The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 8 of 2016

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

Acknowledgement

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

General information

The Federal Register of Legislation 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]

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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 16 September 2016 and 13 October 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

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

Instrument	**AD/A320/21 Amdt 1 - Main Landing Gear Wheel Axle [F2016L01470]** **AD/BEECH 300/8 Amdt 2 - Wing Attach Fittings, Bolts and Nuts [F2016L01472]**
Purpose	These instruments correct a typographical error and amend life limits for parts to correspond with those contained in the aircraft manufacturer's documentation
Last day to disallow	1 December 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:

- AD/A320/21 Amdt 1 - Main Landing Gear Wheel Axle [F2016L01470] (Amdt 1 instrument) incorporates French Direction Générale de l'Aviation Civile (DGAC) AD 90-096-010 (B), dated 2 May 1990 (DGAC); and

- AD/BEECH 300/8 Amdt 2 - Wing Attach Fittings, Bolts and Nuts [F2016L01472] (Amdt 2 instrument) incorporates Beechcraft Structural Inspection and Repair Manual 98-39006, Section 57-18-01, Chart 201 (Model 300) or Section 57-18-02, Chart 201 (B300/B300C) (BSIR).

However, neither the text of Amdt 1 and 2 instruments nor their explanatory statements (ESs) expressly state the manner in which DGAC and BSIR are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Access to documents

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

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

With reference to the above, the committee notes that Amdt 1 instrument incorporates DGAC; and Amdt 2 instrument incorporates BSIR. However, neither the text of the instruments nor the ESs provide 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	**Army and Air Force (Canteen) Regulation 2016 [F2016L01455]**
Purpose	Repeals and replaces the Army and Air Force Canteen Service Regulations 1959 due to sunset on 1 October 2016
Last day to disallow	1 December 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

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

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

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

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

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

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

- Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 - Prudential Standard 3PS 310 - Audit and Related Matters [F2016L01437] (Prudential Standard 3PS 310) provides at paragraph 10 that the terms 'reasonable assurance' and 'limited assurance' have the meanings given in the *Framework for Assurance Engagements* issued by the Australian and Assurance Standards Board (AUASB); and

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

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

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Access to documents

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

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

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

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*. However, in this case the committee notes that *Framework for Assurance Engagements* issued by the AUASB; and *APES 110 Code of Ethics for Professional Accountants*, issued by the APESB in December 2010 are available for free online.[1] Where an incorporated document is

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

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.

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

Description of consultation

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

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

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

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

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

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

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

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

Unclear basis for determining fees

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

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

which an individual imposition or change has been calculated. While the committee notes that the fees described above reflect existing fees, the ES does not state the basis on which the fees have been calculated.

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

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

Insufficient information regarding strict liability offences

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

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

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

The committee also draws the minister's attention to the discussion of strict and absolute liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers,*[2] as providing

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

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

Sub-delegation

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

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

In this respect, the committee notes that the ES for the regulation provides detailed information about the nature of the powers to be delegated and the categories of people to whom powers under the regulation may be delegated. However, it provides no justification for the need to sub-delegate certain powers under the regulation to an Australian Public Service level 4 or 6 employee.[3]

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

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

Access to incorporated documents

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

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

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

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

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

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

While the ES to the determination provides a description of these standards and how they may be obtained, the committee notes that they are only available for sale from SAI Global and the International Organization for Standardization store for a fee of $91.09 and CHF 178[4] respectively, and neither the determination nor the ES provides information about whether the standards are otherwise freely and readily available.

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

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Agriculture and Water Resources
Last day to disallow	1 December 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(d)

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

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

The committee notes that, in *Williams No. 2*,[5] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New table item 172 establishes legislative authority for the Commonwealth government to provide a one-off payment to Dairy Australia Limited (Dairy Australia) to assist Dairy Australia to expand delivery of its existing Tactics for Tight Times (TFTT) program.

The objective of the TFTT program is:

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

> To provide funding to Dairy Australia Limited for the provision of information, services and activities to assist dairy farmers in dealing with challenging conditions in the dairy market.
>
> This objective also has the effect it would have if it were limited to providing assistance:
>
> (a) for activities relating to trade and commerce with other countries, or among the States and Territories; or
>
> (b) in or in relation to a Territory; or
>
> (c) to meet Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Article 11; or
>
> (d) for measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation; or
>
> (e) through the delivery of information and services online.

The ES for the regulation identified 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 trade and commerce power (section 51(i));
> - the external affairs power (section 51(xxix));
> - the communications power (section 51(v));
> - the Commonwealth executive power (section 61); and
> - the territories power (section 122).

The regulation thus appears to rely on the trade and commerce power, the external affairs power, the communications powers, the Commonwealth executive power and the territories power as the relevant heads of legislative power to authorise the addition of the items to Schedule 1AB (and therefore the spending of public money under them).

However, it is unclear to the committee how each of the consitutional heads of power relied on supports the funding of the TFTT program, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

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

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

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

New table item 172 to Part 4 of Schedule 1AB appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund Dairy Australia Limited for the provision of information, services and activities to assist dairy farmers in dealing with challenging conditions in the dairy market. Funding for this item will come from the Department of Agriculture and Water Resources':

> Program 1.8: Dairy Industry, which is part of departmental Outcome 1: More sustainable, productive, internationally competitive and profitable Australian agricultural, food and fibre industries through policies and initiatives that promote better resource management practices, innovation, self-reliance and improved access to international markets. Funding details will be set out in the *Portfolio Additional Estimates Statements 2016-17, Agriculture and Water Resources Portfolio.*

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

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

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

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

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

The regulation adds new table item 170 to Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 establishing legislative authority for spending activities in relation to the National Indigenous Law Awards Programme. While the ES is generally helpful in providing information about the proposed administration of the National Indigenous Law Awards Programme, the committee notes that the program will not be subject to merits review. The ES provides the following justification for the exclusion:

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

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

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulation 2016 [F2016L01583]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training
Last day to disallow	1 December 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

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

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

The committee notes that, in *Williams No. 2*,[6] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulation 2016 [F2016L01583] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New table item 169 establishes legislative authority for the Commonwealth government to provide funding of $5.9 million over two years to make the Early Learning Languages Australia (ELLA) initiative nationally available to early childhood education and care services.

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

The objective of the ELLA initiative is:

> To deliver, through the use of online communication services, language education to children, including by:
>
> (a) maintaining and developing language learning applications for download onto tablet devices; and
>
> (b) developing and providing support materials and professional development to educators; and
>
> (c) funding the purchase of tablet devices.

The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

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

The regulation thus appears to rely on the communications power as the relevant head of legislative power to authorise the addition of item 169 to Schedule 1AB (and therefore the spending of public money under it). However, it is unclear to the committee how the funding of the ELLA initiative is sufficiently connected to the power to make laws with respect to postal, telegraphic, telephonic and other like services so as to be authorised by this head of legislative power.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672]**[7]
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	21 November 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

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

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

The committee notes that, in *Williams No. 2*,[8] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672] (the regulation) adds three new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) to establish legislative authority for spending in relation to these items. New table item 159 establishes legislative authority for the Commonwealth government to fund the National Science Week and strategic science communication activities.

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7 The committee notes that it deferred consideration of this instrument in *Delegated legislation monitors* 6 and 7 of 2016.

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

The committee notes that the objective of the 'National Science Week and strategic science communication activities' initiative is to fund a broad range of activities that are part of National Science Week, and which seek to enhance the community's understanding of, and interest in, science, technology, engineering and mathematics. The regulation provides that the objectives of the scheme also have the effect they would have if they were limited to providing funding in relation to eleven purposes tied to a Constitutional head of power. The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the trade and commerce power (section 51(i));
> - the communications power (section 51(v));
> - the astronomical and meteorological observations power (section 51(viii));
> - the statistics power (section 51(xi));
> - the power to make special laws for people of any race (section 51(xxvi));
> - the external affairs power (section 51(xxix));
> - the power to make grants to the States (section 96);
> - the Territories power (section 122); and
> - the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)).

The committee notes that the objective of the National Science Week initiative, when read in conjunction with the constitutional authority set out in the regulation, appears to be drafted in a manner similar to 'severability provisions' in primary legislation. Severability provisions are designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power under the Constitution.

Severability provisions operate in conjunction with section 15A of the *Acts Interpretation Act 1901*, which provides that Acts shall be read and construed so as not to exceed the legislative power of the Commonwealth. Section 13(1)(a) of the *Legislation Act 2003* applies section 15A of the *Acts Interpretation Act 1901* to legislative instruments.

With respect to section 15A of the *Acts Interpretation Act 1901*, the committee notes that the Office of Parliamentary Counsel, Drafting Direction No. 3.1 on constitutional law issues, provides the following guidance for drafting severability provisions:

> Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.[9]

Noting that section 15A is subject to limitations, the committee's consideration of legislative instruments that appear to rely on the ability of a court to read down provisions must involve an assessment of the effectiveness of any severability or reading down provisions to enable a legislative instrument to operate within available heads of legislative power.

Drafting Direction 3.1 also provides the following example of one of the limitations of section 15A:

> …if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did not exhaust the purported operation of the operative provision in question.[10]

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

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulation supports the funding for the National Science Week initiative, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

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

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9 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

10 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

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

No description of consultation

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

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

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

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

Sub-delegation

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

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

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

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

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

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

Drafting

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

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

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

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

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

Incorporation of documents

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

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

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

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Access to documents

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

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

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

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

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

Further response required

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

Correspondence relating to these matters is included at Appendix 2.

Instrument	**Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016 [F2016L00619]**
Purpose	Establishes by-laws pursuant to the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* to conserve biodiversity and control activities on Aboriginal Land in the Jervis Bay Territory
Last day to disallow	9 November 2016
Authorising legislation	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Availability of merits review

The committee commented as follows:

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

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

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

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

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

Minister's response

The Minister for Indigenous Affairs advised:

> In response to the Committee's comments, the exclusion of external merits review for decisions by the Wreck Bay Aboriginal Community Council (WBACC) under section 71 of the *Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016* (the By-Laws) is justified in the context of the purpose of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Act) and the By-laws.
>
> The Act creates WBACC to hold and exercise the Council's powers as owner of Aboriginal Land in the Jervis Bay Territory for the benefit of the local Indigenous community. In accordance with section 52A of the Act, the By-Laws regulate and manage the use of Aboriginal Land, including providing WBACC with the power to issue certain permits to individuals authorising certain activities that would otherwise be prohibited. External merits review of the Council's decisions in relation to permits would be inconsistent with Council's role as owner of the land in the Jervis Bay Territory.
>
> To address the concerns of the Committee, my Department is consulting with WBACC with a view to lodging a replacement Explanatory Statement in accordance with the process set out in paragraph 15G(4)(b) of the *Legislation Act 2003*. This Explanatory Statement will include a statement setting out the reasons why external merits review is not justified.

Committee's response

The committee thanks the minister for his response.

The committee also thanks the minister for his advice that the Department of the Prime Minister and Cabinet is consulting with the council with a view to lodging a replacement ES that addresses the committee's concerns.

The committee notes the minister's advice that external merits review of the council's decisions in relation to permits would be inconsistent with the council's role as owner of the land in the Jervis Bay Territory. The committee also notes that section 71(6)(b) of the instrument requires the Council to give to a person who requests reconsideration of an initial decision notice of the result of the reconsideration and of the grounds for the result.

However, in the absence of further information about:

- the characteristics of decisions made under Part 7 of the instrument; and
- how the council's role as owner of the land in the Jervis Bay Territory is inconsistent with merits review of the council's decisions

it remains unclear to the committee whether the exclusion of merits review in this instance is justified.

The committee therefore 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	**Amendment of List of Exempt Native Specimens - Freshwater and Marine Animals (28/09/2016) [F2016L01572]**
Purpose	Varies the List of Exempt Native Specimens to include specimens from various fisheries and aquaculture programs
Last day to disallow	1 December 2016
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment and Energy
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 this requirement, the committee notes that the ES for this instrument includes a statement of compatibility that appears to be missing part of the human rights compatibility analysis.

However, the committee notes that the instrument is compatible with human rights as it does not raise any human rights issues.

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

Instrument	**ASIC Corporations (Exchange-Traded Derivatives: Multiple Issuers) Instrument 2016/883 [F2016L01490]** **ASIC Corporations (Repeal) Instrument 2016/885 [F2016L01477]**
Purpose	The instruments provide that where more than one Australian financial services licensee is involved in arranging for a derivative to be entered into or acquired on a financial market, only the market participant need prepare a Product Disclosure Statement (PDS) or a Short-Form PDS for the derivative
Last day to disallow	1 December 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

With reference to these requirements, the committee notes that the shared ES for the instruments states:

> ASIC has reviewed its policy underlying the class order. In light of this review and following public consultation, ASIC considers that this class order relief is necessary, fit-for-purpose and relevant.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the committee considers that the shared ES for the instruments, while stating that consultation occurred in relation to the making of the instruments, does not describe the *nature* of the consultation undertaken (such as, for example, the manner and purpose of the consultation, the parties to the consultation; and the issues raised in, and outcomes of, the consultation).

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

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

Instrument	**Christmas Island Utilities and Services (Electricity Supply and Services Fees) Determination 2016 [F2016L01573]** **Cocos (Keeling) Islands Utilities and Services (Electricity Supply and Services Fees) Determination 2016 [F2016L01574]**
Purpose	The determinations set the fees payable in relation to the supply of electricity on Christmas and the Cocos (Keeling) Islands
Last day to disallow	1 December 2016
Authorising legislation	*Christmas Island Utilities and Services Ordinance 2016; Cocos (Keeling) Islands Utilities and Services Ordinance 2016*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The determinations were registered on the Federal Register of Legislation on 30 September 2016. Section 2 of each of the determinations provides that the determinations commence on 3 October 2016. However, with reference to section 2, the ES for each determination states:

> This section provides that this Determination is to commence on the day it is registered on the Federal Register of Legislation.

While the committee understands that the determinations commenced on 3 October 2016, the committee notes that ESs should be drafted with sufficient care to avoid potential confusion for the anticipated users of instruments.

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

Instrument	**Commonwealth Scholarships Guidelines (Research) 2017 [F2016L01602]** **Other Grants Guidelines (Research) 2017 [F2016L01603]**
Purpose	The instruments set out the purpose and programs under which grants may be made for postgraduate research scholarships and science, social science and humanities research
Last day to disallow	7 February 2016
Authorising legislation	*Higher Education Support Act 2003*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

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

With reference to the above, the committee notes that the definition of *research* in each of the guidelines incorporates the Frascati Manual 2015, maintained by the Organisation for Economic Cooperation and Development. However, neither the text of the guidelines nor the ESs state the manner in which the Frascati Manual 2015 is incorporated.

In this case, the committee understands the Frascati Manual 2015 to be incorporated as at the commencement of the guidelines. However 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 draws this matter to the minister's attention.

Instrument	**Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01557]**
Purpose	Implements changes to the Australian Defence Force (ADF) military justice system, including giving the Inspector-General ADF responsibility for some functions previously conducted within the ADF, and the necessary powers to perform these functions
Last day to disallow	1 December 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

Authorisation

The Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01557] (the regulation) amends regulation 70A of the Defence (Inquiry) Regulations 1985 to provide for the Chief of the Defence Force to authorise an officer or class of officers to appoint inquiry officers or assistants. The power to appoint officers under regulation 70A was previously limited to commanding officers.

The ES for the regulation states that regulation 70A has been amended to 'provide greater flexibility in the appointment of inquiry officers' but provides no further justification for the expansion of the class of officers who may be authorised to appoint inquiry officers or assistants, nor guidance as to how the Chief of the Defence Force will assess who to authorise to appoint inquiry officers or assistants.

However, in this case, the committee notes that this authorisation is confined to the administrative function of appointing inquiry officers and assistants for and on behalf of the Chief of the Defence Force.

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

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 24 of 2016 [F2016L01511]**[11]
Purpose	Determine various reporting standards
Last day to disallow	1 December 2016
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

With reference to these requirements, the committee notes that the shared ES for the determinations states:

> 3. Consultation
>
> The instruments are minor or machinery in nature and do not substantially alter existing arrangements.

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 minor and machinery nature of the determinations. 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 1.

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11 The committee notes that the issue raised here also applies to: Financial Sector (Collection of Data) (reporting standard) determination Nos 25 to 34 of 2016 [F2016L01512]; [F2016L01516]; [F2016L01521]; [F2016L01510]; [F2016L01513]; [F2016L01514]; [F2016L01515]; [F2016L01535]; [F2016L01502]; and [F2016L01500].

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

Instrument	**Telecommunications (Data for emergency warning systems) Instrument 2016 [F2016L01600]**
Purpose	Specifies emergency management persons and emergency laws under state and territory legislation for the purposes of access to Integrated Public Number Database information to issue telephone alerts in the event of an emergency
Last day to disallow	9 February 2016
Authorising legislation	*Telecommunications Act 1997*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of State Acts

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.

With reference to the above the committee notes that the definition of *emergency law* in section 6 of the insturment incorporates State and Territory Acts. However, neither the text of the instrument nor the ES states the manner in which the State and Territory Acts are incorporated.

The committee acknowledges that section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory Acts can be taken to be references to versions of those Acts 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 10A 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 State and Territory Acts are incorporated.

The committee draws this matter to the attention of the minister.

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 (Audit Relief) Instrument 2016/784 [F2016L01542] ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 [F2016L01532] ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 [F2016L01565] ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 [F2016L01538] Australian Prudential Regulation Authority (confidentiality) determination No. 2 of 2016 [F2016L01471] Australian Meat and Live-stock Industry (Export Licensing) Amendment (Approved Arrangements) Regulation 2016 [F2016L01551] Bass Strait Central Zone Scallop Fishery (Closure) Direction No. 2 2016 [F2016L01562]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

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

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

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

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time). 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	ASIC Corporations (Repeal and Transitional) Instrument 2016/396 [F2016L01497] Australian Border Force (Secrecy and Disclosure) Amendment (2016 Measures No. 1) Rule 2016 [F2016L01461] Australian Passports (Application Fees) Amendment (2016 Measures No. 1) Determination 2016 [F2016L01597] Currency (Royal Australian Mint) Amendment Determination (No. 1) 2016 [F2016L01606] Electricity Supply Fees Determination 2017 (Jervis Bay Territory) [F2016L01587] Excise concessional spirit approvals guidelines 2016 (No. 2) [F2016L01554] Excise (Denatured spirits) Determination 2016 (No. 3) [F2016L01523] Excise (Mass of CNG) Determination 2016 (No. 2) [F2016L01522] Excise (Volume—recycled waste oil) Determination 2016 (No. 1) [F2016L01517] Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2016 (No. 2) [F2016L01519] Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2016 (No. 2) [F2016L01520] Export Control (Animals) Amendment (Approved Arrangements) Order 2016 [F2016L01435] Fuel Tax (Fuel Blends) Determination 2016 (No. 1) [F2016L01518]

	Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 5) [F2016L01446] Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 6) [F2016L01463] Private Health Insurance (Complaints Levy) Rules 2016 [F2016L01450] Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 4) [F2016L01447] Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 5) [F2016L01464] Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596] Public Lending Right Scheme 2016 [F2016L01549] Remuneration Tribunal Determination 2016/11 - Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2016L01508] Safety, Rehabilitation and Compensation (Rates of Interest Payable) Notice 2016 [F2016L01469] Telecommunications (Data for emergency warning systems) Instrument 2016 [F2016L01600] Vehicle Standard (Australian Design Rule 2/01 – Side Door Latches and Hinges) 2006 Amendment 2 [F2016L01459]
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.[12]

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

Chapter 2
Concluded matters

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

Correspondence relating to these matters is included at Appendix 2.

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)
Previously reported in	*Delegated legislation monitor* 7 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:

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

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 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.

Minister's response

The Minister for Infrastructure and Transport advised:

> the Civil Aviation Safety Authority (CASA) has advised me that in future it will ensure that legislative instruments that reference another instrument or document, and the accompanying explanatory statement for such instruments, expressly state the manner in which the documents are incorporated. CASA further advises it intends to revoke and re-issue [AD/GAS/1] to deal appropriately with incorporation, as well as revising the explanatory statement…to ensure that the manner of incorporation of documents, and where they can be obtained, is clearly explained.

Committee's response

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

In concluding this matter, the committee notes the minister's advice that CASA intends to revoke and re-issue the instrument to include information on how the documents are incorporated and where they may be freely obtained.

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

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The APVMA [Australian Pesticides and Veterinary Medicines Authority] wishes to clarify that consistently with subsection 14(2) of the *Legislation Act 2003* (Legislation Act), the reference in the Instrument to the Agricultural and Veterinary Labelling Codes is a reference to those Codes as in force at the commencement of the Instrument – namely, 26 July 2016. The APVMA's view is that it would not be possible for the Instrument to incorporate the Codes as in force from time to time under subsection 14(1) of the Legislation Act, because the Codes are neither legislative instruments covered by subsection 14(3) of the Legislation Act nor provisions of an Act.
>
> The APVMA accepts the Committee's expectation that the manner of incorporation of extrinsic material is clearly specified in the instrument and explanatory statement and undertakes to ensure that future instruments and explanatory statements are consistent with those expectations.

Committee's response

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

The committee also thanks the minister for his advice that future instruments and ESs will state the manner in which documents are incorporated.

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

Retrospective commencement

The committee commented as follows:

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.

Minister's response

The Minister for Justice advised:

> *Schedule 1, items 3, 5 and 6*
>
> The provisions of the Regulation with retrospective effect relate to paragraph (b) of the definition of 'national policing information' in the ACC Act. The provisions prescribe three additional systems that hold 'national policing information' with effect from 1 July 2016: the Australian National Child Offender Register (NCOS), the Managed Person System (MPS) and the National Child Offender System (NCOS).
>
> These systems were not included in the NPI Regulation, meaning that information held on them was not captured in the definition of 'national policing information' from 1 July 2016 until 3 September 2016. The definition of 'national policing information' underpins the ability of the ACIC to perform 'national policing information functions' and the ability of the ACIC to collect and disclose vital information to Australian police and law enforcement agencies.
>
> The NCOS is a web-based application that allows Australian police to record and share child offender information. It directly enables police in each state and territory to manage key information to meet their requirements under respective child protection legislation.
>
> The NCOS consists of the ANCOR and the MPS.
>
> - The ANCOR allows authorised police officers to register, case manage and share information about registered persons. It assists police to uphold child protection legislation in their state or territory.

- The MPS holds information on offenders who are charged but not convicted, or after an offender's reporting obligations have been completed.

The prescribed systems relate to offences against children and facilitate decision-making in the context of law enforcement. They directly enable police in each state and territory to manage key information to meet their requirements under respective child protection legislation. The systems are not used for employment screening or other decision making purposes. As such, a criminal history check (which the ACIC is legislated to charge for) does not involve a search of the systems.

Detrimental effect

In light of the purpose for which information held on NCOS, ANCOR and MPS data bases are used, it is unlikely that their use will create a detriment for a person other than the Commonwealth, within the meaning of subsection 12(2) of the *Legislation Act 2003*. That is, information that supports the day to day operational activities of police officers would not ordinarily be used in a context that creates a detriment for a person.

Committee's response

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

In concluding this matter, the committee notes the minister's advice that the 'national policing information' held on the three additional systems with effect from 1 July 2016 supports the day to day operational activities of police officers and would not ordinarily be used in a context that creates a detriment for a person.

The committee also notes the advice that it is unlikely that the limited use of the abovementioned databases will create a detriment for a person other than the Commonwealth, in accordance with subsection 12(2) of the *Legislation Act 2003*.

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

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 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*.

Minister's response

The Treasurer advised:

> Treasury has sought clarification from the Australian Prudential Regulation Authority (APRA) on whether an assessment of the compatibility of the instruments with human rights, as required by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, was undertaken.

APRA indicated that the assessment had in fact not been undertaken and noted that a further seven instruments have also not been assessed as required.

APRA has now rectified this and undertaken the required assessment against the nine instruments, and an additional Explanatory Statement with the statement of compatibility has now been lodged on the Federal Register of Instruments (see Attachment A).

APRA has assured Treasury that all future instruments will now be assessed as required and will include a statement of compatibility.

Committee's response

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

The committee notes that a replacement shared ES for the determinations has been registered on the Federal Register of Legislation and includes a statement of compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*.[1]

The committee also thanks the Treasurer for his advice that APRA will ensure that future instruments include a statement of compatibility.

1 The committee notes that the replacement shared ES also applies to Banking, Insurance and Life Insurance (prudential standard) determinations Nos 3 to 9 of 2016 [F2016L01433]; [F2016L01437]; [F2016L01434]; [F2016L01436]; [F2016L01431]; [F2016L01432]; and [F2016L01440].

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

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

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

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 is incorporated as in force at the commencement of the Biosecurity Charges Imposition (Customs) Regulation 2016 and the Biosecurity Charges Imposition (General) Regulation 2016.

Committee's response

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

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 monitors* 6 and 7 of 2016

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 first 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 first 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.

Minister's second response

The Minister for Health and Aged Care advised:

> In regards to your question as to whether an individual will be aware of what standards apply to an individual operating under section 10 of the Biosecurity (Human Health) Regulation 2016, it is important to note that the individual who performs this function will be doing so under the same standards and requirements that guide their daily business as medical professionals. A registered medical practitioner will be aware of the processes and standards required when collecting specimens for biosecurity purposes, as it is a key component of their competency as a medical professional.
>
> As noted in my previous correspondence, these standards include those required by the National Association of Testing Authorities, which ensure compliance with relevant international and Australian standards and competencies for testing of samples. Additionally, the Australian/New Zealand Standard Safety for microbiological safety in laboratories (AS/NZ 2243.3:2010) provides guidance on the handling of diagnostic specimens. The National Health and Medical Research Council also provides Australian Guidelines for Prevention and Control of Infection in Healthcare, which provides information on storage and transportation.
>
> It is not practical, and potentially duplicative, to list all the specific standards that medical professionals are required to operate under as part of their core competencies. I am fully confident that medical professionals operating under the *Biosecurity Act 2015* will adhere to standards required of them as medical professionals, which are consistent with the Regulation.

Committee's second response

The committee thanks the minister for her response.

However the committee notes that scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers does not trespass unduly on personal rights and liberties.

The committee's inquiry in relation to this regulation arose from concerns that key terms in the regulation may be insufficiently precise. The committee was 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; and that an individual required to provide a body sample in accordance with the regulation should have information regarding the medical or professional standards with which officers must comply when taking or storing body samples.

The committee notes that minister's advice that:

- registered medical practitioners will be aware of the processes and standards required when collecting specimens for biosecurity purposes, as it is a key component of their competency as a medical professional;
- the Australian/New Zealand Standard Safety for microbiological safety in laboratories (AS/NZ 2243.3:2010) provides guidance on the handling of

diagnostic specimens; and that the National Health and Medical Research Council also provides Australian Guidelines for Prevention and Control of Infection in Healthcare, which provide information on storage and transportation; and

- the minister is fully confident that medical professionals operating under the *Biosecurity Act 2015* will adhere to standards required of them as medical professionals, which are consistent with the Regulation.

However, the committee remains concerned that an individual who is required under the regulation to undergo medical examination and have body samples taken, including without consent in certain circumstances, may not know what standards apply to the taking, storing, transporting, labelling and use of such samples.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the inclusion of insufficiently precise terms in delegated legislation, the committee draws this matter to the attention of senators.

Instrument	**Biosecurity Regulation 2016 [F2016L00756]**
Purpose	Prescribes information relating to the exercise of powers by officials under the *Biosecurity Act 2015* and sets information and reporting requirements for those regulated by the *Biosecurity Act 2015*
Last day to disallow	21 November 2016
Authorising legislation	*Biosecurity Act 2015*
Department	Agriculture and Water Resources
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:

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

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

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

However, the committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which exempt instruments are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The Biosecurity (Prohibited and Conditionally Non-prohibited Goods) Determination 2016 and the Biosecurity (Movements between Parts of Australian Territory) Declaration 2016 are incorporated as in force at the commencement of the Biosecurity Regulation 2016.

Committee's response

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

Instrument	**Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853]**
Purpose	Specifies the events that are reportable biosecurity incidents in relation to goods that are subject to biosecurity control
Last day to disallow	21 November 2016
Authorising legislation	*Biosecurity Act 2015*
Department	Agriculture and Water Resources
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 Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853] (the incidents determination) incorporates Biosecurity (Prohibited and Conditionally Non-Prohibited Goods) Determination 2016 (the non-prohibited goods determination), which is made under subsection 174(1) of the Biosecurity Act; and
- the ES to the incidents determination states that the non-prohibited goods determination is incorproated as in force from time to time.

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The Biosecurity (Prohibited and Conditionally Non-Prohibited Goods) Determination 2016 (non-prohibited goods determination) is incorporated as in force at the commencement of the Biosecurity (Reportable Biosecurity Incidents) Determination 2016. The explanatory statement for the Biosecurity (Reportable Biosecurity Incidents) Determination 2016 will be amended to remove the reference to the non-prohibited goods determination being incorporated as in force from time to time.

Committee's response

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

The committee notes the minister's undertaking that the incidents determination will be amended to remove the reference to the non-prohibited goods determination being incorporated as in force from time to time.

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)
Previously reported in	*Delegated legislation monitor* 7 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 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

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 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.

Minister's response

The Minister for Infrastructure and Transport advised:

> Civil Aviation Safety Authority (CASA) has advised me that in future it will ensure that legislative instruments that reference another instrument or document, and the accompanying explanatory statement for such instruments, expressly state the manner in which the documents are incorporated. CASA further advises it intends to revoke and re-issue CASA 100/16 to deal appropriately with incorporation, as well as revising the

explanatory statement to ensure that the manner of incorporation of documents, and where they can be obtained, is clearly explained.

Committee's response

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

In concluding this matter, the committee notes the minister's advice that CASA intends to revoke and re-issue the instrument to include information on how the documents are incorporated and where they may be freely obtained.

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

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Minister for Foreign Affairs advised:

> ISO 230-2:1988 is outdated and was incorporated erroneously in the Determination. The current standard is ISO 230-2:2014, *Test code for machine tools – Part 2: Determination of accuracy and repeatability of positioning of numerically controlled axes.*
>
> In response to the Committee's request for advice on the manner of incorporation of documents in the Determination, ISO 230-2:2014 and IEEE standard 528-2001 are incorporated as in force at the commencement of the Determination pursuant to section 14 of the *Legislation Act 2003*.
>
> I will amend the Determination [and explanatory statement] as soon as practicable to reflect the above advice to the Committee.

Committee's response

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

The committee notes the minister's undertaking to amend the determination to incorporate the correct ISO standard and to specify the manner of incorporation.

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 section 3 of the determination incorporates ISO 230-2:1998 and IEEE standard 528-2001. However, neither the text

of the determination nor the ES provides a description of ISO 230-2:1998 and IEEE standard 528-2001 or indicates how they may be freely obtained.

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

Minister's response

The Minister for Foreign Affairs advised:

> The Committee has requested my advice on the description of documents incorporated into the Determination and how those documents may be obtained.
>
> ISO 230-2:2014 and IEEE standard 528-2001 are internationally recognised standards used by the Nuclear Suppliers Group, of which Australia is a member, to define export control parameters for measuring accuracy and repeatability of certain equipment used for materials processing.
>
> Section 3 of the Determination defines 'repeatability' in reference to IEEE standard 528-2001. The definition includes the following explanatory note:
>
> > The IEEE standard explains that repeatability is the level of similarity between measurements of the same variable under the same operating conditions when changes in conditions or non-operating periods occur between measurements.
>
> IEEE standard 528-2001 can be purchased from the IEEE website (www.ieee.org). ISO 230-2:2014 can be purchased from the ISO website (www.iso.org).
>
> I will amend the Determination [and explanatory statement] as soon as practicable to reflect the above advice to the Committee.

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 additional advice that the incorporated standards are internationally recognised standards used by the Nuclear Suppliers Group, of which Australia is a member, to define export control parameters for measuring accuracy and repeatability of certain equipment used for materials processing.

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

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.

A fundamental principle of the rule of the law is that every person subject to the law should be able to freely and readily access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee draws the *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) report of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament to the attention of senators, ministers and instrument-makers, as the matters raised are relevant to all Australian jurisdictions.

Instrument	**Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 1) [F2016L01209]**
Purpose	Makes a consequential amendment to the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to reflect the making of the Charter of the United Nations (Sanctions – Iran) Regulation 2016 [F2016L01181]
Last day to disallow	21 November 2016
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Drafting

The committee commented as follows:

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

Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2016C00782] (the principal declaration) to reflect the making of the Charter of the United Nations (Sanctions – Iran) Regulation 2016 [F2016L01181].

The amendment declaration replaces Schedule 1 of the principal declaration and specifies the provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to the *Charter of the United Nations Act 1945*. However, the committee notes that the following regulations declared in replacement Schedule 1 to be UN sanction enforcement laws no longer exist:

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

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

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

Minister's response

The Minister for Foreign Affairs advised:

> These regulations were repealed following the easing and subsequent cessation of UNSC sanctions on Cote d'Ivoire, and should not appear in the Declaration.
>
> I will amend the [Declaration and explanatory statement] as soon as practicable to reflect the above advice to the Committee.

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 amend the declaration and its ES to remove the references to the UN sanction enforcement laws which no longer exist.

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)
Previously reported in	*Delegated legislation monitor* 7 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.

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.

Minister's response

The Minister for Infrastructure and Transport advised:

> With regard to the *Coastal Trading (Revitalising Australian Shipping Act 2012* - Section 11 Exemption for cruise vessels 2018 extension [F2016L01308], I can advise the Committee that in 2015, the Australian Government brought forward a proposal to reform Australia's coastal shipping sector through the Shipping Legislation Amendment Bill 2015. This bill would have had the effect of removing the existing exemption for large cruise ships and requiring them to participate in the coastal trading regime by compelling them to operate under a coastal trading permit.
>
> With the defeat of the Bill in the Senate, the Government is currently considering its options for reforming coastal shipping and holding consultations with key stakeholders to help inform the final policy position. While reforms are pursued, I approved an extension to the existing Section 11 exemption. The cruise shipping industry has informed me that as it sets and markets its itineraries two years in advance, it requires certainty for at least this period.
>
> Given that the Government is still working to finalise its future reform path, an extension of the existing exemption is, in my assessment, preferable to any more permanent removal of cruise ships from coastal trading licensing that an amendment to the legislation would provide.

Committee's response

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

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 monitors* 5 and 7 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 first 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 first 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*.

Committee's second response

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 description of consultation in accordance with the *Legislation Act 2003*.

The committee has concluded its examination of the instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulation 2016 [F2016L00686]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Health
Last day to disallow	21 November 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Addition of matters to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (constitutional 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 committee notes that, in *Williams No. 2*,[2] the High Court confirmed that a Constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulation 2016 [F2016L00686] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New table item 162 establishes legislative authority for the Commonwealth government to fund the Biomedical Translation Fund.

The objective of the Biomedical Translation Fund is:

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

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

(a) with respect to the provision of medical and dental services; or

(b) to give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Articles 2 and 12; or

(c) that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the social welfare power (section 51(xxiiiA));
> - the external affairs power (section 51(xxix)); and
> - the Commonwealth executive power and express incidental power (section 61 and section 51(xxxix)).

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

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

In relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.[3] The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the instrument or the ES. However, while the regulation states that it is giving effect to Australia's obligations under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights, it does not explain how the regulation is appropriately adapted to implement specific obligations under these articles.

With respect to the Commonwealth executive power and express incidental power, it is unclear to the committee how the funding of the initiative may be regarded as an 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'.[4]

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

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

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

Minister's response

The Minister for Finance advised:

> The Biomedical Translation Fund (BTF) is a for-profit fund that will provide $250 million of Commonwealth capital to licensed private sector fund managers, who will secure at least matched private capital, to invest in biomedical start-ups.
>
> The aim of the BTF is to improve health outcomes and contribute to significant economic gains for Australia. By investing in biomedical start-ups and encouraging the translation of biomedical discoveries into commercial realities, the BTF may result in the development of improved and innovative treatments, therapeutics, and medical devices than those that currently exist.
>
> In addressing a gap in the 'research pipeline' where great ideas can be lost due to lack of market funding, the BTF will transform biomedical discoveries into tangible products that would otherwise not have been realised without the existence of the BTF. Funding from the BTF will also speed up the translation of biomedical discoveries, resulting in Australians gaining earlier access to better healthcare and improvements in the efficacy of the Australian health system.
>
> Articles 2 and 12 of the International Covenant of Economic, Social and Cultural Rights, and the 'General Comments' adopted by the Committee on Economic, Social and Cultural Rights are to the effect that the right to health requires contracting states to foster research and the provision of information.
>
> The BTF will be of national significance, cross-jurisdictional and beyond the remit of any particular state and territory governments as it will result in improved health outcomes and contribute to significant economic benefits for Australia.
>
> The investments from the BTF will result in the formation of Australian biomedical companies, increased employment in the Australian biomedical sector and possible financial returns to the Commonwealth and participating private sector investors.
>
> It is also expected that funding provided through the BTF will result in a change to the Australian biomedical sector in that it will increase the risk tolerance of the sector's investors which will in turn result in the growth of this sector.
>
> As investment decisions will be the responsibility of fund managers licensed under the BTF, it is expected that investments will be made to biomedical start-ups throughout Australia.
>
> Given this cross-jurisdictional remit, it is considered that the BTF is an activity best performed by the Commonwealth.
>
> 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.

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2016 - GRS 001 - Reporting Requirements [F2016L01225][5]**
Purpose	Determine various reporting standards relating to financial or accounting data of Level 2 insurance groups
Last day to disallow	21 November 2016
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Inadequate 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 shared ESs for the determinations state:

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

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

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

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

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

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

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

Minister's response

The Minister for Revenue and Financial Services advised:

> In regards to the Committee's concern regarding the consultation undertaken, APRA notes that in 2014, APRA undertook a project to identify opportunities for regulatory cost savings for industry. As part of the project, APRA undertook a structured consultation process with each APRA-regulated industry (via the relevant industry associations).
>
> Together, the membership of these industry associations represented all APRA-regulated industries. Submissions from industry bodies suggested that changes to the reporting framework could be made in areas where the frequency of reporting could be reduced.
>
> In 2015, the duplicate reporting requirement represented by the unaudited Level 2 second semi-annual and audited Level 2 annual forms falling due on the same day was identified by industry participants and APRA as an opportunity for regulatory cost savings.
>
> Removing the duplicate reporting and reducing the burden on industry is overall beneficial to industry and as it was a result of earlier engagement with industry, further consultation with industry was not considered necessary.
>
> As requested by the Committee, APRA will shortly re-issue the explanatory statement for the Instruments with the above description of the consultation. The updated explanatory statement is attached.
>
> APRA has advised that it will also commit to providing appropriate and fuller descriptions of its consultation processes in any subsequent explanatory material it issues.

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 received by the committee. The replacement ES includes a description of consultation in accordance with the requirements of the *Legislation Act 2003*.

The committee also thanks the minister for her advice that APRA will commit to providing adequate descriptions of its consultation processes in future ESs.

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 monitors* 6 and 7 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.

Minister's second response

The Minister for the Environment and Energy advised:

> The referenced standards provide technical detail for the energy performance and labelling requirements for products covered by the instrument.
>
> Greenhouse Energy Minimum Standards determinations extract selected definitions and text to ensure any person affected by, or interested in, the determination can ascertain if a product is covered (or excluded) by the relevant instrument. This allows persons interested in the content of the relevant laws to understand what products are regulated by the instrument without having to purchase the referenced standards.
>
> The Australian Government envisages that the parties most likely to wish to access the referenced documents are businesses whose products are covered by the instrument. They can readily purchase the standards online at the SAI Global website.

> The Department of the Environment and Energy is not aware of any complaints from the regulated community about the cost of purchasing the standards referenced in the instrument.
>
> It is common practice internationally to set these kinds of requirements in standards, and the regulated community has consistently indicated it is comfortable with, and supports, this arrangement.
>
> If a member of the regulated community or the general public wanted to see the standards referenced in the instrument without purchasing them, then they can freely access them through the National Library and State Libraries, and from a range of public libraries, universities and other education and training providers.
>
> Accordingly, the Government considers that there is free and ready access to the referenced standards for parties affected by or otherwise interested in the application of the law and the content of relevant standards.
>
> Standards Australia is a non-government, not-for-profit organisation. The Government recognises Standards Australia, via a Memorandum of Understanding, as the peak non-government standards development body in Australia.
>
> Standards Australia prepares standards through consultative and other processes with businesses, consumers and technical experts that involve significant effort and expenditure. Copyright in Australian Standards and Australian/New Zealand Standards vests in Standards Australia. SAI Global Limited is the exclusive licensee for all such standards, and also manages Australian copyright permissions and licensing on behalf of the International Electrotechnical Commission (IEC). Standards Australia recovers the costs of its operations through licence fees paid by SAI Global out of revenue generated from the sale of standards. Accordingly, the Government considers it appropriate that businesses who need to apply standards on a routine basis should contribute to covering the costs of their production.

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 determination extracts selected definitions and text from the incorporated standards to ensure that any person affected by, or interested in, the determination can ascertain if a product is covered (or excluded) by the relevant instrument, and that this allows persons interested in the content of the relevant laws to understand what products are regulated by the instrument without having to purchase the incorporated standards.

The minister's second response also states that the standards referenced in the instrument can be freely accessed through the National Library and State Libraries, and from a range of public libraries, universities and other education and training providers. However, the committee understands that National and State Libraries' negotiations with SAI Global for continued community access to Australian Standards

have been unsuccessful and that online access to Australian Standards is no longer available at these libraries.[6] The committee is also concerned that, of these libraries, only the National Library of Australia may hold a comprehensive collection of Australian Standards in hardcopy, and that even this collection is not complete.[7]

A fundamental principle of the rule of the law is that every person subject to the law should be able to freely and readily access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee draws the *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) report of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament to the attention of senators, ministers and instrument-makers, as the matters raised are relevant to all Australian jurisdictions.

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

6 See National and State Libraries Australasia, *No more access to Australian Standards at the National and State Libraries of Australia*, http://www.nsla.org.au/news/no-more-access-australian-standards-national-and-state-libraries-australia (accessed 8 November 2016).

7 See National Library of Australia, *Research Guides – Standards – Australian*, https://www.nla.gov.au/research-guides/standards/australian (accessed 8 November 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 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.

Minister's response

The Minister for Health and Aged Care advised:

> I note the Committee's comments that the DIST and PST, nor their accompanying ES, expressly state how the ASGC is incorporated. It is my Department's view that the current definition of the 'ASGC' in the DIST and PST is sufficiently clear that the document incorporated is the edition of the ASGC published in July 2010 and, to the extent of any uncertainty, paragraph 14(1)(b) of the *Legislation Act 2003* would operate to ensure that the reference was to that publication as in force or existing on the date of commencement of the DIST or PST, as appropriate.
>
> I note the Committee's comments that the note to the definition of' ASGC' in the DIST is confusing. I have asked my Department to remove that reference in a future variation or remake of the DIST.
>
> With regard to paragraph 2.4.4(b) of the DIST, this paragraph provides reference to the documents that set out the equipment standards relevant to accreditation requirements for the provision of Positron Emission Tomography (PET) nuclear scanning equipment. I note the Committee's comments that the DIST does not expressly state the manner in which the NEMA Standards Publication NU 2-2007 Performance Measurements of Positron Emission Tomography (NEMA NU 2-2007) is incorporated. Next time the DIST is varied or remade, this will be rectified and the DIST will make clear on its face that the instrument is incorporated as in force at the time the DIST commences (or is varied).
>
> I am not aware that the full NEMA NU 2-2007 can be accessed for free. However, clause 2.4.4 of the DIST sets standards relating to the safety of the equipment used for Medicare rebateable PET services. One of these is that the equipment must meet the requirements for accreditation by the Australian and New Zealand Society of Nuclear Medicine (ANZSNM).
>
> ANZSNM is the major professional society for people who practice nuclear medicine in Australia and New Zealand. ANZSNM's Requirements for Pet Accreditation (Instrumentation & Radiation Safety) 2nd Edition (2012) provides that for instrumentation performance standards, assessment of the

characteristics of the instrumentation and facilities are as specified in a number of documents, one of which is the NEMA NU 2-2007.

The NEMA NU 2-2007 provides that its purpose is to specify procedures for evaluating performance of PETs, allowing PET equipment manufacturers to cite standardised measurements to specify the guaranteed performance levels of their tomographs, allowing customers to compare the performance of tomographs from various manufacturers.

Purchasers of PET equipment can then also use standards in the NEMA NU 2-2007 in acceptance-testing of tomographs before and after installation.

I consider that it is reasonable to require Medicare rebateable PET services to be provided on equipment that meets certain technical safety standards, in this case the accreditation standards set by ANZSNM. Persons affected by this requirement, including owners or operators of the PET equipment, could be reasonably expected to have access to the NEMA NU 2-2007, or information about the equipment's compliance with the standard, as a matter of course.

Committee's response

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

The committee also welcomes the minister's additional advice that persons affected by the requirements in the regulations that incorporate, NEMA NU 2-2007, including owners or operators of the PET equipment, could be reasonably expected to have access to the NEMA NU 2-2007, or information about the equipment's compliance with the standard, as a matter of course.

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	**Legal Services Amendment (Solicitor-General Opinions) Direction 2016 [F2016L00645]**
Purpose	Amends the Legal Services Directions 2005 to insert new provisions about seeking opinions on questions of law from the Solicitor-General
Last day to disallow	10 November 2016[8]
Authorising legislation	*Judiciary Act 1903*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* 6 of 2016

Matter more appropriate for parliamentary enactment

On 14 September 2016, in *Delegated legislation monitor* 6 of 2016, the committee requested the advice of the Attorney-General, as follows:

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

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

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

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8 A notice of motion to disallow this instrument was given by Senator the Hon Penny Wong, Leader of the Opposition in the Senate, on 13 September 2016. This notice of motion must be resolved or withdrawn by 28 November 2016 or the instrument will be deemed to be disallowed. See 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 (accessed 8 November 2016).

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

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

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

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

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

Minister's response

The Attorney-General advised:

> The changes effected by the Amendment Direction do not have any impact upon the scope of the Solicitor-General's functions under paragraph 12(a) of the Act. They therefore do not require parliamentary enactment, and are appropriate for a legislative instrument.
>
> The Amendment Direction amends the *Legal Services Directions 2005*. The *Legal Services Directions 2005* are a legislative instrument made pursuant to section 55ZF of the *Judiciary Act 1903*. The Explanatory Statement to the *Legal Services Directions 2005* notes that the power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its agencies, including Commonwealth litigation, and for the provision of legal advice to Cabinet.
>
> The Amendment Direction establishes a procedure that gives effect to paragraph 12(b) of the Act, which provides that one of the functions of the Solicitor-General is to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General. The requirement for the Attorney-General's consent to the reference of a question of law to the Solicitor-General – unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel –flows from paragraph 12(b) of the Act. The Amendment Direction is not intended to change the scope or operation of paragraph 12(b).
>
> Further, the Amendment Direction is not intended to narrow, or otherwise affect, the scope or operation of paragraph 12(a) of the Act. Relevantly, paragraph 10B.9 of the Amendment Direction provides:
>
> *To avoid doubt, this paragraph does not apply in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel under paragraph 12(a) of the Law Officers Act.*

Committee's response

The committee thanks the Attorney-General for his response.

The committee notes the Attorney-General's advice that the procedure established by the direction gives effect to subsection 12(b) of the *Law Officers Act 1964* (the Act); and that the direction is not intended to narrow the operation of subsection 12(a).

The committee also notes the Attorney-General's reference to paragraph 10B.9 of the direction. The committee agrees that this paragraph provides that the direction does not apply in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel under subsection 12(a) of Act.

The functions of the Solicitor-General prescribed by the Act at section 12(a) are to act as counsel for persons and bodies prescribed in 12(a)(i)–(a)(vii), and at 12(b) provide his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General.

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

In cases of significant change, the committee's longstanding view has been that enactment via primary legislation is more appropriate because it ensures that significant proposed changes are subject to the full legislative processes and consideration by the Parliament prior to commencement. In these instances, the committee therefore generally requires a detailed justification for the inclusion of such matters in delegated legislation as opposed to primary legislation.

The committee has concluded its examination of the instrument. However, the committee leaves the question of whether the instrument may be described as effecting a significant change to the operation of section 12 of the *Law Officers Act 1964*, and therefore more appropriate for parliamentary enactment, to the Senate as a whole.

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. However, the *ES* which must accompany an instrument is required only 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)).

The committee's long-standing concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the *Legislation Act 2003* regarding consultation. The separate question as to whether consultation that has been

undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made and does not form part of the committee's scrutiny process.

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.

Therefore, ensuring that the technical requirements of the *Legislation Act 2003* are met in the first instance by including a description of the nature of any consultation negates the need for the committee to write to the relevant minister or instrument-maker seeking compliance. Further information on the committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee notes that on 15 September 2016 the Senate referred an inquiry into the nature and scope of the consultations prior to the making of the direction to the Senate Legal and Constitutional Affairs References Committee for inquiry. The report for this inquiry tabled on 8 November 2016.[9]

With reference to the requirements of the *Legislation Act 2003*, the committee notes that the ES for this direction states:

> Before this instrument was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislative Instruments Act 2003*… As the Direction relates to the process for referring a question of law to the Solicitor-General, the Attorney-General has consulted the Solicitor-General.

The committee therefore considers that the ES for this direction is compliant with the technical descriptive requirements of the *Legislation Act 2003* regarding consultation.

The committee draws this matter to the attention of the Senate.

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9 See Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/SolicitorGeneralOpinion/Report (accessed 8 November 2016).

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

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 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*.

Minister's response

The Minister for Infrastructure and Transport advised:

> [I]n accordance with section 15J(1)(b) of the *Legislation Act 2003*, I will issue a replacement explanatory statement for the Marine Safety (Domestic Commercial Vessel) National Law Amendment (Cost Recovery) Regulation 2016 [F2016L01307] that contains the currently published human rights compatibility statement within the published explanatory statement. This explanatory statement will be 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)).

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 issue a replacement ES that includes a statement of compatibility with human rights.

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;[10] 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 monitors* 5, 6 and 7 of 2016

Background

10 Notices of motion to disallow Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455]; 2016/008 [F2016L00456]; and 2016/010 [F2016L00377] were given by the Chair of the Regulations and Ordinances Committee on 13 October 2016. These notices of motion must be resolved or withdrawn by 9 February 2016 or the instruments will be deemed to be disallowed. See 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 (accessed 8 November 2016).

The instruments are made under Part 1, paragraph 5(1AA)(b), of the *Migration Act 1958* (the Migration Act), and define a class of persons who are fast track applicants for the purpose of paragraph 5(1)(b) of that Act. The committee understood the instruments 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.[11]

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...[12]

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

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

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

- 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.

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 first response

The Minister for Immigration and Border Protection advised:

> The Committee noted that Instruments F2016L00377 and F2016L00679[13] 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."

13 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].

> 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.

Committee's first 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.

Minister's second response

The Minister for Immigration and Border Protection further advised:

> The Explanatory Statements that accompany the instruments in question correctly state that the instruments are subject to disallowance. That is the method by which I state whether or not instruments are disallowable.
>
> However, when the instruments were provided to the Office of Parliamentary Counsel (OPC) for registration on the Federal Register of Legislation, my Department mistakenly indicated that the instruments were not subject to disallowance by ticking the wrong box when submitting the instruments. I understand this to be an isolated error and not the result of a failing in my Department's processes.
>
> My Department's enquiries suggest that OPC may have relied on this incorrect information and provided it to the Parliament's Table Office which, in turn, may have provided the incorrect information to the

Committee. This suggests that OPC and the Table Office do not obtain information about disallowance from the instrument and the Explanatory Statement, but from the metadata obtained as part of the process for submitting instruments for registration.

Committee's second response

The committee thanks the minister for his second response.

The committee notes the minister's advice that the incorrect classification of these instruments as exempt from disallowance by the Department of Immigration and Border Protection is an isolated error.

However, the committee remains concerned about the classification process generally, and the potential for administrative errors to hinder the effective oversight of instruments by Parliament. The committee is therefore interested in the remedial actions that may be available to ensure future administrative errors resulting in the incorrect classification of instruments as exempt from disallowance are avoided.

The committee will continue to monitor the classification of instruments, and would be grateful for advice from the Office of Parliamentary Counsel regarding the processes to ensure correct information about the classification of instruments is provided to the committee and the Parliament's Table Offices.

The committee draws this matter to the attention of ministers, instrument-makers, and the Office of Parliamentary Counsel, and recommends that administrative errors resulting in the incorrect classification of instruments are remedied at the earliest opportunity.

As set out above, the initial incorrect classification of these instruments as exempt from disallowance may have hindered the effective oversight of the instruments by Parliament.

The committee notes that there may be circumstances where incorrect classification may warrant urgent re-making of instruments. However, in these circumstances, noting that the ESs correctly stated that the instruments were subject to disallowance, the committee has resolved to place protective notices of motion on each of the instruments to extend the disallowance period by 15 sitting days.[14]

The committee has concluded its examination of the instruments. However, the committee draws the initial incorrect classification of these instruments to the attention of senators.

14 See 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 (accessed 8 November 2016).

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

Unclear basis for determining fees

The committee commented as follows:

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.

The Minister for Immigration and Border Protection advised:

> *Subclass 188 Provisional visa*
>
> The VAC [visa application charge] for the Entrepreneur stream in the Provisional visa was set by the Government in line with a range of factors, including Government policy objectives, the likely contribution of the individual to Australian society and the comparison to similar visas in the global economy. Specifically, the VAC pricing for this stream was set to

reflect the VAC for the current points-tested skilled visas of $3,600. This is a lower charge than the other streams of the Subclass 188 visa to increase the attractiveness of the new Entrepreneur Stream and reflect that applicants in the Entrepreneur Stream do not require an established business history or wealth level unlike the other streams in the Subclass 188 visa.

Subclass 888 Permanent visa

Following the Committee's correspondence, it was identified that an incorrect amount for the VAC for the Entrepreneur stream in the Permanent visa was inadvertently inserted by the Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016.

The intention was that the VAC for the Entrepreneur stream in the Permanent visa would be consistent with the VAC for all other streams in the Permanent visa, at $2305. Through an administrative oversight, the VAC for the provisional stage of the Entrepreneur stream was inadvertently mirrored for the permanent stage. This resulted in a higher charge of $3600 being set, instead of the intended charge of $2305.

As such, Schedule 2 to the Migration Amendment (Temporary Activity Visas) Regulation 2016 (the Amending Regulation) makes amendments to provide for the correct VAC, to be made at the Federal Executive Council meeting of 10 November 2016 and to commence on 19 November 2016. Although no persons are yet eligible to apply for this permanent visa (and therefore no one has been disadvantaged by the higher VAC), the amendment ensures the lower and correct VAC applies in the future when persons will be eligible to apply for the visa. The rationale for the amended VAC is set out in the Explanatory Statement to Schedule 2 to the Amending Regulation. I have attached both for your information, and trust it responds to your enquiry regarding the specific basis on which the VAC was calculated.

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 the additional advice that no one was disadvantaged by the higher erroneous visa application charge.

The committee notes the minister's undertaking that the regulation will be amended to provide for the correct visa application charge.

Instrument	**Part 21 Manual of Standards Instrument 2016 [F2016L00915]**
Purpose	Prescribes standards for classes of light sport aircraft and for articles for use on civil aircraft; and requirements for special certificates of airworthiness and persons carrying out approved design activities for approved design organisations
Last day to disallow	21 November 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2016

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

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that

an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*.

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

Minister's response

The acting Minister for Infrastructure and Transport advised:

> The Civil Aviation Safety Authority has advised that it expects to lodge a revised Explanatory Statement this instrument in October 2016 that will provide a further description (where possible) of the incorporated documents and indicate where the documents can be obtained.

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 CASA expects to lodge a revised ES that will provide a further description of the incorporated documents and indicate where the documents can be freely obtained.

Instrument	**Primary Industries (Customs) Charges Amendment (Fodder) Regulation 2016 [F2016L00760]**
Purpose	Authorises the imposition of a new export charge on fodder products to fund research and development activities
Last day to disallow	21 November 2016
Authorising legislation	*Primary Industries (Customs) Charges Act 1999*
Department	Agriculture and Water Resources
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 regulation authorises the imposition of a new export charge on certain fodder products to fund research and development activities. Funds raised by the export charge will be collected by the Department of Agriculture and Water Resources, and passed on to the Rural Industries Research and Development Corporation for the administration of fodder industry research.

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

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The Australian Fodder Industry Association (AFIA) consulted the Rural Industries Research and Development Corporation on its research priorities and determined that it would cost at least $750 000 per annum to fund its proposed research programme.
>
> Based on data supplied by the Australian Bureau of Agricultural and Resource Economics and Sciences in the five years from 2009 to 2013, Australia exported over 750 000 metric tonnes of hay and straw annually. With the proposed levy of $0.50 cents per tonne, this would raise approximately $375 000 in levies from Australian fodder exporters every year. This means that the overall pool for research, development and extension (RD&E) each year is likely to be of the order of $750 000, given the government's policy on matching eligible RD&E expenditure, dollar for dollar up to a cap of 0.5 per cent of the gross value of production.
>
> AFIA consulted extensively with its export members, prior to the introduction of the levy. On 4 August 2014, at an AFIA Exporters' Committee meeting, all members, who contribute more than 90 per cent of the levy, voted for introducing an export hay levy of $0.50 cents per tonne for all hay and straw exported. In April 2015, the department emailed all known hay exporters who were not members of the AFIA Exporters Committee offering them the opportunity to make contact with AFIA to learn more about the proposed export hay levy. No objections to the proposal were received by AFIA.

Committee's response

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

Instrument	**Primary Industries (Customs) Charges Amendment (Citrus) Regulation 2016 [F2016L00708]** **Primary Industries (Excise) Levies Amendment (Citrus) Regulation 2016 [F2016L00716]**
Purpose	These regulations increase the statutory charge and levy rates on citrus in the Primary Industries (Customs) Charges Regulations 2000 and Primary Industries (Excise) Levies Regulations 1999
Last day to disallow	21 November 2016
Authorising legislation	*Primary Industries (Customs) Charges Act 1999*; and *Primary Industries (Excise) Levies Act 1999*
Department	Agriculture and Water Resources
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 regulations increase the statutory charge and levy rates on citrus in the Primary Industries (Customs) Charges Regulations 2000 and Primary Industries (Excise) Levies Regulations 1999.

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

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The increased rates for research and development (R&D) and Plant Health Australia (PHA) membership were requested by Citrus Australia on behalf of the Australian citrus industry. Setting and determining fees requires the

support and approval of industry. The increased rates for R&D and PHA membership were agreed and supported through an industry vote.

Increased rates for R&D

Citrus Australia asked for the rate increase due to an annual $1.5 million shortfall in funding to achieve the aims of the Citrus R&D investment plan. The rate increase assumes levy collection based upon a 600 000 tonne citrus crop, however yields vary from year to year, with matching government funding up to a cap of 0.5 per cent of the gross value of production.

Increased rates for PHA membership

The PHA rate increase is based on a figure of $162 000, which was nominated by industry, and will provide additional funds for planned pest response programs. The rate increase assumes a 600 000 tonne citrus crop, however yields vary from year to year and programs will be adjusted accordingly.

The box rate for these charges has been calculated using the per tonne rate and a box weight of 20 kilograms.

Committee's response

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

Instrument	**Primary Industries (Excise) Levies Amendment (Forest Growers) Regulation 2016 [F2016L00715]**
Purpose	Introduces an Emergency Plant Pest Response levy on growers of certain plantation trees
Last day to disallow	21 November 2016
Authorising legislation	*Primary Industries (Excise) Levies Act 1999*
Department	Agriculture and Water Resources
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 regulation amends the statutory levies for forest growers to replace the category of leviable logs processed from trees felled in a plantation with two new categories; and introduces an Emergency Plant Pest Response levy on growers of certain plantation trees.

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

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> In 2013, the Australian Forest Products Association (AFPA) obtained majority industry support to introduce an Emergency Plant Pest Response (EPPR) levy for forestry which was set at nil. This was established in order to cover industry's share of any future eradication response affecting forestry. Following the detection of giant pine scale (GPS) in Victoria and South Australia, an eradication response was carried out under the Emergency Plant Pest Response Deed (EPPRD).
>
> Once this decision was made, AFPA notified levy payers of its proposal to increase the EPPR levy for *Pinus sp*. plantation logs and held a 30-day objection period. As no objections were received, AFPA requested that the department undertake the appropriate processes to activate the levy.
>
> Under the EPPRD, the Australian Government can underwrite the industry share of the EPPR costs. The EPPR levy is the mechanism most industries use to repay this liability, with the default timeframe for repayment being within ten years.
>
> Unless the industry has agreed differently, once the liability is fully repaid, the EPPR levy is reset to nil. AFPA has advised that in this case the intention is to reset to nil after the forest plantation industry's share of the costs has been repaid.
>
> The total agreed budget for the response to GPS was $9.3 million, with the forest plantation industry's share of the costs approximately $3.2 million. The EPPR levy was activated on *Pinus sp.* plantation logs only, as GPS only affects *Pinus sp.* trees.
>
> Therefore, AFPA calculated the EPPR levy rate increase as follows:
>
> > Estimated production of 13 million cubic metres per annum multiplied by a rate of 5 cents per cubic metre would raise $650 000 per annum. This would repay the liability to the Australian Government over, depending on actual production, around five years. While ten years is allowed for repayment, industries will usually try to repay in fewer years, to allow for the possibility that a future pest incursion and eradication response may result in an additional debt to be repaid.

The production estimate was based on figures from the Australian Bureau of Agricultural and Resource Economics and Sciences report Australian forest and wood products statistics: March and June quarters 2015 (published 11 Nov 2015). The estimate is conservative, as the data is for all plantation softwood and a small percentage of softwood production in Australia is from non-*Pinus sp.* trees.

Committee's response

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

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)
Previously reported in	*Delegated legislation monitor* 7 of 2016

Drafting

The committee commented as follows:

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.

Minister's response

The Minister for Health and Aged Care advised:

> In relation to the Private Health Insurance (Data Provision) Rules 2016 (No. 1) instrument, the '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. The explanatory statement incorrectly states, because of a typographical error, that GT-Dental Data and HCP2 Data were approved on 25 April 2016. My Department will seek to have this corrected.

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 which incorporates the typographical correction has been registered on the Federal Register of Legislation and received by the committee.

Instrument	**Quality Agency Principles Amendment Principle 2016 [F2016L00830]**
Purpose	Removes the methods for calculation and indexation of application fees for accreditation from the Quality Agency Principles 2013 [F2016C00652]
Last day to disallow	21 November 2016
Authorising legislation	*Australian Aged Care Quality Agency Act 2013*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 6 and 7 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 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 Parliamentary oversight.

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.[15]

15 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).

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 first 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 first 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 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.

Minister's second response

The Minister for Health and Aged Care advised:

> The amendments to the Quality Agency Principles 2013 have been made to facilitate the implementation of full cost recovery of accreditation services in line with the 2015-16 Budget decision. Residential aged care services will be required to pay the full cost of accreditation services provided by the Australian Aged Care Quality Agency (Quality Agency) in line with the

Australian Government's cost recovery policy. The Quality Agency will remain accountable under the Australian Government Cost Recovery Guidelines (Guidelines).

Transparency of the charging structure and fees is embedded in the Guidelines which require that the details be set out in the Cost Recovery Implementation Statement (CRIS). The draft CRIS for the cost recovery of accreditation services for residential care services was developed in accordance with the Guidelines. The draft CRIS, including the proposed fees, was open for public consultation on the Quality Agency's website from 6 May 2016 to 28 June 2016.

In line with the Guidelines, Ministerial approval of the CRIS is required. Following this, the fees are required to be publicly displayed on the Quality Agency website.

The Quality Agency must update the CRIS annually after each year of cost recovery activity, commencing with the 2016-17 financial year. The Quality Agency must include a report on expenses and revenue related to the delivery of accreditation services and provide an explanation of any material difference between them. These reporting requirements ensure transparency that the fees charged for accreditation services are commensurate with the services provided.

Collectively, these requirements ensure accountability and transparency of the Quality Agency's fee arrangements.

Committee's second response

The committee thanks the minister for her response.

The committee's inquiry in relation to this instrument arose from concerns that no justification was provided for removing details of how fees for accreditation of certain aged care services are calculated and indexed from the 2013 principles (a disallowable legislative instrument), thereby removing these matters from direct parliamentary oversight (including consideration by this committee).

The committee notes the minister's advice that the Australian Government Cost Recovery Guidelines (Guidelines), which require the details of the charging structure and fees of the Australian Aged Care Quality Agency (the Agency) to be set out in a Cost Recovery Implementation Statement, ensure accountability and transparency of the Agency's fee arrangements.

However, 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 again acknowledges that the Quality Agency Act authorises the Chief Executive Officer of the Agency to publish a document setting accreditation and re-accreditation fees. However, the committee reiterates its previous comments with respect to the response provided to the Senate Standing Committee for the Scrutiny of Bills by the previous minister in relation to the Quality Agency Act, which indicated

that these fees would be included in a disallowable legislative instrument and subject to Parliamentary oversight.

The committee has concluded its examination of the instrument. However, in light of the concerns regarding the absence of a justification for removing from a disallowable legislative instrument the process for calculating and indexing fees for the accreditation of certain aged care services, the committee draws this matter to the attention of senators.

The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Bills for information.

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 monitors* 6 and 7 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 first 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 first 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.

Minister's second response

The Minister for Communications advised:

> With respect to the availability of the Australian Standard AS/NZS IEC 62287.1:2007 referenced in the *Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294]*, the Australian Communications and Media Authority (ACMA) has indicated that it agrees with the Committee that it would be beneficial to have a free copy available. The ACMA will make a copy of the Standard available for viewing on request in each of its state and territory offices. The ACMA will also amend the Explanatory Statement for the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence in the near future to include reference to this facility…
>
> I have also copied this reply to the Honourable Craig Laundy MP, Assistant Minister for Industry, Innovation and Science, as he is responsible for government policy about the use of Australia Standards.

Committee's second 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 copies of the incorporated standard will be made available for viewing free of charge at ACMA's state and territory offices.

The committee also notes the minister's undertaking to amend the ES to include a reference to this facility.

The committee also thanks the minister for bringing the issues concerning the use of Australian Standards in delegated legislation to the attention of the Assistant Minister for Industry, Innovation and Science.

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)
Previously reported in	*Delegated legislation monitor* 7 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 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.[16] 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[17], 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.

Minister's response

The Minister for Communications advised:

> ACMA will also make a copy of each of the six Australian Standards incorporated by reference in the *Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]* available at its state and territory offices. The Explanatory Statement will likewise be amended to reference this change.
>
> I have also copied this reply to the Honourable Craig Laundy MP, Assistant Minister for Industry, Innovation and Science, as he is responsible for government policy about the use of Australia Standards.
>
> I would like to thank the Committee for bringing to my attention the fact that neither the *Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]* nor the accompanying Explanatory Statement explain the manner in which the *Radio Regulations Articles* are incorporated. The ACMA had intended that the definition of "radar" as defined in the Radio Regulations Articles published by the International Telecommunications Union be taken as applying as it exists from time to time (as permitted by subsection 314A(2) of the *Radiocommunications Act 1992*).
>
> Accordingly, the ACMA will amend the Emergency Locating Devices Class Licence and the Explanatory Statement in the near future to make this matter clear. The ACMA will also include a description of the Radio Regulations Articles and note where they may be accessed online for free, as per the Committee's suggestion about best practice.

Committee's response

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

17 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.

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 copies of the incorporated standards will be made available for viewing free of charge at ACMA's state and territory offices.

The committee also notes the minister's undertaking to amend the ES to specify the manner in which the Radio Regulations Articles are incorporated, and to provide a description of where documents that are incorporated into the licence can be freely obtained.

The committee also thanks the minister for bringing the issues concerning the use of Australian Standards in delegated legislation to the attention of the Assistant Minister for Industry, Innovation and Science.

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)
Previously reported in	*Delegated legislation monitor* 7 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 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*.

Minister's response

The Minister for Employment advised:

> The attached draft revised Explanatory Statement has been amended so it now includes more detailed information on the Remuneration Tribunal's consultation process. The Tribunal's secretariat will arrange for its registration on the Federal Register of Legislation.
>
> The Tribunal has been reminded of the requirements of 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 thanks the minister for his advice that the Remuneration Tribunal has been reminded of the consultation requirements of the *Legislation Act 2003*.[18]

18 The committee notes that the issue raised here applies to Remuneration Tribunal Determination 2016/11 - Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2016L01508]. In this regard, the committee requests that the ES for this determination also be updated in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Water Efficiency Labelling and Standards Amendment (WELS Standard) Determination 2016 [F2016L01293]**
Purpose	Amends the Water Efficiency Labelling and Standards Determination 2013 (No. 2) [F2013L01574] to incorporate a new standard, modify existing standards and provide for transitional arrangments
Last day to disallow	21 November 2016
Authorising legislation	*Water Efficiency Labelling and Standards Act 2005*
Department	Agriculture and Water Resources
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 Schedule 1, item 1 of the determination incorporates:

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

> Standards Australia and Standards New Zealand, as in force on 1 July 2016 and as modified by subsection 5B(1) of the determination (AS/NZS 6400:2016).

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> The standard underpinning Water Efficiency Labelling and Standards (WELS) legislation is AS/NZS 6400:2016 Water efficient products - Rating and labelling, which forms a basis for the rating and labelling of a range of products including washing machines, dishwashers, lavatory equipment, showers and taps. The department pays a fee to make this available to the public free of charge. The determination makes references to AS 3662:2013, Performance of showers for bathing (AS 3662), in order to amend this standard.
>
> The determination enables WELS registration of showers with a flow rate between 4.5 L/min and 6.0 L/min (as it previously only applied to a flow rate between 6.0 L/min and 7.5 L/min) and the standard AS 3662 was modified to improve performance testing of showers in this flow rate range. The modification to AS 3662 is clearly specified in the determination and access to AS 3662 is not required to understand this change.
>
> Businesses involved in the manufacturing or testing of showers would require access to AS 3662 regardless of the WELS determination. The fee to access AS 3662 is $123.44 for one user, which is unlikely to be a barrier as only commercial entities would require access as non-commercial entities are not involved in the manufacturing or testing of showers.

Committee's response

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

The committee welcomes the minister's additional advice that the Department of Agriculture and Water Resources pays a fee to make AS/NZS 6400:2016 freely available and that access to AS 3662 is not required to understand the determination.

The committee notes the minister's advice that he does not consider the fee to access AS 3662 as an unreasonable barrier for industry.

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.

Senator John Williams (Chair)

Appendix 1

Guideline on consultation

Purpose

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

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislation Act 2003* (the Act)[1] regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

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

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

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

Requirements of the *Legislation Act 2003*

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

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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 important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

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

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

Describing the nature of consultation

To meet the requirements of section 15J of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

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

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

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as

requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

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

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 15J of the Act.

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

Seeking further advice or information

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

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

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

Appendix 2

Correspondence

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC16-078023

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

Dear Senator

Thank you for your letter of 15 September 2016 seeking response to comments contained the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* 6 of 2016, concerning the following instrument for which I have portfolio responsibility.

Aboriginal Land Grant (Jervis Bay Territory) By-laws 2016 (F2016L00619)

In response to the Committee's comments, the exclusion of external merits review for decisions by the Wreck Bay Aboriginal Community Council (WBACC) under section 71 of the *Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016* (the By-Laws) is justified in the context of the purpose of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Act) and the By-laws.

The Act creates WBACC to hold and exercise the Council's powers as owner of Aboriginal Land in the Jervis Bay Territory for the benefit of the local Indigenous community. In accordance with section 52A of the Act, the By-Laws regulate and manage the use of Aboriginal Land, including providing WBACC with the power to issue certain permits to individuals authorising certain activities that would otherwise be prohibited. External merits review of the Council's decisions in relation to permits would be inconsistent with Council's role as owner of the land in the Jervis Bay Territory.

To address the concerns of the Committee, my Department is consulting with WBACC with a view to lodging a replacement Explanatory Statement in accordance with the process set out in paragraph 15G(4)(b) of the *Legislation Act 2003.* This Explanatory Statement will include a statement setting out the reasons why external merits review is not justified.

Thank you for raising this matter and I look forward to working with you to assist in responding to future queries.

Yours sincerely

NIGEL SCULLION

// / 10 / 2016

EXPLANATORY STATEMENT

Aboriginal Land Grant (Jervis Bay Territory) Act 1986

ABORIGINAL LAND GRANT (JERVIS BAY TERRITORY)

BY – LAWS 2016

These By-Laws were made by the Wreck Bay Aboriginal Community Council (the Council) under section 52A of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Jervis Bay Act). The Council is established by section 4 of the Jervis Bay Act for the purpose of holding title to Aboriginal Land within the Jervis Bay Territory and managing that land for the benefit of the local indigenous community.

For the purposes of the By-Laws, Aboriginal Land is all the land which has been granted to the Council under the Jervis Bay Act but excluding land within the Booderee National Park and the Booderee Botanical Gardens. The effect of this is that the operation of the By-Laws will be confined to the Wreck Bay Village and surrounding land.

Subsection 52A(2) of the Jervis Bay Act empowers the Council to make by-laws for or with respect to: economic enterprise; cultural and other activities including hunting, shooting and fishing; access to Aboriginal Land including the control of visitors and authorisation of activities; management, conservation, development and use of Aboriginal Land; sacred sites; protection and conservation of flora and fauna; use of timber, and the regulation of motor traffic and parking on Aboriginal land. The charging of entrance fees for entry to Aboriginal land is authorised by section 52A(2)(i) of the Jervis Bay Act.

Subsection 52A(3) of the Jervis Bay Act provides that By-Laws made by the Council may apply any regulation made under the *Environment Protection and Biodiversity Conservation Act 1999* to Aboriginal Land, with whatever changes are needed for that purpose. Accordingly relevant provisions of the Environment Protection and Biodiversity Regulations (EPBC Regulations) have been applied with adaptations.

Part 1 titles the By-Laws, sets 1 April 2016 as the commencement date and includes as part of the By-Laws a dictionary which defines relevant words and expressions.

The purposes of Parts 2 and 3 of the By-Laws are to protect threatened species and ecological communities and to conserve biodiversity on Aboriginal Land. Relevant provisions of the EPBC Regulations are applied in order to achieve such protection through the establishment of criteria for the listing of native species. Native species, ecological communities and threatening processes can be nominated for inclusion on this list. All nominations for listing are to be sent to the Council before forwarding to the Minister for review. Offences are created for certain actions in relation to protected species.

Part 4 requires the Council, after notification to residents, to develop, introduce and maintain a Town Plan for each Township on Aboriginal Land.

Part 5 regulates various activities in relation to Aboriginal Land and creates a series of general offences for activities which are capable of causing damage to land, heritage or the environment. These activities include the dumping of waste, use of firearms, taking animals or plants onto bushland, use of the burial ground, camping, fishing, lighting fires, capturing images or recording sound in contravention of a Council restriction. Hazardous activities such as abseiling or hang gliding may only be carried out in areas provided for such activities. Entry to any part of Aboriginal Land in contravention of a Council restriction is prohibited and approval is required for the operation of a commercial activity from a structure on Aboriginal Land.

Sections 24, 25, 28, 29, 33, 34, 42, 44, 47, 48, 54, 55, 58 and 68 place an evidential burden on the defendant in respect of exceptions to offences against these sections. These exceptions are matters likely to be peculiarly within the knowledge of the defendant.

Part 5 also regulates the use of vehicles on Aboriginal Land, sets speed limits and authorises the issuing of parking permits by the Council. Signs for controlling traffic may be erected. Wardens or other authorised persons may request a person to produce a permit and may require a vehicle to stop until allowed to proceed. Wardens may require a person found to have committed an offence against the Jervis Bay Act or the By-Laws to leave Aboriginal Land. Fees for entry onto Aboriginal Land can be determined in writing by the Council and entry denied in the case of non-payment. Offence provisions in Part 5 do not apply to activities which are in accordance with a current Management Plan, otherwise approved by the Council, or carried out by a Commonwealth, State or Territory agency for law enforcement purposes.

Part 6 consists of enforcement provisions including the appointment by the Council of wardens who are issued with identity cards. Subsection 71 provides that a~~A~~ person whose interests are affected by a decision by the Council in relation to a permit may request a review of that decision by the Council, which must reconsider the decision within one month. External merits review of section 71 decisions is not provided. The Jervis Bay Act creates the Council to hold and exercise the Council's powers as owner of Aboriginal Land in the Jervis Bay Territory. External merits review of the Council's decisions in relation to permits would be inconsistent with the Council's role as owner of Aboriginal Land in the Jervis Bay Territory.

Part 7 regulates the issuing of permits by the Council for authorisation of activities on Aboriginal Land. The purpose of the permits is to assist in the protection of native species and cultural heritage, the prevention of damage to Aboriginal Land and fishing stocks and the maintenance of public safety and privacy.

Part 8 enables the Council to order a person to take action to remedy waste and misuse of water on Aboriginal Land. Misuse of water is an offence against the By-Laws.

Consultation took place prior to the making of these By-Laws with the Executive Members of the Executive Committee of the Council.

Penalties for offences against the By-Laws will be contained in Regulations to be made under subsections 52A (7) and (8) of the Jervis Bay Act.

Statement of Compatibility with Human Rights:- .

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

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

These By-Laws will commence on 1 April 2016.

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

PDR ID: MC16-005251

26 OCT 2016

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.11
Parliament House
CANBERRA ACT 2600

Dear Chair John

Thank you for your letter of 13 October 2016 regarding the Senate Regulations and Ordinances Committee's report, *Delegated legislation monitor* 7 of 2016. I note that the Committee has requested a response in relation to issues identified in the monitor regarding instruments for which I have portfolio responsibility. In this response I address the Committee's request for advice in relation to the following instruments: AD/GAS/1 Amdt 11 - Inspection, Test and Retirement [F2016L01364]; CASA 100/16 - Instructions — V.F.R. flights conducted by CGG Aviation (Australia) Pty Ltd [F2016L01407]; *Coastal Trading (Revitalising Australian Shipping) Act 2012* - Section 11 Exemption for cruise vessels 2018 extension [F2016L01308]; and *Marine Safety (Domestic Commercial Vessel) National Law Amendment (Cost Recovery) Regulation 2016* [F2016L01307].

With regard to the *Coastal Trading (Revitalising Australian Shipping) Act 2012* – Section 11 Exemption for cruise vessels 2018 extension [F2016L01308], I can advise the Committee that in 2015, the Australian Government brought forward a proposal to reform Australia's coastal shipping sector through the Shipping Legislation Amendment Bill 2015. This bill would have had the effect of removing the existing exemption for large cruise ships and requiring them to participate in the coastal trading regime by compelling them to operate under a coastal trading permit.

With the defeat of the Bill in the Senate, the Government is currently considering its options for reforming coastal shipping and holding consultations with key stakeholders to help inform the final policy position. While reforms are pursued, I approved an extension to the existing Section 11 exemption. The cruise shipping industry has informed me that as it sets and markets its itineraries two years in advance, it requires certainty for at least this period.

Given that the Government is still working to finalise its future reform path, an extension of the existing exemption is, in my assessment, preferable to any more permanent removal of cruise ships from coastal trading licensing that an amendment to the legislation would provide.

I can also inform you that in accordance with section 15J(1)(b) of the *Legislation Act 2003*, I will issue a replacement explanatory statement for the *Marine Safety (Domestic Commercial Vessel) National Law Amendment (Cost Recovery) Regulation 2016* [F2016L01307] that contains the currently published human rights compatibility statement within the published explanatory statement. This explanatory statement will be 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)).

With respect to AD/GAS/1 and CASA 100/16, the Civil Aviation Safety Authority (CASA) has advised me that in future it will ensure that legislative instruments that reference another instrument or document, and the accompanying explanatory statement for such instruments, expressly state the manner in which the documents are incorporated. CASA further advises it intends to revoke and re-issue instruments AD/GAS/1 and CASA 100/16 to deal appropriately with incorporation, as well as revising the explanatory statement for each to ensure that the manner of incorporation of documents, and where they can be obtained, is clearly explained.

I hope this information is of assistance to the Committee.

Yours sincerely

DARREN CHESTER

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC16-008503

17 OCT 2016

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

Dear Chair

Thank you for your correspondence of 15 September 2016, requesting advice on instruments within my portfolio responsibility that have been identified in the *Delegated legislation monitor* No. 6 of 2016.

For ease of reference, responses to each of the committee's issues are addressed in the enclosed documents.

Thank you again for your letter.

Yours sincerely

Barnaby Joyce MP

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@agriculture.gov.au

Agricultural and Veterinary Chemicals Code (Notifiable Variations) Instrument 2016 [F2016L01233]

Incorporation of documents

The Australian Pesticides and Veterinary Medicines Authority (**APVMA**) has reviewed the Committee's comments in relation to the *Agricultural and Veterinary Chemicals Code (Notifiable Variations) Instrument 2016* (**Instrument**).

The APVMA wishes to clarify that consistently with subsection 14(2) of the *Legislation Act 2003* (**Legislation Act**), the reference in the Instrument to the Agricultural and Veterinary Labelling Codes is a reference to those Codes as in force at the commencement of the Instrument – namely, 26 July 2016. The APVMA's view is that it would not be possible for the Instrument to incorporate the Codes as in force from time to time under subsection 14(1) of the Legislation Act, because the Codes are neither legislative instruments covered by subsection 14(3) of the Legislation Act nor provisions of an Act.

The APVMA accepts the Committee's expectation that the manner of incorporation of extrinsic material is clearly specified in the instrument and explanatory statement and undertakes to ensure that future instruments and explanatory statements are consistent with those expectations.

Biosecurity Charges Imposition (Customs) Regulation 2016 [F2016L00723]
Biosecurity Charges Imposition (General) Regulation 2016 [F2016L00727]

Incorporation of documents

The *Biosecurity (Movements between Parts of Australian Territory) Declaration 2016* is incorporated as in force at the commencement of the *Biosecurity Charges Imposition (Customs) Regulation 2016* and the *Biosecurity Charges Imposition (General) Regulation 2016*.

Biosecurity Regulation 2016 [F2016L00756]

Incorporation of documents

The *Biosecurity (Prohibited and Conditionally Non-prohibited Goods) Determination 2016* and the *Biosecurity (Movements between Parts of Australian Territory) Declaration 2016* are incorporated as in force at the commencement of the *Biosecurity Regulation 2016*.

Biosecurity (Reportable Biosecurity Incidents) Determination 2016 [F2016L00853]

Incorporation of documents

The *Biosecurity (Prohibited and Conditionally Non-Prohibited Goods) Determination 2016* **(non-prohibited goods determination)** is incorporated as in force at the commencement of the *Biosecurity (Reportable Biosecurity Incidents) Determination 2016*. The explanatory statement for the *Biosecurity (Reportable Biosecurity Incidents) Determination 2016* will be amended to remove the reference to the non-prohibited goods determination being incorporated as in force from time to time.

Primary Industries (Customs) Charges Amendment (Fodder) Regulation 2016 [F2016L00760]

Unclear basis for determining fees

The Australian Fodder Industry Association (**AFIA**) consulted the Rural Industries Research and Development Corporation on its research priorities and determined that it would cost at least $750 000 per annum to fund its proposed research programme.

Based on data supplied by the Australian Bureau of Agricultural and Resource Economics and Sciences in the five years from 2009 to 2013, Australia exported over 750 000 metric tonnes of hay and straw annually. With the proposed levy of $0.50 cents per tonne, this would raise approximately $375 000 in levies from Australian fodder exporters every year. This means that the overall pool for research, development and extension (RD&E) each year is likely to be of the order of $750 000, given the government's policy on matching eligible RD&E expenditure, dollar for dollar up to a cap of 0.5 per cent of the gross value of production.

AFIA consulted extensively with its export members, prior to the introduction of the levy. On 4 August 2014, at an AFIA Exporters' Committee meeting, all members, who contribute more than 90 per cent of the levy, voted for introducing an export hay levy of $0.50 cents per tonne for all hay and straw exported. In April 2015, the department emailed all known hay exporters who were not members of the AFIA Exporters Committee offering them the opportunity to make contact with AFIA to learn more about the proposed export hay levy. No objections to the proposal were received by AFIA.

Primary Industries (Customs) Charges Amendment (Citrus) Regulation 2016 [F2016L00708]
Primary Industries (Excise) Charges Amendment (Citrus) Regulation 2016 [F2016L00716]

Unclear basis for determining fees

The increased rates for research and development (**R&D**) and Plant Health Australia (**PHA**) membership were requested by Citrus Australia on behalf of the Australian citrus industry. Setting and determining fees requires the support and approval of industry. The increased rates for R&D and PHA membership were agreed and supported through an industry vote.

Increased rates for R&D

Citrus Australia asked for the rate increase due to an annual $1.5 million shortfall in funding to achieve the aims of the Citrus R&D investment plan. The rate increase assumes levy collection based upon a 600 000 tonne citrus crop, however yields vary from year to year, with matching government funding up to a cap of 0.5 per cent of the gross value of production.

Increased rates for PHA membership

The PHA rate increase is based on a figure of $162 000, which was nominated by industry, and will provide additional funds for planned pest response programs. The rate increase assumes a 600 000 tonne citrus crop, however yields vary from year to year and programs will be adjusted accordingly.

The box rate for these charges has been calculated using the per tonne rate and a box weight of 20 kilograms.

Primary Industries (Excise) Levies Amendment (Forest Growers) Regulation 2016 [F2016L00715]

Unclear basis for determining fees

In 2013, the Australian Forest Products Association (**AFPA**) obtained majority industry support to introduce an Emergency Plant Pest Response (**EPPR**) levy for forestry which was set at nil. This was established in order to cover industry's share of any future eradication response affecting forestry. Following the detection of giant pine scale (**GPS**) in Victoria and South Australia, an eradication response was carried out under the Emergency Plant Pest Response Deed (**EPPRD**).

Once this decision was made, AFPA notified levy payers of its proposal to increase the EPPR levy for *Pinus sp.* plantation logs and held a 30-day objection period. As no objections were received, AFPA requested that the department undertake the appropriate processes to activate the levy.

Under the EPPRD, the Australian Government can underwrite the industry share of the EPPR costs. The EPPR levy is the mechanism most industries use to repay this liability, with the default timeframe for repayment being within ten years.

Unless the industry has agreed differently, once the liability is fully repaid, the EPPR levy is reset to nil. AFPA has advised that in this case the intention is to reset to nil after the forest plantation industry's share of the costs has been repaid.

The total agreed budget for the response to GPS was $9.3 million, with the forest plantation industry's share of the costs approximately $3.2 million. The EPPR levy was activated on *Pinus sp.* plantation logs only, as GPS only affects *Pinus sp.* trees.

Therefore, AFPA calculated the EPPR levy rate increase as follows:

> Estimated production of 13 million cubic metres per annum multiplied by a rate of 5 cents per cubic metre would raise $650 000 per annum. This would repay the liability to the Australian Government over, depending on actual production, around five years. While ten years is allowed for repayment, industries will usually try to repay in fewer years, to allow for the possibility that a future pest incursion and eradication response may result in an additional debt to be repaid.

The production estimate was based on figures from the Australian Bureau of Agricultural and Resource Economics and Sciences report Australian forest and wood products statistics: March and June quarters 2015 (published 11 Nov 2015). The estimate is conservative, as the data is for all plantation softwood and a small percentage of softwood production in Australia is from non-*Pinus sp.* trees.

Water Efficiency Labelling and Standards Amendment (WELS Standard) Determination 2016 [F2016L01293]

Access to incorporated documents

The standard underpinning Water Efficiency Labelling and Standards (**WELS**) legislation is AS/NZS 6400:2016 Water efficient products – Rating and labelling, which forms a basis for the rating and labelling of a range of products including washing machines, dishwashers, lavatory equipment, showers and taps. The department pays a fee to make this available to the public free of charge.

The determination makes references to AS 3662:2013, Performance of showers for bathing (**AS 3662**), in order to amend this standard. The determination enables WELS registration of showers with a flow rate between 4.5 L/min and 6.0 L/min (as it previously only applied to a flow rate between 6.0 L/min and 7.5 L/min) and the standard AS 3662 was modified to improve performance testing of showers in this flow rate range. The modification to AS 3662 is clearly specified in the determination and access to AS 3662 is not required to understand this change.

Businesses involved in the manufacturing or testing of showers would require access to AS 3662 regardless of the WELS determination. The fee to access AS 3662 is $123.44 for one user, which is unlikely to be a barrier as only commercial entities would require access as non-commercial entities are not involved in the manufacturing or testing of showers.

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

MS16-017879

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

Dear Senator Williams

I am writing in relation to the Delegated Legislation Monitor number 7 of 2016, in which the Senate Standing Committee on Regulations and Ordinances (the Committee) sought further advice on whether the retrospective commencement of the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No.1)* (the Regulation) would disadvantage any person other than the Commonwealth.

The relevant provisions of the Regulation retrospectively prescribed, from 1 July 2016, the the Australian National Child Offender Register (ANCOR), the Managed Person System (MPS) and the National Child Offender System (NCOS) in the definition of 'national policing information' for the purpose of the *Australian Crime Commission Act 2002*.

In facilitating the drafting of the Regulation, my department was mindful of the application of subsection 12(2) of the *Legislation Act 2003*. To that end, I can advise that the retrospective application of the Regulation is unlikely to disadvantage the rights of, or impose liabilities on, a person other than the Commonwealth.

In light of the purpose for which information held on NCOS, ANCOR and MPS data bases are used – namely, assisting police to manage key information in their day to day duties – it has been assessed that the retrospective prescription of information held on these databases as 'national policing information' is unlikely to create a detriment within the meaning of subsection 12(2) of the Legislation Act. Further information is available at **Attachment A.**

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Attachment A – further information on the retrospective provisions of the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No.1)*

Attachment A

Further information on the retrospective provisions of the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No.1)

Background to Regulation

The Regulation, which was made in September 2016, supports the operations of the Australian Criminal Intelligence Commission (ACIC). The *Australian Crime Commission Amendment (National Policing Information) Regulation 2016* (NPI Regulation) was made in May 2016, amending the *Australian Crime Commission Regulations 2002* (ACC Regulations). It listed bodies that collect information and kinds of information for the purposes of the definition of 'national policing information' in section 4 of the *Australian Crime Commission Act 2002* (ACC Act).

The NPI Regulation commenced on 1 July 2016, coinciding with the commencement of the ACIC. After the NPI Regulation was made and the ACIC commenced operations, the Government identified further regulation amendments that were required to better support the operations of the agency.

The *Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No.1)* (the Regulation) was made in September 2016, further amending the *Australian Crime Commission Regulations 2002* (ACC Regulations).

Schedule 1, items 3, 5 and 6 of the Regulation commenced on 1 July 2016, to coincide with amendments to the ACC Act and previous amendments to the ACC Regulations. Therefore, these items have retrospective effect.

Schedule 1, items 3, 5 and 6

The provisions of the Regulation with retrospective effect relate to paragraph (b) of the definition of 'national policing information' in the ACC Act. The provisions prescribe three additional systems that hold 'national policing information' with effect from 1 July 2016: the Australian National Child Offender Register (NCOS), the Managed Person System (MPS) and the National Child Offender System (NCOS).

These systems were not included in the NPI Regulation, meaning that information held on them was not captured in the definition of 'national policing information' from 1 July 2016 until 3 September 2016. The definition of 'national policing information' underpins the ability of the ACIC to perform 'national policing information functions' and the ability of the ACIC to collect and disclose vital information to Australian police and law enforcement agencies.

The NCOS is a web-based application that allows Australian police to record and share child offender information. It directly enables police in each state and territory to manage key information to meet their requirements under respective child protection legislation.

The NCOS consists of the ANCOR and the MPS.

- The ANCOR allows authorised police officers to register, case manage and share information about registered persons. It assists police to uphold child protection legislation in their state or territory.

- The MPS holds information on offenders who are charged but not convicted, or after an offender's reporting obligations have been completed.

The prescribed systems relate to offences against children and facilitate decision-making in the context of law enforcement. They directly enable police in each state and territory to manage key information to meet their requirements under respective child protection legislation. The systems are not used for employment screening or other decision making purposes. As such, a criminal history check (which the ACIC is legislated to charge for) does not involve a search of the systems.

Detrimental effect

In light of the purpose for which information held on NCOS, ANCOR and MPS data bases are used, it is unlikely that their use will create a detriment for a person other than the Commonwealth, within the meaning of subsection 12(2) of the *Legislation Act 2003*. That is, information that supports the day to day operational activities of police officers would not ordinarily be used in a context that creates a detriment for a person.

TREASURER

Ref: MC16-018830

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

regords.sen@aph.gov.au

Dear Chairperson

Thank you for your correspondence of 13 October 2016 concerning the Senate Regulations and Ordinances Committee's request for a response in relation to the issues identified within the Delegated legislation monitor 7 of 2016: Banking, Insurance and Life Insurance (prudential standard) determination No 1. of 2016 [F2016L01428] and determination No 2. of 2016 [F2016L01429].

Treasury has sought clarification from the Australian Prudential Regulation Authority (APRA) on whether an assessment of the compatibility of the instruments with human rights, as required by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, was undertaken.

APRA indicated that the assessment had in fact not been undertaken and noted that a further seven instruments have also not been assessed as required.

APRA has now rectified this and undertaken the required assessment against the nine instruments, and an additional Explanatory Statement with the statement of compatibility has now been lodged on the Federal Register of Instruments (see **Attachment A**).

APRA has assured Treasury that all future instruments will now be assessed as required and will include a statement of compatibility.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

3 / 4 / 2016

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

Attachment A

The updated Explanatory Statement for the following nine instruments has been published on the Federal Register of Instruments:

- Banking, Insurance and Life Insurance (prudential standard) determination No. 1 of 2016
  https://www.legislation.gov.au/Details/F2016L01428

- Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2016
  https://www.legislation.gov.au/Details/F2016L01429

- Banking, Insurance and Life Insurance (prudential standard) determination No. 3 of 2016
  https://www.legislation.gov.au/Details/F2016L01433

- Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016
  https://www.legislation.gov.au/Details/F2016L01437

- Banking, Insurance and Life Insurance (prudential standard) determination No. 5 of 2016
  https://www.legislation.gov.au/Details/F2016L01434

- Banking, Insurance and Life Insurance (prudential standard) determination No. 6 of 2016
  https://www.legislation.gov.au/Details/F2016L01436

- Banking, Insurance and Life Insurance (prudential standard) determination No. 7 of 2016
  https://www.legislation.gov.au/Details/F2016L01431

- Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016
  https://www.legislation.gov.au/Details/F2016L01432

- Banking, Insurance and Life Insurance (prudential standard) determination No. 9 of 2016
  https://www.legislation.gov.au/Details/F2016L01440

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

Ref No: MC16-031533

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 correspondence of 13 October 2016 regarding Senate Standing Committee on Regulations and Ordinances, Delegated legislation monitor 7 of 2016.

You have requested a response to queries detailed in the Delegated legislation monitor 7 of 2016 relating to two 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 regards to your question as to whether an individual will be aware of what standards apply to an individual operating under section 10 of the Biosecurity (Human Health) Regulation 2016, it is important to note that the individual who performs this function will be doing so under the same standards and requirements that guide their daily business as medical professionals. A registered medical practitioner will be aware of the processes and standards required when collecting specimens for biosecurity purposes, as it is a key component of their competency as a medical professional.

As noted in my previous correspondence, these standards include those required by the National Association of Testing Authorities, which ensure compliance with relevant international and Australian standards and competencies for testing of samples. Additionally, the Australian/New Zealand Standard Safety for microbiological safety in laboratories (AS/NZ 2243.3:2010) provides guidance on the handling of diagnostic specimens. The National Health and Medical Research Council also provides Australian Guidelines for Prevention and Control of Infection in Healthcare, which provides information on storage and transportation.

It is not practical, and potentially duplicative, to list all the specific standards that medical professionals are required to operate under as part of their core competencies. I am fully confident that medical professionals operating under the *Biosecurity Act 2015* will adhere to standards required of them as medical professionals, which are consistent with the Regulation.

Quality Agency Principles Amendment Principle 2016
The amendments to the Quality Agency Principles 2013 have been made to facilitate the implementation of full cost recovery of accreditation services in line with the 2015-16 Budget decision. Residential aged care services will be required to pay the full cost of accreditation services provided by the Australian Aged Care Quality Agency (Quality Agency) in line with the Australian Government's cost recovery policy. The Quality Agency will remain accountable under the Australian Government Cost Recovery Guidelines (Guidelines).

Transparency of the charging structure and fees is embedded in the Guidelines which require that the details be set out in the Cost Recovery Implementation Statement (CRIS). The draft CRIS for the cost recovery of accreditation services for residential care services was developed in accordance with the Guidelines. The draft CRIS, including the proposed fees, was open for public consultation on the Quality Agency's website from 6 May 2016 to 28 June 2016.

In line with the Guidelines, Ministerial approval of the CRIS is required. Following this, the fees are required to be publicly displayed on the Quality Agency website.

The Quality Agency must update the CRIS annually after each year of cost recovery activity, commencing with the 2016-17 financial year. The Quality Agency must include a report on expenses and revenue related to the delivery of accreditation services and provide an explanation of any material difference between them. These reporting requirements ensure transparency that the fees charged for accreditation services are commensurate with the services provided.

Collectively, these requirements ensure accountability and transparency of the Quality Agency's fee arrangements.

Thank you for bringing these matters to my attention.

Yours sincerely

The Hon Sussan Ley MP

cc: regords.sen@aph.gov.au

03 NOV 2016

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

Thank you for your letter of 15 September 2016 enclosing the Delegated Legislation Monitor (No. 6 of 2016) and requesting my advice on the following instruments:

- *Charter of the United Nations (Sanctions - Iran) (Export Sanctioned Goods) List Determination 2016* [F2016L01208] (the Determination)

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

Charter of the United Nations (Sanctions - Iran) (Export Sanctioned Goods) List Determination 2016

The Standing Committee on Regulations and Ordinances (the Committee) has requested my advice in relation to the incorporation of two documents into the Determination:

- International Organization for Standardization's Standard ISO 230-2:1988, *Acceptance code for machine tools – Part 2: Determination of accuracy and repeatability of positioning of numerically controlled machine tools*; and

- Institute of Electronic Engineers (IEEE) standard 528-2001 – IEEE Standard for Inertial Sensor Terminology.

ISO 230-2:1988 is outdated and was incorporated erroneously in the Determination. The current standard is ISO 230-2:2014, *Test code for machine tools – Part 2: Determination of accuracy and repeatability of positioning of numerically controlled axes.*

In response to the Committee's request for advice on the manner of incorporation of documents in the Determination, ISO 230-2:2014 and IEEE standard

528-2001 are incorporated as in force at the commencement of the Determination pursuant to section 14 of the *Legislation Act 2003*.

The Committee has requested my advice on the description of documents incorporated into the Determination and how those documents may be obtained.

ISO 230-2:2014 and IEEE standard 528-2001 are internationally recognised standards used by the Nuclear Suppliers Group, of which Australia is a member, to define export control parameters for measuring accuracy and repeatability of certain equipment used for materials processing.

Section 3 of the Determination defines 'repeatability' in reference to IEEE standard 528-2001. The definition includes the following explanatory note:

> The IEEE standard explains that repeatability is the level of similarity between measurements of the same variable under the same operating conditions when changes in conditions or non-operating periods occur between measurements.

IEEE standard 528-2001 can be purchased from the IEEE website (www.ieee.org). ISO 230-2:2014 can be purchased from the ISO website (www.iso.org).

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

The Committee has requested my advice on the inclusion of the following regulations, which no longer exist, in Schedule 1 of the Declaration:

- Schedule 1, Item 4, regulation 11 of the *Charter of the United Nations (Sanctions – Côte d'Ivoire) Regulations 2008*; and

- Schedule 1, Item 19, regulation 4N of the *Customs (Prohibited Imports) Regulations 1956*.

These regulations were repealed following the easing and subsequent cessation of UNSC sanctions on Côte d'Ivoire, and should not appear in the Declaration.

I will amend the Determination and the Declaration and their Explanatory Statements as soon as practicable to reflect the above advice to the Committee.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

11 OCT 2016

REPLACEMENT EXPLANATORY STATEMENT

Commonwealth Electoral (Logo Requirements) Determination 2016

Issued by Authority of the Electoral Commissioner

Commonwealth Electoral Act 1918

Legislative Authority

Subsection 126(2AB) of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides, that for the purposes of paragraph 126(2AA)(b) the Electoral Commissioner may, by legislative instrument, determine requirements in relation to setting out a logo in an application for registration of a political party under Part XI of the Electoral Act.

Background

Subsection 126(2AB) was inserted to the Electoral Act by the *Commonwealth Electoral Amendment Act 2016*.

Purpose and operation

The *Commonwealth Electoral (Logo Requirements) Determination 2016* specifies the technical requirements that must be complied with when making an application to include a party logo on the Register under Part XI of the Electoral Act.

Details of the proposed Determination are set out in the **Attachment.**

Consultation

Consultation was undertaken for the *Commonwealth Electoral Amendment Act 2016* and the *Commonwealth Electoral (Logo Requirements) Determination 2016* through the Joint Standing Committee on Electoral Matters (JSCEM). The *Commonwealth Electoral Amendment Act 2016* was the culmination of an extensive inquiry into the 2013 Federal Election by JSCEM.

Prior to the introduction of the *Commonwealth Electoral Amendment Act 2016*, the then Special Minister of State met extensively with representatives from the Australian Labor Party, the Australian Greens and crossbench Senators when developing the changes to the Electoral Act, including the proposal to include logos on ballot papers.

Statement of compatibility with Human Rights

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.*

Human Rights Implications

The Determination engages the right to take part in public affairs and elections, as contained in article 25 of the *International Covenant on Civil and Political Rights*.

Article 25 provides, among other things, that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives and to vote and to be elected at periodic elections.
The Determination will advance the rights to take part in public affairs and elections by determining the technical requirements party logos must comply with when making an application to include the logo on the Register of political parties. Party logos included on the Register may subsequently be printed on ballot papers.

The printing of party logos on ballot papers aims to reduce the risk of voter confusion where political parties have similar names and to provide confidence to voters that they can easily identify the party of their preference.

Conclusion

The Determination is compatible with human rights as it seeks to enforce the right to take part in public affairs and elections.

Attachment

Details of the *Commonwealth Electoral (Logo Requirements) Determination 2016*

Section 1- Name of Determination

This section provides that the name of the Determination is the *Commonwealth Electoral (Logo Requirements) Determination 2016*.

Section 2 – Commencement

This section provides that the Determination commences on the day after it is registered.

Section 3- Authority

This section provides that the Determination is made under subsection 126(2AB) of the *Commonwealth Electoral Act 1918* (the Act).

Section 4 – Definitions

This section specifies the meaning of terms that have been used through the Determination.

Section 5 – Requirements for a logo set out in an application

This section specifies the requirements for including a party logo in an application for registration under Part XI of the Act. The purpose of this section is to specify the technical requirements relating to the design and electronic file format that a party logo must comply with in order for the application to be approved by the Electoral Commission.

Paragraph 5(a) - Vector graphic in electronic format

Paragraph 5(a) provides that the logo must be a vector graphic in electronic format. We note that vector graphics, sometimes called scalable graphics, are made of mathematical points. This means the graphic can be scaled up and down to any size without having to be concerned about resolution. Requiring vector logos provides flexibility for current and future purposes.

Paragraph 5(b) - 100% black in a CMYK colour space

Paragraph 5(b) provides that the logo must be designed using 100% black in the CMYK colour space. This requirement will ensure that the printing of party logos on ballot papers complies with the existing printing requirements for ballot papers.

All ballot paper content, other than the security feature, are currently set to 100% black in a CMYK colour space. Restricting the level to 100% means that the ballot paper logos can be implemented into the existing workflow with minimal complication and risk

Paragraph 5(c) - Frame size of 10mm by 10mm

Paragraph 5(c) provides that the logo set out in the application be no larger than a maximum size of 10mm by 10mm. The maximum size was chosen because it had minimal impact on production costs and could be implemented within the rules of the Act.

Paragraph 5(d) - Able to be reproduced correctly within a frame of 7 mm by 7 mm

Paragraph 5(d) provides that the logo set out in the application must be able to be reproduced within a minimum frame size of 7mm by 7mm. This minimum size was chosen following reproduction testing with a House of Representatives ballot paper containing 16 candidates. The reproduction testing identified 7mm by 7mm as the maximum size frame a logo can be printed when a House of Representatives ballot paper contains 16 candidates.

We note that this is the largest number of candidates that has appeared on a ballot paper since the amendments made in 2010 which limited the number of candidates that a party is able to endorse in a Division in a House of Representatives election - see subsection 166(1AA).

Paragraph 5(e) – Logo features that will not be compliant with section 5 of this Determination

Paragraph 5(e) specifies a number of technical features which compliant party logos must not include when setting out the logo in the application.

Subparagraph 5(e)(i) - Exclude live text

Subparagraph 5(e)(i) provides that the logo must not include live text. We note that live text can cause printing issues such as missing or unexpected reproduction of fonts. It is common practice to outline fonts when certainty around font management cannot be guaranteed.

Subparagraph 5(e)(ii) - Exclude transparency and overprinting

Subparagraph 5(e)(ii) provides that the logo must not include transparency or overprinting. We note that the use of transparency in files can cause unexpected issues with some print workflows. It is common practice to exclude transparency in situations where it is not necessary.

All elements within the ballot paper are set to overprint by default through the desktop publishing software. If the logo is also set to overprint (double overprint) this can cause unexpected issues when printing.

Subparagraph 5(e)(iii) - Exclude custom halftone, transfer curve or colour profile settings

Subparagraph 5(e)(iii) provides that the logo must not include custom halftone, transfer curve or colour profile settings. Custom halftone, transfer curve or colour profile settings can be embedded into PDF (electronic document) to control how colours reproduce on the printer. The inclusion of these could cause logos not to print the same way. It is common practice when using monochromatic graphics to strip these settings.

Paragraph 5(f) – ISO compliant portable document file of less than 5MB

Paragraph 5(f) provides that the logo set out in the application must be a portable document file (pdf) with a size restriction of 5 megabytes (5MB) that complies with International Standard ISO 32000-1:2008.

We note that the size restriction was included as a requirement as large vector file can signify an issue with the file, possibly hidden data or points layered on other points. Overly large files can negatively impact design and production workflows. Simple vector files are

typically small and usually less than 1 megabyte. A 5 megabyte limit will facilitate the use of complex vector graphics when designing a logo.

Paragraph 5(f) also specifies that the PDF (electronic document) must comply with the International Standard ISO 32000-1:2008 as in force at the time this instrument commences. By specifying this standard we are requiring a PDF that meets best practice standards as documented by Adobe and can be confident it will reproduce as expected.

The International Standard ISO 32000-1:2008 was produced by the International Organisation for Standardisation (ISO) in 2008 so as to ensure that PDFs were consistent and reliable. The International Standard ISO 32000-1:2008 can be purchased from the ISO for a fee. However ISO has allowed Adobe System to provide and host an unofficial ISO 3200-1 document that is available as a free download.

The Standard can be accessed at:
http://www.adobe.com/content/dam/Adobe/en/devnet/acrobat/pdfs/PDF32000_2008.pdf

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

REF: MC16-002450

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 (Health Measures No. 3) Regulation 2016* (the Regulation).

In the *Delegated legislation monitor, Monitor 6 of 2016*, 14 September 2016, the Committee requested further information about an item included in the Regulation, namely funding for the Biomedical Translation Fund.

The Minister for Health and Aged Care, the Hon Sussan Ley MP, has provided the attached response to the Committee's request and I have provided the Minister with a copy of this letter.

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

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

Kind regards

Mathias Cormann
Minister for Finance

8 November 2016

Provided by the Minister for Health and Aged Care

Response to the Committee's questions about the 'Biomedical Translation Fund' initiative

The Biomedical Translation Fund (BTF) is a for-profit fund that will provide $250 million of Commonwealth capital to licensed private sector fund managers, who will secure at least matched private capital, to invest in biomedical start-ups.

The aim of the BTF is to improve health outcomes and contribute to significant economic gains for Australia. By investing in biomedical start-ups and encouraging the translation of biomedical discoveries into commercial realities, the BTF may result in the development of improved and innovative treatments, therapeutics, and medical devices than those that currently exist.

In addressing a gap in the 'research pipeline' where great ideas can be lost due to lack of market funding, the BTF will transform biomedical discoveries into tangible products that would otherwise not have been realised without the existence of the BTF. Funding from the BTF will also speed up the translation of biomedical discoveries, resulting in Australians gaining earlier access to better healthcare and improvements in the efficacy of the Australian health system.

Articles 2 and 12 of the International Covenant of Economic, Social and Cultural Rights, and the 'General Comments' adopted by the Committee on Economic, Social and Cultural Rights are to the effect that the right to health requires contracting states to foster research and the provision of information.

The BTF will be of national significance, cross-jurisdictional and beyond the remit of any particular state and territory governments as it will result in improved health outcomes and contribute to significant economic benefits for Australia.

The investments from the BTF will result in the formation of Australian biomedical companies, increased employment in the Australian biomedical sector and possible financial returns to the Commonwealth and participating private sector investors.

It is also expected that funding provided through the BTF will result in a change to the Australian biomedical sector in that it will increase the risk tolerance of the sector's investors which will in turn result in the growth of this sector.

As investment decisions will be the responsibility of fund managers licensed under the BTF, it is expected that investments will be made to biomedical start-ups throughout Australia. Given this cross-jurisdictional remit, it is considered that the BTF is an activity best performed by the Commonwealth.

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.

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 John

Thank you for your letter of 15 September 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice on the *Financial Sector (Collection of Data) (Reporting Standard) Determination No. 1 of 2016 – GRS 001 – Reporting Requirements* and related instruments (the Financial Sector (Collection of Data) (reporting standard) determinations Nos 2 to 15 of 2016) (the Instruments).

I have raised the Committee's concerns with the Australian Prudential Regulation Authority (APRA) which is responsible for making the Instruments.

In regards to the Committee's concern regarding the consultation undertaken, APRA notes that in 2014, APRA undertook a project to identify opportunities for regulatory cost savings for industry. As part of the project, APRA undertook a structured consultation process with each APRA-regulated industry (via the relevant industry associations).

Together, the membership of these industry associations represented all APRA-regulated industries. Submissions from industry bodies suggested that changes to the reporting framework could be made in areas where the frequency of reporting could be reduced.

In 2015, the duplicate reporting requirement represented by the unaudited Level 2 second semi-annual and audited Level 2 annual forms falling due on the same day was identified by industry participants and APRA as an opportunity for regulatory cost savings.

Removing the duplicate reporting and reducing the burden on industry is overall beneficial to industry and as it was a result of earlier engagement with industry, further consultation with industry was not considered necessary.

Parliament House, Canberra ACT 2600, Australia
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As requested by the Committee, APRA will shortly re-issue the explanatory statement for the Instruments with the above description of the consultation. The updated explanatory statement is attached.

APRA has advised that it will also commit to providing appropriate and fuller descriptions of its consultation processes in any subsequent explanatory material it issues.

Yours faithfully

Kelly O'Dwyer

Financial Sector (Collection of Data) determination Nos. 1 to 15 of 2016

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Financial Sector (Collection of Data) Act 2001(the Act), subsections 13(1) and 15(1)

Acts Interpretation Act 1901, subsection 33(3)

Under paragraph 13(1)(a) of the Act, APRA may, by writing, determine reporting standards with which financial sector entities must comply. Such standards relate to reporting financial or accounting data and other information regarding the business or activities of the entities. Subsection 15(1) of the Act provides that APRA may declare a day on and after which the reporting standards are to apply.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to issue an instrument the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to revoke any such instrument.

On 19 July 2016, APRA made the following determinations (the instruments):

1. Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2016 which:
   (i) revokes *Reporting Standard GRS 001 Reporting Requirements* made under Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2013; and
   (ii) determines *Reporting Standard GRS 001 Reporting Requirements*;

2. Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2016 which:
   (i) revokes *Reporting Standard GRS 110.1_G Prescribed Capital Amount (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 27 of 2013; and
   (ii) determines *Reporting Standard GRS 110.1_G Prescribed Capital Amount*;

3. Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2016 which:
   (i) revokes *Reporting Standard GRS 112.0_G Determination of Capital Base (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No.28 of 2013; and
   (ii) determines *Reporting Standard GRS 112.0_G Determination of Capital Base (Level 2 Insurance Group)*;

4. Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2016 which:

   (i) revokes *Reporting Standard GRS 112.3_G Related Party Exposures (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 29 of 2013; and

   (ii) determines *Reporting Standard GRS 112.3_G Related Party Exposures (Level 2 Insurance Group)*;

5. Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2016 which:

   (i) revokes *Reporting Standard GRS 114.0_G Asset Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2013; and

   (ii) determines *Reporting Standard GRS 114.0_G Asset Risk Charge (Level 2 Insurance Group)*;

6. Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2016 which:

   (i) revokes *Reporting Standard GRS 114.1_G Assets by Counterparty Grade (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 31 of 2013; and

   (ii) determines *Reporting Standard GRS 114.1_G Assets by Counterparty Grade (Level 2 Insurance Group)*;

7. Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2016 which

   (i) revokes *Reporting Standard GRS 114.3_G Off-balance Sheet Business (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 32 of 2013; and

   (ii) determines *Reporting Standard GRS 114.3_G Off-balance Sheet Business (Level 2 Insurance Group)*;

8. Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2016 which

   (i) revokes *Reporting Standard GRS 115.0_G Outstanding Claims Liabilities – Insurance Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 33 of 2013; and

   (ii) determines *Reporting Standard GRS 115.0_G Outstanding Claims Liabilities – Insurance Risk Charge (Level 2 Insurance Group)*;

9. Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2016 which:

   (i) revokes *Reporting Standard GRS 115.1_G Premiums Liabilities – Insurance Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 34 of 2013; and

   (ii) determines *Reporting Standard GRS 115.1_G Premiums Liabilities –*

Insurance Risk Charge (Level 2 Insurance Group);

10. Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2016 which:

    (i) revokes *Reporting Standard GRS 116.0_G Insurance Concentration Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 35 of 2013; and

    (ii) determines *Reporting Standard GRS 116.0_G Insurance Concentration Risk Charge (Level 2 Insurance Group)*;

11. Financial Sector (Collection of Data) (reporting standard) determination No. 11 of 2016 which:

    (i) revokes *Reporting Standard GRS 117.0_G Asset Concentration Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 36 of 2013; and

    (ii) determines *Reporting Standard GRS 117.0_G Asset Concentration Risk Charge (Level 2 Insurance Group)*;

12. Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2016 which:

    (i) revokes *Reporting Standard GRS 118.0_G Operational Risk Charge (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 37 of 2013; and

    (ii) determines *Reporting Standard GRS 118.0_G Operational Risk Charge (Level 2 Insurance Group)*;

13. Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2016 which:

    (i) revokes *Reporting Standard GRS 300.0_G Statement of Financial Position (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 38 of 2013; and

    (ii) determines *Reporting Standard GRS 300.0_G Statement of Financial Position (Level 2 Insurance Group)*;

14. Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2016 which:

    (i) revokes *Reporting Standard GRS 302.0_G Statement of Financial Position by Region (Level 2 Insurance Group)* made under Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2013; and

    (ii) determines *Reporting Standard GRS 302.0_G Statement of Financial Position by Region (Level 2 Insurance Group)*; and

15. Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2016 which:

    (i) revokes *Reporting Standard GRS 310.0_G Income Statement (Level 2 Insurance Group)* made under Financial Sector (Collection of Data)

(reporting standard) determination No. 40 of 2013; and

(ii) determines *Reporting Standard GRS 310.0_G Income Statement (Level 2 Insurance Group).*

The instrument commences on 30 June 2016 and applies to reporting periods ending on and after that date. The instruments are being registered after this date; however, parent entities of Level 2 insurance groups will not be adversely impacted by this retrospective operation as APRA has removed the duplicate reporting requirement to reduce unnecessary reporting for the parent entities. No parent entity's rights will be adversely affected, nor will any liabilities be imposed by these instruments, as the time for lodging forms with APRA for the parent entities of Level 2 insurance groups will arise no earlier than three months after the June reporting period.

1. Background

Until now, Level 2 insurance groups have provided two unaudited semi-annual returns and an audited annual return each financial year. The second unaudited semi-annual return was due one month prior to the audited annual return, and was used by APRA supervisors to review capital position and financial performance prior to submission of the audited return.

The due dates for audited annual return submission was made one month earlier for reporting periods after 1 January 2015, making it due on the same day as the unaudited second semi-annual return.

Consistent with APRA's commitment to look for opportunities to reduce compliance costs for business and the community, APRA has removed this duplicate reporting requirement to reduce unnecessary reporting for Level 2 insurance groups.

2. Purpose and operation of the instrument

The purpose of the instrument is to remove the second semi-annual return for Level 2 insurance groups and reduce their reporting burden by amending the reporting standards.

3. Consultation

In 2014, APRA undertook a project to identify opportunities for regulatory cost savings for industry. As part of the project, APRA undertook a structured consultation process with each APRA-regulated industry (via the relevant industry associations). Together, the membership of these industry associations represented all APRA-regulated industries. Submissions from industry bodies suggested that changes to the reporting framework could be made in areas where the frequency of reporting could be reduced.

In 2015, the duplicate reporting requirement represented by the unaudited Level 2 second semi-annual and audited Level 2 annual forms falling due on the same day was identified by industry participants and APRA as an opportunity for regulatory costs savings.

Removing the duplicate reporting and reducing the burden on industry is overall beneficial to industry and as it was resultant of earlier engagement with industry further consultation with industry was not considered necessary.

4. Regulatory Impact Statement

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

5. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

A Statement of Compatibility with Human Rights is Appendix A to this Explanatory Statement.

Appendix A

Statement of Compatibility with Human Rights

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

Financial Sector (Collection of Data) (reporting standard) determinations No. 1 to 15 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* (HRPS Act).

Overview of the Legislative Instruments

These Legislative Instruments removes the requirement to report the second semi-annual return for Level 2 insurance groups in the following reporting standards:

- Reporting Standard GRS 110.1_G Prescribed Capital Amount (Level 2 Insurance Group);
- Reporting Standard GRS 112.0_G Determination of Capital Base (Level 2 Insurance Group);
- Reporting Standard GRS 112.3_G Related Party Exposures (Level 2 Insurance Group);
- Reporting Standard GRS 114.0_G Asset Risk Charge (Level 2 Insurance Group);

- Reporting Standard GRS 114.1_G Assets by Counterparty Grade (Level 2 Insurance Group);
- Reporting Standard GRS 114.3_G Off-balance Sheet Business (Level 2 Insurance Group);
- Reporting Standard GRS 115.0_G Outstanding Claims Liabilities - Insurance Risk Charge (Level 2 Insurance Group);
- Reporting Standard GRS 115.1_G Premiums Liabilities - Insurance Risk Charge (Level 2 Insurance Group);
- Reporting Standard GRS 116.0_G Insurance Concentration Risk Charge (Level 2 Insurance Group);
- Reporting Standard GRS 117.0_G Asset Concentration Risk Charge (Level 2 Insurance Group);
- Reporting Standard GRS 118.0_G Operational Risk Charge (Level 2 Insurance Group);
- Reporting Standard GRS 300.0_G Statement of Financial Position (Level 2 Insurance Group);
- Reporting Standard GRS 302.0_G Statement of Financial Position by Region (Level 2 Insurance Group); and
- Reporting Standard GRS 310.0_G Income Statement (Level 2 Insurance Group).

Human rights implications

APRA has assessed the instruments and are of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the HRPS Act. Accordingly, in APRA's assessment, the instruments are compatible with human rights.

Conclusion

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

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MS16-002092
MS16-002090

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

Dear Chair

I refer to the request from the Senate Standing Committee on Regulations and Ordinances (the Committee), contained in *Delegated legislation monitor* No. 7 of 2016, for further advice concerning the *Greenhouse and Energy Minimum Standards (Incandescent Lamps for General Lighting Services Determination 2016* [F2016L00659].

The Committee has asked for a further response in relation to standards incorporated in the instrument, which are available to be purchased from SAI Global limited, the commercial arm of Standards Australia Limited.

The referenced standards provide technical detail for the energy performance and labelling requirements for products covered by the instrument.

Greenhouse Energy Minimum Standards determinations extract selected definitions and text to ensure any person affected by, or interested in, the determination can ascertain if a product is covered (or excluded) by the relevant instrument. This allows persons interested in the content of the relevant laws to understand what products are regulated by the instrument without having to purchase the referenced standards.

The Australian Government envisages that the parties most likely to wish to access the referenced documents are businesses whose products are covered by the instrument. They can readily purchase the standards online at the SAI Global website.

The Department of the Environment and Energy is not aware of any complaints from the regulated community about the cost of purchasing the standards referenced in the instrument. It is common practice internationally to set these kinds of requirements in standards, and the regulated community has consistently indicated it is comfortable with, and supports, this arrangement.

If a member of the regulated community or the general public wanted to see the standards referenced in the instrument without purchasing them, then they can freely access them through the National Library and State Libraries, and from a range of public libraries, universities and other education and training providers.

Accordingly, the Government considers that there is free and ready access to the referenced standards for parties affected by or otherwise interested in the application of the law and the content of relevant standards.

Standards Australia is a non-government, not-for-profit organisation. The Government recognises Standards Australia, via a Memorandum of Understanding, as the peak non-government standards development body in Australia.

Standards Australia prepares standards through consultative and other processes with businesses, consumers and technical experts that involve significant effort and expenditure. Copyright in Australian Standards and Australian/New Zealand Standards vests in Standards Australia. SAI Global Limited is the exclusive licensee for all such standards, and also manages Australian copyright permissions and licensing on behalf of the International Electrotechnical Commission (IEC). Standards Australia recovers the costs of its operations through licence fees paid by SAI Global out of revenue generated from the sale of standards. Accordingly, the Government considers it appropriate that businesses who need to apply standards on a routine basis should contribute to covering the costs of their production.

Thank you for writing on this matter.

Yours sincerely

JOSH FRYDENBERG

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

Ref No: MC16-031544

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 13 October 2016 concerning the following instruments:

Health Insurance (Diagnostic Imaging Services Table) Regulation 2016
Health Insurance (Pathology Services Table) Regulation 2016
Private Health Insurance (Data Provision) Rules 2016 (No. 1)

The *Health Insurance (Diagnostic Imaging Services Table) Regulation* (DIST) and the *Health Insurance (Pathology Services Table) Regulation* (PST) provide the legal basis to pay Medicare benefits for diagnostic imaging and pathology services.

It is a requirement of the *Health Insurance Act 1973* (the HI Act) that the DIST and PST are remade each year. The HI Act prescribes that the tables cease to take effect 12 months and 15 sitting days of the House of Representatives after the day of their registration on the Federal Register of Legislation.

The purpose of the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2016* and the *Health Insurance (Pathology Services Table) Regulations 2016* is to remake the 2015 DIST and PST to ensure the continuing legal basis for payments of diagnostic imaging and pathology services. In addition, the instruments also make minor and machinery amendments. These amendments are outlined in the explanatory statements (ES) for each instrument. Without these instruments, there would be no legal basis for the payment of Medicare rebates for diagnostic imaging and pathology services.

You have sought further information on the Australian Standard Geographical Classification (ASGC) being incorporated in the DIST and PST. The ASGC is a method of defining remoteness based purely on the geographical distance between an area and population centres. Since 2004, the ASGC has been used within the DIST and PST to assist in the definition of additional geographical areas that are eligible for the bulk billing incentive items 64991 and 74991 respectively. Additionally ASGC is referenced in the DIST with the definition of 'non-metropolitan hospital' to allow referrals from a medical practitioner who has obstetric privileges at a non-metropolitan hospital for certain pregnancy related ultrasounds; and certain rural exemptions such as for capital sensitivity.

Initially the DIST and PST incorporated the 2002 version of the ASGC but this was updated in 2011 to incorporate the edition of the ASGC published in July 2010. This version of the instrument can be found on the Australian Bureau of Statistics website at www.abs.gov.au and searching 'Australian Standard Geographical Classification (ASGC) July 2010'.

I note the Committee's comments that the DIST and PST, nor their accompanying ES, expressly state how the ASGC is incorporated. It is my Department's view that the current definition of the 'ASGC' in the DIST and PST is sufficiently clear that the document incorporated is the edition of the ASGC published in July 2010 and, to the extent of any uncertainty, paragraph 14(1)(b) of the *Legislation Act 2003* would operate to ensure that the reference was to that publication as in force or existing on the date of commencement of the DIST or PST, as appropriate.

I note the Committee's comments that the note to the definition of 'ASGC' in the DIST is confusing. I have asked my Department to remove that reference in a future variation or remake of the DIST.

With regard to paragraph 2.4.4(b) of the DIST, this paragraph provides reference to the documents that set out the equipment standards relevant to accreditation requirements for the provision of Positron Emission Tomography (PET) nuclear scanning equipment. I note the Committee's comments that the DIST does not expressly state the manner in which the NEMA Standards Publication NU 2-2007 *Performance Measurements of Positron Emission Tomography* (NEMA NU 2-2007) is incorporated. Next time the DIST is varied or remade, this will be rectified and the DIST will make clear on its face that the instrument is incorporated as in force at the time the DIST commences (or is varied).

I am not aware that the full NEMA NU 2-2007 can be accessed for free. However, clause 2.4.4 of the DIST sets standards relating to the safety of the equipment used for Medicare rebateable PET services. One of these is that the equipment must meet the requirements for accreditation by the Australian and New Zealand Society of Nuclear Medicine (ANZSNM). ANZSNM is the major professional society for people who practice nuclear medicine in Australia and New Zealand. ANZSNM's *Requirements for Pet Accreditation (Instrumentation & Radiation Safety) 2nd Edition (2012)* provides that for instrumentation performance standards, assessment of the characteristics of the instrumentation and facilities are as specified in a number of documents, one of which is the NEMA NU 2-2007.

The NEMA NU 2-2007 provides that its purpose is to specify procedures for evaluating performance of PETs, allowing PET equipment manufacturers to cite standardised measurements to specify the guaranteed performance levels of their tomographs, allowing customers to compare the performance of tomographs from various manufacturers. Purchasers of PET equipment can then also use standards in the NEMA NU 2-2007 in acceptance-testing of tomographs before and after installation.

I consider that it is reasonable to require Medicare rebateable PET services to be provided on equipment that meets certain technical safety standards, in this case the accreditation standards set by ANZSNM. Persons affected by this requirement, including owners or operators of the PET equipment, could be reasonably expected to have access to the NEMA NU 2-2007, or information about the equipment's compliance with the standard, as a matter of course.

Given the annual remake requirement for these regulations it would be impractical to outline every element of the regulation where there have been no changes made. This has been a long accepted approach to these remakes.

In relation to the *Private Health Insurance (Data Provision) Rules 2016 (No. 1)* instrument, the '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**. The explanatory statement incorrectly states, because of a typographical error, that GT-Dental Data and HCP2 Data were approved on 25 April 2016. My Department will seek to have this corrected.

I trust the above information is of assistance.

Yours sincerely

The Hon Sussan Ley MP

02 NOV 2016

ATTORNEY-GENERAL

CANBERRA

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

regords.sen@aph.gov.au

Dear Chair

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

I refer to the letter of 15 September 2016 from the Secretary of the Standing Committee on Regulations and Ordinances, enclosing an extract from the *Delegated legislation monitor 6 of 2016* concerning the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (the Amendment Direction).

The committee requests my advice about whether the changes effected by the Amendment Direction may be regarded as more appropriate for parliamentary enactment. The committee asks for this advice on the basis that it perceives that the Amendment Direction appears to narrow the scope of the Solicitor-General's functions prescribed under paragraphs 12(a)(i)–(a)(vii) of the *Law Officers Act 1964* (the Act). The committee suggests that a result of the Amendment Direction is that persons or bodies listed under paragraphs 12(a)(i)–(a)(vii) can no longer seek the advice of the Solicitor-General on questions of law without the consent of the Attorney-General, unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel.

My advice is that, contrary to the committee's suggestion, the changes effected by the Amendment Direction do not have any impact upon the scope of the Solicitor-General's functions under paragraph 12(a) of the Act. They therefore do not require parliamentary enactment, and are appropriate for a legislative instrument.

The Amendment Direction amends the *Legal Services Directions 2005*. The *Legal Services Directions 2005* are a legislative instrument made pursuant to section 55ZF of the *Judiciary Act 1903*. The Explanatory Statement to the *Legal Services Directions 2005* notes that the power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its agencies, including Commonwealth litigation, and for the provision of legal advice to Cabinet.

The Amendment Direction establishes a procedure that gives effect to paragraph 12(b) of the Act, which provides that one of the functions of the Solicitor-General is to furnish his or her

opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General. The requirement for the Attorney-General's consent to the reference of a question of law to the Solicitor-General—unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel—flows from paragraph 12(b) of the Act. The Amendment Direction is not intended to change the scope or operation of paragraph 12(b).

Further, the Amendment Direction is not intended to narrow, or otherwise affect, the scope or operation of paragraph 12(a) of the Act. Relevantly, paragraph 10B.9 of the Amendment Direction provides:

> To avoid doubt, this paragraph does not apply in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel under paragraph 12(a) of the Law Officers Act.

I trust that this addresses the issue raised by the committee.

Yours faithfully

(George Brandis)

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS16-003745

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

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances (the Committee) for requesting my advice in Delegated Legislation Monitor No. 7 of 2016 in relation to the following legislative instruments:

- Migration Act 1958 – Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [2016L00455];
- Migration Act 1958 – Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [2016L00456];
- Migration Act 1958 – Specification of Class of Persons Defined as Fast Track Applicants 2016/010 [2016L00377]; and
- Migration Act 1958 – Specification of Class of Persons Defined as Fast Track Applicants 2016/049 [2016L00679].

The Committee expressed concern 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. The Committee is also concerned that these instruments were improperly classified and that it is unable to determine how this occurred. The Committee is 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 Explanatory Statements that accompany the instruments in question correctly state that the instruments are subject to disallowance. That is the method by which I state whether or not instruments are disallowable.

However, when the instruments were provided to the Office of Parliamentary Counsel (OPC) for registration on the Federal Register of Legislation, my Department mistakenly indicated that the instruments were not subject to disallowance by ticking the wrong box when submitting the instruments. I understand this to be an isolated error and not the result of a failing in my Department's processes.

My Department's enquiries suggest that OPC may have relied on this incorrect information and provided it to the Parliament's Table Office which, in turn, may have provided the incorrect information to the Committee. This suggests that OPC and the Table Office do not obtain information about disallowance from the instrument and the Explanatory Statement, but from the metadata obtained as part of the process for submitting instruments for registration.

Thank you again for bringing these matters to my attention. I trust the information will inform the Committee's enquiries into the classification process.

Yours sincerely

PETER DUTTON 26/10/16

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS16-003807

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

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 13 October 2016 regarding comment in the Delegated legislation monitor No. 7 of 2016, concerning the *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016* [F2016L01391].

The Committee enquired about the basis on which the visa application charges (VACs) for the new Entrepreneur streams in the Provisional Subclass 188 (Business Innovation and Investment) and the Permanent Subclass 888 (Business Innovation and Investment) visas were calculated.

Subclass 188 Provisional visa
The VAC for the Entrepreneur stream in the Provisional visa was set by the Government in line with a range of factors, including Government policy objectives, the likely contribution of the individual to Australian society and the comparison to similar visas in the global economy. Specifically, the VAC pricing for this stream was set to reflect the VAC for the current points-tested skilled visas of $3,600. This is a lower charge than the other streams of the Subclass 188 visa to increase the attractiveness of the new Entrepreneur Stream and reflect that applicants in the Entrepreneur Stream do not require an established business history or wealth level unlike the other streams in the Subclass 188 visa.

Subclass 888 Permanent visa
Following the Committee's correspondence, it was identified that an incorrect amount for the VAC for the Entrepreneur stream in the Permanent visa was inadvertently inserted by the *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016*.

The intention was that the VAC for the Entrepreneur stream in the Permanent visa would be consistent with the VAC for all other streams in the Permanent visa, at $2305. Through an administrative oversight, the VAC for the provisional stage of the Entrepreneur stream was inadvertently mirrored for the permanent stage. This resulted in a higher charge of $3600 being set, instead of the intended charge of $2305.

As such, Schedule 2 to the *Migration Amendment (Temporary Activity Visas) Regulation 2016* (the Amending Regulation) makes amendments to provide for the correct VAC, to be made at the Federal Executive Council meeting of 10 November 2016 and to commence on 19 November 2016. Although no persons are yet eligible to apply for this permanent visa (and therefore no one has been disadvantaged by the higher VAC), the amendment ensures the lower and correct VAC applies in the future when persons will be eligible to apply for the visa.

Thank you again for bringing these matters to my attention.

Yours sincerely

PETER DUTTON 02/11/16.

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: MC16-004532

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.

Part 21 Manual of Standards Instrument 2016 [F2016L00915]

The Committee notes that when an instrument incorporates, as in force from time to time, various international airworthiness requirements, certification specifications and standards, the Explanatory Statement will provide a description of these documents and indicate how they may be obtained. The Civil Aviation Safety Authority has advised that it expects to lodge a revised Explanatory Statement this instrument in October 2016 that will provide a further description (where possible) of the incorporated documents and indicate where the documents can be obtained.

I trust this information is of assistance to the Committee.

Yours sincerely

FIONA NASH

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

Delegated Legislation Monitor 7 of 2016

Dear Chair John

Thank you for your letters of 13 October 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances about the Delegated Legislation Monitor 7 of 2016.

With respect to the availability of the Australian Standard AS/NZS IEC 62287.1: 2007 referenced in the *Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence 2016 [F2016L01294]*, the Australian Communications and Media Authority (ACMA) has indicated that it agrees with the Committee that it would be benefitical to have a free copy available. The ACMA will make a copy of the Standard available for viewing on request in each of its state and territory offices. The ACMA will also amend the Explanatory Statement for the Radiocommunications (Aircraft and Aeronautical Mobile Stations) Class Licence in the near future to include reference to this facility.

Similarly, the ACMA will also make a copy of each of the six Australian Standards incorporated by reference in the *Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]* available at its state and territory offices. The Explanatory Statement will likewise be amended to reference this change.

I have also copied this reply to the Honourable Craig Laundy MP, Assistant Minister for Industry, Innovation and Science, as he is responsible for government policy about the use of Australia Standards.

I would like to thank the Committee for bringing to my attention the fact that neither the *Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]* nor the accompanying Explanatory Statements explain the manner in which the *Radio Regulations Articles* are incorporated. The ACMA had intended that the definition of "radar" as defined in the *Radio Regulations Articles* published by the International Telecommunications Union be taken as applying as it exists from time to time (as permitted by subsection 314A(2) of the *Radiocommunications Act* 1992).

Accordingly, the ACMA will amend the Emergency Locating Devices Class Licence and the Explanatory Statements in the near future to make this matter clear. The ACMA will also include a description of the *Radio Regulations Articles* and note where they may be accessed online for free, as per the Committee's suggestion about best practice.

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

Yours sincerely

MITCH FIFIELD

31/10/16

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

Reference: MS 16-000116

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

Dear Chair

Standing Committee on Regulations and Ordinances - Remuneration Tribunal Determination 2016/10

Thank you for your letter to the Senior Adviser to the Minister Assisting the Cabinet Secretary dated 13 October 2016. I have been asked to respond on their behalf as the Remuneration Tribunal sits in my portfolio.

The attached draft revised Explanatory Statement has been amended so it now includes more detailed information on the Remuneration Tribunal's consultation process. The Tribunal's secretariat will arrange for its registration on the Federal Register of Legislation.

The Tribunal has been reminded of the requirements of section 17 of the *Legislation Act 2003*.

Yours sincerely

Senator the Hon Michaelia Cash
26 /10/2016

REMUNERATION TRIBUNAL

Explanatory Statement: Determination 2016/10: Remuneration and Allowances for Holders of Public Office

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

Consultation

2. Section 11 of the Act advises that in the performance of its functions the Tribunal:
   - may inform itself in such manner as it thinks fit;
   - may receive written or oral statements;
   - is not required to conduct any proceeding in a formal manner; and
   - is not bound by the rules of evidence.

3. The Tribunal normally receives submissions on remuneration from a Portfolio Minister, or a Secretary, Program Manager or Employing Body (in respect of a principal executive office) with responsibility for the relevant office(s). The Tribunal will normally seek the views of the relevant Portfolio Minister prior to determining remuneration for an office.

4. The Tribunal may reach a decision based on the information provided in the submission and other publicly available information such as portfolio budget statements, annual reports, corporate plans, legislation and media releases. On occasion it may wish to meet with relevant parties or seek further information from the relevant Minister or person making the submission.

5. Amongst other relevant matters in deliberating on appropriate remuneration for an office the Tribunal informs itself on:
   - the main functions, responsibilities and accountabilities of the office;
   - the organisational structure, budget and workforce;
   - the requisite characteristics, skills or qualifications required of the office holder(s); and
   - the remuneration of similar, comparator, offices within its jurisdiction.

Chief Executive Officer of the National Disability Insurance Launch Transition Agency

6. The Tribunal received a submission from the Minister for Social Services requesting a review of remuneration for this office. The submission provided details on the expansion of the National Disability Insurance Scheme to full implementation from 1 July 2016.

7. In considering remuneration for the office the Tribunal also met with the Secretary for the Department of Social Services.

Aboriginal and Torres Strait Islander Social Justice Commissioner

8. There was no consultation on this matter as the amendments delete conditions applying to an office holder who resigned from the public office.

Retrospectivity

9. Any retrospective application of this determination is in accordance with subsection 12(2) of the *Legislation Act 2003* as it does not affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) to that person's disadvantage, nor does it impose any liability on such a person.

Details of the determination are as follows:

PART 1 – FULL-TIME OFFICES

9. Clause 1.1 specifies the Principal Determination (Number 21 of 2015 as amended) for the purposes of Part 1 of the Determination.
10. Clauses 1.2 and 1.3 remove all reference to Mr M Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission. Mr Gooda has resigned to take up another appointment.
11. Clause 1.4 sets increased total remuneration for the Chief Executive Officer of the National Disability Insurance Scheme Launch Transition Agency of $522,240.
12. Clause 1.5 sets the commencement date, 1 July 2016, of Clause 1.4.

Authority: Subsections 7(3) and 7(4)
Remuneration Tribunal Act 1973

Statement of Compatibility with Human Rights

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

Remuneration Tribunal Determination 2016/10

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

This Determination amends Principal Tribunal Determination:

2015/21: Remuneration and Allowances for Holders of Full-Time Public Office.

The Determination:

- removes all reference to Mr M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission. Mr Gooda has resigned to take up another appointment.
- sets increased remuneration for the Chief Executive Officer, of the National Disability Insurance Scheme Launch Transition Agency, due to the expansion of the scheme.

The instrument maintains the principle of fair, and current, remuneration for work performed.

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.

Remuneration Tribunal