Economic and Fiscal Outlook decisions. Further analysis had shown that Student VACs comprise 0.3-0.4 percent of the total cost and benefit of staying in Australia, and thus a small change in price was expected to have negligible impact on international students.

The amount of the increase does not exceed the applicable charge limit set out in the Migration (Visa Application) Charge Act 1997, and the Regulation does not change the VAC amount as set in the 2015 Amendment Regulation.

Committee's response

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

Instrument	**Migration Regulations 1994 - Working Holiday Visa - Definitions of Specified Work and Regional Australia 2016/041 [F2016L00757]** **Migration Regulations 1994 - Specification of Designated Areas - IMMI 16/044 [F2016L00777]** **Migration Regulations 1994 - Specification of Regional Certifying Bodies and Regional Postcodes - IMMI 16/045 [F2016L00778]** **Migration Regulations 1994 - Specification of Arrangements for Resident Return Visa Applications 2016/042 - IMMI 16/042 [F2016L00785]** **Migration Regulations 1994 - Specification of Arrangements for Other Visas 2016/043 - IMMI 16/043 [F2016L00786]** **Migration Regulations 1994 - Specification of Visa Subclass for the Purposes of the Health Requirement - IMMI 16/067 [F2016L01126]**
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	Exempt
Authorising legislation	*Migration Regulations 1994*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Previously reported in	*Delegated legislation monitor* 6 of 2016

Classification as a disallowable instrument

The committee commented as follows:

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.

Minister's response

The Minister for Immigration and Border Protection advised:

> The Explanatory Statements for Instruments F2016L00757, F2016L00777, F2016L00778, F2016L00786 and F2016L01126 all contain the same error. In each case, the Explanatory Statement provides that the instrument is subject to disallowance. However, the empowering provision under which each of these instruments are made are prescribed in table 20 of section 10 of the Exemption Regulation, the effect of which is to make these

> instruments exempt from disallowance. The relevant paragraph in each Explanatory Statement should be read as an error.

Committee's response

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

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	*Fuel Tax Act 2006*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No statement of compatibility

The committee commented as follows:

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*.

Minister's response

The acting Minister for Infrastructure and Transport advised:

> I can advise that a statement of compatibility with Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* was omitted in error. The Explanatory Statement for this instrument will be updated to include a statement of compatibility as soon as possible.

Committee's response

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

The committee notes the minister's undertaking to update the ES to include a statement of compatibility with human rights.

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	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents[11]

The committee commented as follows:

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

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.

(c) Palm Island Aboriginal Shire Council.

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

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 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*.

Minister's response

The Minister for Social Services advised:

> In regards to the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* [F2016L00544], I note your concern that neither the text of the rules nor the Explanatory Statement (ES) expressly state the manner in which the relevant parts *of Schedules 1 and 2 of Local Government Regulation 2012* (Qld) are incorporated. I also note concerns that the ES does not adequately describe the nature of consultation undertaken.
>
> As to the first issue raised, our intention was to incorporate the regulation as in force at the time the rules were made. Having regard to section 14 of the *Legislation Act 2003,* I will submit a revised ES, following consultation with Queensland. I note this also applies to the *National Disability Insurance Scheme (timeframes for Decision Making) Amendment Rules 2016*...Regarding consultation, I will more fully describe the nature of consultation undertaken, in accordance with Appendix 2; Guideline on Consultation, and submit an amended ES which reflects this intention.

Committee's response

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

The committee notes the minister's undertaking that the ES will be revised to expressly state the manner of incorporation and include a description of the nature of consultation undertaken.

Instrument	**National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Queensland) Rules 2016 [F2016L00342]**
Purpose	Outlines the phasing schedule for the preparation of participants' plans in the Queensland early transition sites of Charters Towers, Townsville and Palm Island
Last day to disallow	13 October 2016
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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 section 3.4 of the instrument contains the following definitions:

> ***Townsville*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).
>
> ***Charters Towers*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).
>
> ***2016 NDIS early transition area*** has the same meaning as in the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*.
>
> ***Palm Island*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).

However, neither the text of the instrument nor the ES expressly states the manner in which the Local Government Regulation 2012 (Qld) or the National Disability Insurance Scheme (Becoming a Participant) Rules 2013 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 external documents which are Commonwealth disallowable instruments (such as the National Disability Insurance Scheme (Becoming a Participant) Rules 2013) can be taken to be references to versions of those instruments as in force from time to time. However, this construction does not apply to the Local Government Regulation 2012 (Qld).

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'.

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.

Minister's response

The Minister for Social Services advised:

> …our intention was to incorporate the regulation as in force at the time the rules were made. Having regard to section 14 of the *Legislation Act 2003,* I will submit a revised ES, following consultation with Queensland.

Committee's response

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

The committee notes the minister's undertaking to amend the ES to state the manner in which the document is incorporated.

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	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No statement of compatibility

The committee commented as follows:

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*.

Minister's response

The Minister for Social Services advised:

> In regard to the *National Disability Insurance Scheme (Prescribed Programs - New South Wales) Rules 2016* [F2016L00792], the failure to incorporate a Statement of Compatibility with Human Rights was an oversight and I thank you for bringing this to my attention. I will submit a revised ES incorporating a statement of compatibility, in accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Committee's response

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

The committee notes the minister's undertaking that the ES will be revised to incorporate a statement of compatibility with human rights.

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	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the 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*.

Minister's response

The Minister for Health and Aged Care advised:

> In regard to your request for advice on why there was no description of consultation in the instrument, consultation was not necessary because the sole purpose of the amendment was to rectify a typographical error. The Explanatory Statement for this instrument will be updated and registered on the Federal Register of Legislation.

Committee's response

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

The committee notes that a replacement ES has been registered on the Federal Register of Legislation, and that the replacement ES includes a description of consultation that meets the committee's expectations.

Instrument	**National Measurement Guidelines 2016 [F2016L00538]**
Purpose	Govern the way in which Australian legal units of measurement may be combined to produce an Australian legal unit of measurement, and with prefixes to produce Australian legal units of measurement
Last day to disallow	8 November 2016
Authorising legislation	*National Measurement Act 1960*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

No statement of compatibility

The committee commented as follows:

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rulemaker 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 Department of Industry, Innovation and Science advised:

> Please see attached the Amended Explanatory Statement for the Guidelines including a Human Rights Compatibility Statement (both in a marked up and a clean version for your ease of reference).
>
> I advise the Committee that the Amended Explanatory Statement has been lodged and registered with the Federal Register of Legislation and will be tabled on the earliest convenient sitting date.
>
> The Amended Explanatory Statement can be accessed at https://www.legislation.gov.au/Details/F2016L00538.

Committee's response

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

The committee notes that a replacement ES has been registered on the Federal Register of Legislation and received by the committee. The replacement ES includes a statement of compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Instrument	**Norfolk Island Customs Ordinance 2016 [F2016L00736]**
Purpose	Applies the *Customs Act 1901*, 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	*Norfolk Island Act 1979*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Sub-delegation

The committee commented as follows:

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.

Minister's response

The Minister for Local Government and Territories advised:

> From 1 July 2016, the Department of Immigration and Border Protection (DIBP) administers customs arrangements for Norfolk Island, replacing the previous arrangements administered by the former Administration of Norfolk Island under the *Customs Act 1913* (NI) and Customs Regulations 1986. As the agency responsible for administration of customs functions, DIBP modified the application of the *Customs Act 1901* (Cth) to reflect the unique circumstances of Norfolk Island.
>
> I note the Senate Standing Committee on Regulations and Ordinances' expectations in relation to the delegation and sub-delegation of the Comptroller-General of Customs' powers under the Ordinance to 'an officer of Customs'.
>
> In response to the matters raised by the Committee, DIBP has advised the approach to delegations in the *Customs Act 1901* (NI) mirrors the approach taken to delegations in the *Customs Act 1901* (Cth). The large number and variety of powers in the *Customs Act 1901* (NI) means their delegation to only nominated officers or members of the senior executive service (in accordance with the Committee's expectations) would not be practical from an operational perspective.
>
> The operational considerations include the small population and remote location of Norfolk Island. A small number of DIBP staff are posted to

12 See *Customs Act 1901*, s 4.

> Norfolk Island to operate the customs service for the territory and these staff are not senior executive staff and may not be holders of nominated offices. This practical constraint on the operational environment requires a sub-delegation to a broad category of officers.

Committee's response

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

Instrument	**PAYG Withholding Variation: Variation of amount to be withheld from Indigenous artists when an ABN is not provided [F2016L00358]**
Purpose	Provides that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives in a remote area and does not quote an Australian Business Number
Last day to disallow	13 October 2016
Authorising legislation	*Taxation Administration Act 1953*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Drafting

The committee commented as follows:

The instrument repeals and replaces a previous PAYG Withholding Variation to continue to provide that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives or works in zone A (ordinary or special) and does not quote an Australian Business Number.

However, neither the instrument, nor the ES define zone A (ordinary or special). The committee notes the importance of the definition of zone A (ordinary or special) to understanding the instrument and is concerned about the ability of persons affected by the instrument to understand its operation.

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

Minister's response

The Minister for Revenue and Financial Services advised:

> The comments of the Committee have been noted and accepted by the Australian Taxation Office (ATO). The ATO has advised me that the Explanatory Statement to the legislative instrument will be revised to include a legislative reference that will provide the required explanation of

> the terms Zone A and Special Zone A as used in the instrument. The revision should be completed in the week ending 16 October 2016.

Committee's response

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

The committee notes the minister's undertaking that the ATO will remake the ES to address the committee's concerns by including an explanation of the terms Zone A and Special Zone A used in the instrument.

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	*Taxation Administration Act 1953*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No statement of compatibility

The committee commented as follows:

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*.

Minister's response

The Minister for Revenue and Financial Services advised:

> I regret the omission of the statement, which was unintended.

> Please see enclosed a proposed amended Explanatory Statement that now includes a statement of compatibility with human rights.
>
> The proposed amended Explanatory Statement will be registered with the Federal Register of Legislation as soon as practicable.

Committee's response

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

Instrument	**Private Health Insurance (Prostheses) Rules 2016 (No. 1) [F2016L00268]** **Private Health Insurance (Prostheses) Rules 2016 (No. 2) [F2016L00381]**
Purpose	These instruments revoke and replace previous rules, add new prostheses to the schedule and remove billing codes
Last day to disallow	10 October 2016; 13 October 2016
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Drafting

The committee commented as follows:

The ESs to the instruments state that the purpose of the instruments is:

> …to list the kinds of prostheses for which a benefit must be paid where the prosthesis is provided in the conditions and circumstances specified, and set out the minimum and, where applicable, maximum benefit payable.

However, the committee notes that Part A – Prostheses list to the first instrument appears not to list a minimum benefit in a number of cases. For example, Billing Code JJ687 on page 497 appears not to list a minimum benefit, but lists $515 as the maximum benefit; and Billing Code JJ688 on page 515 appears not to list a minimum benefit, but lists $1800 as the maximum benefit.

Similarly, in relation to Part A – Prostheses list to the second instrument, Billing Code JJ687 on page 499 appears not to list a minimum benefit, but lists $515 as the maximum benefit; and Billing Code JJ688 on page 619 appears not to list a minimum benefit, but lists $1800 as the maximum benefit.

It is unclear to the committee whether figures appearing in this way throughout the instruments are in fact intended to be the minimum benefits payable.

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

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 section 4 of each instrument contains the following definitions:

> ***certified overnight Type C procedure*** has the same meaning as in rule 3 of the Private Health Insurance (Benefit Requirements) Rules.
>
> ***certified Type C procedure*** has the same meaning as in rule 3 of the Private Health Insurance (Benefit Requirements) Rules.

However, neither the text of the instruments nor the ESs expressly state the manner in which the Private Health Insurance (Benefit Requirements) Rules 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 external documents which are Commonwealth disallowable instruments (such as the Private Health Insurance (Benefit Requirements) Rules) can be taken to be references to versions of those instruments as in force from time to time.

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

The committee 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 anticipated users, instruments (and, ideally, their accompanying ESs) should clearly state the manner of incorporation of extrinsic material.

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

Minister's response

The Minister for Health and Aged Care advised:

> I note the Committee's concerns in relation to minimum private health insurance benefits payable for prostheses listed in the Private Health Insurance (Prostheses) Rules 2016 (No. 1) [F2016L00268] and the Private Health Insurance (Prostheses) Rules 2016 (No. 2) [F2016L00381]. The

> Committee identified that certain prostheses appeared to be listed without a minimum benefit but with a maximum benefit only.
>
> It would seem that there was a formatting error in this very long document. Where only one benefit appears for a particular device, I can confirm that it is intended that this will be the minimum benefit payable for the device.
>
> I also note the Committee's comments in relation to its expectations where an instrument incorporates extrinsic material by reference.

Committee's response

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

Instrument	**Public Governance, Performance and Accountability Amendment (CSC) Rule 2016 [F2016L00504]**
Purpose	Makes the Commonwealth Superannuation Corporation (CSC) subject to certain arrangements that applied to ComSuper when it performed the administrative services function in relation to the superannuation schemes administered by CSC
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Public Governance, Performance and Accountability Act 2013*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Sub-delegation

The committee commented as follows:

The instrument inserts new subsection 28A(1) into the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) which modifies the operation of subsection 107(1) and section 110 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to enable the Finance Minister and the Commonwealth Superannuation Corporation (CSC) Board to sub-delegate certain powers, functions and duties concerning the recovery of debts due to the Commonwealth under the PGPA Act and the PGPA Rule. The ES to the instrument states:

> This is necessary given CSC's function to provide administrative services in relation to the superannuation schemes administered by the organisation. The relevant powers, functions or duties were performed by ComSuper when it previously undertook this administrative services function. Debts

> owed to CSC in its own right are not affected by the Amendment Rule and will be managed in the same manner as has been CSC's practice to date.

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

In this respect, the committee notes that the instrument does not limit the category of people to whom the minister's and CSC Board's powers under the instrument might be sub-delegated.

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

Minister's response

The Minister for Finance advised:

> The sub-delegation powers in the CSC Rule are consistent with the sub-delegation powers of accountable authorities of non-corporate Commonwealth entities, set out in sub-section 110(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). This is appropriate as CSC, a corporate Commonwealth entity, now performs functions, usually undertaken by non-corporate Commonwealth entities, on behalf of the Commonwealth. Limiting the CSC Board's sub-delegation powers would undermine the principles of coherence, operational independence and efficiency embodied in the PGPA Act.
>
> In providing for sub-delegations, the PGPA Act reduces the risks associated with sub delegating powers through duties placed on accountable authorities (sections 15-19) and officials (sections 25-29) which facilitate high standards of governance, performance and accountability. In particular, section 16 of the PGPA Act requires accountable authorities to establish and maintain an appropriate system of risk oversight, management and internal control over the entity, which includes sub-delegation arrangements.
>
> The CSC Rule also provides for only a limited delegation of my power under paragraph 63(1)(b) of the PGPA Act and the duty placed on accountable authorities by section 11 of the PGPA Rule. These provisions deal with, in turn, the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth, and the requirement for accountable authorities to pursue recovery of debts.

Committee's response

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

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	*Public Lending Right Act 1985*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the 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

The committee commented as follows:

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,

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).

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.

Minister's response

The Minister for Communications advised:

> The Public Lending Right rates of payment are reviewed annually by my department, taking into consideration the results of library surveys and the available budget. The surveys, also conducted annually, provide the estimated number of books held in public lending libraries. The calculations undertaken by my department showed sufficient funds were available to enable a modest increase in the payment rates for 2015-16. I was satisfied that consultation prior to my decision was not necessary given the changes to the rates of payment are of minor technical nature and do not substantially alter the current arrangements for the Public Lending Right program.
>
> The *Public Lending Right Scheme 1997* is scheduled to sunset on 1 October 2016 and I am remaking the Scheme without significant change. Please note the Explanatory Statement of the new *Public Lending Right Scheme 2016* will address the issues raised in your correspondence.

Committee's response

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

The committee also thanks the minister for his advice that the ES to the remade instrument will address the committee's concerns.

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	*Radiocommunications Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

Minister's response

The Minister for Communications advised:

> A determination made under subsection 294(1) of the Act must comply with any directions made by the Minister under section 294 (see subsection 294(4) of the Act). It follows that any such determination must comply with any such direction as in force at the time of the commencement of the relevant determination. Accordingly, the Determination has incorporated the Pricing Direction as in force at the time of the commencement of the Determination.
>
> The ACMA agrees with the Committee, nonetheless, that it would have been beneficial if the Determination or the Explanatory Statement had mentioned that the Pricing Direction was incorporated as in force at the time of the commencement of the Determination. The ACMA proposes to amend the Explanatory Statement to clarify the matter in the near future.

Committee's response

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

The committee also thanks the minister for his advice that ACMA proposes to amend the ES to state how the direction is incorporated.

Instrument	**Safety, Rehabilitation and Compensation (Rate of Interest Payable – s26(3)) Notice 2016 [F2016L00464]**
Purpose	Specifies the rate of interest payable on lump sum payments to claimants for injuries which result in permanent impairment (under the *Safety, Rehabilitation and Compensation Act 1988*) which are not paid within thirty days after assessment
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

Drafting

The committee commented as follows:

The *Safety, Rehabilitation and Compensation Act 1988* (the Act) establishes the Commonwealth workers' compensation and rehabilitation scheme for employees of the Commonwealth, Commonwealth authorities and licensed corporations. This

instrument sets the rate of interest payable in respect of permanent impairment payments to a claimant under section 24 or 25 of the Act which are not made within thirty days after the date of assessment of the amount of permanent impairment.

Section 4 of the instrument states:

> The rate of interest payable under subsection 26(3) of the Act is specified to be the weighted average yield of 90 day bank-accepted bills, as published by the Reserve Bank of Australia, settled immediately prior to the last day of the thirty day settlement period.

However, it is unclear to the committee which specific published material or documents this section refers to, the manner in which this published material is incorporated and where it can be accessed. Neither the text of the instrument nor the ES provides any information in relation to these matters.

The committee notes the importance of the published material as a point of access to understanding the regulation and is concerned about the ability of anticipated users or persons affected by the instrument to understand its operation.

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

Minister's response

The Minister for Employment advised:

> The weighted average yield of 90 day bank-accepted bills is a matter of fact and is incorporated as published by the Reserve Bank of Australia on its website under 'Interest Rates and Yields – Money Market- Daily-F1' at www.rba.gov.au/statistics/tables/index.html.
>
> Historically, the rate of interest for the purposes of section 26 has been:
>
> - the weighted average yield derived from the Treasury note tender for ninety day notes settled immediately prior to the last day of the thirty day settlement period (1988–2003)
> - the weighted average yield of 90 day bank-accepted bills, as published by the Reserve Bank of Australia, settled immediately prior to the last day of the thirty day settlement period (2003–current).

Committee's response

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

Instrument	**Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 [F2016L00720]**
Purpose	Repeals and substitutes section 10 of the *Social Security (International Agreements) Act 1999*, 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	*Social Security (International Agreements) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

The committee commented as follows:

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.

Minister's response

The Minister for Social Services advised:

> Section 8 of the *Social Security (International Agreements) Act 1999* (the International Agreements Act) provides for regulations to add to the Act a Schedule setting out the terms of an agreement between Australia and another country if the agreement relates to reciprocity in social security or superannuation matters. The Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016, which adds a new schedule 10 to the International Agreements Act, must therefore set out the exact terms of the agreement between Australia and the Republic of Austria. The reference to Regulation (EC) No. 883/2004 appears in Article 14.2 (Calculation of Austrian Benefits) of the Agreement between Australia and the Republic of Austria on Social Security.
>
> Where the text of an international social security agreement is set out in a Schedule to the Act, the provisions of the agreement have effect despite anything in the social security law (subsection 6(1) of the Act). However, this only applies to provisions of the agreement that are:
>
> - in force; and
> - affect the operation of the social security law (subsection 6(2) of the Act).

Regulation (EC) No. 883/2004 affects the operation of Austrian law but does not affect the operation of the social security law. The Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 does not therefore apply, adopt or incorporate Regulation (EC) No. 883/2004 for the purpose of section 14 of the *Legislation Act 2003*.

I also note the comments of the Committee with respect to the description of and access to incorporated documents.

The Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 and the Explanatory Statement do not describe Regulation (EC) No. 883/2004 and how it may be obtained because it affects the operation of Austrian law. Regulation (EC) No. 883/2004 does not affect the operation of the social security law. For that reason, it is not considered necessary to describe Regulation (EC) No. 883/2004 and how it may be obtained in the Explanatory Statement to meet the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003*.

An explanation of the EC Regulation can be freely obtained from the following website links:
http://eur-lex.europa.eu/legal-content/EN/TXT%20/?uri=uriserv%3Ac1052
and http://ec.europa.eu/social/main.jsp?langId=en&catId=849

Committee's response

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

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 *Education Services for Overseas Students Act 2000*
Last day to disallow	21 November 2016
Authorising legislation	*Tertiary Education Quality and Standards Agency Act 2011*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Unclear basis for determining fees

The committee commented as follows:

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.

Minister's response

The Minister for Education and Training advised:

> As noted in the explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013,* the determination of the fees is based on TEQSA's estimate of the costs associated with particular activities, such as staff time, travel and associated costs, and considering historic comparative data and modelling of future costs. TEQSA also considered the fees charged by other agencies, including the state and territory accrediting authorities and the former Australian Universities Quality Agency. The Tertiary Education Quality and Standards Agency (TEQSA) considered that the cost of assessing those applications is likely to be substantially the same as the cost associated with assessing applications under former section 9AA of the *Education Services for Overseas Students Act 2000.* Accordingly, TEQSA determined that the same $5000 fee would apply.
>
> TEQSA has prepared an amended explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees*

(Amendment) No. 1 of 2016 to clarify these matters. A copy of the amended explanatory statement is enclosed for your information.

Committee's response

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

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	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Incorporation of documents

The committee commented as follows:

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

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

The committee commented as follows:

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.

Minister's response

The Minister for Health and Aged Care advised:

> In regard to your request for advice on the incorporation of documents into this instrument, my Department's intention was to incorporate these as amended from time to time. The authority to do so is provided by subsection 26BB(8) of the *Therapeutic Goods Act 1989,* which notes that, notwithstanding subsection 14(2) of the *Legislation Act 2003,* a determination under section 26BB may make provision in relation to a matter by applying, adopting or incorporating any matter in an instrument or other writing as in force or existing from time to time. The above references will be clarified in the next edition of the permissible ingredients instrument.
>
> In regard to your request for advice on the description of and access to incorporated documents, the current Determination refers to the following New Zealand legislation:

- *The Animal Products Act 1999* (New Zealand) available free on-line at www.legislation.govt.nz/act/public/1999/0093/latest/DLM33502.html
- *The Animal Welfare Act 1999* (New Zealand) available free on-line at www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html

The current instrument includes reference to the Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) which is available for free on line at www.ich.org/home.html.

The current instrument also refers to the following documents that provide international standards for the safety and quality for ingredients for medicines. A fee is required for access to these documents, but it is expected that a sponsor of a medicine included in the Australian Register of Therapeutic Goods would already have access to these documents.

- British Pharmacopoeia, available on-line at: www.pharmacopoeia.com
- United States Pharmacopeia – National Formulary, available on-line at www.usp.org/usp-nf
- Food Chemical Codex published by the United States Pharmacopeial Convention, available on-line at online.foodchemicalscodex.org

The references in question will be clarified in the Explanatory Statement for the October edition of the permissible ingredients instrument, with the exception of the ICH reference which will be removed in future editions of the instrument, as the ICH is a guideline only and not an authoritative standard.

Committee's response

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

The committee also thanks the minister for her advice that ES for the amended edition of the determination will clarify the references to incorporated documents. In this regard, the committee notes that it will generally 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. In addition to access for industry members, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

Instrument	**Work Health and Safety (Managing Electrical Risks in the Workplace) Code of Practice 2015 [F2016L00407]** **Work Health and Safety (Preventing Falls in Housing Construction) Code of Practice 2015 [F2016L00411]** **Work Health and Safety (Spray Painting and Powder Coating) Code of Practice 2015 [F2016L00412]** **Work Health and Safety (Labelling of Workplace Hazardous Chemicals) Code of Practice 2015 [F2016L00413]** **Work Health and Safety (How to Safely Remove Asbestos) Code of Practice 2015 [F2016L00418]** **Work Health and Safety (Managing Risks of Hazardous Chemicals in the Workplace) Code of Practice 2015 [F2016L00420]** **Work Health and Safety (Managing the Work Environment and Facilities) Code of Practice 2015 [F2016L00421]** **Work Health and Safety (How to Manage and Control Asbestos in the Workplace) Code of Practice 2015 [F2016L00423]** **Work Health and Safety (Preparation of Safety Data Sheets for Hazardous Chemicals) Code of Practice 2015 [F2016L00424]** **Work Health and Safety (Managing the Risk of Falls at Workplaces) Code of Practice 2015 [F2016L00425]** **Work Health and Safety (Managing Noise and Preventing Hearing Loss at Work) Code of Practice 2015 [F2016L00426]**
Purpose	These instruments remake Work Health and Safety Codes of Practice previously set out in compilations as separate instruments
Last day to disallow	13 October 2016
Authorising legislation	*Work Health and Safety Act 2011*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2016

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 these instruments incorporate requirements set out in a number of Australian Standards and Australian/New Zealand Standards. However, neither the text of the instruments nor the shared ES expressly states the manner in which the standards are incorporated.

The committee further notes that Work Health and Safety (Labelling of Workplace Hazardous Chemicals) Code of Practice 2015 [F2016L00413], Work Health and Safety (Preparation of Safety Data Sheets for Hazardous Chemicals) Code of Practice 2015 [F2016L00424], and Work Health and Safety (Managing Risks of Hazardous Chemicals in the Workplace) Code of Practice 2015 [F2016L00420] incorporate requirements relating to the transport of hazardous chemicals that are contained in the Australian Dangerous Goods Code (ADG Code).

While these instruments define the ADG code as 'the Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition, approved by the Australian Transport Council', neither the text of the instruments, nor the shared ES expressly states the matter in which the ADG Code 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.

Minister's response

The Minister for Employment advised:

> Subsection 274(3) of the *Work Health and Safety Act 2011* (WHS Act) provides that approved codes of practice made under the WHS Act may apply, adopt or incorporate material from other documents in force at a particular time or from time to time. Technical documents such as Australian Standards are generally incorporated in the codes as these apply from time to time. However where a particular version of a document is cited, for example *AS.NZS 1715:2009 Selection, Use and Maintenance of Respiratory Protective Devices,* the document is incorporated as in force at a particular time.
>
> Duty holders are expected to have regard to a range of information and best practice. Technical material that is incorporated by reference should be read in conjunction with the relevant approved code of practice and legislation.
>
> An approved code of practice provides practical guidance to duty holders on achieving the standards of health and safety required under the WHS Act

and the *Work Health and Safety Regulations 2011* (WHS Regulations). Approved codes of practice are not enforceable. A court may have regard to a code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates and may rely on a code in determining what is reasonably practicable in the circumstances to which the code relates (subsections 275(2) and 275(3)). References to technical material such as Australian Standards is included to further guide duty holders on safe ways of undertaking particular types of work.

It is not always appropriate for an approved code of practice to refer to material, such as an Australian Standard, as it exists at a particular point in time since it is likely to be subject to regular revision as risk management practices evolve over time. Moreover, this material is specific to particular industries and undertakings (for example, the storage of hazardous chemicals) and should be well known to duty holders in those industries and undertakings.

While a cost may be incurred by businesses and undertakings that engage in activities to which the Australian Standards apply, the cost is considered minimal given the overall budgets of Commonwealth departments, Commonwealth public authorities and non-Commonwealth licensees covered by the WHS Act. Subsection 274(6) of the WHS Act requires Comcare to ensure that a copy of each approved code of practice and each document applied, adopted or incorporated (to any extent) by an approved code of practice is available for inspection by members of the public without charge.

The WHS Regulations do not extend to the transportation of dangerous goods. Relevant approved codes of practice note that duty holders must continue to comply with the *Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition* (ADG Code) and relevant state and territory laws for the transport of dangerous goods by road and rail. This additional information is provided to assist duty holders. The ADG Code is defined in all of the approved codes to mean the *Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition*, approved by the Australian Transport Council. The ADG Code is freely available from the National Transport Commission website www.ntc.gov.au.

Committee's response

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

Appendix 1
Correspondence

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

Ref No: MC16-029167

Mr Toni Dawes
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Dawes

Thank you for your correspondence of 15 September 2016 regarding Senate Standing Committee on Regulations and Ordinances, Delegated legislation monitor 6 of 2016.

You have requested a response to queries detailed in the Delegated legislation monitor 6 of 2016 relating to five legislative instruments registered on the Federal Register of Legislation by my Department. The responses in relation to each query are outlined below.

Biosecurity (Human Health) Regulation 2016
In regard to your request for advice on the incorporation of documents into this instrument, it is intended that the reference to the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 (the Movements Declaration) be read as in force on commencement of the Biosecurity (Human Health) Regulation 2016. I note that the Deputy Prime Minister and Minister for Agriculture and Water Resources, the Hon Barnaby Joyce MP, will also be advising on a similar matter regarding incorporation of the Movements Declaration.

In regard your request for advice on whether the terms 'appropriate medical standard' and 'appropriate professional standard' are sufficiently precise, an individual operating under section 10 of the Biosecurity (Human Health) Regulation 2016 will always be a qualified medical professional. The reference to 'appropriate professional standards' captures all standards and requirements that apply to medical professionals in their care and treatment of patients, such as codes of conduct set by colleges to which medical professionals belong, as well as standards for laboratories in the storage, transportation and labelling of body samples, including those established by the National Association of Testing Authorities. Adherence to these quality assurance systems is regulated by multiple bodies outside of my Department.

I consider that adherence to existing professional medical standards and requirements, appropriately manages human rights concerns, including privacy and respect for personal rights and liberties.

Health Legislation Amendment (eHealth-Governance Restructure Day) Proclamation 2016
As requested, the Explanatory Statement for this instrument has been updated and registered on the Federal Register of Legislation to include information regarding appropriate consultation and to include a Statement of Compatibility with Human Rights.

National Health Determination under paragraph 98(c)(1)(b) Amendment 2016 (no. 4) (PB 44 of 2016)

In regard to your request for advice on why there was no description of consultation in the instrument, consultation was not necessary because the sole purpose of the amendment was to rectify a typographical error. The Explanatory Statement for this instrument will be updated and registered on the Federal Register of Legislation.

Quality Agency Principles Amendment Principle 2016

In regard to your query regarding removing fees from the instrument, the *Quality Agency Act 2013* does not give the Minister authority to set fees for accreditation services in the instrument. Instead, section 15 of the *Quality Agency Act 2013* authorises the Chief Executive Officer of the Quality Agency to publish a document setting out accreditation fees and re-accreditation fees. This allows a transparent approach to the setting of such fees for accreditation services which is also consistent with the legislative authority in the *Quality Agency Act 2013*.

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

In regard to your request for advice on the incorporation of documents into this instrument, my Department's intention was to incorporate these as amended from time to time. The authority to do so is provided by subsection 26BB(8) of the *Therapeutic Goods Act 1989*, which notes that, notwithstanding subsection 14(2) of the *Legislation Act 2003*, a determination under section 26BB may make provision in relation to a matter by applying, adopting or incorporating any matter in an instrument or other writing as in force or existing from time to time. The above references will be clarified in the next edition of the permissible ingredients instrument.

In regard to your request for advice on the description of and access to incorporated documents, the current Determination refers to the following New Zealand legislation:

- *The Animal Products Act 1999* (New Zealand) available free on-line at www.legislation.govt.nz/act/public/1999/0093/latest/DLM33502.html
- *The Animal Welfare Act 1999* (New Zealand) available free on-line at www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html

The current instrument includes reference to the Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) which is available for free on line at www.ich.org/home.html.

The current instrument also refers to the following documents that provide international standards for the safety and quality for ingredients for medicines. A fee is required for access to these documents, but it is expected that a sponsor of a medicine included in the Australian Register of Therapeutic Goods would already have access to these documents.

- British Pharmacopoeia, available on-line at: www.pharmacopoeia.com
- United States Pharmacopeia – National Formulary, available on-line at www.usp.org/usp-nf
- Food Chemical Codex published by the United States Pharmacopeial Convention, available on-line at online.foodchemicalscodex.org

The references in question will be clarified in the Explanatory Statement for the October edition of the permissible ingredients instrument, with the exception of the ICH reference which will be removed in future editions of the instrument, as the ICH is a guideline only and not an authoritative standard.

Thank you for bringing these matters to my attention.

Yours sincerely

The Hon Sussan Ley MP

6 OCT 2016

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Cabinet Secretary
Senator for Victoria

REF: MC16-002451

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Williams,

I refer to the letter of 15 September 2016 from Ms Toni Dawes, Committee Secretary of the Standing Committee on Regulations and Ordinances, concerning information requested in relation to the *Commonwealth Electoral (Logo Requirements) Determination 2016* and the *Electoral and Referendum Regulation 2016* which was raised in the Delegated legislation monitor No. 5 of 2016. As these instruments relate to electoral matters, your questions have been referred to me for reply.

Please note that I have addressed the issues raised in *the Delegated legislation monitor* No. 5 of 2016 in relation to the two instruments separately below.

The Determination

Consultation was undertaken for the *Commonwealth Electoral Amendment Act 2016* (the Amendment Act) and the *Commonwealth Electoral (Logo Requirements) Determination 2016* through the Joint Standing Committee on Electoral Matters (JSCEM).

The Amendment Act was the culmination of an extensive inquiry into the 2013 Federal Election by JSCEM where a number of recommendations were made into improving the Senate voting system. In particular, in its inquiry into the 2013 Federal Election, JSCEM noted that the use of logos on ballot papers should be investigated:

"The Committee is conscious of the merits of the proposal to permit the inclusion of party logos on ballot papers. The potential to limit confusion amongst voters, especially with complex ballot papers, is an argument for the adoption of logos."

Following the Committee's report, and prior to the introduction of the Amendment Act, the then Special Minister of State met extensively with representatives from the Labor Party, the Greens and all Independent Senators, when developing the changes to the Electoral Act, including the proposal to include logos on ballot papers.

After the Bill was introduced to Parliament, it was subject to a specific inquiry from JSCEM, which included the opportunity for the public to make submissions. The JSCEM inquiry received 107 submissions about the proposed changes, a number of which commented favourably on the proposal of using political party logos on ballot papers.

In response to your second question regarding the Determination and the incorporation of the International Standard ISO 32000-1:2008, I am advised that the Standard is the universal format which is used to produce portable document formats (PDFs). The Standard was produced by the International Organisation for Standardisation in 2008 so as to ensure that products, for example PDFs, were consistent and reliable.

The Standard was incorporated into the Determination to ensure that an industry standard proprietary format was used so that the logos submitted would be compatible with industry hardware and software. The use of the Standard (ISO 32000-1:2008) also ensures that the files will contain stable and reliable graphic files which can be reproduced reliably when resized for reproduction on ballot papers.

Given the industry-wide use of the Standard in producing PDFs, the incorporation of the Standard into the Determination was not considered a disadvantage to the public. Further, we note that while the Standard can be purchased from ISO for a fee, ISO has also allowed Adobe Systems to provide and host an unofficial ISO 3200-1 document, available as a free download from Adobe Systems.

The Standard can be accessed at the following web address:

http://www.adobe.com/content/dam/Adobe/en/devnet/acrobat/pdfs/PDF32000_2008.pdf

The Regulation

In response to the concerns that the explanatory statement for the *Electoral and Referendum Regulation 2016* (the Regulation) does not adequately explain the reasoning why sections 23 and 24 contain offences of strict liability, I note the following.

The Regulation was made to repeal and replace the Electoral and Referendum Regulations 1940 (the 1940 Regulation) which was due to sunset on 1 April 2016. The Regulation was based on the 1940 Regulation and no substantive changes were made. In particular, there were no changes to sections 23 and 24 (formerly regulations 50 and 51 of the 1940 Regulation) which were included in the Regulation as a result of the introduction of electronically assisted voting in 2007 (see Electoral and Referendum Amendment Regulations 2007 (No.3); *Electoral and Referendum Legislation Amendment Act 2007*).

I note that the provisions introduced in 2007 were modelled off the pre-poll voting regime in the Electoral Act and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) and as a result the offence provisions set out in the Regulation are consistent with the offence provisions set out in section 200J of the Electoral Act and section 73H of the Referendum Act.

In addition to the harmonisation of offences across the electoral framework, it was considered important that the failure to follow the requirements for the scrutiny of ballot papers should be considered a serious offence which should be accompanied by a prescribed penalty commensurate to the offence. As such the electoral legislative framework provides that offences such as those set out in section 200J of the Electoral Act, section 73H of the Referendum Act and sections 23 and 24 of the Regulation are offences of strict liability.

I trust that the above information is of assistance to the Committee in their consideration of these matters.

Yours sincerely

SCOTT RYAN

21 September 2016

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

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

MC16-0014361

Dear Chair

I refer to the letter dated 15 September 2016 requesting a response to your Committee in relation to matters raised in *Delegated legislation monitor* No. 6 of 2016 that pertain to instruments falling within my Portfolio responsibilities.

The instruments in question are the:

1. *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016* [F2016L01148];
2. *Building Energy Efficiency Disclosure Determination 2016* [F2016L01276];
3. *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];
4. *Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Spotted-tailed Quoll) (02/05/2016)* [F2016L00657];
5. *Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Mountain Pygmy-Possum) (02/05/2016)* [F2016L00658];
6. *Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Orange-bellied Parrot) (02/05/2016)* [F2016L00662]; and
7. *Greenhouse and Energy Minimum Standards (Incandescent Lamps for General Lighting Services) Determination 2016* [F2016L00659].

My response to the matters raised by the Committee is attached.

Thank you for bringing the Committee's concerns to my attention. I trust my responses satisfy the Committee and I will ensure that the issues raised are taken into account in the future.

Yours sincerely

JOSH FRYDENBERG

Encl. (1)

ENVIRONMENT AND ENERGY PORTFOLIO INSTRUMENTS
RESPONSE TO DELEGATED LEGISLATION MONITOR NO. 6 OF 2016

Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016
Building Energy Efficiency Disclosure Determination 2016

The Committee has identified that the measurement standards for Net Lettable Area (NLA) referenced in the instrument are published by the Property.Council of Australia Limited (PCA) The standard is readily available from the PCA, but a fee applies.

The *Building Energy Efficiency Disclosure Act* (the BEED Act) establishes the Commercial Building Disclosure (CBD) Program, which requires the public disclosure of energy efficiency information relating to large commercial office spaces. The aim of the CBD Program is to improve the energy efficiency of Australia's large office buildings, ensuring prospective buyers and tenants have access to consistent and accurate energy efficiency information about office spaces to better inform sale and leasing decisions.

The CBD Program incorporates and makes use of the pre-existing National Australian Built Environment Rating System (NABERS) program. NABERS is managed nationally by the NSW Office of Environment and Heritage (OEH), on behalf of Commonwealth, state and territory governments and provides a framework for rating and comparing the sustainability performance of buildings. The CBD Program requires building owners and lessors to display a certified NABERS rating when advertising commercial office buildings for sale or lease.

A key component of the NABERS rating system is the measurement of relevant building floor area, a significant moderating factor when comparing building sustainability performance. The *PCA Method of Measurement for Lettable Area 1997* is the accepted industry standard for measuring the floor area of commercial office space in the Australian property market, and has been used as the standard for measuring building floor area from the inception of the NABERS program in 1998.

While the referenced NLA method is available only for a fee, it should be noted the BEED Act does not apply to the general public, but rather it applies to building owners and lessors of large commercial office spaces. Further, building owners and lessors do not need to purchase the method. It is used by CBD Assessors to provide NABERS ratings for the owners and lessors. There are currently 180 accredited CBD assessors.

CBD Assessors must undertake a CBD training course and associated accreditation exams to achieve CBD accreditation and be allowed to participate in the program. These accreditation processes help to maintain the high quality standards required for the CDB program. It is a pre-requisite to becoming a CBD Assessor that the person holds NABERS accreditation. NABERS accreditation is used for a range of purposes beyond the CBD program. The assessor will, therefore, need to have purchased the NLA method prior to seeking CBD accreditation.

While there are various costs for CBD Assessors associated with training courses and accreditation, the additional cost of procuring the NLA method is a once-off, minimal cost in comparison to other accreditation costs. Accordingly, the Australian Government does not consider the fee to be an unreasonable impost on persons affected by the law.

Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Mallee Emu-Wren, Red-lored Whistler, Western Whipbird) (02/05/2016)

Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Spotted-tailed Quoll) (02/05/2016)

Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Mountain Pygmy-Possum) (02/05/2016)

Environment Protection and Biodiversity Conservation Act 1999 – Section 269A – Instrument Adopting Recovery Plan (Orange-bellied Parrot) (02/05/2016)

The Committee has identified that relevant Explanatory Statements did not outline the nature of the consultation that took place in relation to the instruments.

These instruments adopt national recovery plans for listed threatened species under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Section 269A(7) allows the Minister to adopt, by written instrument, a plan made by a State or Territory government or agency as a national recovery plan for a listed threatened species or ecological community.

All four instruments adopt, as national recovery plans, plans prepared by the Victorian Department of Environment, Land, Water and Planning (Victorian Department). The Department of the Environment and Energy, then the Department of Sustainability, Environment, Water, Population and Communities, facilitated consultation on the plans before they were finalised by the Victorian Department.

Details of the consultation that took place for each draft plan are set out below. Section 277 of the EPBC Act provides that the Minister may only adopt a plan if he or she is satisfied that an appropriate level of consultation took place in making the plan. The Minister was satisfied that an appropriate level of consultation occurred for each plan prior to making.

The Department will ensure that future plans more clearly address the nature of the consultation that was undertaken.

a. Recovery Plan for the Mallee Emu-Wren, Red-lored Whistler, Western Whipbird

The Department sought public comments on this plan between 7 March 2012 and 4 May 2012. The plan was placed on the Department's external website, and notices inviting comments were placed in the Commonwealth of *Australia Government Notices Gazette* and The Australian newspaper. No submissions were received. South Australia and NSW were also consulted during the drafting of the recovery plan, as the species covered by the plan occurs within their jurisdictions.

b. Recovery Plan for the Spotted-tailed Quoll

The Department sought public comments on this plan between 19 March 2010 and 19 May 2010. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper. No submissions were received. Tasmania, Queensland, NSW and the ACT were

also consulted during the drafting of the recovery plan, as the spotted-tailed quoll occurs within their jurisdictions.

c. Recovery Plan for the Mountain Pygmy-Possum

The Department sought public comments on this plan between 18 June 2010 and 20 August 2010. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper.

The Department received eight submissions on the plan, which were provided to the Victorian Department and taken into account when the plan was finalised. NSW and the ACT were also consulted during the drafting of the recovery plan, as the mountain pygmy-possum occurs within their jurisdictions.

d. Recovery Plan for the Orange-bellied Parrot

The Department sought public comments on this plan between 30 July 2014 and 7 November 2014. The plan was placed on the Department's external website, and notices inviting comments were published in the *Australia Government Notices Gazette* and The Australian newspaper.

The Department received 38 submissions. These were provided to the Victorian Department and considered by the Department's Orange-bellied Parrot Recovery Team before the plan was finalised. Tasmania, South Australia and NSW were also consulted, as the orange-bellied parrot occurs within their jurisdictions, as were affected Commonwealth agencies.

Greenhouse and Energy Minimum Standards (Incandescent Lamps for General Lighting Services) Determination 2016

Access to incorporated documents

The Committee has identified that the Australian Standards referenced in the instrument are published by SAI Global Limited. The standards are readily available, but a fee applies.

The *Greenhouse and Energy Minimum Standards Act 2012* (GEMS Act) and associated governmental agreements enable the Commonwealth, states and territories and New Zealand to set out specific energy performance and labelling requirements with the aim of reducing energy use for regulated products.

GEMS product determinations, including the instrument noted above and its predecessors, reference industry standards that provide the technical detail for the requirements. The Australian and joint Australian/New Zealand standards were developed via a Standards Australia committee. The committee is made up of a diverse range of stakeholders, including industry representatives, consumer advocates and government representatives. The committee members provide their expertise freely, but the intellectual property developed resides with Standards Australia and SAI Global

The IEC standard used in the instrument is developed by the International Electrotechnical Commission (IEC), which is the international standards and conformity assessment body for all fields of electrotechnology. SAI Global manages copyright permissions and licensing on behalf of Standards Australia and the IEC.

While the referenced standards are available for a fee, it should be noted the legislative instruments do not apply to the general public, but rather manufacturers and importers of the regulated products. The stakeholders using these determinations are likely to already have access to the standards via participation in the committee process. However, there are no restrictions preventing interested parties from purchasing the standards and in the case of new entrants the Australian Government does not consider the fees as unreasonable or an access barrier for industry. Industry stakeholders have broadly supported the Standards Australia process in developing new determinations under the GEMS Act. The Government also views it as a well-functioning practice to ensure effective regulation for the end benefit of Australian consumers.

Drafting

The Committee has correctly noted that there is a discrepancy in section 3 of the instrument which refers to IEC 60630 Edition 2.5 and the table set out in subsection 5(1) of the instrument which refers to IEC 60630 Edition 2. The reference to IEC 60630 Edition 2 in subsection 5(1) is a drafting error.

The instrument is currently being reviewed as part of the consideration of whether to regulate LED products under the GEMS Act, and this error will be corrected in any new instrument arising as part of that process.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS16-003526

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

Dear Chair

Queries raised in Delegated Legislation Monitor No. 5 & 6 of 2016

I thank the Senate Standing Committee on Regulations and Ordinances (the Committee) for its letters of 4 May 2016 and 16 September 2016 concerning Delegated Legislation Monitor No. 5 & 6 of 2016, in which the Committee requested a response regarding a number of legislative instruments. The response in relation to each enquiry is attached, as follows:

Attachment A

1. Comptroller-General of Customs Directions (Use of Force – Norfolk Island) 2016 [F2016L01033].

Attachment B

2. *Migration Act 1958* – Class of Persons defined as Fast Track Applicants 2016 – IMMI 16/010 [F2016L00377].
3. *Migration Act 1958* – Class of Persons defined as Fast Track Applicants 2016 – IMMI 16/049 [F2016L00679].

Attachment C

4. *Migration Regulations 1994* – Working Holiday Visa – Definitions of Specified Work and Regional Australia – IMMI 16/041 [F2016L00757].
5. *Migration Regulations 1994* – Specifications of Designated Areas – IMMI 16/044 [F2016L00777].
6. *Migration Regulations 1994* – Specification of Regional Certifying Bodies and Regional Postcodes – IMMI 16/045 [F2015L00778].
7. *Migration Regulations 1994* – Specifications of Arrangements for Other Visas – IMMI 16/043 [F2016L00786].

8. *Migration Regulations 1994* – Specification of Visa Subclass for the Purposes of the Health Requirement – IMMI 16/067 [F2016L01126].

Attachment D

9. *Migration Regulations 1994* – Specifications of Arrangements for Resident Return Visa Applications – IMMI 16/042 [F2016L00785].

Attachment E

10. *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016* - [F2016L00295].

Attachment F

11. *Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016* - [F2016L00523].

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

Yours sincerely

PETER DUTTON

06 / 10 /2016

Attachment A

Comptroller-General of Customs Directions (Use of Force – Norfolk Island) 2016

[F2016L01033]

The Committee sought advice as to the circumstances in which the safety order is incorporated in the Direction, as currently neither the text of the directions nor the Explanatory Statement expressly states the manner in which the safety order is incorporated.

Response:

As the safety order is not a legislative instrument, it is incorporated as in force at the commencement of the Direction. In future, the circumstances in which a document is incorporated in a legislative instrument will be clearly set out in the legislative instrument and in its Explanatory Statement.

The Committee also noted that although sections 3 and 4 of the Directions incorporate the safety order, there is no description of the safety order or an indication of how it may be freely obtained. This would normally fail to satisfy the requirements of section 15J(2) of the *Legislation Act 2003*, however in this case the Explanatory Statement does state that the safety order may be obtained from the Department, while the Committee noted that the safety order is accessible online. This is not expressly stated in the Explanatory Statement but in future will also be included.

Attachment B

Migration Act 1958 – Class of Persons defined as Fast Track Applicants 2016 – IMMI 16/010
[F2016L00377]

Migration Act 1958 – Class of Persons defined as Fast Track Applicants 2016 – IMMI 16/049
[F2016L00679]

The Committee has sought advice to clarify whether the above instruments are exempt from disallowance (and thereby being effectively removed from the oversight of the Parliament).

Response:

The Committee noted that Instruments F2016L00377 and F2016L00679 are made under Part 1 of the *Migration Act 1958* (the Migration Act) and should thus be exempt from disallowance, according to section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation). The Explanatory Statement to both instruments states however, that "under section 42 of the *Legislation Act 2003*, the instrument is subject to disallowance."

However, Instruments F2016L00377 and F2016L00679 are made under paragraph 5(1AA)(b) of the Migration Act, which states that the Minister may make a legislative instrument for the purposes of paragraph (b) of the definition of "fast track applicant" in subsection 5(1) of the Act. Subsection 5(1AD) of the Migration Act stipulates that despite subsection 44(2) of the *Legislation Act 2003* (the Legislation Act), section 42 of the Legislation Act (which deals with the disallowance of legislative instruments) applies to an instrument made under subsection 5(1AA). Consequently, regardless of the provision in section 10 of the Exemption Regulation (which creates an exemption for instruments made under Part 1 of the Migration Act) Instruments F2016L00377 and F2016L00679 are subject to disallowance. This is consistent with the Explanatory Statements associated with the instruments.

Attachment C

Migration Regulations 1994 – Working Holiday Visa – Definitions of Specified Work and Regional Australia – IMMI 16/041
[F2016L00757]

Migration Regulations 1994 – Specifications of Designated Areas – IMMI 16/044
[F2016L00777]

Migration Regulations 1994 – Specification of Regional Certifying Bodies and Regional Postcodes – IMMI 16/045
[F2015L00778]

Migration Regulations 1994 – Specifications of Arrangements for Other Visas – IMMI 16/043
[F2016L00786]

Migration Regulations 1994 – Specification of Visa Subclass for the Purposes of the Health Requirement – IMMI 16/067
[F2016L01126]

The Committee has sought advice to clarify whether the above instruments are exempt from disallowance as they are made under certain schedules or parts of the *Migration Regulations 1994* that are specified in item 20 of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation).

Response:

The Explanatory Statements for Instruments F2016L00757, F2016L00777, F2016L00778, F2016L00786 and F2016L01126 all contain the same error. In each case, the Explanatory Statement provides that the instrument is subject to disallowance. However, the empowering provision under which each of these instruments are made are prescribed in table 20 of section 10 of the Exemption Regulation, the effect of which is to make these instruments exempt from disallowance. The relevant paragraph in each Explanatory Statement should be read as an error.

Attachment D

Migration Regulations 1994 – Specifications of Arrangements for Resident Return Visa Applications – IMMI 16/042
[F2016L00785]

The Committee has sought advice to clarify whether the above instrument is exempt from disallowance as it is made under Schedule 1 of the *Migration Regulations 1994* which is prescribed in item 20 of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation).

Response:

The Explanatory Statement to Instrument F2016L00785 states in paragraph 9 that the instrument is subject to disallowance. This was incorrect.

This instrument is no longer in force, as it was revoked on 5 September 2016 by Instrument F2016L01405, which commenced on 10 September 2016 and deals with the same subject matter. Paragraph 8 of the Explanatory Statement to current Instrument F2016L01405 correctly states that the instrument is exempt from disallowance, by operation of section 10 of the Exemption Regulation.

Attachment E

Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016
[F2016L00295]

The Committee has enquired about the *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016* (the Regulation).

Response:

The Regulation introduced a priority consideration of visa application service (priority service) for Subclass 600 (Visitor) visa applications in both the Tourist and the Business Visitor streams, for eligible Chinese nationals seeking to visit Australia. This initiative is a result of the Government's White Paper on Developing Northern Australia, which recommended a number of key visa initiatives, including the priority service.

This optional priority service may be requested by a visa applicant for a fee of AUD1,000, charged in addition to the existing visa application charge (VAC).

The fee is only charged to applicants who choose the priority service, as opposed to the VAC, which is payable by all applicants. In order for the Department to successfully deliver the enhanced priority service, it is critical for the priority service to be adequately resourced, without any reduction in the level of resources given to ordinary visa processing. In practice, therefore, processing times for Visitor visas more generally will not be affected by this service. Further, the applicant may avoid paying the priority service fee by using ordinary processing arrangements.

In calculating the amount of the priority service fee, the Department had regard to a number of factors, including the Department's resourcing costs to implement the priority service over the forward estimates. This included Information Communications Technology (ICT) investment and supporting costs required to implement the priority service across multiple locations in China.

The Department also considered the amount of the priority service fee imposed by other comparable nations for a similar product for Chinese nationals, in order to ensure that Australia remains a competitive and attractive destination.

As part of the evaluation of the priority service, all parameters of the priority consideration service, including the fee, will be continually re-assessed, and adjustments may be made to ensure that the parameters of the service remain appropriate and reasonable.

Attachment F

Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L00523]

The Committee has enquired about the *Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016* (the Regulation).

Response:

The Regulation introduced, among other amendments, a simplified international student visa framework. The Regulation sets out Visa Application Charges (VAC) for the Student (Temporary) (Class TU) visa as follows: $550 base application charge; $410 additional applicant charge for any other applicant who is at least 18; and $135 additional applicant charge for any other applicant who is less than 18.

The current VAC amounts were introduced on 1 July 2015 by the Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 (2015 Amendment Regulation) and have not increased since that time. The VAC amounts in the 2015 Amendment Regulation gave effect to the Government's decision as part of the 2015-16 Budget to adjust the price of a number of VAC amounts, including relevantly, Student visas, which were increased by an inflation rate of 2.3 per cent. These changes were made in lieu of indexation of all VACs for 2015.

Prior to the Student VAC amount increase in 1 July 2015, the VAC prices decreased by 5 per cent in 2012 and had not changed since. This was in contrast to other visas, with base charges increased up to 35 per cent from 2010 to 2014 as a result of the Visa Pricing Transformation and subsequent Budget and Mid-Year Economic and Fiscal Outlook decisions. Further analysis had shown that Student VACs comprise 0.3-0.4 percent of the total cost and benefit of staying in Australia, and thus a small change in price was expected to have negligible impact on international students.

The amount of the increase does not exceed the applicable charge limit set out in the Migration (Visa Application) Charge Act 1997, and the Regulation does not change the VAC amount as set in the 2015 Amendment Regulation.

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

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

Radiocommunications delegated instruments

Dear Chair John

Thank you for your letter of 15 September 2016 on behalf of the Senate Regulations and Ordinance Committee regarding Delegated legislation monitor 6 of 2016.

In respect to the request for advice in relation to the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294] (the Class Licence), the ACMA noted that the Class Licence replaced an equivalent legislative instrument (the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2006) made by the ACMA, which also incorporated the Standard, and which had been in place since 2006.

The ACMA has advised that Australian Standards published by Standards Australia (including the Standard) are distributed, under licence, by SAI Global. The ACMA understands that various standards published by Standards Australia are also made available by certain public libraries for their borrowers, free of direct charge. The ACMA notes, however, that the beneficiaries of the grant of rights given by the Class Licence, and so the key end-users of the Standard, are, for the most part, large commercial entities, including major airlines. The amount charged for the Standard is not unreasonable for these end-users.

The ACMA will continue to monitor the cost of, and availability of access to, standards set by Standards Australia (and any other relevant standard-setting body) when making legislative instruments that adopt such standards. This will ensure, so far as is possible, that costs of access to those standards are contained and reasonable, and that access to them is readily and reasonably assured.

The ACMA have further advised that in relation to the *Radiocommunications (Spectrum Access Charges — 2 GHz Band) Determination 2016* (the Determination) made by the ACMA under subsection 294(1) of the *Radiocommunications Act 1992* (the Act), section 4 of the Determination incorporates the Radiocommunications (Spectrum Access Charges) Direction 2012 (the Pricing Direction) made by the Minister under section 294 of the Act.

A determination made under subsection 294(1) of the Act must comply with any directions made by the Minister under section 294 (see subsection 294(4) of the Act). It follows that any such determination must comply with any such direction as in force at the time of the commencement of the relevant determination. Accordingly, the Determination has incorporated the Pricing Direction as in force at the time of the commencement of the Determination.

The ACMA agrees with the Committee, nonetheless, that it would have been beneficial if the Determination or the Explanatory Statement had mentioned that the Pricing Direction was incorporated as in force at the time of the commencement of the Determination. The ACMA proposes to amend the Explanatory Statement to clarify the matter in the near future.

Thank you for bringing this matter to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

4/10/16

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MC16-004536

30 SEP 2016

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

Dear Senator Williams

I write in response to the Committee Secretary's letter of 15 September 2016 to the Hon Darren Chester MP, Minister for Infrastructure and Transport, regarding instruments included in the Senate Standing Committee on Regulations and Ordinance's *Delegated Legislation Monitor* No. 5 of 2016. I am responding as the acting Minister for Infrastructure and Transport.

I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee for each of the instruments.

AD/RAD/47 Amdt 4 - Periodic Testing of ATC Transponders [F2016L00368] and CASA 27/16 - Instructions — use of Global Navigation Satellite System (GNSS) [F2016L00475]

The Committee considers it is best practice for these instruments and Explanatory Statements (ES), when referencing another instrument or document, to refer to it as *in force from time to time*. CASA has advised that in future it will ensure that legislative instruments that reference another instrument or document, will reference it as in force from time to time, unless it is intended that the reference only be to the version of the document in force at the time of the making of the new instrument.

The Committee also noted that regarding *NAT Doc 007*, as this International Civil Aviation Organization document is not a Commonwealth legislative instrument, the manner of incorporation of this document is unclear. CASA has advised that the basis of incorporation is subsection 98(5D) of the *Civil Aviation Act 1988*, which operates to allow the instrument to incorporate non-legislative material as in force at a particular date or as in force from time to time. The definition of *NAT Doc 007* in the instrument makes it clear that it is the edition of that publication in force at a particular time that must be considered.

CASA EX50/16 - Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft Air Operator Certificate AOC holders [F2016L00373]

The Committee noted that, in light of the purpose and significant duration of the exemption, no information is provided in the ES as to why the exemption continues to be used in favour of an amendment to the relevant drug and alcohol management plan provisions of Part 99 the Civil Aviation Safety Regulations 1998 (CASR). In this regard, CASA provided drafting instructions to the Office of Parliamentary Counsel in February 2016, for proposed amendments to Part 99, which include changing requirements for foreign aircraft AOC holders, which are currently being progressed.

CASA EX57/16 - Exemption — for seaplanes [F2016L00466]

The Committee notes exemptions of a similar nature to this instrument have been issued by CASA since 2005 and that no information is provided in the ES as to why an exemption continues to be used in favour of an amendment to the relevant provisions of CASR. Proposed Part 91 of the CASR will negate the need for an exemption. A draft of Part 91 has been the subject of public consultation. CASA has published a regulatory program timeline at www.casa.gov.au/files/new-regulatory-timeline-2016jpg which indicates Part 91 is scheduled to be brought forward in September 2017 and commence in September 2018.

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

Yours sincerely

FIONA NASH

TREASURER

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

Dear Chair

Thank you for your letter of 15 September 2016 to the Minister for Revenue and Financial Services requesting a response in relation to the issues identified by the Senate Standing Committee on Regulations and Ordinances (the Committee) in the *Delegated legislation monitor*, No.6 of 2016, concerning the *Australian Prudential Regulation Authority instrument fixing charges No. 2 of 2016* (the Instrument). I note that the Instrument falls within my area of portfolio responsibility and accordingly, I am responding to you.

I have raised the Committee's concerns with the Australian Prudential Regulation Authority (APRA), who are responsible for making the Instrument. APRA notes that the charges imposed by the Instrument are fully expected, as APRA has been imposing fixed charges on certain members of the financial industry for the accreditation and assessment of models-based capital adequacy for over 10 years. Nevertheless, APRA conducts a simple consultation for each set of fixing charges annually.

For the charges imposed in 2015-16 by the Instrument, the relevant officers at all of the entities specified in the Instrument (see table below) were contacted, advised of APRA's intention to continue to charge for this accreditation work, and invited to raise any questions or concerns, prior to the charging occurring. In the cases of Bendigo and Adelaide Bank Limited and Suncorp-Metway Limited, who received the charges for the first time, prior contact was made by the relevant APRA supervisor with these entities to ensure the correct contact person was identified.

Consulted entity	**Consulted person**
Australia and New Zealand Banking Group Limited	Chief Risk Officer
Commonwealth Bank of Australia	Chief Risk Officer
National Australia Bank Limited	Group Chief Risk Officer
Westpac Banking Corporation	Chief Risk Officer
Macquarie Bank Limited	Executive Director - Risk Management Group
ING Bank (Australia) Limited	Chief Financial Officer
Bendigo and Adelaide Bank Limited	Chief Risk Officer
Suncorp-Metway Limited	Chief Risk Officer Banking & Wealth

No questions (or other comments) in regards to the charges were received by APRA from the entities in question. Therefore, the outcome of the consultation process was that no objections

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against the charges were received, and charging commenced. All entities have subsequently paid the charges in full.

APRA has also indicated that, in response to the Committee's query, it will update the Explanatory Statement for the Instrument with a description of the consultation process outlined above, and will arrange for its approval and registration on the Federal Register of Legislation as soon as practicable. APRA will also commit to providing appropriate and fuller descriptions of its consultation process in subsequent explanatory material it issues in relation to these charges.

Yours sincerely

The Hon Scott Morrison MP

11 / 11 / 2016

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

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

Dear Chair

Thank you for your letter of 4 May 2016 requesting a response in relation to the issues identified by the Senate Standing Committee on Regulations and Ordinances (the Committee) in the *Delegated legislation monitor*, No.5 of 2016, concerning the *ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70* (the Instrument).

I have raised the Committee's concerns with the Australian Securities and Investments Commission (ASIC), which is responsible for making the Instrument. ASIC notes that the strict liability provisions imposed by the Instrument are directly modelled on section 724(1A) of the *Corporations Act 2001* (the Act). Section 724 provides a series of procedural choices that are open to issuers if they have failed to satisfy, among other things, a minimum subscription condition, a quotation admittance condition or a quotation application condition.

These choices are essentially a choice to (1) refund application monies; (2) offer withdrawal rights; or (3) issue/transfer the securities and offer withdrawal rights. If an issuer fails to implement at least one of these choices, this is a contravention which can be prosecuted as a strict liability offence. Under section 724 of the Act, the choices available to an issuer are the same set of choices, irrespective of which condition (i.e. minimum subscription condition, quotation admittance condition or quotation application condition) has not been satisfied within the timeframes.

The effect of the ASIC legislative instrument is to give issuers greater flexibility in satisfying the conditions by allowing them to "refresh/reset" the timeframes by which the conditions must be satisfied. This greater flexibility is achieved through a new "refresh timeframes and offer withdrawal rights" procedure. However, if an issuer chooses not to take advantage of this "refresh timeframes and offer withdrawal rights" procedure, then the remaining procedural choices open to an issuer are more limited and more specific to the condition that has not been satisfied, namely:

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- where a minimum subscription condition is not satisfied within the required timeframe by the issuer, the issuer must follow a procedure of refunding application monies;

- where the quotation admittance condition is not satisfied within the required timeframe by the issuer, the issuer must follow a procedure of refunding application monies;

- where the quotation application condition is not satisfied by the issuer within the required timeframe, the issuer must either refund application monies or follow the required "refresh and offer withdrawal rights" procedure.

A failure to follow these procedures will be a contravention which can be prosecuted as an offence of strict liability. Technically, there are three new offences of strict liability because different procedural requirements/choices will apply depending on which kind of condition has not been satisfied. The separation of the different procedural requirements/choices, with three new offences of strict liability, was purely a matter of drafting convenience. However, in substance, there is still only a single strict liability offence for a failure to follow the required procedure and so, to that extent, the instrument replicates the existing position under section 724(1A) of the Act.

ASIC have stated that in future, where delegated legislation includes offences (particularly strict liability offences), ASIC will commit to providing a detailed explanation of and justification for the framing of such offences in the explanatory material that accompanies the delegated legislation.

Yours faithfully

Kelly O'Dwyer

Australian Competition & Consumer Commission

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28 September 2016

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House CANBERRA
(c/- Committee Secretary Toni Dawes)

By email: regords.sen@aph.gov.au

Dear Senator

Australian Consumer Law: Interim ban on hoverboards that do not meet specific safety requirements [F2016L00357]

We refer to the Committee Secretariat's letter on 15 September 2016 about the incorporation of extrinsic material in the *Australian Consumer Law interim ban on hoverboards that do not meet specific safety requirements* [F2016L00357]. That letter also referred to the previous committee's pre-election letter dated 4 May 2016.

The instrument

The instrument was an interim ban that could only operate for a limited period of 60 days, plus a maximum of two extensions of 30 days each. The Hon Kelly O'Dwyer MP, the Minister for Small Business and Assistant Treasurer, imposed the interim ban on 18 March 2016, extended it to 16 June 2016, and then extended it for a further 30 days and it lapsed on 16 July 2016. The instrument is no longer in effect.

Extrinsic material

The instrument did not expressly state that the standards specified were the versions that applied at its commencement. However, the titles of the specified International Electrotechnical Commission (IEC) standards are unique identifiers that reflect the publication date for that particular version of the standard. That is, the instrument incorporates the standards IEC 62133 Edition 2.0 2012-12, IEC 60335-1 Edition 5.1 2013-12 and AS/NZS 60335.1:2011. The underlined sections (added) specify the edition of the standard incorporated by the instrument. In each case, this was the standard as it applied at the date of commencement.

The instrument also incorporates the UL 2272 standard that Underwriters Laboratories Inc. developed earlier this year and that applied at the date of commencement. When the Minister made the instrument, there was only one version of this standard.

Access to extrinsic material

We also note the Committee's comments in relation to the best-practice approach in providing access to extrinsic material. In this case, as the Committee has commented, it is likely that access to these standards would primarily be sought by testing laboratories and by hoverboard designers and manufacturers.

Where practicable, product safety legislative instruments are complete, self-contained instruments that do not reference extrinsic material. However, many product safety legislative instruments need to incorporate extrinsic technical standards. For this reason, the ACCC has over several years attempted to negotiate free public access to those extrinsic standards with Standards Australia. Unfortunately, those negotiations have been unsuccessful.

Product safety standards tend to be long, complex and technical in nature, and people outside the specific regulatory or commercial sphere to which they relate are highly unlikely to seek them. In practice, consumers and retailers cannot verify compliance with standards themselves and only need to identify the standards so they can specify them in purchasing agreements and when they submit goods for assessment by test laboratories.

Safety standard instrument

On 5 July 2016, the Minister made a safety standard for self-balancing scooters, previously known as hoverboards [F2016L01180] that started on 17 July 2016 and is in force for two years. It effectively replaced the interim ban and has the same technical requirements. The safety standard instrument addresses the issues raised by the Committee:

- The safety standard instrument expressly specifies the versions of the referenced standards including the dates of publication and purchasing instructions.
- The explanatory statement advises that we can make copies of the referenced standards available for viewing free of charge at ACCC offices in all state and territory capital cities and in Townsville.

To date, no member of the public has approached the ACCC for access to any of the standards incorporated in any of these legislative instruments.

Yours sincerely

Rayne de Gruchy
Chief Operating Officer

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

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

23 SEP 2016

Dear Senator Williams John

I am writing in relation to the Delegated Legislation Monitor number 6 of 2016, in which the Committee sought further information in relation to the Australian Crime Commission (National Policing Information Charges) Determination 2016.

The Determination, which was made in May 2016, prescribes the charges applicable for criminal history checks carried out by the Australian Criminal Intelligence Commission (ACIC).

The Determination was intended to continue the pricing structure used by the former CrimTrac Agency, prior to its merger with the ACIC. This continuity in pricing was intended to provide certainty to stakeholders throughout the transition process associated with the merger.

The former CrimTrac Board considered and endorsed for implementation the current pricing structure as part of the 2013-14 budget, with effect from 1 January 2014. The costs for accredited agencies and police were calculated to recover the full costs of all CrimTrac services at the time, whereas the volunteer checks were set at a level that only recovered the cost of the national police checking service. This also reflected CrimTrac's policy to provide checks relating to volunteers at a discounted rate. The difference in the cost of the charge between accredited agencies and police was due to the calculated cost of the additional administrative process involved in accrediting and auditing the accredited agencies. The pricing structure was considered and reconfirmed by the former CrimTrac Board annually.

Yours sincerely

Michael Keenan

The Hon Dan Tehan MP
Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for Cyber Security
Minister Assisting the Prime Minister for the Centenary of ANZAC

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MC16-002824

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

Dear Chair

Thank you for your letter of 15 September 2016 about a technical issue identified in a Defence Determination 2016/19, *Conditions of Service*, made under section 58B of the *Defence Act 1903*.

I note the issue raised in your letter and in the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 6 of 2016, relates to matters for which I have portfolio responsibility.

The committee raised a similar issue in relation to Defence Determinations identified in its previous Delegated Legislation Monitor No. 5 of 2016. The Minister for Defence, Senator the Hon Marise Payne, responded to the committee's previous concern on 22 September 2016. The Department of Defence is reviewing Defence Determination 2016/19, as amended, and will amend this instrument so that the manner of incorporation of all extrinsic material is clearly specified in both the instrument itself and the explanatory statement as requested. This will enable users to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material. This work is in progress.

I trust this information is of assistance to you.

Yours sincerely

Dan Tehan

10 OCT 2016

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC16-002750

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

Dear Chair John,

Thank you for your letters of 4 May 2016 and 15 September 2016 about technical issues identified in recent determinations made under section 58B of the *Defence Act 1903*.

I note the issues raised in your letter of 4 May 2016 and in the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 5 of 2016, for which I have portfolio responsibility.

The Department of Defence has submitted revised explanatory statements for each of the determinations, which did not include a description of consultation. The revised statements include information about the relevant consultation processes in accordance with section 17 of the *Legislation Act 2003*.

With the amendments made to the *Legislation Act 2003* in March 2016, Defence was required to remake its principal determination for Australian Defence Force conditions of service to comply. The new principal determination, Defence Determination 2016-19, *Conditions of service*, commenced on 1 July 2016 and repealed the previous principal determination. Any changes to amending determinations made between March and June 2016 would be of no effect because they related to a repealed principal determination.

Therefore, instead of remaking the amending instruments identified by the committee, Defence is reviewing the new principal Defence determination, and will make any necessary amendments to the principal instrument so that the manner of incorporation is clearly specified in both the instrument itself and the explanatory statement as desired by the committee. This will enable users to understand its operation without the need to rely on specialist legal knowledge or advice, or to consult extrinsic material.

Defence has also reviewed its legislative instrument templates and made the required adjustments in order to ensure the issues the committee raised in the monitor are not repeated in the future.

I appreciate you bringing the committee's concerns to my attention, and trust this information is of assistance to you.

Yours sincerely

MARISE PAYNE

2 7 SEP 2016

Senator the Hon Marise Payne
Minister for Defence

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MC16-002751

Chair
Senate Standing Committee on
Regulations and Ordinances
Room S1.111
Parliament House
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Dear ~~Chair~~ John

Thank you for the Standing Committee's letter of 15 September 2016 drawing to my attention the *Delegated Legislation Monitor* 6 or 2016, and the Standing Committee's comments on the Defence Trade Controls Act – Foreign Country List [F2016L00548] (the Instrument).

The delay in registering the Instrument was an administrative oversight by the Department of Defence, which was identified earlier this year during preparations for the commencement of the offence provisions in the *Defence Trade Controls Act 2012*. Additionally, Defence had omitted to seek ministerial approval of the supporting documentation required for registration of the Instrument.

Following my approval of the supporting documentation, the Instrument was promptly registered on the Federal Register of Legislative Instruments. While the Instrument was not registered immediately after being made by the then Minister for Defence, the Hon Kevin Andrews MP, steps were taken to have it registered as soon as practicable after the oversight was identified.

The Defence Export Controls Branch, which administers the *Defence Trade Controls Act 2012* within Defence, has now established a process where all legislative instruments will be coordinated with Defence Legal Division to assist the proper approval and registration of legislative instruments in accordance with the *Legislation Act 2003*.

Yours sincerely

MARISE PAYNE
28 SEP 2016

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

REF: MS16-001259

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 15 September 2016 sent to my office seeking further information about the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016* (the Regulation).

In the *Delegated legislation monitor, Monitor No. 5 of 2016*, 3 May 2016, the Committee requested further information about two items included in the Regulation, namely funding for quantum computing and the Prime Minister's Prizes for Science.

The Minister for Industry, Innovation and Science, the Hon Greg Hunt MP, has provided the attached response to the Committee's request. A copy of the replacement explanatory statement referenced in the response is also attached for the Committee's information.

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

I have copied this letter to the Minister for Industry, Innovation and Science.

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

Kind regards

Mathias Cormann
Minister for Finance

October 2016

Attachment A

Response to the Committee's question about the 'Funding for quantum computing' initiative

There is no doubt that the proposed research initiative in this case is concerned with highly advanced technology that is significant in both national and international terms. The proposed research is potentially world-leading in a highly competitive international field and of national importance. It is clear that it would be facilitated by the Commonwealth on behalf of the nation in order to advance Australia's national interests.

Through the quantum computing programme, the Commonwealth will provide $25.8 million to support the Centre for Quantum Computation and Communication Technology (CQC2T) to conduct applied research into the development of the world's-first silicon-based quantum computer. CQC2T's unique approach has given researchers at the UNSW lab a two to three year lead over the rest of the world.

CQC2T requires around $100 million in funding over five years to undertake the next phase of their research – specifically, the development of a 10 qubit silicon chip, which is the first step in building a functional silicon-based quantum computer. As these activities are large-scale, capital intensive, and ultimately unproven, they carry a level of risk which is not otherwise commercially viable. Without Commonwealth support, this critical and internationally significant research would either be forced off-shore, or simply would not happen at all.

Quantum computers are expected to provide substantial benefits for issues of national significance such as defence (particularly encryption, cyber-security and pattern recognition), medical research, healthcare, economic forecasting, communications infrastructure and other areas. If successful, the development of a silicon-based quantum computer, and associated high-tech ecosystem, has the potential to solve national challenges and generate significant social and economic benefits for the Australian people.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Attachment B

Response to the Committee's question about the 'Prime Minister's Prizes for Science' initiative

Following review of the Explanatory Statement, it became apparent that a transcription error occurred when entering the references for the constitutional heads of power for the following programmes:

- item 145 – Prime Minister's Prizes for Science;
- item 146 – Science and Mathematics Olympiads;
- item 147 – The Asian Physics Olympiad; and
- item 148 – International Science Competitions.

The typographical errors will be resolved in a Replacement Explanatory Statement, which will set out the corrected references to the relevant constitutional heads of power for these items.

In relation to the Committee's query about the social welfare power regarding the programme specified at item 145, the Prime Minister's Prizes for Science programme originally contemplated the inclusion of two new prize categories: one for early career innovators, and the other a national-level youth excellence in science award.

The programme was subsequently revised such that it will not include the youth prize as part of the suite of Prime Minister's Prizes for Science. The programme no longer includes any expenditure which would rely on the student benefits power. The programme will only include spending activities supported by the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution). However, as the revised programme is within scope of what would be supported by item 145, it is not necessary to further amend the item.

The Prime Minister's Prizes for Science programme provides national-level prizes and awards to recognise the nation's most outstanding scientists and science teachers. The programme has national significance as part of the Commonwealth's science strategy.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 15 April 2016 for the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016* [F2016L00513] to correct the constitutional powers referenced in table items 145, 146, 147 and 148.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Schedule 1 to the Regulation amends the Principal Regulations to establish legislative authority in Schedule 1AB for spending by the Government on initiatives under the National Innovation and Science Agenda, which was announced by the Prime Minister, the Hon Malcolm Turnbull MP, and the Minister for Industry, Innovation and Science, the Hon Christopher Pyne MP, on 7 December 2015. The initiatives will be administered by the Department of Industry, Innovation and Science, with an aspect of the Global Innovation Strategy to be administered by the Australian Trade Commission. Funding details were included in the *Mid-Year Economic and Fiscal Outlook 2015-16*, released on 15 December 2015.

Funding will be provided for:

- quantum computing research to support the development of silicon quantum computing technology in Australia;
- the Global Innovation Strategy to support collaborations between Australian business, researchers and international clusters;

- expanding opportunities for women in science, technology, engineering and mathematics (STEM) and entrepreneurship to attract and retain girls and women in STEM studies;
- the Prime Minister's Prizes for Science to recognise excellence in STEM in young Australians and early career research;
- the Science and Mathematics Olympiads to support Australian students' participation in the Olympiads program;
- the Asian Physics Olympiad to support Australia's hosting of the 2019 Asian Physics Olympiad and Australian student participation in this event;
- international science competitions to support the participation of Australian students in international STEM competitions; and
- STEM community engagement to support an annual National Youth Science Forum to deliver programs to encourage students' participation in STEM subjects, STEM events for students in primary school and secondary school, and provide scholarships that enable students to attend STEM events.

Details of the Regulation are set out at Attachment A. A Statement of Compatibility with Human Rights is at Attachment B.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulation commences on the day after registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Industry, Innovation and Science.

A regulation impact statement is not required as the Regulation only applies to non-corporate Commonwealth entities and does not adversely affect the private sector.

Attachment A

Details of the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016*

Section 1 – Name

This section provides that the title of the Regulation is the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulation is made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedules to the Regulation.

Schedule 1 – Amendments

Item 1 – Part 4 of Schedule 1AB (table)

This item adds eight new table items to Part 4 of Schedule 1AB that establish legislative authority for government spending on a number of initiatives which are part of the National Innovation and Science Agenda (NISA), which was announced by the Prime Minister, the Hon Malcolm Turnbull MP, and the Minister for Industry, Innovation and Science, the Hon Christopher Pyne MP, on 7 December 2015. The initiatives will be administered by the Department of Industry, Innovation and Science, with an aspect of the Global Innovation Strategy to be administered by the Australian Trade Commission.

New **table item 142** establishes legislative authority for the Government to provide funding to support the development of silicon quantum computing technology in Australia. Funding of $25.8 million over five years from 2016-17 will be provided to assist the Centre for Quantum Computation and Communications Technology (CQC2T) with the development of a silicon quantum integrated circuit – the first step in developing a practical quantum computing system. It is expected that the funding will be provided to a new company which is proposed to be established with the Commonwealth's involvement. This initiative is a key measure of the NISA.

Information on this initiative is set out in the *Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget* at page 197, under the measure 'National Innovation and Science Agenda – quantum computing'.

The decision-maker for funding made under this initiative will be a senior departmental official (or delegate). Decisions by the decision-maker will be made in accordance with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and, if applicable, the *Commonwealth Grants Rules and Guidelines* (CGRGs). Funding will be provided over five years ($5 million, per year) to match research output. Specific details would be finalised as part of the shareholder/funding agreement to be entered into between CQC2T and the Commonwealth should a company be formed.

Given the targeted, non-competitive nature of the funding that will be provided to CQC2T, merits review is not applicable.

This initiative is part of Sub-program 1.2: Business research, development and commercialisation, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution).

New **table item 143** establishes legislative authority for government funding through the Global Innovation Strategy (GIS) to support collaborations between Australian business, researchers and international clusters, focusing on the Government's key growth sectors and science and research priorities.

The GIS supports Australia's international whole-of-government activities, initiatives and programs for innovation and science to capitalise on global opportunities. This includes government-to-government agreements and dialogues, programs enabling research and industry stakeholders to engage with international partners and other science and innovation stakeholders to establish and foster relationships with their counterparts.

Under the GIS, funding of $36 million will be provided over five years from 2016-17 to:

- establish 'landing-pads' in five locations to support entrepreneurial Australians ($11 million);
- provide seed funding to assist Australian collaborations including major venture projects involving international partners, and small and medium-sized enterprises (SME) and researcher links ($22 million); and
- invest in reducing barriers to regional partnerships and promoting an open-market approach to industry research collaboration, including Asia-Pacific workshops, multilateral projects and mobility support for businesses and researchers ($3 million).

Funding for this initiative will commence from 1 July 2016. Information on the initiative is set out in the *Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget* at pages 194 to 195, under the measure 'National Innovation and Science Agenda – Global Innovation Strategy', and the Government's website on the NISA (www.innovation.gov.au).

Landing pads will assist emerging Australian companies with their approach to identifying and engaging with international opportunities in overseas markets. Landing pads will be a physical space providing a mechanism for entrepreneurial Australian companies to make linkages with customers, mentors, investors and other businesses in the country of location. The Australian Trade Commission (Austrade) will deliver the landing pads through a three-tier service offering:

- Tier 1 relates to the landing pad site itself. Core services will be delivered free of charge by Austrade through service provider partnerships. Service providers will be reputable workspace communities and have existing infrastructure, business networks and marketing networks for Australian startups to leverage.
- Tier 2 relates to the locally engaged landing pad coordinator. The landing pad coordinator will be contracted by Austrade to manage the landing pad and will assist participants in customer identification, advice on accessing investors, understanding the local regulatory environment, leveraging the Austrade network and access to mentors.
- Tier 3 relates to third parties and external providers. To assist the Australian startups in creating a strong network of people, companies and programs to assist them in their expansion into international markets, Austrade will enable landing pad participants to access services provided by third parties (which may be sponsored, free of charge or on a fee for service basis).

These activities support Austrade's role in promoting Australian export trade, making information available to Australian organisations regarding opportunities for Australian export trade, supporting and facilitating investment in foreign countries and in Australia, and providing assistance in the development of markets in foreign countries. Funding decisions in relation to these activities will be made by the Chief Executive Officer of Austrade, or delegate, in accordance with the functions set out in section 8 of the *Australian Trade Commission Act 1985.*

The decision-maker for spending decisions in relation to major venture projects under this measure is the Minister for Industry, Innovation and Science (or delegate). Grants will be made in accordance with the PGPA Act and the CGRGs.

The Minister or the Minister's authorised departmental delegate (in accordance with the Guidelines) will award the SME-researcher link component as a grant to the Australian Academy of Technology and Engineering (ATSE). The delegate will be required to act in accordance with the Accountable Authority Instructions issued by the Secretary of the department. This initiative will provide seed funding for small-to-medium-sized enterprises and researchers to connect internationally with key innovation economies, with further funding available for connections that show strong commercial promise. This grant will support one or more of the Government's policy objectives relating to broadening Australia's international science and innovation engagement. Specifically, this is to enhance the relationships between Australia's learned academies and counterparts in other countries. The grant to the ATSE will be made in accordance with the PGPA Act and the CGRGs.

The ATSE will deliver this component of the program via a competitive process, in which applications will be reviewed and assessed by an expert science and innovation panel (convened by the ATSE).

The Department of Industry, Innovation and Science will be closely involved with the ATSE in the development of the relevant criteria, consistent with enhancing the relationships between the ATSE and its international counterparts. Criteria against which applications will be reviewed and assessed will be specified in guidelines issued by the ATSE, which will be available on the ATSE website (www.atse.org.au). Given the targeted, non-competitive nature of the funding that will be provided to the ATSE, merits review is not applicable.

The Minister or the Minister's authorised departmental delegate (in accordance with the Guidelines) will award the regional collaborations component as a grant to the Australian Academy of Science (AAS). This will support one or more of the Government's policy objectives relating to broadening Australia's international innovation and science engagement, by providing support for innovative solutions to regional challenges in the Asia-Pacific region. Specifically, this is to enhance the relationships between Australia's learned academies and counterparts in other countries which serve to broaden Australia's international innovation and science engagement. The grant to the AAS will be made in accordance with the PGPA Act and the CGRGs.

The Department of Industry, Innovation and Science will be closely involved with the AAS in the development of the relevant criteria for the delivery of activities under this initiative, consistent with enhancing the relationships between the AAS and its international counterparts. Criteria against which applications will be reviewed and assessed will be specified in guidelines issued by the AAS. The guidelines will be available on the AAS website (www.science.org.au). Given the targeted, non-competitive nature of the funding that will be provided to the AAS, merits review is not applicable.

The Global Innovation Strategy is part of Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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 trade and commerce power (section 51(i)); and
- the external affairs power (section 51(xxix)).

New **table item 144** establishes legislative authority for the Government to fund activities to expand opportunities for women in science, technology, engineering and mathematics (STEM) and entrepreneurship. The activities will seek to attract and retain girls and women in STEM studies; address impediments to women pursuing STEM-based careers in the research sector, business or industry; and support girls and women in STEM and entrepreneurial careers.

Expenditure of $12.3 million over four years from 2016-17 will:

- fund projects to boost female enrolments and participation in STEM studies and careers;
- support the expansion of the Science in Australia Gender Equity (SAGE) initiative to all Australian publicly funded science and research organisations. The expansion will

require participants to collect, analyse and present data on gender equity policies and practices in STEM disciplines, as well as identify gaps and opportunities for improvement. Funding will also be provided to the Australian Academy of Science to establish an independent, not-for-profit limited liability entity to carry out external evaluations of participants and to continue the initiative; and

- establish a new initiative using the 'Male Champions of Change' model to identify champions for gender equity in STEM-based careers and industries.

Information on this initiative is set out in the *Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget* at pages 196 to 197, under the measure 'National Innovation and Science Agenda – inspiring all Australians in STEM'.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Grant guidelines and funding agreements will be in accordance with the PGPA Act and the CGRGs. Selection criteria for these measures will be made publicly available on the NISA website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Funding for the expansion of SAGE and for the 'Champions of Change for STEM' is being provided to specific recipients on a non-competitive basis. Given this, merits review is not applicable for these grants. Other funding under this initiative will be awarded via a competitive selection process that will be set out in program guidelines. The guidelines will be available on the NISA website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au). These decisions will not be subject to merits review given the limited allocation of funding that is available, however the Department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the external affairs power (section 51(xxix)) of the Constitution.

New **item 145** establishes legislative authority for the Government to fund the Prime Minister's Prizes for Science to inspire engagement with STEM in society and participation in further study.

Funding of $15.2 million over four years from 2016-17 will, in part, support the Prime Minister's Prizes for Science, which are Australia's most prestigious and highly regarded awards for excellence in scientific research, innovation and science teaching. Under the National Innovation and Science Agenda, this program will be expanded to recognise the efforts of youth and early career research excellence in STEM. Nominations for the prizes are assessed by the Science Prizes and Science Teaching Prizes committees. More information is available on www.science.gov.au.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Guidelines and funding agreements are being developed, with delegations to be prescribed within, and will be in accordance with the PGPA Act and the CGRGs. Selection criteria for these measures will be made publicly available on the NISA website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Merits review is not applicable in respect of decisions made in relation to targeted funding, given the non-competitive nature of the funding. Where funds are allocated using a competitive selection process, such decisions are not considered suitable for merits review given the limited allocation of funding available. However, the department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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 Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)); and
- the social welfare power (section 51(xxiiiA)).

New **item 146** establishes legislative authority for government funding to support the participation of Australian students in the Science and Mathematics Olympiads to inspire engagement with STEM in society and participation in further study.

Funding of $15.2 million over four years from 2016-17 will, in part, support the Olympiads program. Targeted funding will be awarded to the national organisers in Australia through appropriate funding agreements. More information will be available at www.innovation.gov.au and www.science.gov.au as it becomes available.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Guidelines and funding agreements are being developed, with delegations to be prescribed within, and will be in accordance with the PGPA Act and the CGRGs. Guidelines will be made publicly available on the National Innovation and Science Agenda website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Merits review is not applicable in respect of decisions made in relation to targeted funding, given the non-competitive nature of the funding. However, the department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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

New **item 147** establishes legislative authority for government funding of the Asian Physics Olympiad to inspire engagement with STEM in society and participation in further study.

Funding of $15.2 million over four years from 2016-17 will, in part, support targeted funding to the national organiser, through an appropriate funding agreement, to support Australia's hosting of the 2019 Asian Physics Olympiad and Australian student participation in this event. More information will be available at www.innovation.gov.au and www.science.gov.au as it becomes available.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Guidelines and funding agreements are being developed with delegations to be prescribed within and will be in accordance with the PGPA Act and the CGRGs. Guidelines will be made publicly available on the National Innovation and Science Agenda website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Merits review is not applicable in respect of decisions made in relation to targeted funding, given the non-competitive nature of the funding. However, the department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and

productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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

New **item 148** establishes legislative authority for government funding of international science competitions to inspire engagement with STEM in society and participation in further study. Ongoing funding will be provided for youth to participate in these science competitions.

Funding of $15.2 million over four years from 2016-17 will, in part, support the participation of Australian students in international STEM competitions. Funding will be awarded through competitive grants based on applications from students chosen to represent Australia in these competitions. More information will be available at www.innovation.gov.au and www.science.gov.au as it becomes available.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Guidelines and funding agreements are being developed, with delegations to be prescribed within, and will be in accordance with the PGPA Act and the CGRGs. Selection criteria for these measures will be made publicly available on the National Innovation and Science Agenda website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Merits review is not applicable in respect of decisions made in relation to targeted funding, given the non-competitive nature of the funding. Where funds are allocated using a competitive selection process, such decisions are not considered suitable for merits review given the limited allocation of funding available. However, the department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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

New **item 149** establishes legislative authority for government funding to support community engagement in STEM.

Funding of $15.2 million over four years from 2016-17 will, in part, support:

- an annual National Youth Science Forum to deliver programs to students to encourage their participation in STEM subjects;
- STEM events for students in primary school and secondary school; and
- scholarships that enable students to attend STEM events.

Funding will be provided through both targeted funding to relevant organisations and competitive grants. More information will be available on www.innovation.gov.au and www.science.gov.au as it becomes available. Information on this initiative is set out in the *Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget* at pages 196 to 197, under the measure 'National Innovation and Science Agenda – inspiring all Australians in STEM'.

The decision-maker for grants made under this initiative is to be determined in consultation with stakeholders. Guidelines and funding agreements are being developed, with delegations to be prescribed within, and will be in accordance with the PGPA Act and the CGRGs. Selection criteria for these measures will be made publicly available on the National Innovation and Science Agenda website (www.innovation.gov.au) and the Government's Science website (www.science.gov.au).

Merits review is not applicable in respect of decisions made in relation to targeted funding, given the non-competitive nature of the funding. Where funds are allocated using a competitive selection process, such decisions are not considered suitable for merits review given the limited allocation of funding available. However, the department has established processes for dealing with complaints and these will be followed in instances where applicants for funding are dissatisfied with the outcomes of funding rounds.

Funding for this initiative will come under Sub-program 1.1: Science awareness, infrastructure and international engagement, which is part of Program 1: Supporting Science and Commercialisation. Program 1 comes under Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Funding details are set out in the *Portfolio Additional Estimates Statements 2015-16, Industry, Innovation and Science Portfolio* at page 26.

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)); and
- the external affairs power (section 51(xxix)).

Attachment B

Statement of Compatibility with Human Rights

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

Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016

This 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.*

Overview of the Legislative Instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs.

The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013.*

Schedule 1 to the Regulation amends the Principal Regulations to establish legislative authority in Schedule 1AB for spending by the Government on initiatives under the National Innovation and Science Agenda, which was announced by the Prime Minister, the Hon Malcolm Turnbull MP, and the Minister for Industry, Innovation and Science, the Hon Christopher Pyne MP, on 7 December 2015. The initiatives will be administered by the Department of Industry, Innovation and Science, with an aspect of the Global Innovation Strategy to be administered by the Australian Trade Commission. Funding details were included in the *Mid-Year Economic and Fiscal Outlook 2015-16*, released on 15 December 2015.

Funding will be provided for:

- quantum computing research to support the development of silicon quantum computing technology in Australia;
- the Global Innovation Strategy to support collaborations between Australian business, researchers and international clusters;
- expanding opportunities for women in science, technology, engineering and mathematics (STEM) and entrepreneurship to attract and retain girls and women in STEM studies;
- the Prime Minister's Prizes for Science to recognise excellence in STEM in young Australians and early career research;
- the Science and Mathematics Olympiads to support Australian students' participation in the Olympiads program;
- the Asian Physics Olympiad to support Australia's hosting of the 2019 Asian Physics Olympiad and Australian student participation in this event;

- international science competitions to support the participation of Australian students in international STEM competitions; and
- STEM community engagement to support an annual National Youth Science Forum to deliver programs to encourage students' participation in STEM subjects, STEM events for students in primary school and secondary school, and provide scholarships that enable students to attend STEM events.

The Minister for Industry, Innovation and Science has portfolio responsibility for these programs.

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.

Senator the Hon Mathias Cormann
Minister for Finance

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

Ref No: MC16-029198

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

Dear Chair

Thank you for your representations of 19 September 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances regarding the Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134].

I note and understand the committee's position that the delegation powers in the Guidelines should be limited to accord with the Senate Committee for the Scrutiny of Bills' approach of ensuring delegations are not provided to a relatively large class of persons, with little or no specificity as to their qualification or attributes.

I confirm that my Department is amending the Guidelines and will remove the delegation provisions as part of this process. It is expected that the amended Guidelines will be completed and signed into effect before 1 March 2017.

Thank you for bringing this matter to my attention.

Yours sincerely

The Hon Sussan Ley MP

4 OCT 2016

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MC16-004532

30 SEP 2016

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

Dear Senator Williams

I write in response to the Committee Secretary's letter of 15 September 2016 to the Hon Darren Chester MP, Minister for Infrastructure and Transport, seeking advice about instruments in regard to the Senate Regulations and Ordinances Committee, *Delegated legislation monitor 6* of 2016. I am responding as the acting Minister for Infrastructure and Transport.

Marine Order 12 (Construction – subdivision and stability, machinery and electrical installations) 2016 [F2016L01049; Marine Order 21 (Safety and emergency arrangements) 2016 [F20116I01076]; and Marine Order 27 (Safety of navigation and radio equipment) 2016 [F2016L01077]

The Committee has raised a concern in relation to the manner of incorporation of documents. The Committee has indicated it is not clear whether the industry standards identified in its report are incorporated as in force from time to time, or as in force at the commencement of the relevant Order.

The Australian Maritime Safety Authority (AMSA) has advised that when these Marine Orders are amended, they will clearly state the policy intention – which was to incorporate the identified standards as in force at the time of the Marine Order's commencement.

The Committee further raised concerns about the adequacy of the Explanatory Statements regarding free access to the incorporated documents. Each of the Marine Orders includes a note that directs users to an AMSA website page giving access information for documents incorporated by reference in the Marine Orders. I am informed that the Marine Order webpage provides information about where industry standards can be sourced for free and, for other incorporated documents, how to navigate the web to download them for free. The explanatory statements summarised the access information set out in the Marine Order webpage.

While the possible sources of free access to hard copies of industry standards, in particular Australian libraries, are set out in the Marine Order webpage link, AMSA has advised that in future it will make it clearer in its Explanatory Statements how to access any free sources of standards. A free access option for a stakeholder or member of the public is to contact AMSA for assistance with accessing material that is not copyright protected.

AMSA is currently considering imposing a service fee for requests for access to any standard incorporated by reference into a Marine Order that is copyright protected. This service fee will cover the copyright licence fees and royalties for which AMSA becomes liable as a result of downloading and providing public access to copyright protected material. If it is determined that a fee will be charged, AMSA will make this clear in Explanatory Statements for Marine Orders that incorporate industry standards that are subject to copyright.

It should be noted there are certain International Maritime Organization (IMO) published industry manuals and codes for which carriage by vessels is mandated for operational safety in Marine Order 27. Publications in book format are available for purchase through the IMO and electronic versions can be downloaded at no cost. In future, AMSA will clarify this in the Explanatory Statements for the relevant Marine Orders.

Minister's Road User Charge Determination 2016 (No. 1) [F2016L00556]

I can advise that a statement of compatibility with Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* was omitted in error. The Explanatory Statement for this instrument will be updated to include a statement of compatibility as soon as possible.

I trust this information is of assistance to the Committee.

Yours sincerely

FIONA NASH

Australian Government
Department of Industry, Innovation and Science

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

By email: regords.sen@aph.gov.au

Dear Chair

I write on behalf of the Department of Industry, Innovation and Science (**Department**) in response to the Committee's letters of 4 May 2016 and 15 September 2016, and the issue identified in the *Delegated Legislation Monitor No. 5 of 2016*, in relation to the *National Measurement Guidelines 2016* (**Guidelines**).

Please see **attached** the Amended Explanatory Statement for the Guidelines including a Human Rights Compatibility Statement (both in a marked up and a clean version for your ease of reference).

I advise the Committee that the Amended Explanatory Statement has been lodged and registered with the Federal Register of Legislation and will be tabled on the earliest convenient sitting date. The Amended Explanatory Statement can be accessed at https://www.legislation.gov.au/Details/F2016L00538.

Yours sincerely,

Michael Bussing
Senior Legal Counsel
Department of Industry, Innovation and Science

4 October 16

Encls (2)

AMENDED EXPLANATORY STATEMENT

Issued by the Chief Metrologist

National Measurement Act 1960

National Measurement Guidelines 2016

Deleted: *Amendment*

Purpose and Operation

The principal objects of the *National Measurement Act 1960* (the Act) are to:

- establish a national system of units and standards of measurement of physical quantities;
- provide for the uniform use of those uniform units and standards of measurement throughout Australia;
- co-ordinate the operation of the national system of measurement; and
- provide the legal framework for a national system of trade measurement.

The Act and the *National Measurement Regulations 1999* (the Regulations) prescribe SI (International System of Units) base units of measurement and Australian legal units of measurement. They also prescribe certain additional, non-SI, legal units of measurement that may be used for particular purposes.

Section 7B of the Act provides that the Chief Metrologist may make guidelines governing the way in which Australian legal units of measurement may be combined to produce Australian legal units of measurement, and the way in which Australia legal units of measurement may be combined with a prefix for the purposes of section 7A(3) of the Act.

The purpose of the *National Measurement Guidelines 2016* (the Guidelines) is to support the national measurement system by prescribing a uniform system to express Australian legal units of measurement to ensure a common and consistent understanding of measurement units used in Australia and to align the expression of measurement units in Australia with internationally accepted practice.

The Guidelines commenced on 1 April 2016.

Consultation

The Guidelines are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Sections 17 and 18 of the *Legislative Instruments Act 2003* require details of consultation undertaken to be provided in the Explanatory Statement accompanying such instruments or their exemption from it. In the case of this legislative instrument, only minor adjustments are being made and there is no change in regulatory policy and no new fee items are introduced. In these circumstances, it is not appropriate to engage in a consultation process.

Details of the Guidelines are set out in the Attachment.

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ATTACHMENT

Details of the *National Measurement Amendment Guidelines 2016*

Clause 1 – Name of Guidelines

This specifies the name of the Guidelines as the *National Measurement Guidelines 2016.*

Clause 2 – Authority

This sets out the provision of the *National Measurement Act 1960* under which the Guidelines are made.

Clause 3 – Commencement

This provides that the Guidelines commenced on 1 April 2016.

Clause 4 – Revocation

This provides that the Guidelines revokes the *National Measurement Guidelines 1999* (the former Guidelines) on 1 April 2016.

Clause 5 – Objects of the Guidelines

This item provides that the objects of the Guidelines are to provide a uniform system to express Australian legal units of measurement by governing the way in which Australian legal units of measurement may be combined to produce an Australian legal unit of measurement, and how they may be combined with prefixes to produce Australian legal units of measurement.

Clause 6 – Definitions

This item provides for definitions of terms used in the Guidelines.

Clause 7 – Physical quantities

Schedule 1 and 2 of the *National Measurement Regulations 1999* (the Regulations) prescribes the Australian legal units of measurement for physical quantities. This item replaces the unnecessary duplication of listing physical quantities of Australian legal units of measurement mentioned under the former Guidelines to an amended provision that Australian legal units of measurement may be formed only for the physical quantities prescribed under the Regulations. The amendment removes the requirement to amend the instrument when new Australian legal units of measurement are introduced to ensure that the national measurement legislation provides for the current formation of Australian legal units of measurement.

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Clause 8 – Combining Australian legal units of measurement

This item provides that if a physical quantity is formed by combining two or more physical quantities then the Australian legal unit of measurement used to describe the

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combined physical quantity would be the same as the relationship between the Australian legal units of measurement for those physical quantities. The resulting Australian legal unit of measurement may be then represented by either a name or symbol that is itself derived from an Australian legal unit of measurement. For example the Australian legal unit of measurement of *pascal* can either be represented as Pa or N/m^2. See schedule 1 and 2 of the Regulations for the list of names and symbols of Australian legal units of measurement.

Clause 9 – Combining Australian legal units of measurement and SI prefix

This item provides that a decimal multiple or submultiple of an Australian legal unit of measurement must be formed using a single SI prefix, as prescribed under schedule 3 of the Regulations, with the exemption of a *kilogram* which due to historical reasons is the only SI base unit which already contains a prefix (*kilo*) as part of its name.

This item includes a typographical amendment from the former Guidelines. The amendment corrects the example annotating how a decimal multiple or submultiple of an Australian legal unit of measurement, formed using a single SI prefix, is expressed to render it consistent with the requirements in section 13(10) of the instrument. The previous wording may have caused confusion in relation to the use of a space when expressing Australian legal units of measurement.

The item also provides that an additional derived unit of measurement, as listed under part 4 of schedule 1 of the Regulations, may also be combined with another Australian legal unit of measurement to form an Australian legal unit of measurement. For example the amount of gram per mole unit may be represented as grams/mol.

In addition, this item provides that an Australian legal unit of measurement and a SI prefix may be combined with other Australian legal units of measurement symbols, as listed under schedule 1 and 2 of the Regulations, to form a symbol for a compound unit that is an Australian legal unit of measurement. For example the Australian legal unit measurement of *metre* (m) with the prefix of *kilo* (k) can be combined with the non-SI unit of time (*hour*), represented with the symbol (h), to form km/h for a measurement of speed.

Clause 10 – Australian legal units of measurement that must not be combined with prefixes

This item provides the list of Australian legal units of measurement which must not be combined with SI prefixes as to avoid confusion and that as *kilogram* already contains a prefix a decimal multiple of sub-multiple of *kilogram* must be formed by attaching a prefix to *gram.*

Clause 11 – Australian legal units of measurement that may only be combined with prefixes that form multiples of the unit

This item provides the Australian legal units of measurement of *tonne* may only be combined with an SI prefix that gives a decimal multiple of *tonne.* For example *tonne* may be combined with the SI prefix of *kilo* to form kilotonne which is a multiple of a *tonne* but not with the SI prefix of *milli* to form millitonne as it is a decimal sub-multiple of a *tonne*.

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Clause 12 – Combination of a prescribed SI prefix with a combination of Australian Legal units of measurement

This item provides that an Australian legal unit of measurement must be formed from a combination of Australian legal units of measurement as prescribed under section 8 of the instrument and the use of an SI prefix as prescribed under schedule 3 of the Regulations.

Clause 13 – Expression of Australian legal units of measurement

This item provides for requirements when expressing Australian legal units of measurement to align the expression of measurement units in Australia with internationally accepted practice.

This item includes the following amendments from the former Guidelines:

(i) The use of the product symbol of a space is excluded when the symbol for an Australian legal unit of measurement is the same as an SI prefix to align the expression with internationally accepted practice. The previous wording may have caused confusion in relation to the correct expression of Australian legal units of measurement. For example the Australian legal unit of measurement of thermo-dynamic temperature (*kelvin*) represented with the symbol (K) and length (*metre*), represented with the symbol (m), may be combined with the SI derived unit of measurement of power (*watt*), represented with the symbol (W), to form the expressed as m·K/W (*metre kelvin* per *watt*) as a measurement for thermal resistivity which if the product symbol of a space was used to form the expression m K/W it may be confused with millikelvin per *watt* (which itself may be expressed as mK/W). The amendment replaces the requirement previously under section 11(8) of the instrument.

(ii) The example annotating how an Australian legal unit of measurement derived from the division of 2 other Australian legal units of measurement may be expressed to produce an unambiguous expression has been corrected to render it consistent with the requirements in section 13(6) of the instrument. The previous wording may have caused confusion in relation to the correct expression of Australian legal units of measurement.

(iii) The example annotating how a complex expression, negative exponents or parentheses must be used when expressing Australian legal unit of measurement has been corrected to render it consistent with the requirements in section 13(6) of the instrument. The previous wording may have caused confusion in relation to the correct expression of Australian legal units of measurement.

(iv) An exemption to the requirements regarding the use of a space after the numerical value of an Australian legal unit of measurement and the symbol of unit of measurement has been provided for expressing angles. When expressing geographic coordinates no space must be left between the numerical values and the symbols for degrees, minutes and seconds. On consultation with Geoscience Australia the former Guidelines may have caused confusion in relation to expressing geographic coordinates.

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STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

National Measurement Guidelines 2016

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

Overview of the Legislative Instrument

The *National Measurement Guidelines 2016* support the national measurement system by prescribing a uniform system to express Australian legal units of measurement to ensure a common and consistent understanding of measurement units used in Australia and to align the expression of measurement units in Australia with internationally accepted practice.

Human rights implications

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

Conclusion

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

The Chief Metrologist, Peter Fisk

AMENDED EXPLANATORY STATEMENT

Issued by the Chief Metrologist

National Measurement Act 1960

National Measurement Guidelines 2016

Purpose and Operation

The principal objects of the *National Measurement Act 1960* (the Act) are to:

- establish a national system of units and standards of measurement of physical quantities;
- provide for the uniform use of those uniform units and standards of measurement throughout Australia;
- co-ordinate the operation of the national system of measurement; and
- provide the legal framework for a national system of trade measurement.

The Act and the *National Measurement Regulations 1999* (the Regulations) prescribe SI (International System of Units) base units of measurement and Australian legal units of measurement. They also prescribe certain additional, non-SI, legal units of measurement that may be used for particular purposes.

Section 7B of the Act provides that the Chief Metrologist may make guidelines governing the way in which Australian legal units of measurement may be combined to produce Australian legal units of measurement, and the way in which Australia legal units of measurement may be combined with a prefix for the purposes of section 7A(3) of the Act.

The purpose of the *National Measurement Guidelines 2016* (the Guidelines) is to support the national measurement system by prescribing a uniform system to express Australian legal units of measurement to ensure a common and consistent understanding of measurement units used in Australia and to align the expression of measurement units in Australia with internationally accepted practice.

The Guidelines commenced on 1 April 2016.

Consultation

The Guidelines are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Sections 17 and 18 of the *Legislative Instruments Act 2003* require details of consultation undertaken to be provided in the Explanatory Statement accompanying such instruments or their exemption from it. In the case of this legislative instrument, only minor adjustments are being made and there is no change in regulatory policy and no new fee items are introduced. In these circumstances, it is not appropriate to engage in a consultation process.

Details of the Guidelines are set out in the Attachment.

ATTACHMENT

Details of the *National Measurement Amendment Guidelines 2016*

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This item provides that the objects of the Guidelines are to provide a uniform system to express Australian legal units of measurement by governing the way in which Australian legal units of measurement may be combined to produce an Australian legal unit of measurement, and how they may be combined with prefixes to produce Australian legal units of measurement.

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Clause 8 – Combining Australian legal units of measurement

This item provides that if a physical quantity is formed by combining two or more physical quantities then the Australian legal unit of measurement used to describe the

combined physical quantity would be the same as the relationship between the Australian legal units of measurement for those physical quantities. The resulting Australian legal unit of measurement may be then represented by either a name or symbol that is itself derived from an Australian legal unit of measurement. For example the Australian legal unit of measurement of *pascal* can either be represented as Pa or N/m^2. See schedule 1 and 2 of the Regulations for the list of names and symbols of Australian legal units of measurement.

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This item provides that a decimal multiple or submultiple of an Australian legal unit of measurement must be formed using a single SI prefix, as prescribed under schedule 3 of the Regulations, with the exemption of a *kilogram* which due to historical reasons is the only SI base unit which already contains a prefix (*kilo*) as part of its name.

This item includes a typographical amendment from the former Guidelines. The amendment corrects the example annotating how a decimal multiple or submultiple of an Australian legal unit of measurement, formed using a single SI prefix, is expressed to render it consistent with the requirements in section 13(10) of the instrument. The previous wording may have caused confusion in relation to the use of a space when expressing Australian legal units of measurement.

The item also provides that an additional derived unit of measurement, as listed under part 4 of schedule 1 of the Regulations, may also be combined with another Australian legal unit of measurement to form an Australian legal unit of measurement. For example the amount of gram per mole unit may be represented as grams/mol.

In addition, this item provides that an Australian legal unit of measurement and a SI prefix may be combined with other Australian legal units of measurement symbols, as listed under schedule 1 and 2 of the Regulations, to form a symbol for a compound unit that is an Australian legal unit of measurement. For example the Australian legal unit measurement of *metre* (m) with the prefix of *kilo* (k) can be combined with the non-SI unit of time (*hour*), represented with the symbol (h), to form km/h for a measurement of speed.

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Clause 12 – Combination of a prescribed SI prefix with a combination of Australian Legal units of measurement

This item provides that an Australian legal unit of measurement must be formed from a combination of Australian legal units of measurement as prescribed under section 8 of the instrument and the use of an SI prefix as prescribed under schedule 3 of the Regulations.

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This item provides for requirements when expressing Australian legal units of measurement to align the expression of measurement units in Australia with internationally accepted practice.

This item includes the following amendments from the former Guidelines:

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(ii) The example annotating how an Australian legal unit of measurement derived from the division of 2 other Australian legal units of measurement may be expressed to produce an unambiguous expression has been corrected to render it consistent with the requirements in section 13(6) of the instrument. The previous wording may have caused confusion in relation to the correct expression of Australian legal units of measurement.

(iii) The example annotating how a complex expression, negative exponents or parentheses must be used when expressing Australian legal unit of measurement has been corrected to render it consistent with the requirements in section 13(6) of the instrument. The previous wording may have caused confusion in relation to the correct expression of Australian legal units of measurement.

(iv) An exemption to the requirements regarding the use of a space after the numerical value of an Australian legal unit of measurement and the symbol of unit of measurement has been provided for expressing angles. When expressing geographic coordinates no space must be left between the numerical values and the symbols for degrees, minutes and seconds. On consultation with Geoscience Australia the former Guidelines may have caused confusion in relation to expressing geographic coordinates.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

National Measurement Guidelines 2016

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

Overview of the Legislative Instrument

The *National Measurement Guidelines 2016* support the national measurement system by prescribing a uniform system to express Australian legal units of measurement to ensure a common and consistent understanding of measurement units used in Australia and to align the expression of measurement units in Australia with internationally accepted practice.

Human rights implications

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

Conclusion

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

The Chief Metrologist, Peter Fisk

The Hon Christian Porter MP
Minister for Social Services

MC16-008006

10 OCT 2016

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

Dear Chair

Thank you for your letters of 15 September 2016, incorporating your letter of 4 May 2016, regarding the reports of the Senate Regulatory and Ordinances Committee, *Delegated legislation monitors 5 and 6* of 2016. I appreciate the Committee bringing these matters to my attention.

In regards to the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* [F2016L00544], I note your concern that neither the text of the rules nor the Explanatory Statement (ES) expressly state the manner in which the relevant parts *of Schedules 1 and 2 of Local Government Regulation 2012* (Qld) are incorporated. I also note concerns that the ES does not adequately describe the nature of consultation undertaken.

As to the first issue raised, our intention was to incorporate the regulation as in force at the time the rules were made. Having regard to section 14 of the *Legislation Act 2003,* I will submit a revised ES, following consultation with Queensland. I note this also applies to the *National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2016* and to *National Disability Insurance Scheme (Facilitating the Preparation of Participant Plans – Queensland) Rules 2016.* Regarding consultation, I will more fully describe the nature of consultation undertaken, in accordance with Appendix 2; Guideline on Consultation, and submit an amended ES which reflects this intention.

In regard to the *National Disability Insurance Scheme (Prescribed Programs – New South Wales) Rules 2016* [F2016L00792], the failure to incorporate a Statement of Compatibility with Human Rights was an oversight and I thank you for bringing this to my attention. I will submit a revised ES incorporating a statement of compatibility, in accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

In regards to the *Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016,* I note the comments of the Committee with respect to the incorporation of documents.

Section 8 of the *Social Security (International Agreements) Act 1999* (the International Agreements Act) provides for regulations to add to the Act a Schedule setting out the terms of an agreement between Australia and another country if the agreement relates to reciprocity in social security or superannuation matters. The *Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016*, which adds a new schedule 10 to the International Agreements Act, must therefore set out the exact terms of the agreement between Australia and the Republic of Austria. The reference to Regulation (EC) No. 883/2004 appears in Article 14.2 (Calculation of Austrian Benefits) of the Agreement between Australia and the Republic of Austria on Social Security.

Where the text of an international social security agreement is set out in a Schedule to the Act, the provisions of the agreement have effect despite anything in the social security law (subsection 6(1) of the Act). However, this only applies to provisions of the agreement that are:

- in force; and
- affect the operation of the social security law (subsection 6(2) of the Act).

Regulation (EC) No. 883/2004 affects the operation of Austrian law but does not affect the operation of the social security law. The *Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016* does not therefore apply, adopt or incorporate Regulation (EC) No. 883/2004 for the purpose of section 14 of the *Legislation Act 2003.*

I also note the comments of the Committee with respect to the description of and access to incorporated documents.

The *Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016* and the Explanatory Statement do not describe Regulation (EC) No. 883/2004 and how it may be obtained because it affects the operation of Austrian law. Regulation (EC) No. 883/2004 does not affect the operation of the social security law. For that reason, it is not considered necessary to describe Regulation (EC) No. 883/2004 and how it may be obtained in the Explanatory Statement to meet the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003.*

An explanation of the EC Regulation can be freely obtained from the following website links:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Ac10521 and
http://ec.europa.eu/social/main.jsp?langId=en&catId=849

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MB16-000468

28 SEP 2016

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

Dear Senator Williams

I refer to the letter of 15 September 2016 from the Senate Standing Committee on Regulations and Ordinances regarding the Norfolk Island Customs Ordinance 2016 (the Ordinance).

The Ordinance was made by the Federal Executive Council on 5 May 2016 under section 19A of the *Norfolk Island Act 1979.* The purpose of the Ordinance is to apply the *Customs Act 1901* (Cth), the Customs Regulation 2015 and the Customs (International Obligations) Regulation 2015 on Norfolk Island from 1 July 2016, as modified by the Ordinance.

The Department of Infrastructure and Regional Development has principal responsibility for administering Australian territories on behalf of the Commonwealth. Australian Government agencies have worked with the Department through a whole of government reform taskforce to implement taxation, social security, immigration, customs and biosecurity services on Norfolk Island.

From 1 July 2016, the Department of Immigration and Border Protection (DIBP) administers customs arrangements for Norfolk Island, replacing the previous arrangements administered by the former Administration of Norfolk Island under the *Customs Act 1913* (NI) and Customs Regulations 1986. As the agency responsible for administration of customs functions, DIBP modified the application of the *Customs Act 1901* (Cth) to reflect the unique circumstances of Norfolk Island.

I note the Senate Standing Committee on Regulations and Ordinances' expectations in relation to the delegation and sub-delegation of the Comptroller-General of Customs' powers under the Ordinance to 'an officer of Customs'.

In response to the matters raised by the Committee, DIBP has advised the approach to delegations in the *Customs Act 1901* (NI) mirrors the approach taken to delegations in the *Customs Act 1901* (Cth). The large number and variety of powers in the *Customs Act 1901* (NI) means their delegation to only nominated officers or members of the senior executive service (in accordance with the Committee's expectations) would not be practical from an operational perspective.

The operational considerations include the small population and remote location of Norfolk Island. A small number of DIBP staff are posted to Norfolk Island to operate the customs service for the territory and these staff are not senior executive staff and may not be holders of nominated offices. This practical constraint on the operational environment requires a sub-delegation to a broad category of officers.

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

Yours sincerely

FIONA NASH

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

MS16-000110

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

Dear Senator Williams John

I am writing in response to comments made by the Committee in *Delegated legislation monitor number 5 of 2016* in relation the legislative instrument *PAYG Withholding Variation: Variation of amount to be withheld from Indigenous artists when an ABN is not provided* [F2016L00358].

The comments of the Committee have been noted and accepted by the Australian Taxation Office (ATO). The ATO has advised me that the Explanatory Statement to the legislative instrument will be revised to include a legislative reference that will provide the required explanation of the terms Zone A and Special Zone A as used in the instrument. The revision should be completed in the week ending16 October 2016.

Yours sincerely

Kelly O'Dwyer

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

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

REF: MS16-001193

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

Dear Senator Williams

I refer to the Committee Secretary's letter of 15 September 2016 sent to my office seeking further information on the *Public Governance, Performance and Accountability Amendment (CSC) Rule 2016* (the CSC Rule).

In the *Delegated legislation monitor* No. 5, 3 May 2016, the Committee requested information on the Commonwealth Superannuation Corporation (CSC) Board's power, under subsection 28A(1) of the CSC Rule, to sub-delegate certain powers, functions and duties concerning the recovery of debts due to the Commonwealth. The Committee has asked why this section does not limit the category of people to whom the CSC Board can sub delegate.

The sub-delegation powers in the CSC Rule are consistent with the sub-delegation powers of accountable authorities of non-corporate Commonwealth entities, set out in sub-section 110(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). This is appropriate as CSC, a corporate Commonwealth entity, now performs functions, usually undertaken by non-corporate Commonwealth entities, on behalf of the Commonwealth. Limiting the CSC Board's sub-delegation powers would undermine the principles of coherence, operational independence and efficiency embodied in the PGPA Act.

In providing for sub-delegations, the PGPA Act reduces the risks associated with sub delegating powers through duties placed on accountable authorities (sections 15-19) and officials (sections 25-29) which facilitate high standards of governance, performance and accountability. In particular, section 16 of the PGPA Act requires accountable authorities to establish and maintain an appropriate system of risk oversight, management and internal control over the entity, which includes sub-delegation arrangements.

The CSC Rule also provides for only a limited delegation of my power under paragraph 63(1)(b) of the PGPA Act and the duty placed on accountable authorities by

section 11 of the PGPA Rule. These provisions deal with, in turn, the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth, and the requirement for accountable authorities to pursue recovery of debts.

I trust this information addresses the Committee's concerns.

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

Kind regards

Mathias Cormann
Minister for Finance

28 September 2016

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

28 SEP 2016

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

Dear Chair

Thank you for your letter of 15 September 2016 which drew my attention to the *Delegated Legislation Monitor 6 of 2016*. The monitor notes that the Explanatory Statement accompanying the *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016* is non-compliant due to the absence of a statement of compatibility with human rights.

I regret the omission of the statement, which was unintended.

Please see enclosed a proposed amended Explanatory Statement that now includes a statement of compatibility with human rights.

The proposed amended Explanatory Statement will be registered with the Federal Register of Legislation as soon as practicable.

I note your letter also included concerns related to the *Australian Prudential Regulation Authority instrument fixing charges*. This issue will be dealt with by the Australian Prudential Regulation Authority separately.

Yours sincerely

Kelly O'Dwyer

Enc.

Parliament House, Canberra ACT 2600, Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Taxation Administration Act 1953

Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016

Sections 426-103 and 426-110 in Schedule 1 to the *Taxation Administration Act 1953* (the Act) provide that the Minister must, by legislative instrument, set out rules in the form of guidelines for public ancillary funds and private ancillary funds and their trustees.

Purpose

The *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016* (amending guidelines) amend the *Private Ancillary Fund Guidelines 2009* and the *Public Ancillary Fund Guidelines 2011* to:

- update the *Private Ancillary Fund Guidelines 2009* to reflect improvements incorporated in the later made *Public Ancillary Fund Guidelines 2011*;
- introduce portability into the *Private Ancillary Fund Guidelines 2009*;
- update both sets of Guidelines to reflect the introduction of the Australian Charities and Not-for-profits Commission (ACNC);
- remove red tape by ensuring that material provided to the ACNC is not also requested separately by the Australian Taxation Office and allow smaller private funds to seek a review instead of an audit;
- update the investment strategy rules to, amongst other things, ensure funds must consider both their status as a registered charity and conflicts of interest in preparing and maintaining a strategy;
- allowing ancillary funds to provide loan guarantees over borrowings of deductible gift recipients;
- provide further guidance on calculating the distribution in relation to social impact investments;
- give the Commissioner of Taxation the power to lower the annual minimum distribution rate of a fund in appropriate circumstances;
- remove references to the Australian Valuation Office following its closure on 30 June 2014; and
- repeal spent guidelines.

Context

The *Private Ancillary Fund Guidelines 2009* and the *Public Ancillary Fund Guidelines 2011* were made in 2009 and 2011, and set minimum standards for the governance and conduct of ancillary funds and their trustees. The introduction of

each set of Guidelines coincided with the commencement of a new regulatory regime governing ancillary funds. Both sets of Guidelines have not been updated since they were made.

On 18 March 2015 the then Parliamentary Secretary to the Prime Minister announced a number of deregulation initiatives to be implemented in conjunction with the 2015 Autumn Repeal Day, including some of the amendments to each set of Guidelines.

The then Assistant Treasurer provided further details on these changes in a Media Release of 28 May 2015.

A draft of the amending guidelines was released for public consultation between 22 December 2015 and 12 February 2016. Further targeted consultation was undertaken between 15 April 2016 and 20 April 2016.

Application

The amending guidelines commenced and applied from the day after their registration.

Conditions

The Act does not specify any conditions that need to be met before the power to make the amending guidelines may be exercised.

Statement of Compatibility with Human Rights

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

Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016

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

Overview of the Legislative Instrument

The *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016* (amending guidelines) amend the *Private Ancillary Fund Guidelines 2009* and the *Public Ancillary Fund Guidelines 2011* (the Guidelines) to make a range of improvements, such as reflecting the role of the Australian Charities and Not-for-profits Commission which did not exist at the time the Guidelines were first made; and reducing red tape.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms because it relates to slight updates to rules for specific types of philanthropic funds rather than affecting the rights or freedoms of individuals.

Conclusion

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

ATTACHMENT A

Details of the *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016*

Section 1

The amending instrument is named the *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016* (the amending guidelines).

Section 2

The amending guidelines commence the day after they are registered.

Section 3

The amending guidelines are made under sections 426-103 and 426-110 in Schedule 1 to the *Taxation Administration Act 1953*.

Section 4

The amending guidelines make various changes to the *Private Ancillary Fund Guidelines 2009* and *Public Ancillary Fund Guidelines 2011* as set out in the Schedules to the amending guidelines.

Schedule 1 – amendments to the *Private Ancillary Fund Guidelines 2009*

The amending guidelines made various changes to the *Private Ancillary Fund Guidelines 2009* as set out below.

Update the *Private Ancillary Fund Guidelines 2009* to reflect improvements incorporated in the later made *Public Ancillary Fund Guidelines 2011*

The amending guidelines make a number of changes to the *Private Ancillary Fund Guidelines 2009* to incorporate improvements made in the later *Public Ancillary Fund Guidelines 2011*. ***[Schedule 1, items 4, 11, 31 to 34, guidelines 14.2, 19.3(example), 37.1, 40.1A, 42 and 43(note)]***

The changes predominantly provide additional guidance on the operation of particular Guidelines. The more substantive changes:

- allow a greater number of individuals to qualify as responsible entities;
- provide exceptions for Public Trustees better reflecting their statutory obligations and limitations under the various Public Trustee Acts of the states and territories; and
- incorporate an example on the treatment of social impact investments for the purposes of calculating annual distributions.

Further details on these guidelines can be found in the explanatory statement to the *Public Ancillary Fund Guidelines 2011* and related guidance on the Australian Taxation Office (ATO) website.

Introduce portability into the *Private Ancillary Fund Guidelines 2009*

The amending guidelines introduce consistent treatment for private ancillary funds and public ancillary funds. This provides private ancillary funds, which are private funds set up to provide money or property to deductible gift recipients, with the flexibility to transfer their net assets to other ancillary funds to facilitate the portability of funds between trustees and managers. This option is already available to public ancillary funds. ***[Schedule 1, item 35, guideline 51A]***

With the agreement of the Commissioner of Taxation (Commissioner), a private ancillary fund is permitted to transfer all its assets to another ancillary fund. This allows for the portability of funds between trustees, introducing flexibility in the management of funds and greater contestability with regard to fees and charges.

A fund is eligible for portability if, with the agreement of the Commissioner, the fund transfers all its net assets to another ancillary fund, complies with the minimum annual distribution rules for the year in which the transfer occurs, and any of the assets of the fund have not been received from another ancillary fund during the two previous financial years.

Update the Guidelines to reflect the introduction of the *Australian Charities and Not-for-profits Commission* and the *Charities Act 2013*

Since the introduction of the *Private Ancillary Fund Guidelines 2009*, the regulatory framework applying to private ancillary funds has changed with the introduction of the Australian Charities and Not-for-profits Commission (ACNC) and the *Charities Act 2013*.

Many private ancillary funds will be registered charities by the ACNC (as affected by the *Charities Act 2013*).

The amending guidelines have made some minor changes to reflect the new regulatory framework in which ancillary funds operate. ***[Schedule 1, items 1 and 2, guideline 8]***

Reduce red tape

The amending guidelines introduced a number of changes to reduce red tape for private ancillary funds.

Firstly, the amending guidelines ensure that materials provided to the ACNC do not also have to be provided to the Australian Taxation Office (ATO). ***[Schedule 1, items 5, 19 and 25, guidelines 17.1, 27 and 29]***

Secondly, a small private ancillary fund with both revenue and assets of less than $500,000 (that is, revenue of the fund is less than $1 million and assets of the fund are less than $1 million) can seek a review of its financial report and compliance with the *Private Ancillary Fund Guidelines 2009* rather than a full audit, reducing compliance costs from audit fees. ***[Schedule 1, items 21 to 24 and 28, guidelines 28, 29 and 32]***

Lastly, the amending guidelines provide guidance to clarify that compliance with the ACNC financial report requirements also meets the requirements of the *Private Ancillary Fund Guidelines 2009* for funds that are registered charities. ***[Schedule 1, item 19, guideline 26.1]***

Update the investment strategy rules

The amending guidelines adjust the matters to be considered by trustees in developing and maintaining an investment strategy.

The new matters to be considered are the status of the fund as a registered charity (where the fund is a registered charity), any perceived or actual material conflicts of interest in holding particular investments, including those relating to individuals involved in the decision-making of the fund, and the terms and other circumstances relating to any gift to the fund under a will. ***[Schedule 1, item 26, guideline 30.2]***

The first two new matters were developed following a review by the ATO into the compliance of ancillary funds with their respective guidelines. The ATO identified a small number of ancillary funds that held substantial investments with related parties or had entered into a number of related party transactions with donors and founders of the fund. The investments of these funds tended to be undiversified, may have been structured to increase tax deductions available to donors, and did not reflect prudent investment strategies that trustees of charitable entities are expected to undertake.

The amending guidelines have made some minor adjustments to the investment strategy rules as a reminder to trustees of the core obligations of trustees to manage perceived or material conflicts of interest and to operate a charitable fund for the public benefit.

The amending guidelines also incorporate an increase in the penalty (from 10 to 15 penalty units) for failing to comply with the investment strategy rules to better align with other penalties set out in the guidelines. ***[Schedule 1, item 27, guideline 31]***

The last new matter to be considered by trustees in developing and maintaining an investment strategy allows trustees to have regard to the terms and other circumstances relating to any gift to the fund under a will. This will give trustees the flexibility to adjust their investment strategies in situations in which they receive a large gift from a will that cannot be quickly and easily divested to comply with the general investment strategies obligations. ***[Schedule 1, item 26, guideline 30.2]***

Allowing private ancillary funds to provide loan guarantees over borrowings of deductible gift recipients

The amending guidelines amend the investment limitations to allow a private ancillary fund to provide a loan or similar guarantee over its assets for the sole benefit of a deductible gift recipient provided such a guarantee is consistent with the governing rules of the fund. ***[Schedule 1, item 30, guideline 35.1]***

This will allow private ancillary funds to provide greater assistance to those deductible gift recipients they were established to support.

Amendment to the minimum annual distribution rate

The amending guidelines introduce a new discretion for the Commissioner of Taxation to allow the Commissioner to reduce the minimum annual distribution rate for a fund for a financial year where it is appropriate to do so in the circumstances.

The Commissioner may reduce the minimum annual distribution rate at any time which may be before the financial year commences or after it has finished. The amending guidelines provide a list of factors the Commissioner must consider prior to deciding to reduce the rate for a fund for a financial year.

The new discretion is intended to provide additional flexibility into the regulatory system to assist funds in unusual circumstances, such as those that receive large gifts from a will subject to terms and conditions that limit fund's investment choices. It may also cover cases where a fund has made large distributions above their minimum over one or two years reducing their corpus into the future.

[Schedule 1, items 6 to 10 and 12, guidelines 19, 19.1, 19.1 (note) and 19.7]

Providing further guidance on calculating a distribution in relation to a social impact investment

The amending guidelines add further examples to the guidelines to assist trustees with calculating their distributions for a financial year where the fund has made social impact investments. The guidelines cover investing in lending money to deductible gift recipient at a discount to market rates and providing loan guarantees over loans provided to deductible gift recipients.

The Commissioner of Taxation may also provide safe harbour valuation methods for funds in specific circumstances into the future. ***[Schedule 1, item 11, guideline 19.3 (examples)]***

Remove references to the Australian Valuation Office

The amending guidelines remove references to the Australian Valuation Office from the *Private Ancillary Fund Guidelines 2009*. ***[Schedule 1, items 14 to 17, guidelines 20 to 22]***

The Australian Valuation Office closed on 30 June 2014.

Repealing spent guidelines

The amending guidelines also fix spelling errors and repeal spent and redundant guidelines. ***[Schedule 1, items 3, 13, 18, 36 and 37, guidelines 12 (note), 20(note), 23, 52 to 58]***

Schedule 2 – amendments to the Public Ancillary Fund Guidelines 2011

The amending guidelines made various changes to the *Public Ancillary Fund Guidelines 2011* as set out below.

Update the Guidelines to reflect the introduction of the ACNC and the *Charities Act 2013*

Since the introduction of the *Public Ancillary Fund Guidelines 2011*, the regulatory framework applying to public ancillary funds has changed with the introduction of the ACNC and the *Charities Act 2013*.

Many public ancillary funds will be registered charities by the ACNC (as affected by the *Charities Act 2013*).

The amending guidelines have made some minor changes to reflect the new regulatory framework in which ancillary fund operates. ***[Schedule 2, items 1 and 2, guideline 8]***

Reduce red tape

The amending guidelines introduce a number of changes to reduce red tape for public ancillary funds.

The amending guidelines ensure that materials provided to the ACNC do not also have to be provided to the ATO. ***[Schedule 2, items 5, 18 and 19, guidelines 17.1, 27 and 29]***

The amending guidelines also provide guidance to clarify that compliance with the ACNC financial report requirements also meets the requirements of the *Public Ancillary Fund Guidelines 2011* for funds that are registered charities. ***[Schedule 2, item 17, guideline 26.1]***

Update the investment strategy rules

The amending guidelines adjust the matters to be considered by trustees in developing and maintaining an investment strategy.

The new matters to be considered are the status of the fund as a registered charity (where the fund is a registered charity), any real or perceived material conflicts of interest in holding particular investments, including those relating to individuals involved in the decision-making of the fund, and the terms and other circumstances relating to any gift to the fund under a will. ***[Schedule 2, item 20, guideline 30.2]***

The new matters were developed following a review by ATO into the compliance of ancillary funds with their respective guidelines. The ATO identified a small number of ancillary funds that held substantial investments with related parties or had entered into a number of related party transactions with donors and founders of the fund. The investments of these funds tended to be undiversified, may have been structured to increase tax deductions available to donors, and did not reflect prudent investment strategies that trustees of charitable entities are expected to undertake.

The amending guidelines have made some minor adjustments to the investment strategy rules as a reminder to trustees of the core obligations of trustees to manage perceived or material conflicts of interest and to operate a charitable fund for the public benefit.

The amending guidelines also incorporate a small increase in the penalty (from 10 to 15 penalty units) for failing to comply with the investment strategy rules to better align with other penalties set out in the guidelines. ***[Schedule 2, item 21, guideline 31]***

The last new matter to be considered by trustees in developing and maintaining an investment strategy allows trustees to have regard to the terms and other circumstances relating to any gift to the fund under a will. This will give trustees the flexibility to adjust their investment strategies in situations in which they receive a large gift from a will that cannot be quickly and easily divested to comply with the general investment strategies obligations. ***[Schedule 2, item 20, guideline 30.2]***

Allowing public ancillary funds to provide loan guarantees over borrowings of deductible gift recipients

The amending guidelines amend the investment limitations to allow a public ancillary fund to provide a loan or similar guarantee over its assets for the sole benefit of a deductible gift recipient provided such a guarantee is consistent with the governing rules of the fund. ***[Schedule 2, item 24, guideline 35.1]***

This will allow public ancillary funds to provide greater assistance to those deductible gift recipients they were established to support.

Amendment to the minimum annual distribution rate

The amending guidelines amend introduce a new discretion for the Commissioner of Taxation to allow the Commissioner to reduce the minimum annual distribution rate for a fund for a financial year where it is appropriate to do so in the circumstances.

The Commissioner may reduce the minimum annual distribution rate at any time which may be before the financial year commences or after it has finished. The amending guidelines provide a list of factors the Commissioner must consider prior to deciding to reduce the rate for a fund for a financial year.

The new discretion is intended to provide additional flexibility into the regulatory system to assist funds in unusual circumstances, such as those that receive large gifts from a will subject to terms and conditions that limit fund's investment choices. It may also cover cases where a fund has made large distributions above their minimum over one or two years reducing their corpus into the future.

[Schedule 2, items 6 to 10 and 12, guidelines 19, 19.1 and 19.1 (note) and 19.7]

Providing further guidance on calculating a distribution in relation to a social impact investment

The amending guidelines add further examples to the guidelines to assist trustees with calculating their distributions for a financial year where the fund has made social impact investments. The guidelines cover investing in lending money to deductible gift recipient at a discount to market rates and providing loan guarantees over loans provided to deductible gift recipients.

The Commissioner of Taxation may also provide safe harbour valuation methods for funds in specific circumstances into the future. ***[Schedule 2, item 11, guideline 19.3 (examples)]***

Remove references to the Australian Valuation Office

The amending guidelines remove references to the Australian Valuation Office from the *Public Ancillary Fund Guidelines 2011*. ***[Schedule 2, items 13 to 16, guidelines 20 to 22]***

The Australian Valuation Office closed on 30 June 2014.

Repealing spent guidelines

The amending guidelines update references and repeal spent and redundant guidelines. ***[Schedule 2, items 3, 4, 22, 27 to 29, guidelines 12, 14.1, 32, 50, 52 to 55]***

Other minor changes

The amending guidelines also provide guidance to trustees of public ancillary funds about good practice in relation to the fund's status as a public fund. Specifically, it reminds trustees that it is generally good practice to review the non-binding preferences of donors prior to making distributions from the fund to deductible gift recipients except where their governing rules provide otherwise. ***[Schedule 2, items 25 and 26, guideline 44 (note 2)]***

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

Ref No: MC16-029193

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

Dear ~~Chair~~ John

I refer to correspondence of 15 September 2016 from the Committee Secretary regarding comments made by the Senate Standing Committee on Regulations and Ordinances.

I note the Committee's concerns in relation to minimum private health insurance benefits payable for prostheses listed in the *Private Health Insurance (Prostheses) Rules 2016 (No1)* [F2016L00268] and the *Private Health Insurance (Prostheses) Rules 2016* (No2) [F2016L00381]. The Committee identified that certain prostheses appeared to be listed without a minimum benefit but with a maximum benefit only.

It would seem that there was a formatting error in this very long document. Where only one benefit appears for a particular device, I can confirm that it is intended that this will be the minimum benefit payable for the device.

I also note the Committee's comments in relation to its expectations where an instrument incorporates extrinsic material by reference.

Thank you for bringing these matters to my attention.

Yours sincerely

The Hon Sussan Ley MP

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
PO Box 6100
Parliament House
CANBERRA ACT 2600

Public Lending Right Scheme 1997 (Modification No. 1 of 2016)

Dear Senator John

Thank you for your letter of 15 September 2016 regarding the *Public Lending Right Scheme 1997* (Modification No. 1 of 2016) and seeking my advice regarding two aspects of the Modification's Explanatory Statement: description of consultation prior to my decision to raise the rates of Public Lending Right payments for 2015-16 and the basis for determining the new rates.

The Public Lending Right rates of payment are reviewed annually by my department, taking into consideration the results of library surveys and the available budget. The surveys, also conducted annually, provide the estimated number of books held in public lending libraries. The calculations undertaken by my department showed sufficient funds were available to enable a modest increase in the payment rates for 2015-16. I was satisfied that consultation prior to my decision was not necessary given the changes to the rates of payment are of minor technical nature and do not substantially alter the current arrangements for the Public Lending Right program.

The *Public Lending Right Scheme 1997* is scheduled to sunset on 1 October 2016 and I am remaking the Scheme without significant change. Please note the Explanatory Statement of the new *Public Lending Right Scheme 2016* will address the issues raised in your correspondence.

Thank you for bringing this matter to my attention.

Yours sincerely

MITCH FIFIELD
28/9/16

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

Reference: MB16-000151

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

regords.sen@aph.gov.au

Dear Chair

Response to Letter of 15 September 2016 in Relation to the Delegated Legislation Monitor

Thank you for the letter of 15 September 2016 from Ms Toni Dawes, Committee Secretary, concerning the Senate Standing Committee on Regulations and Ordinances' *Delegated legislation monitor* 5 of 2016.

The Committee requested advice in relation to a number of legislative instruments.

Safety, Rehabilitation and Compensation (Rate of Interest Payable – s26(3)) Notice 2016 [F2016L00464]

Section 4 of the instrument states:

> The rate of interest payable under subsection 26(3) of the Act is specified to be the weighted average yield of 90 day bank-accepted bills, as published by the Reserve Bank of Australia, settled immediately prior to the last day of the thirty day settlement period.

The Committee requested advice in relation to which specific published material or documents this section refers to, the manner in which this published material is incorporated and where it can be accessed.

The weighted average yield of 90 day bank-accepted bills is a matter of fact and is incorporated as published by the Reserve Bank of Australia on its website under 'Interest Rates and Yields – Money Market – Daily – F1' at www.rba.gov.au/statistics/tables/index.html.

Historically, the rate of interest for the purposes of section 26 has been:

- the weighted average yield derived from the Treasury note tender for ninety day notes settled immediately prior to the last day of the thirty day settlement period (1988–2003)
- the weighted average yield of 90 day bank-accepted bills, as published by the Reserve Bank of Australia, settled immediately prior to the last day of the thirty day settlement period (2003–current).

Work Health and Safety Codes of Practice

Subsection 274(3) of the *Work Health and Safety Act 2011* (WHS Act) provides that approved codes of practice made under the WHS Act may apply, adopt or incorporate material from other documents in force at a particular time or from time to time. Technical documents such as Australian Standards are generally incorporated in the codes as these apply from time to time. However where a particular version of a document is cited, for example *AS.NZS 1715:2009 Selection, Use and Maintenance of Respiratory Protective Devices*, the document is incorporated as in force at a particular time.

Duty holders are expected to have regard to a range of information and best practice. Technical material that is incorporated by reference should be read in conjunction with the relevant approved code of practice and legislation.

An approved code of practice provides practical guidance to duty holders on achieving the standards of health and safety required under the WHS Act and the *Work Health and Safety Regulations 2011* (WHS Regulations). Approved codes of practice are not enforceable. A court may have regard to a code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates and may rely on a code in determining what is reasonably practicable in the circumstances to which the code relates (subsections 275(2) and 275(3)). References to technical material such as Australian Standards is included to further guide duty holders on safe ways of undertaking particular types of work.

It is not always appropriate for an approved code of practice to refer to material, such as an Australian Standard, as it exists at a particular point in time since it is likely to be subject to regular revision as risk management practices evolve over time. Moreover, this material is specific to particular industries and undertakings (for example, the storage of hazardous chemicals) and should be well known to duty holders in those industries and undertakings.

While a cost may be incurred by businesses and undertakings that engage in activities to which the Australian Standards apply, the cost is considered minimal given the overall budgets of Commonwealth departments, Commonwealth public authorities and non-Commonwealth licensees covered by the WHS Act. Subsection 274(6) of the WHS Act requires Comcare to ensure that a copy of each approved code of practice and each document applied, adopted or incorporated (to any extent) by an approved code of practice is available for inspection by members of the public without charge.

The WHS Regulations do not extend to the transportation of dangerous goods. Relevant approved codes of practice note that duty holders must continue to comply with the *Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition* (ADG Code) and relevant state and territory laws for the transport of dangerous goods by road and rail. This additional information is provided to assist duty holders. The ADG Code is defined in all of the approved codes to mean the *Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition*, approved by the Australian Transport Council. The ADG Code is freely available from the National Transport Commission website www.ntc.gov.au.

Yours sincerely

Senator the Hon Michaelia Cash
7 / 10 / 2016

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC16-006198

04 OCT 2016

Ms Toni Dawes
Committee Secretary
The Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your letter of 15 September 2016 requesting advice in relation to the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016*. The Senate Standing Committee on Regulations and Ordinances (the Committee) has requested my advice as to the basis on which the amended fee specified in the instrument was determined.

As noted in the explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013*, the determination of the fees is based on TEQSA's estimate of the costs associated with particular activities, such as staff time, travel and associated costs, and considering historic comparative data and modelling of future costs. TEQSA also considered the fees charged by other agencies, including the state and territory accrediting authorities and the former Australian Universities Quality Agency. The Tertiary Education Quality and Standards Agency (TEQSA) considered that the cost of assessing those applications is likely to be substantially the same as the cost associated with assessing applications under former section 9AA of the *Education Services for Overseas Students Act 2000*. Accordingly, TEQSA determined that the same $5000 fee would apply.

TEQSA has prepared an amended explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016* to clarify these matters. A copy of the amended explanatory statement is enclosed for your information.

Thank you for bringing this matter to my attention.

Yours sincerely

Simon Birmingham

Encl.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

EXPLANATORY STATEMENT

Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016

Issued by the authority of the Tertiary Education Quality and Standards Agency (TEQSA)

Subject: *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016*

Authority

Subsection 158(1) of the *Tertiary Education Quality and Standards Agency Act 2011* (the Act) allows TEQSA to determine, by legislative instrument, fees that TEQSA may charge for things done in the performance of its functions.

Purpose and operation

The purpose of the instrument is to amend Determination of Fees No. 3 of 2013 to provide for the fees payable for applications for registration and renewal of registration under the *Education Services for Overseas Students Act 2000* (ESOS Act). The amendment is necessary as a result of amendments to the ESOS Act made by the *Education Services for Overseas Students Amendment (Streamlining Regulation) Act 2015* which commence on 1 July 2016.

The explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013* noted that the determination of the fees in that instrument were based on "TEQSA's estimate of the costs associated with particular activities, such as staff time, travel and associated costs, and considering historic comparative data and modelling of future costs. TEQSA also considered the fees charged by other agencies, including the state and territory accrediting authorities and the former Australian Universities Quality Agency."

The *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013* specified that the fee for assessing applications for a recommendation under section 9AA of the ESOS Act for the purposes of registration or renewal of registration was $5,000. After considering the matters set out in the explanatory statement for the *Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013*, TEQSA considered that the cost of assessing those applications is likely to be substantially the same as the cost associated with assessing applications under former section 9AA of the ESOS Act. Accordingly, TEQSA determined that the same $5,000 fee would apply.

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.

Description of the provisions

Item 1 of the Schedule to the Instrument amends Item 8 of the Table in Schedule A to Determination of Fees No. 3 of 2013. The amendment provides that the fee for applications under ss 9 and 10D of the *Education Services for Overseas Students Act* is $5,000.

Consultation

TEQSA previously consulted in relation to the development of the Determination of Fees No. 1 of 2012 and details of the consultation arrangements undertaken are set out in the explanatory statement to that instrument.

Given that the only amendment made by the instrument is to retain the existing fee for a provision being amended by the *Education Services for Overseas Students Amendment (Streamlining Regulation) Act 2015*, TEQSA did not consider it necessary to undertake further consultations. Consistent with the requirement in subsection 158(5) of the TEQSA Act, the Minister for Education and Training gave written approval to the making of the instrument.

The higher education sector and other stakeholders will be fully consulted as part of the review of TEQSA's cost recovery arrangements, noted above.

Commencement

This Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and will commence on 1 July 2016.

Statement of Compatibility with Human Rights

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

Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees (Amendment) No. 1 of 2016

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

Overview of the Legislative Instrument

The purpose of the instrument is to amend Determination of Fees No. 3 of 2013, which determines the fees charged by TEQSA for things done in the performance of its functions.

Human rights implications

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

Conclusion

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

Professor Nicholas Saunders AO
Chief Commissioner

Linley Martin
Commissioner

Emeritus Professor Cliff Walsh
Commissioner

Tertiary Education Quality and Standards Agency

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.

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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:

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