

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

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

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

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the

1 For further information on the disallowance process and the work of the committee see *Oggers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

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

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 following the receipt of additional information from ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.

Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.³

Guidelines

Guidelines referred to by the committee are published on the committee's website.⁴

Acknowledgement

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

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.⁵

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.⁶

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.

3 See www.aph.gov.au/regords_monitor.

4 See www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.⁷

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

7 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2017*, 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 7 July 2017 and 10 August 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Guidelines referred to by the committee are published on the committee's website.¹

Response required

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

Instrument	Airports (Protection of Airspace) Amendment Regulations 2017 [F2017L00969]
Purpose	Amend the Airports (Protection of Airspace) Regulations 1996 to exempt certain controlled activities on and around the Sydney West Airport site during airport construction and prior to the commencement of air transport operations
Authorising legislation	<i>Airports Act 1996</i>
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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.

1 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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.

Item 11 of the regulations inserts new section 16A into the Airports (Protection of Airspace) Regulations 1996 which declares controlled activities in three classes to be exempt from Division 4 of Part 12 of the *Airports Act 1996* (the Act). With reference to the above, the committee notes that new subsection 16A(4) appears to incorporate an airport plan for the Sydney West Airport (SWA). While the ES notes that the Minister for Urban Infrastructure determined an airport plan for SWA under section 96B(1) of the Act on 5 December 2016, neither the instrument nor the ES state the manner in which this document 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 a particular time). 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²

The committee requests the advice of the minister in relation to the above.

Access to incorporated document

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 (i.e. without cost) 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 appears to incorporate an airport plan for the Sydney West Airport (SWA), and that the Minister

2 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

for Urban Infrastructure determined an airport plan for SWA under section 96B(1) of the Act on 5 December 2016. However, the ES does not contain any further description of this document, or indicate how the document may be obtained.

In this instance, the committee notes that the current airport plan for the SWA is available for free online.³ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁴

The committee draws the above to the minister's attention.

Instrument	ASIC Corporations (Amendment) Instrument 2017/642 [F2017L00905]
	ASIC Credit (Amendment) Instrument 2017/641 [F2017L00904]
Purpose	Amend ASIC Class Orders [13/898] and [13/18] respectively, to extend their operation until 12 July 2019
Authorising legislation	<i>National Consumer Credit Protection Act 2009; Corporations Act 2001</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(d)

Timetable for making substantive amendments (Continuing exemption)

3 See Department of Infrastructure and Regional Development, *Airport Plan*, available at <http://westernsydneyairport.gov.au/about/airport-plan/index.aspx> (accessed 4 September 2017).

4 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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 primary rather than delegated legislation).

The instruments extend existing exemptions from requirements in the *Corporations Act 2001*, Corporations Regulations 2001 and the National Credit Code relating to managed investment schemes and the provision of credit. The exemptions apply to lawyers, litigation funders, and members of litigation funding arrangements or schemes and proof of debt funding arrangements or schemes.

The exemptions from these requirements were first granted in 2013, in response to decisions of the Federal Court and High Court relating to litigation funding that found:

- a funded representative action and solicitors' retainers for two representative proceedings in the Federal Court constituted a managed investment scheme that should have been registered for the purposes of the *Corporations Act 2001*;⁵
- a litigation funding agreement in a matter was a 'credit facility' within the meaning of regulation 7.1.06 of the Corporations Regulations 2001; and
- the litigation funding agreement was 'credit' because it was a form of financial accommodation provided by the litigation funder to the litigant and its provision 'for any period' was a 'credit facility'.⁶

The committee notes that the ES to each instrument states that the exemptions are being continued to provide certainty for lawyers, litigation funders and members of litigation funding arrangements or schemes and proof of debt funding arrangements or schemes. However, the committee also notes that at the time the exemptions were originally granted, and in previous instruments extending the exemptions, the ESs to those instruments stated that the exemptions were being made to provide time for government to consider making regulations or other amendments to exempt litigation funding arrangements and proof of debt funding arrangements from the Credit Act and the managed investment scheme requirements in the Corporations Act and Regulations.⁷

5 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147.

6 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45.

7 See explanatory statements to ASIC Class Order [CO 13/18] [F2013L00043] and ASIC Class Order [CO 13/898] [F2013L01376]; and ASIC Credit (Amendment) Instrument 2016/632 [F2016L01171] and ASIC Corporations (Amendment) Instrument 2016/476 [F2016L01170].

The committee generally prefers that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation. Given the committee's general expectation in this regard, the committee notes that the instruments extend the exemptions for a further two years until 12 July 2019, but no information is provided as to whether further amendments to primary legislation or principal regulations are still being considered to remove the need for the continued exemptions.

The committee requests the advice of the minister in relation to the above.

Instrument	CASA EX106/17 - Exemptions and directions - use of portable electronic devices when loading fuel [F2017L00975]
Purpose	Exempts operators, operator personnel, and pilots in command of turbine engine aircraft using underwing fuelling systems from compliance with specified provisions of Civil Aviation Order 20.9 and the Civil Aviation Regulations 1988
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 'PED' in section 2 of the instrument incorporates 'IEEE 802.11 wireless standard'. However, neither the instrument nor its ES specifies the manner in which this document is incorporated.

The committee requests the advice of the minister in relation to the above.

Access to incorporated document

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 (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the 'IEEE 802.11 wireless standard'. However, neither the instrument nor the ES indicates where the standard can be freely accessed.

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 may fail to satisfy the requirements of the *Legislation Act 2003*. In this case the committee has observed that the document appears to be available for free online.⁸ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁹

The committee draws the above to the minister's attention.

8 See IEEE Standards Association, IEEE Get Program, available at <https://standards.ieee.org/about/get/802/802.11.html> (accessed 4 September 2017).

9 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Instrument	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) [F2017L00991]
Purpose	Amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to reflect the making of the Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Department	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The declaration replaces Schedule 1 of Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2017C00676] (the principal declaration) to specify provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to the *Charter of the United Nations Act 1945*.

The committee has requested advice from the minister in relation to the apparent inclusion of repealed regulations in this Schedule on two previous occasions.¹⁰ The minister's response on each occasion advised that these regulations should not have appeared in the principal declaration, and the minister undertook to amend the declaration and its ES, as soon as practicable, to remove the references to the UN sanction enforcement laws which no longer existed.

The committee notes that the earlier repealed regulations have not been included in the current replacement Schedule 1. However, item 10 of replacement Schedule 1 lists regulations 8, 10, 12 and 13 of the Charter of the United Nations (Sanctions – Liberia) Regulations 2008 [F2014C01028]. The committee understands that this regulation is no longer in force, in accordance with section 8 of the *Charter of the United Nations Act 1945*, due to the adoption of UN Security Council Resolution 2288 (2016) on 25 May 2016.

¹⁰ See *Delegated legislation monitors* 6 and 8 of 2016; and 1 and 3 of 2017.

It is therefore unclear to the committee why this regulation has been included in the declaration.

The committee requests the advice of the minister in relation to the above.

Instrument	Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulations 2017 [F2017L00920]
Purpose	Amends the Fisheries Management (International Agreements) Regulations 2009 to include amendments to the international fisheries management measures that are currently prescribed and prescribe those that came into force as a result of meetings of five international fisheries management organisations held between 1 July 2015 and 30 June 2016
Authorising legislation	<i>Fisheries Management Act 1991</i>
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 regulations incorporate the following documents:

- Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) Conservation Measures 10-04, 25-02 (Annex 25-02/A) and 41-01 (Annex 41-01/C);¹¹ and

11 See items 10, 13 and 14.

- South Pacific Regional Fisheries Management Organisation (SPRFMO) Conservation and Management Measure 13-2016.¹²

However, neither the regulations nor the ES state 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 a particular time). 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹³

The committee requests the advice of the minister in relation to the above.

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) 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 regulations incorporate the abovementioned documents. However, neither the regulations nor the ES provide descriptions of the documents or indicate where they can be freely accessed.

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 may fail to satisfy the requirements of the *Legislation Act 2003*. In this case the

12 See item 50.

13 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

committee notes that the documents are available for free online.¹⁴ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹⁵

The committee draws the above to the minister's attention.

Instrument	Great Barrier Reef Marine Park Amendment (Whitsundays Plan of Management) Instrument 2017 [F2017L00932]
Purpose	Amends the Whitsundays Plan of Management 1998 to implement the outcomes of a review of the Plan conducted between December 2014 and June 2017
Authorising legislation	<i>Great Barrier Reef Marine Park Act 1975</i>
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instrument makes amendments to the Whitsundays Plan of Management 1998 (the Plan), in response to a recent review.

Item 106 of Schedule 1 to the instrument repeals and substitutes the definition of 'Regulations' in the Plan. Previously 'regulations' were defined by specific reference

14 See Commission for the Conservation of Antarctic Marine Living Resources, *Conservation measures*, available at <https://www.ccamlr.org/en/conservation-and-management/browse-conservation-measures>; and South Pacific Regional Fisheries Management Organisation, *2017 Conservation and Management Measures*, available at <https://www.sprfmo.int/conservation-measures/> (accessed 31 August 2017).

15 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

to the Great Barrier Reef Marine Park Regulations 1983. The new definition now refers to 'Regulations made under the Act'.

The ES states:

In order to ensure the definition does not become outdated, it has been replaced with a reference to 'regulations made under the Act'. This will ensure that if the Regulations are repealed and remade in the future, the definition in the Plan will not need to be updated.

A number of provisions of the plan are also amended to remove reference to specific regulations in the Great Barrier Reef Marine Park Regulations 1983, and to instead refer just to 'the Regulations'.

The committee notes that, by referring only in general terms to 'regulations made under the Act', the new definition and provisions may make it more difficult for persons affected by, or interested in, the instrument and the Plan to identify the relevant regulations involved. The definition may also cause confusion if, in future, separate regulations are made under the Act.

In the interests of promoting the clarity and intelligibility of instruments, the committee notes its expectation that instruments and their ESs be drafted with sufficient care and precision to avoid potential confusion for anticipated users.

The committee requests the advice of the minister in relation to the above.

Instrument	Norfolk Island Continued Laws Amendment (Director of Public Prosecutions) Ordinance 2017 [F2017L00986]
Purpose	Amends the Norfolk Island Continued Laws Ordinance 2015 to allow the Commonwealth Director of Public Prosecutions to perform certain functions in relation to particular Norfolk Island laws
Authorising legislation	<i>Norfolk Island Act 1979</i>
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), 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 in legislation 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.

With reference to the above, the committee notes that item 12 of Schedule 1 to the ordinance inserts item 12E into the Norfolk Island Continued Laws Ordinance 2015, and thereby amends the *Interpretation Act 1979* (Norfolk Island) to allow the Commonwealth Director of Public Prosecutions (CDPP) to delegate all or any of his or her functions or powers under an enactment to a member of staff of the Office of the CDPP other than the Associate Director. The ES to the ordinance states:

The delegation power is necessary as it will often not be practicable for the Director to personally discharge functions under Norfolk Island laws. The provision will allow the Director to delegate functions under Norfolk Island continued laws consistently with how functions conferred on the Director under Commonwealth laws may be delegated.

However, the committee notes that neither the ordinance nor the ES provides information about whether a delegate who exercises the powers of the CDPP is required to be at a certain level in the Australian Public Service, such as a member of the senior executive service.

In addition, the committee is concerned that the delegation provision contains no requirement that a member of staff to whom functions or powers under a Norfolk Island enactment are delegated is appropriately trained or qualified to ensure the proper exercise of the powers. The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the ordinance; rather, that the provision include a requirement that the CDPP be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee requests the advice of the minister in relation to the above.

Instrument	Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 6) [F2017L00894]
Purpose	Amends the Private Health Insurance (Benefit Requirements) Rules 2011 by increasing the minimum benefit payable per night by private health insurers for nursing-home type patients in South Australian public hospitals
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a) and (b)

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)).

The committee notes that under the heading of consultation, the ES states:

Schedule A of the Amendment Rules - Item 1

One minor error was identified in the Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 5) that came into effect on 1 July 2017. The issue was due to a clerical error resulting in an incorrect NHTP contribution rate calculation for South Australia.

However, the committee notes that the ES does not provide information regarding consultation undertaken in relation to the instrument.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.¹⁶

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

Effect of drafting error

Schedule A of the instrument sets out the minimum benefit payable per night by private health insurers for patients that are classified as nursing-home type patients in public hospitals. Item 1 of Schedule A increases the minimum benefit for South Australian public hospitals by \$2, from \$116 to \$118 per night. As noted above, the ES states that this minimum benefit has been increased to correct an error in the previous version of the Private Health Insurance (Benefit Requirements) Rules 2011, as amended by the Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 5), which came into effect on 1 July 2017.

The committee notes that, as this instrument commenced on 8 July 2017, it appears possible that, between 1 and 8 July 2017, nursing-home type patients in South Australian public hospitals may have received a lower benefit for their hospital accommodation than that to which they were entitled.

The committee will generally be concerned about the effect, if any, on individuals during periods in which instruments containing errors are in effect. In this case the committee notes that any potential disadvantage to individuals would only have arisen in the 7 days before the correction of the error, and that the maximum possible detriment to an individual may only amount to \$14.

Nevertheless, the committee emphasises the importance of ensuring that individuals are not disadvantaged by drafting errors. The committee also considers that the onus should not be placed on policyholders to identify any shortfall. The committee requests that this continuing concern be taken into account when similar circumstances arise in future.

The committee draws the above to the minister's attention.

16 See Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

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 published on the committee's website.¹⁷

Instrument	Inspector of Transport Security Regulations 2017 [F2017L00510]
Purpose	Identifies the international obligations that the Inspector of Transport Security must comply with; sets the form of the identity card that must be issued to persons exercising the Inspector's delegated search powers; prescribes the criteria that a person must satisfy to be delegated powers under the <i>Inspector Transport Security Act 2006</i> ; and details the fee for attendance at a coronial inquiry and the due date for payment
Authorising legislation	<i>Inspector of Transport Security Act 2006</i>
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 11 May 2017) The time to give a notice of motion to disallow expired on 4 September 2017 Notice given on 4 September 2017 ¹⁸ Motion currently must be resolved by 16 November 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 6 and 10 of 2017</i>

The committee previously commented on two matters as follows:

Manner of incorporation

17 See www.aph.gov.au/regords_monitor.

18 See Regulations and Ordinances Committee, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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 7 of the Inspector of Transport Security Regulations 2017 [F2017L00510] (the regulation) appears to incorporate paragraphs 5.12 and 6.2 of Annex 13 to the Convention on International Civil Aviation (Annex 13). However, neither the regulation nor the ES state the manner in which Annex 13 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 a particular time). 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's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requested the advice of the minister in relation to the above.

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) 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 note to section 7 of the regulation states:

The Convention is in Australian Treaty Series 1957 No. 5 ([1957] ATS 5) and could in 2017 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

However, the committee notes that the text of Annex 13 does not appear to be available at this location and the ES does not contain any further information about where Annex 13 can be freely accessed.

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

The committee requested the advice of the minister in relation to the above.

Minister's first response

The Minister for Infrastructure and Transport advised:

I have sought advice from the Department of Infrastructure and Regional Development in relation to the Committee's concerns regarding incorporation of and access to Annex 13 of The Convention of International Civil Aviation and an amendment to the statement regarding consultation.

The Department has advised that the Explanatory Statement will be replaced to address these issues.

Committee's first response

The committee thanked the minister for his response.

The committee also notes the minister's undertaking to replace the ES to address the committee's concerns. However, the committee remains concerned that in the interim period before the ES is replaced, interested persons will not know the manner in which Annex 13 is incorporated; nor where it can be freely accessed.

The committee therefore requests that the minister provide advice to the committee as to the manner in which Annex 13 is incorporated; and where it can be obtained (in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*).

The committee requested the further advice of the minister in relation to the above.

Minister's second response

The Minister for Infrastructure and Transport advised:

I have sought advice from the Department of Infrastructure and Regional Development in relation to the Committee's concerns regarding incorporation of and access to Annex 13 of *The Convention of International Civil Aviation*.

The Department has advised that the Replacement Explanatory Statement to address these issues was registered on the Federal Register of Legislation on 23 August 2017.

Relevant excerpt from the replacement ES:

Section 81 of the *Inspector of Transport Security Act 2006* incorporates provisions of the Annex as in force from time to time. This section envisages that the regulations will simply identify Australia's obligations under international agreements, and not indicate whether the agreements (or obligations under them) are as in force from time to time.

This section notes that The Convention can be located in the Australian Treaty series 1957 No. 5 ([1957] ATS 5) and could in 2017 be viewed in the Australian Treaties Library on the AustLII website (www.austlii.edu.au). This only provides context to The Convention, which contains provisions for adoption of annexes. The individual annexes can be accessed at a cost from the International Civil Aviation Organisation Online Store or by a government agency that has access as an ICAO signatory.

Committee's response

The committee thanks the minister for his response.

The committee is satisfied with the explanation of the manner of incorporation of Annex 13 to *The Convention of International Civil Aviation* in the replacement ES.

However, the committee notes that the replacement ES does not provide information on where the document may be accessed for free. As noted above, generally the committee will be concerned where incorporated documents are not publicly and freely available, because a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms. The issue of access to material incorporated into the law by reference to external documents has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees.

The committee's expectation, at a minimum, is that consideration be given by the department to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing upon request to the department. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

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

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis.

Instrument	AD/CFM56/15 Amdt 2 Fuel Filter Cover Attachment Inspection [F2017L00910]
Purpose	Repeals and replaces AD/CFM56/15 Amdt 1 - Fuel Filter Cover Attachment Inspection to correct a typographical error in the number of the DGAC AD referenced
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) 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 CFM International (CFMI) Service Bulletin CFM 56-3 73-A129 as in force at the time of issue for the instrument. The ES states:

The CFMI Service Bulletins referred to in the AD can be obtained from CFMI, however, any Australian aircraft operator which operates aircraft

fitted with CFMI engines are provided with these documents by CFMI by subscription.

The committee acknowledges that anticipated users of the instrument would be in possession of the CFMI Service Bulletin. However, in addition to access for operators of the relevant aircraft in Australia, 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 law is that every person subject to the law should be able to readily and freely access its terms. The issue of access to material incorporated into the law by reference to external documents has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹⁹

The committee draws the above to the minister's attention.

19 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Instrument	<p>Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2017 [F2017L00906]</p> <p>Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 2017 [F2017L00908]</p> <p>General Insurance Supervisory Levy Imposition Determination 2017 [F2017L00911]</p> <p>Life Insurance Supervisory Levy Imposition Determination 2017 [F2017L00912]</p> <p>Superannuation Supervisory Levy Imposition Determination 2017 [F2017L00914]</p>
Purpose	Set financial institutions supervisory levies for the 2017-18 financial year
Authorising legislation	<i>Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998; General Insurance Supervisory Levy Imposition Act 1998; Life Insurance Supervisory Levy Imposition Act 1998; Superannuation Supervisory Levy Imposition Act 1998</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The instruments set levies for the 2017-18 financial year on certain financial institutions that are supervised by the Australian Prudential Regulation Authority (APRA).

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 charge has been calculated.

With respect to these expectations, the committee notes that the ES to each of the instruments, in addressing the *Legislation Act 2003* consultation requirements, refers

to a discussion paper, *Proposed Financial Institutions Supervisory Levies For 2017-18* published in May 2017.²⁰ The committee has observed that this discussion paper sets out in detail the basis and methodology for determining each of the levies, and makes clear that the amounts of the levies have been calculated to recover APRA's operational costs, and other specific costs incurred by certain other Commonwealth agencies and departments.

However, with respect to future instruments imposing similar levies, the committee expresses its preference for the ES to include a clear statement that the levy is calculated to recover the relevant costs. This can then be supported by noting that more detail may be found in the referenced discussion paper.

The committee draws the above to the minister's attention.

Instrument	Legislation (ACT Self-Government Instruments) Sunset-altering Declaration 2017 [F2017L00942]
Purpose	Aligns the sunseting dates of eight instruments relating to the establishment and functioning of the Australian Capital Territory as a self-governing territory to enable their inclusion in a thematic review
Authorising legislation	<i>Legislation Act 2003</i>
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Deferral of sunseting

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

20 See The Treasury, Discussion Paper *Proposed Financial Institutions Supervisory Levies For 2017-18* (26 May 2017) available at <http://treasury.gov.au/ConsultationsandReviews/Consultations/2017/Proposed-Financial-Institutions-Supervisory-Levies-for-201718> (accessed 28 August 2017).

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

The Legislation (ACT Self-Government Instruments) Sunset-altering Declaration 2017 [F2017L00942] (the declaration) aligns the sunseting dates of eight instruments relating to the establishment and functioning of the Australian Capital Territory as a self-governing territory, which would otherwise sunset between 1 April 2018 and 1 April 2019. The committee notes that the declaration has the effect of deferring the sunseting of all of the instruments, which will now have a new sunseting date of 1 April 2020.

The ES to the declaration explains that the eight instruments 'are or will be the subject of a single review' and that the declaration facilitates that review and the implementation of its findings.

The committee draws the extension of the sunseting dates for eight instruments, to 1 April 2020, to the attention of the Senate.

Instrument	National Health (IVF Program) Special Arrangement Amendment Instrument 2017 (No. 1) [F2017L00957]
Purpose	Amends the National Health (IVF Program) Special Arrangement 2015 (PB 60 of 2015) by adding a new pharmaceutical benefit
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in

relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for this instrument describes the general process of consultation with the Pharmaceutical Benefits Advisory Committee in relation to matters relevant to the administration of the Pharmaceutical Benefits Scheme (PBS), including special arrangements. This general process includes consultation with pharmaceutical companies whose products are listed on the PBS.

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 ES refers to a general process of consultation and does not provide information about whether consultation was or was not undertaken specifically in relation to this instrument. 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 further consultation for the instrument was considered unnecessary (or inappropriate) due to the nature of the consultation that had already taken place.²¹

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.²²

The committee draws the above to the minister's attention.

21 The committee notes that it previously commented on similar issues on an advice-only basis. See *Delegated legislation monitor 2* of 2017, pp. 21-22.

22 See Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

Instrument	Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00964]
Purpose	Supports the implementation of the measures contained in the <i>Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Act 2017</i> by prescribing the detail of the hydrofluorocarbon phase-down scheme, prescribing allowable uses for hydrochlorofluorocarbons from 1 January 2020, allowing the Secretary to delegate functions and powers, prescribing fee arrangements and other administrative measures relating to licenses, and other matters
Authorising legislation	<i>Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995; Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995; Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a), (d)

Sub-delegation

Item 34 of Schedule 1 to the regulation inserts new regulation 916 into the Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 (OPSGGM Regulations). New paragraph 916(1)(b) provides that the minister's functions and powers can be delegated to an Australian Public Service (APS) employee who holds, or is acting in, an Executive Level 2 (or equivalent) position in the Department of Environment and Energy (the department).

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), 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 in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

The committee acknowledges that new paragraph 916(1)(b) of the OPSGGM Regulations is similar to section 67A in the *Ozone Protection and Synthetic*

Greenhouse Gas Management Act 1989 (OPSGGM Act) which provides for delegations to Executive Level 2 officers within the department. The committee notes that the ES states:

While Item 34 is drafted to refer to an APS employee who holds or performs the duties of an Executive Level 2, or equivalent, position, it is intended that these functions and powers would only be delegated to Executive Level 2 employees in the Department who have day-to-day responsibility for the administration of the OPSGGM Act and the Principal Regulations.

The capacity to delegate to Executive Level 2 officers who have day-to-day responsibilities in relation to the OPSGGM Act and the Principal Regulations is essential to streamline the administration of the OPSSGM legislation.

The giving of delegations and the exercise of delegated powers are the subject of fraud control procedures, risk management processes and other protocols. These are designed to ensure delegated decision-making is made at the appropriate level and in a transparent and accountable manner.

The committee notes this elaboration of the department's intended approach to the relevant delegations, and the minister's description of the safeguards in place to ensure that delegated decision-making power is exercised appropriately.

The committee remains concerned, however, that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the regulation; rather, that the regulation include a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

In light of the committee's concerns regarding the absence of a legislative requirement that an Executive Level 2 officer to whom the relevant powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the power, the committee draws the above to the attention of the Senate.

Delegation of legislative power – exceptions to offences

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 primary rather than delegated legislation).

The committee notes that amendments made to the OPSGGM Act by the Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017 included an offence for unlicensed manufacture, import or export of ozone depleting substances and synthetic greenhouse gases (new section 13). New section 13 provides for some of the exceptions to the offence to rely on circumstances, types of equipment, amounts of relevant substances, and conditions to be prescribed in the regulations, rather than these details being included in the principal legislation.

These amendments were identified by the Scrutiny of Bills committee as a delegation to the executive of the Parliament's power to legislate significant matters – in this case exceptions to offences contained in principal legislation – and were referred to this committee's attention.²³

The committee notes that item 6 of Schedule 1 to the regulations amends regulation 3 of the OPSGGM Regulations to prescribe 'low volume thresholds', being amounts of substances and conditions to meet the exemptions in section 13 of the OPSGGM Act.

The Scrutiny of Bills committee also noted that it considers that, where the Parliament delegates its legislative power in relation to significant regulatory matters, it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

In this respect, the committee notes that the ES to the regulations provides the following description of consultation that occurred before making the regulations:

A review of the Ozone Protection and Synthetic Greenhouse Gas Program (the Review), completed in 2016, identified a range of measures to improve the effectiveness and efficiency of the Program and further reduce emissions of ozone depleting substances (ODS) and synthetic greenhouse gases (SGGs).

...Relevant industry stakeholders (including HFC importers, equipment manufacturers, end users, state and territory governments, and non-government organisations) were consulted regularly throughout the Review between 2014 and 2016. This consultation included the measures included in the Regulations. Consultation was undertaken through public consultation meetings, invitations for public comment on an options paper, participation in a technical working group representative of stakeholders, and regular meetings with HFC importers, equipment manufacturers, and end users. HFC importers and equipment manufacturers were also consulted with in deciding Australia's revised

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, pp 120-123.

phase-down schedule following agreement to the global HFC phase-down under the Montreal Protocol in October 2016.

The committee takes this opportunity to share and reiterate the view of the Scrutiny of Bills committee that important matters should be included in primary legislation unless a compelling justification is provided for their inclusion in delegated legislation.

The committee draws the above to the attention of the Senate.

Instrument	Taxation Administration (Remedial Power—Foreign Resident Capital Gains Withholding) Determination 2017 [F2017L00992]
Purpose	Modifies the operation of the crediting provisions in Schedule 1 to the <i>Taxation Administration Act 1953</i> , to permit an entity to claim a credit for an amount paid to the Commissioner, in respect of a transaction that is subject to the Foreign Resident Capital Gains Withholding provisions in subdivision 14-D in Schedule 1
Authorising legislation	<i>Taxation Administration Act 1953</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Delegation of legislative power – commissioner of taxation’s remedial power

The committee notes that this determination is made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953*, which was inserted into that Act by the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2016*. This provision confers on the Commissioner of Taxation a 'remedial power' to modify, by a disallowable legislative instrument, the operation of a taxation law. The provision was referred to the committee's attention by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which noted that the power is akin to a so-called 'Henry VIII law' as it enables a legislative instrument to modify the operation of primary legislation.²⁴

24 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp 504-516.

Henry VIII clauses enable delegated legislation to override the operation of legislation which has been passed by the Parliament. In this regard, the committee's concern is that such provisions may subvert the appropriate relationship between the Parliament and the Executive branch of government.

In its consideration of this provision, the Scrutiny of Bills committee noted advice from the minister that the Commissioner's Remedial Power (CRP) would in practice only be used as a last resort, and that its use would be subject to strict limitations. Nevertheless, the Scrutiny of Bills committee remained concerned that the full breadth of the power may not be necessary, and that there may be scope for further legislative guidance on its use. The Scrutiny of Bills committee drew these matters to the attention of this committee.

The Scrutiny of Bills committee also sought further information from the minister about consultation that would take place before the CRP was exercised, and whether specific obligations to consult before exercising the power could be included in the *Taxation Administration Act 1953*. On response from the minister that he considered the consultation requirements in the *Legislation Act 2003* to be sufficient, the Scrutiny of Bills committee also drew this matter to the attention of this committee.

The committee notes that this determination retrospectively modifies the operation of sections 18-15, 18-20 and 18-25 of the *Taxation Administration Act 1953* to allow an entity to claim a credit entitlement for Foreign Resident Capital Gains Withholding (FRCGW) payments in the same income year as that in which the tax liability related to the sale of an asset subject to FRCGW arises. In relation to the retrospective operation of the determination, the ES states:

Retrospective application ensures the benefit of the modification is available to entities that have already entered into contracts that may straddle income years. This ensures that vendors, who have entered into relevant contracts on or after 1 July 2016, do not encounter adverse cash flow or compliance cost consequences which may have occurred but for the instrument.

Importantly, the retrospective application of this instrument is limited by the operation of subsection 370-5(4). This ensures that this instrument, made under section 370-5, will not apply if its application would produce a less favourable result for an entity. Nothing in this instrument prevents a taxpayer from applying the law as it is enacted.

The committee notes that the ES to the determination also sets out the limitations on the use of the CRP previously identified in explanatory material on the bill, and indicates how they are complied with in this instance.

The committee also notes that the ES provides the following information in relation to consultation that occurred in relation to the making of the determination:

Broad consultation has been undertaken. The draft determination and draft explanatory statement were published on the ATO Legal database <http://www.ato.gov.au> seeking feedback and comments for a period of four weeks. Notice of the draft determination was also published on <http://www.ato.gov.au> and subscription alerts issued. Tax professionals and tax associations regularly review both the Legal database and <http://www.ato.gov.au> and further promulgate advice of new drafts issued in their internal news bulletins. The major legal publishers also publish news of the drafts in their key tax alerting services – such as the Weekly Tax Bulletin (published by Thomson Reuters Australia) and Tax Tracker and Tax Week (published by CCH Australia). Additionally, draft determinations and draft explanatory statements were published on the ATO Consultation Hub.

Public consultation resulted in submissions from the Property Council of Australia and the Law Institute of Victoria. Both supported the CRP's use to resolve this issue. The Law Institute of Victoria expressly supported retrospective application, given the adverse consequences that could otherwise arise for transactions which may have already been entered into and which could straddle income tax years.

In addition, targeted consultation on prospective CRP candidates is undertaken with the CRP Panel, a body comprised of private sector specialists, Treasury and ATO representatives. This Panel provided feedback on the legislative instrument and draft explanatory statement. This resulted in more targeted language in the instrument and additional examples in the explanatory statement. The CRP Panel also supported retrospective application of this instrument, to ensure entities that have already entered into relevant property transactions can nonetheless have the advantage of access to this modification.

The Board of Taxation was also consulted on the use of the CRP to resolve this issue, the draft legislative instrument and explanatory statement. The Board supported the CRP use and identified potential interaction issues with interest on early payments and over payments. These were investigated and found to be a function of the operation of the interest on early payment and over payment rules.

In light of the issues raised by the Scrutiny of Bills committee in relation to the delegation of legislative power through the CRP, the committee takes this opportunity to note its use in this instrument.

The committee draws the above to the attention of the Senate.

Instrument	Therapeutic Goods Information (Sharing information about in-house in vitro diagnostic medical devices) Specification 2017 [F2017L00965]
Purpose	Permits the Secretary of the Department of Health to release certain therapeutic goods information that relates to in-house in vitro diagnostic medical devices to the National Association of Testing Authorities
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

With reference to these requirements, the committee notes that the ES for this instrument provides the following information:

The Specification is intended to support the operation of the MOU (memorandum of understanding) between TGA and NATA (as per Clause 5.7 of the MoU). The MOU was developed in consultation with NATA and facilitates the exchange of information on matters relating to the compliance of NATA-accredited laboratories engaged in the manufacture of in-house IVD medical devices with conformity assessment procedures set out in Schedule 3 to the TG MD Regulations.

The MOU is a publicly available document that can be viewed without charge on the NATA website, <https://www.nata.com.au/nata/about-nata/agreements>. Laboratories engaged in the manufacture of in-house IVD medical devices are aware of the MoU and upon submission of an application for inclusion (for a Class 4 in-house IVD medical device) or a notification (for Class 1-3 in-house medical devices) certify that the information provided is current and correct and acknowledge that any information provided to support an application for inclusion or notification may be shared with NATA.

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 ES refers to a general process of consultation that occurred in relation to the development of a memorandum of understanding and does not provide information about whether consultation was or was not undertaken specifically in relation to this instrument. 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 further consultation for the instrument was considered unnecessary (or inappropriate) due to the nature of the consultation that had already taken place.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.²⁵

The committee draws the above to the minister's attention.

25 See Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

Instrument	Therapeutic Goods (Permissible Ingredients) Determination No. 3 of 2017 [F2017L00926]
Purpose	Replaces the Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017, and has the effect of permitting the ingredients described in the determination to be contained in medicines or listed on the Australian Register of Therapeutic Goods
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) 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 determination incorporates:

- British Pharmacopoeia;
- European Pharmacopoeia;
- United States Pharmacopoeia – National Formulary; and
- Food Chemicals Codex published by the United States Pharmacopoeial Convention.

While the committee notes that the ES is generally helpful in providing information about where documents incorporated in the determination can be obtained, in relation to the above documents, the ES states:

A fee is required for access to these documents. It is anticipated that a sponsor of a medicine included in the Australian Register of Therapeutic Goods and other interested persons in the medicines industry using this instrument would be in possession of these standards in order to manufacture the medicine or use the ingredients. Further, versions of these documents are available through a number of libraries allowing public access.

The committee acknowledges that anticipated users and other interested persons in the medicines industry using this determination would be in possession of the incorporated documents. However, in addition to access for members of the medicines industry, 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. In this respect, the committee notes the advice in the ES that the incorporated documents are available through a number of libraries allowing public access.

The issue of access to material incorporated into the law by reference to external documents has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²⁶

The committee draws the above to the minister's attention.

26 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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	<p>ASIC Corporations (Credit Union Member Shares) Instrument 2017/616 [F2017L00898]</p> <p>AusCheck Regulations 2017 [F2017L00971]</p> <p>Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2017 [F2017L00906]</p> <p>CASA 70/17 - Direction — stop bars [F2017L00954]</p> <p>General Insurance Supervisory Levy Imposition Determination 2017 [F2017L00911]</p> <p>Great Barrier Reef Marine Park Amendment (Whitsundays Plan of Management) Instrument 2017</p> <p>Life Insurance Supervisory Levy Imposition Determination 2017 [F2017L00912]</p> <p>Superannuation Supervisory Levy Imposition Determination 2017 [F2017L00914]</p> <p>Telecommunications (Integrated Public Number Database Scheme – Conditions for Authorisations) Determination 2017 [F2017L00941]</p> <p>Telecommunications (Integrated Public Number Database Scheme – Criteria for Deciding Authorisation Applications) Instrument 2017 [F2017L00937]</p> <p>Telecommunications (Integrated Public Number Database – Public Number Directory Additional Information) Instrument 2017 [F2017L00933]</p> <p>Telecommunications (Integrated Public Number Database – Public Number Directory Requirements) Instrument 2017 [F2017L00934]</p> <p>Therapeutic Goods Information (Sharing information about in-house in vitro diagnostic medical devices) Specification 2017 [F2017L00965]</p>
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

The instruments identified above incorporate by reference Commonwealth disallowable legislative instruments. This means that they incorporate the content of other disallowable legislative instruments without reproducing the relevant text.

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

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, neither the text of the instruments identified above nor their accompanying ESs explain the relevance of these provisions to their operation.

The committee considers that, in the interests of promoting the clarity and intelligibility of delegated legislation, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated; and/or clearly identify the relevance of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) to their operation. 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's expectations in this regard are set out in the guideline on incorporation published on the committee's website.²⁷

The committee draws the above to the attention of ministers.

27 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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

Instruments	
	ASIC Corporations (Amendment) Instrument 2017/642 [F2017L00905]
	ASIC Credit (Amendment) Instrument 2017/641 [F2017L00904]
	Australian Prudential Regulation Authority (Commonwealth Costs) Determination 2017 [F2017L00907]
	Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2017 [F2017L00906]
	Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 2017 [F2017L00908]
	Autonomous Sanctions (Russia, Crimea and Sevastopol) Amendment Specification 2017 [F2017L01001]
	Broadcasting (Hours of Local Content) Declaration No. 1 of 2017 [F2017L01000]
	Carbon Credits (Carbon Farming Initiative) Amendment Rule 2017 (No. 1) [F2017L00925]
	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) [F2017L00991]
	Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 3/2017 [F2017L00931]
	General Insurance Supervisory Levy Imposition Determination 2017 [F2017L00911]
	Life Insurance Supervisory Levy Imposition Determination 2017 [F2017L00912]
	Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 6) [F2017L00894]
	Public Governance, Performance and Accountability (Relevant Company) Amendment (2017 Measures No 2) Rules 2017 [F2017L00935]
	Retirement Savings Account Providers Supervisory Levy Imposition Determination 2017 [F2017L00913]
	Superannuation Supervisory Levy Imposition Determination 2017 [F2017L00914]

<p>Scrutiny principle</p>	<p>Telecommunications (Integrated Public Number Database Scheme – Conditions for Authorisations) Determination 2017 [F2017L00941]</p> <p>Telecommunications (Integrated Public Number Database Scheme – Criteria for Deciding Authorisation Applications) Instrument 2017 [F2017L00937]</p> <p>Telecommunications (Integrated Public Number Database – Permitted Research Purposes) Instrument 2017 [F2017L00938]</p> <p>Telecommunications (Integrated Public Number Database – Public Number Directory Additional Information) Instrument 2017 [F2017L00933]</p> <p>Telecommunications (Integrated Public Number Database – Public Number Directory Requirements) Instrument 2017 [F2017L00934]</p> <p>Therapeutic Goods (Permissible Ingredients) Determination No. 3 of 2017 [F2017L00926]</p> <p>Standing Order 23(3)(a)</p>
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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 that 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.²⁸

The committee draws the above to the attention of ministers.

²⁸ For more extensive comment on this issue, see *Delegated legislation monitor 8 of 2013*, p. 511.

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers.

Correspondence relating to these matters is available on the committee's website.¹

Instrument	Australian Radiation Protection and Nuclear Safety Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00781]
Purpose	Amends the Australian Radiation Protection and Nuclear Safety Regulations 1999 to increase licence application fees by an indexation amount of 2.3 per cent
Authorising legislation	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Access to incorporated documents

The committee previously commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement (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 (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents

1 See www.aph.gov.au/regords_monitor.

are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the following Australian/New Zealand Standards into the Australian Radiation Protection and Nuclear Safety Regulations 1999 (ARPANS Regulations), as existing on 1 July 2017:

- Australian/New Zealand Standard AS/NZS IEC 60825.1:2014 Safety of laser products, Part 1: Equipment classification and requirements;
- Australian/New Zealand Standard AS/NZS IEC 60825.2:2011 Safety of laser products, Part 2: Safety of optical fibre communication systems (OFCS); and
- Australian/New Zealand Standard AS/NZS IEC 62471:2011 Photobiological safety of lamp and lamp systems.

The ES states that these standards are available from the SAI global website, but does not provide further information as to where the standards incorporated into the ARPANS Regulations can be accessed for free. The committee understands the standards to be only available for purchase from the SAI global website.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²

The committee requested the advice of the minister in relation to the above.

Minister's response

The Assistant Minister for Health advised:

The Australian/New Zealand Standards that have been incorporated by reference into the Australian Radiation Protection and Nuclear Safety Regulations 1999 are copyrighted to Standards Australia who have been designated by the Australian Government as the nation's peak non-government standards development organisation. Standards Australia have exclusively licenced SAI Global to publish standards developed by it. Other than accessing a copy, where available, at a public library, there is no alternative method to legally obtain Australian Standards free-of-charge.

The Regulations only apply to the Australian Radiation Protection and Nuclear Safety Agency's licence holders and potential licence holders, which are other Commonwealth departments or agencies. Therefore, in this context, these standards would only affect a small number of technical and scientific personnel from Commonwealth entities and not the general public.

2 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Committee's response

The committee thanks the Assistant Minister for his response and has concluded its examination of the above.

The committee notes the minister's advice that the incorporated standards would only affect a small number of technical and scientific personnel from Commonwealth entities and not the general public.

However, the committee expects Commonwealth agencies to take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard. In addition to access for persons who are directly affected by a legislative instrument, 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's expectation, at a minimum, is that consideration be given by the department to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing upon request to the department. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue.³ This report comprehensively outlined the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

3 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, Thirty-Ninth Parliament, Report 84, June 2016, [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/416D0BF968BDB17048257FDB0009BEF9/\\$file/dg.asa.160616.rpf.084.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf) (accessed 28 August 2017).

Instrument	Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00808]
Purpose	Increases by an indexation amount of 2.3 per cent the annual licence charges paid by Commonwealth entities to the Australian Radiation Protection and Nuclear Safety Agency
Authorising legislation	<i>Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Access to incorporated documents

The committee previously commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement (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 (i.e. without cost) 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 item 8 of the regulations inserts new table item 23 into clause 1 of Schedule 3 to the Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2000, which incorporates Australian/New Zealand Standard AS/NZS IEC 60825.1:2014 *Safety of laser products, Part 1: Equipment classification and requirements*, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as existing on 1 July 2017.

The ES states:

Table item 23 refers to an Australian/New Zealand Standard on laser products that was published in 2011. The amendment updates the

reference to the most recent version of the Standard that was published in 2014 and adds information on the name of the publishers of the Standard, namely Standards Australia and Standards New Zealand, which is in line with current drafting conventions of the Office of Parliamentary Counsel. This Standard may be obtained from SAI Global (www.saiglobal.com).

While the ES states that this standard is available from the SAI global website, it does not provide further information as to where the standard incorporated into the regulations can be accessed for free. The committee understands the standard to be only available for purchase from the SAI global website.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁴

The committee requested the advice of the minister in relation to the above.

Minister's response

The Assistant Minister for Health advised:

The Australian/New Zealand Standards that have been incorporated by reference into the Australian Radiation Protection and Nuclear Safety Regulations 1999 are copyrighted to Standards Australia who has been designated by the Australian Government as the nation's peak non-government standards development organisation. Standards Australia have exclusively licenced SAI Global to publish standards developed by it. Other than accessing a copy, where available, at a public library, there is no alternative method to legally obtain Australian Standards free-of-charge.

The Regulations only apply to the ARPANSA's licence holders and potential licence holders, which are other Commonwealth departments or agencies. Therefore, in this context, these standards would only affect a small number of technical and scientific personnel from Commonwealth entities and not the general public.

Committee's response

The committee thanks the Assistant Minister for his response and has concluded its examination of the above.

The committee notes the minister's advice that the incorporated standards would only affect a small number of technical and scientific personnel from Commonwealth entities and not the general public.

However, the committee expects Commonwealth agencies to take appropriate steps to ensure that standards are freely available wherever possible, including as an

4 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

alternative to a purchasable standard. In addition to access for persons who are directly affected by a legislative instrument, 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's expectation, at a minimum, is that consideration be given by the department to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing upon request to the department. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

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 published a detailed report on this issue.⁵ This report comprehensively outlined the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

5 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, Thirty-Ninth Parliament, Report 84, June 2016, [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/416D0BF968BDB17048257FDB0009BEF9/\\$file/dg.asa.160616.rpf.084.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf) (accessed 28 August 2017).

Instrument	Banking (prudential standard) determination No. 2 of 2017 - Prudential Standard APS 001 – Definitions [F2017L00661]
Purpose	Incorporates definitions used in prudential standards relating to authorised deposit-taking institutions
Authorising legislation	<i>Banking Act 1959</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 June 2017) Notice of motion to disallow currently must be given by 11 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Access to incorporated documents

The committee previously 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 (i.e. without cost) 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 definitions of 'limited assurance' and 'reasonable assurance' in section 5 of the instrument incorporate the *Framework for Assurance Engagements* issued by the Auditing and Assurance Standards Board (AUASB) from time to time. However, neither the instrument nor the ES provides a description of this document or indicates where it can be freely accessed.⁶

6 The committee notes that it has previously commented on a similar issue. See *Delegated legislation monitor 10 of 2016*, Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 – Prudential Standard 3PS 310 - Audit and Related Matters [F2016L01437] and Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016 – Prudential Standard CPS 510 Governance [F2016L01432], pp 29-32.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*. However, in this case the committee notes that the *Framework for Assurance Engagements* issued by the AUASB is available for free online.⁷ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁸

The committee requested the advice of the minister in relation to the above.

Minister's response

The Treasurer advised:

I have raised the Committee's concern with the Australian Prudential Regulation Authority (APRA), which is responsible for the Instrument. APRA acknowledges that the ES to the Instrument does not comply with the *Legislation Act 2003*, which requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it could be accessed.

APRA notes the Committee has stated that where an incorporated document is available for free online, the Committee considers that a best practice approach is for the ES to provide details of the website where the document can be accessed.

Adopting the Committee's approach, APRA has agreed to lodge a replacement ES for inclusion on the Register of Legislative Instruments forthwith. That document will expand the description of the *Framework for Assurance Engagements* and include details of the website where that document can be accessed.

Committee's response

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

7 See Auditing and Assurance Standards Board, *Framework for Assurance Engagements*, <http://www.auasb.gov.au/Pronouncements/Framework-for-Assurance-engagements.aspx> (accessed 21 July 2017).

8 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

The committee notes the Treasurer's undertaking to register a replacement ES on the Federal Register of Legislation, containing a description of the incorporated document and indicating where it is freely available.

Instrument	Building and Construction Industry (Improving Productivity) (Federal Safety Officers) General Directions 2017 [F2017L00655]
Purpose	Directs Federal Safety Officers how to conduct themselves when exercising powers and performing functions under the <i>Building and Construction Industry (Improving Productivity) Act 2016</i>
Authorising legislation	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>
Department	Employment
Disallowance	15 sitting days after tabling (tabled Senate 14 June 2017) The time to give a notice of motion to disallow expired on 6 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

The committee previously commented on two issues as follows:

Manner of incorporation

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. However, 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 instrument incorporates the Federal Safety Officer Code of Conduct (FSO Code of Conduct), dated 1 January 2015, issued by the Federal Safety Commissioner.

Pursuant to section 14 of the *Legislation Act 2003*, as the FSO Code of Conduct is not a Commonwealth Act or disallowable instrument, it may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14. The committee is not aware of any legislation that alters the operation of section 14 in relation to this instrument and therefore understands the FSO Code

of Conduct to be incorporated as in force at the commencement of the instrument. However, neither the text of the instrument nor the ES expressly states that the FSO Code of Conduct is incorporated as in force at the commencement of the instrument.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated. 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁹

The committee drew the above to the minister's attention.

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the FSO Code of Conduct. However, neither the instrument nor the ES provides a description of this document or indicates where it can be freely accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹⁰

The committee requested the advice of the minister in relation to the above.

9 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

10 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Minister's response

The Minister for Employment advised:

The General Directions are made by the Federal Safety Commissioner under subsection 68(5) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCI Act). The General Directions direct Federal Safety Officers on how to conduct themselves when exercising powers and performing functions under the BCI Act.

In accordance with section 14 of the *Legislation Act 2003*, the FSO Code of Conduct is incorporated into the General Directions as in force or existing at the time when the General Directions commenced. However, the Committee notes that neither the text of the General Directions nor the explanatory statement expressly states that this is the manner in which the FSO Code of Conduct is incorporated into the General Directions.

The Committee also notes that neither the General Directions nor the explanatory statement provides a description of the FSO Code of Conduct or indicates where it can be freely accessed. Section 4 of the General Directions defines 'FSO Code of Conduct' to mean 'the Federal Safety Officer Code of Conduct, dated 1 January 2015, issued by the Federal Safety Commissioner'. The FSO Code of Conduct is made available to Federal Safety Officers during an induction at the commencement of their engagement and is also available on the Federal Safety Commissioner's website (www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/Federal_Safety_Officer_Code_of_Conduct.pdf).

To address the Committee's expectations regarding the incorporation of material in legislative instruments, the Federal Safety Commissioner will issue a replacement explanatory statement to the General Directions clarifying the manner in which the FSO Code of Conduct is incorporated into the General Directions and detailing where the document can be freely accessed.

Committee's response

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

The committee notes the minister's undertaking to issue a replacement ES clarifying the manner in which the FSO Code of Conduct is incorporated into the General Directions and detailing where the document can be freely accessed.

Instrument	Civil Aviation Order 95.10 Instrument 2017 [F2017L00480]
Purpose	Exempts operators of low-momentum ultralight aeroplanes from particular requirements of the Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998
Authorising legislation	Civil Aviation Regulations 1988; Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors</i> 6 and 8 of 2017

Manner of incorporation

The committee previously 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 6.1(c) of the Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] (the order) provides that an aeroplane to which the order applies must be flown in specified classes of airspace; and that the definition of those classes of airspace in the note to subsection 6.1(c) incorporates the Australian Airspace Policy Statement.¹¹ However, neither the order nor the ES expressly states the manner in which the Australian Airspace Policy Statement 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 a particular time). 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.

11 The committee understands that the Australian Airspace Policy Statement 2015 [F2015L01133] is a legislative instrument that is not subject to disallowance.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹²

The committee requested the advice of the minister in relation to the above.

Minister's first response

The Minister for Infrastructure and Transport advised:

The Civil Aviation Safety Authority (CASA) has pointed to the reference to the Australian Airspace Policy Statement being included in a note to paragraph 6.1(d) of Civil Aviation Order 95.10. The note states *Classes of airspace are defined in the Australian Airspace Policy Statement*, clarifying the requirement for the aircraft to be flown in class A, B, C, or D airspace in accordance with the requirements of paragraph 6.4. There is no entry in the Explanatory Statement relating to the content of the note.

CASA has advised that in its view, mention of the Australian Airspace Policy Statement in this way is not an incorporation by reference, but simply a guidance note for where a person can ascertain the scope of the classes of airspace.

Committee's response

The committee thanked the minister for his response.

The committee noted the minister's advice that, in CASA's view the Australian Airspace Policy Statement is not incorporated into the order.

However, the committee notes that the definitions of classes A, B, C, or D airspace (as set out in the Australian Airspace Policy Statement) could be said to affect the operation of the instrument, because these definitions determine the classes of airspace in which aircraft subject to the order are permitted to fly. It is therefore unclear to the committee how the Australian Airspace Policy Statement is not incorporated into the order.

The committee requested the further advice of the minister in relation to the above.

Minister's second response

The Minister for Infrastructure and Transport advised:

After further consideration, the Civil Aviation Safety Authority (CASA) advises that the Instrument should be remade to clarify the role of the 'classes' of airspace by reference to the "Determination of airspace and controlled aerodromes etc" made under Regulation 5 of the Airspace Regulations 2007, rather than by reference to the AAPS. The Determination is a legislative instrument and would be incorporated

12 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

as in force from time to time, consistent with Section 14 of the *Legislation Act 2003*.

On this basis, I am advised that CASA proposes to remake the Instrument, with a revised Explanatory Statement that adequately explains the manner of incorporation of the Determination. However, I note that the Instrument may not be remade until the current notice of motion to disallow has been resolved.

Committee's response

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

The committee notes the minister's advice that CASA will remake the instrument, incorporating the 'Determination of airspace and controlled aerodromes etc' rather than the Australian Airspace Policy Statement, and that the new instrument will be accompanied by a revised Explanatory Statement that explains the manner of incorporation of the determination.

The committee notes that the determination is made under regulation 5 of the Airspace Regulations 2007, and that a determination made under that regulation is not subject to disallowance, by virtue of table item 3 of section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 [F2016C01049]. 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.

However, the committee notes that the operation of section 14 may be altered by authorising and other legislation. In this instance, subsection 98(5D) of the *Civil Aviation Act 1988* provides that, despite section 14 of the *Legislation Act 2003*, a legislative instrument made under that Act or the regulations (including the Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998) may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing at a particular time or as in force or existing from time to time.

Instrument	Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387]
Purpose	Prescribes a new mandatory Sugar Code of Conduct which regulates the conduct of growers, mill owners and marketers in relation to the supply of cane or the on-supply of sugar
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) The time to give a notice of motion to disallow expired on 16 August 2017 ¹³ Notice given on 16 August 2017 ¹⁴ Motion currently must be resolved by 14 November 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 5, 6 and 10 of 2017</i>

Consultation

The committee previously 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 Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387] (the sugar code) provides no information regarding consultation.

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

13 The committee notes that a separate notice of motion to disallow this instrument was given on 15 August 2017. See *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

14 See Regulations and Ordinances Committee, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

The committee further notes that the Prime Minister granted an exemption from the regulation impact statement (RIS) requirements for the sugar code 'because urgent and unforeseen events arose requiring a decision before a RIS could be prepared.'¹⁵ The ES to the sugar code states:

The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.

To ensure the Sugar Code of Conduct (the Code) operates efficiently and effectively as intended, the Regulations also require a review of the Code to take place within 18 months after its commencement.

The committee's guideline on consultation states:

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

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

Minister's first response

The Treasurer advised:

With regards to consultation, unfortunately due to the events that warranted the Government's intervention in the raw sugar export industry, it was not reasonably practical for the Government to consult on the regulation. The Government started developing the regulations in February as a contingency should commercial negotiations fail; however consulting at that time was not appropriate as it would have undermined those negotiations. When it became clear that a commercial outcome was no longer a reasonable possibility, the Government considered the benefits of acting quickly to provide certainty for the industry outweighed the benefits of taking further time to consult before making the regulation.

Committee's first response

15 Australian Government, Department of Prime Minister and Cabinet, *Prime Minister's exemption – Sugar Industry Code*, 5 April 2017, <http://ris.pmc.gov.au/2017/04/05/prime-minister%E2%80%99s-exemption-%E2%80%93-sugar-industry-code> (accessed 5 May 2017).

The committee noted the Treasurer's advice that consultation was not undertaken for the sugar code.

However, the committee's concern with 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 (including in appropriate instances a description stating that consultation was not considered necessary) falls short of these requirements.

The committee requested the further advice of the Treasurer in relation to this matter; and reiterated its request that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's second response

The Treasurer advised:

The Committee notes that while the ES refers to an exemption from the Regulatory Impact Statement process, it does not explicitly state that no consultation was undertaken for the Sugar Code. The Committee has requested that the ES be updated to reflect this in order to be technically compliant with the requirements of the *Legislation Act 2003*.

In my previous response to the Committee, I explained that no consultation was undertaken by the Government due to the events within the raw sugar export industry at the time. Given that this information is now on the public record and outlined in the Committee's report, I do not believe updating the ES will provide any additional benefit to stakeholders or interested persons in explaining the operation of the Regulations. I therefore respectfully decline the Committee's request for the ES to be updated.

Committee's second response

The committee thanked the Treasurer for his response.

The committee noted the Treasurer's advice that he does 'not believe updating the ES will provide any additional benefit to stakeholders or interested persons in explaining the operation of the Regulations' and that he 'therefore respectfully decline[s] the Committee's request for the ES to be updated'.

The committee's concern with respect to consultation is to ensure that an ES is compliant with the descriptive requirements of the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The absence of a description of consultation in an ES (including that no consultation was required) also falls short of the committee's longstanding requirements in relation to the content of ESs.

The expectation that ESs address the matter of consultation predates the enactment of the *Legislation Act 2003* (previously the *Legislative Instruments Act 2003*), which placed a number of the committee's longstanding requirements in relation to the

making of delegated legislation and ESs on a statutory basis. The committee regards the extent and nature of consultation in relation to the making of an instrument as a critical aspect of the exercise of the parliament's delegated powers and, accordingly, information regarding consultation as a critical inclusion for ESs.

On this basis, the committee considers that the fact that the information that no consultation was undertaken in relation to the sugar code is now on the public record does not satisfy the committee's request that the ES be updated with the relevant information.

The committee therefore requested the further advice of the Treasurer and reiterated its request that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's third response

The Treasurer advised:

I would like to inform the Committee that I have agreed to update the ES to explicitly state that no consultation was undertaken for the Regulations. I note that the explanation as to why no consultation occurred at the time is already set out in the ES. Please see attached for an excerpt of the updated ES, which includes the additional text.

I trust this change will ensure that the ES is technically compliant with the requirements of the *Legislation Act 2003*.

The updated ES will be lodged on the Federal Register of Legislation and tabled in accordance with standard procedures.

Relevant excerpt from the ES:

The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.

Due to these circumstances and the urgent need for Government intervention, no consultation was undertaken on the Regulations.

Committee's third response

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

The committee notes the Treasurer's advice that no consultation was undertaken in making the regulations and notes that the replacement ES containing the above relevant excerpt has now been registered on the Federal Register of Legislation.

Instrument	<p>Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516]</p> <p>Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452]</p> <p>Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518]</p>
Purpose	<p>Specifies construction, design, performance and labelling requirements for babies' dummies;</p> <p>Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear; and</p> <p>Extends the interim ban on certain decorative alcohol fuelled devices by a period of 30 days from 16 May 2017</p>
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Department	Treasury
Disallowance	<p>Exempt</p> <p>[F2017L00452] tabled Senate 9 May 2017</p> <p>[F2017L00516] and [F2017L00518] tabled Senate 13 June 2017</p>
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 6 and 8 of 2017</i>

The committee previously commented as follows:

Background

Subsection 44(1) of the *Legislation Act 2003* (LA) provides:

Section 42 [disallowance of legislative instruments] does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

- (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
- (b) authorises the instrument to be made by the body or for the purposes of the body or scheme;

unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

The explanatory memorandum to the *Legislative Instruments Act 2003*¹⁶ explains:

Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.

In 2010 the *Trade Practices Act 1974* was amended to be named the *Competition and Consumer Act 2010* (CCA) and to establish the Australian Consumer Law (ACL). The amendments were made pursuant to the agreements of the Council of Australian Governments (COAG) made on July and October 2008, to create a single national consumer law for Australia, including a national product safety law, and the *Intergovernmental Agreement for the Australian Consumer Law*, signed by COAG in July 2009.

The ACL therefore appears to facilitate the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States.

Sections 104 and 105 of the ACL authorise safety standards to be made; and section 109 authorises interim bans to be made for the purposes of the ACL scheme. Section 131E of the CCA provides that instruments made under these sections of the ACL are to be made by legislative instrument. Neither the ACL, CCA or another Act appear to otherwise have the effect that legislative instruments made under these sections are disallowable. Therefore, it appears that by virtue of paragraph 44(1)(a) of the LA such legislative instruments would be exempt from disallowance.

Classification of legislative instruments as subject to disallowance

The Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516] (the dummy standard) is made under section 104 of the ACL. The purpose of the dummy standard is to ensure babies' dummies and dummy chains have safety features that reduce the risk of injury.

The Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) is made under section 105 of the ACL. The purpose of the nightwear

16 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*.

standard is to reduce the risk of child death and injury associated with nightwear catching fire.

The Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518] (the interim devices ban) is made under section 109 of the ACL. The purpose of the interim devices ban is to minimise the risk of injury to persons due to uncontrolled fire while refuelling, lighting or being in close proximity to an alcohol fuelled device.

As set out above, the dummy standard and the nightwear standard are made under sections 104 and 105 of the ACL; and the interim device ban is made under section 109. Therefore, as these standards appear to facilitate the operation of an intergovernmental scheme, are not regulations and do not appear to be disallowable under the CCA, ACL or another Act, the committee understands that these instruments may be exempt from disallowance in accordance with subsection 44(1) of the LA.

However, the ESs to the dummy standard, the nightwear standard and the interim devices ban state the following in relation to each instrument:

This legislative instrument is subject to disallowance under Chapter 3, Part 2 of the *Legislation Act 2003*.

It is therefore unclear to the committee whether these standards have been properly described as subject to disallowance.

The committee is also interested to understand more about the apparent inconsistent approach to the classification of instruments made under the ACL. For example, the committee notes that the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474] (the egg standard) also seems to be covered by the operation of section 44(1) of the LA, but it is classified as exempt from disallowance (and thereby removed from the effective oversight of the Parliament).¹⁷

The committee requested the advice of the minister in relation to the above.

Minister's first response

The Minister for Small Business advised:

Classification of legislative instruments as subject to disallowance

I appreciate the Committee drawing my attention to the explanatory statements to the above legislative instruments which describe the instruments as subject to disallowance under the *Legislation Act 2003*.

17 The egg standard is made under section 134 of the ACL which authorises information standards to be made for the purposes of the ACL scheme. As the egg standard is not a regulation and does not appear to be disallowable under the CCA, ACL or another Act, it appears to be exempt from disallowance.

As the Committee notes, subsection 44(1) of the *Legislation Act 2003* provides that legislative instruments are not subject to disallowance if they are made under certain legislation facilitating the operation of an intergovernmental scheme.

I can advise the Committee the ACL facilitates the operation of an intergovernmental scheme and the above legislative instruments are not subject to disallowance. The contrary references in the explanatory statements are incorrect and will be rectified shortly.

Committee's first response

The committee thanked the minister for his response.

The committee noted the minister's advice that these instruments are not disallowable.

The committee also noted the minister's undertaking to correct references in the ESs to the instruments being subject to disallowance.

However, the committee is concerned that when these instruments were received by both the Parliament and the committee they had been classified as subject to disallowance, and thereby tabled as subject to disallowance. The committee also remains concerned about the classification process generally, and is interested in understanding how these misclassifications occurred and whether there is any further action that needs to be taken to ensure this situation does not occur again in the future.

The committee also noted that it had since received another instrument, Further Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00664], which also appears to have been misclassified as subject to disallowance.

The committee requested the further advice of the minister in relation to the above.

Minister's second response

The Minister for Small Business advised:

I have conferred with the Australian Competition and Consumer Commission (ACCC) which is responsible for drafting the explanatory statements for the above instruments. The ACCC has advised me that prior to the Committee bringing this matter to my attention on 15 June 2017 the ACCC had not considered the potential application of section 44 of the *Legislation Act 2003* to instruments of this kind.

I have written to the First Parliamentary Counsel, Mr Peter Quiggin, to request the explanatory statements to the above instruments be rectified on the Federal Register of Legislation.

I have asked the ACCC to implement processes which provide for the correct classification of future instruments made under the ACL. The ACCC has advised me that these processes are in place and instruments

prepared following the receipt of the Committee's initial advice on 15 June 2017 are correct.

The Committee notes the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474] which was registered on 26 April 2017. As the Committee notes, the instrument was correctly classified as being exempt from disallowance. The instrument was prepared by my Department.

The Committee also notes the Further Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00664] which is incorrectly classified as being subject to disallowance. This instrument was made on 1 June 2017 and registered on 14 June 2017, prior to the Committee bringing this matter to my attention on 15 June 2017. The incorrect reference in the explanatory statement to the instrument will be rectified shortly.

Committee's second response

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

The committee notes the minister's advice that the ACCC has implemented processes to provide for the correct classification of future instruments made under the ACL.

The committee also notes the minister's undertaking to amend the ES for the Further Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00664].

Instrument	Defence Determination 2017/18, Overseas conditions of service (Budget measure 2017-18 – Overseas allowances) amendment [F2017L00657]
Purpose	Gives effect to the outcome of a whole-of-Government review of overseas entitlements, allowances, financial support and conditions of service provided to Australian Government employees stationed overseas as it applies to the Australian Defence Force
Authorising legislation	<i>Defence Act 1903</i>
Department	Defence
Disallowance	15 sitting days after tabling (tabled Senate 14 June 2017) The time to give a notice of motion to disallow expired on 6 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Manner of incorporation

The committee previously 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.

Subsection 58B(1A) of the *Defence Act 1903* (Defence Act) provides that determinations made by the Defence Force Remuneration Tribunal (DFRT) under section 58H of the Defence Act may be incorporated into defence determinations made under section 58B, either as in force at a particular time or as in force from time to time. The determination is made under section 58B of the Defence Act.

Schedule 3 of the determination inserts new subsection 15.2A.15(1) into Defence Determination 2016/19, Conditions of service [F2016L00643] (the COS determination) which incorporates DFRT Determination 2 of 2017, *Salaries*. However, neither the determination nor the ES states the manner in which the DFRT determination 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 at a particular time or as in force from time to time). 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹⁸

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Defence advised:

Section 14(1)(b) of the *Legislation Act 2003* provides that if enabling legislation authorises a provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing that exists at the time the instrument commences.

Defence Determination 2017/18 is an amending determination to Defence Determination 2016/19, Conditions of service [F2016L00643]. Section 1.2.5A of Defence Determination 2016/19 establishes a rule whereby a reference to determination made by the Defence Force Remuneration Tribunal under section 58H of the *Defence Act 1903* is a reference to that Determination, as in force from time to time, unless specified otherwise. Upon incorporation into Defence Determination 2016/19 the rule at section 1.2.5A will apply and DFRT Determination 2 of 2017, Salaries, will be incorporated as in force from time to time.

In future, Defence will ensure that when incorporation is used in amending determinations, that the manner of incorporation is specified in the Explanatory Statement. This practice will enable users to better understand the operation of the determination without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Committee's response

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

The committee notes the minister's advice that Defence will specify the manner of incorporation of documents in future instruments.

Legal certainty

The committee previously commented as follows:

18 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Schedule 3 of the determination inserts new Part 2A into the COS determination. New section 15.2A.12, as inserted by this determination, sets out the methodology that is to be used to calculate the cost of living adjustment (COLA) for Australian Defence Force (ADF) members posted on or after 1 July 2017. The ES explains that the purpose of the COLA is:

to maintain the purchasing power of a member's disposable income at locations where the cost of goods and services is more expensive than in Australia.

The methodology that is used to calculate the COLA includes the application of a 'spendable salary factor' which is calculated by an independent data provider. With respect to the calculation of the 'spendable salary factor', the ES explains:

This calculation is applied prior to applying the post index to reflect the cost of living difference between Australia and the host country. The independent data provider's methodology is their intellectual property and cannot be disclosed publicly as it does not belong to the Commonwealth and would be in breach of the terms and conditions under which it is obtained.

The committee appreciates that this determination implements the government's decision to standardise allowances across departments and agencies, and that the COLA calculation (including the 'spendable salary factor') is a core part of this outcome. However, the committee is interested in exploring how ADF members may confirm that their COLA has been calculated correctly, when it appears that the details of the 'spendable salary factor' used to determine the COLA will not be disclosed.

A fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms. Without more specific information regarding the 'spendable salary factor', it is unclear to the committee whether an ADF member could access or obtain a copy of the 'spendable salary factor' that was used to determine their COLA.

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Defence advised:

The 'spendable salary factor' referred to in Defence Determination 2017/18 is a reference to information owned by a data service provider. In preparing Defence Determination 2017/18, Defence worked with the data service provider to enable the publication of as much information as possible to support the calculations. However, as the information is the data service provider's intellectual property, Defence sought their consent to publish the formula. The data service provider denied this request on commercial grounds.

On this basis, Defence is developing a tool for members that will be available on the Defence Restricted/Protected Network that will provide members with a personalised estimate of the value of the cost of living adjustment applicable to their personal circumstances prior to, or during, their overseas posting. This estimator applies the spendable salary factor to information entered by the member.

Committee's response

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

The committee notes the minister's advice that Defence will develop a tool which will effectively enable affected members to apply the 'spendable salary factor' to their personal circumstances, in order to ascertain or check the determination of their COLA. The committee requests that the issue of legal certainty be taken into account in the department's preparation of future legislative instruments.

Instrument	Do Not Call Register (Access Fees) Determination 2017 [F2017L00841]
Purpose	Sets subscription fees for the provision of a 'washed list' and provides for the refund of fees for services provided by the Do Not Call Register
Authorising legislation	<i>Do Not Call Register Act 2006</i>
Department	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

Secton 7 of the determination sets subscription fees according to eight subscription types, with fees varying according to the maximum amount of telephone numbers that can be submitted for 'washing' against the Do Not Call Register.

The ES to the determination states:

On 19 March 2017, the ACMA commenced a consultation process on cost recovery arrangements for the Do Not Call Register... The consultation

paper, the draft Cost Recovery Implementation Statement and draft instruments were published on the ACMA's website and provided directly to key industry stakeholders, including associations representing organisations engaged in telemarketing. The ACMA received five submissions to the consultation, although none of these submissions addressed the proposed cost recovery arrangements (including access fees).

However, despite the above reference to 'proposed cost recovery arrangements', the ES does not specify the basis on which the subscription fees have been calculated; for example, whether they are calculated on the basis of cost recovery, or on another basis.

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

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Communications and the Arts advised:

You have specifically requested clarification of the basis on which the subscription fees for washing numbers against the Do Not Call Register (DNCR) have been calculated.

The fees have been calculated on a cost recovery basis. The details of the cost-recovery approach the Australian Communications and Media Authority (ACMA) has adopted are set out in the Cost Recovery Implementation Statement (CRIS) for the fees, which is available at http://www.acma.gov.au/~media/Finance%20Budgets%20and%20Revenue%20Assurance/Report/Word%20Document/DNCR_CRIS_2017%20docx.docx. I have attached a copy for your convenience.

In summary, the methodology used by the ACMA estimates the amount that needs to be recovered to fund the DNCR and then establishes the fees needed to recover the costs from classes of subscribers based on their use of the system.

The CRIS confirms the fees are consistent with the Australian Government's Cost Recovery Principles.

Committee's response

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

The committee notes the minister's advice that the fees are calculated on a cost recovery basis. The committee reiterates its expectation that future ESs make clear the specific basis on which the imposition or change of a fee has been calculated.

Instrument	Hazardous Waste (Regulation of Exports and Imports) Legislation Amendment (2017 Measures) Regulations 2017 [F2017L00788]
Purpose	Makes amendments to hazardous waste regulations that are consequential to the <i>Hazardous Waste (Regulation of Exports and Imports) Amendment Act 2017</i> and <i>Hazardous Waste (Regulation of Exports and Imports) Levy Act 2017</i> to provide full cost recovery of the hazardous waste permitting scheme
Authorising legislation	<i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i>
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Description of consultation

The committee previously commented as follows:

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

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

Relevant industry stakeholders have been consulted in relation to the amendments. The Office of Best Practice Regulation (OBPR) was consulted in relation to the making of the Regulations. OBPR advised that a Regulation Impact Statement was not required, as the changes do not have more than a minor regulatory impact on business, community organisations or individuals.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the committee considers that the ES, while stating that 'relevant industry stakeholders have been consulted in relation to the

amendments', does not provide an informative description of consultation that was undertaken specifically in relation to this instrument.

The committee further notes that the requirements regarding the preparation of a regulation impact statement (RIS) are separate to the requirements of the *Legislation Act 2003* in relation to consultation. As set out in the committee's guideline on consultation:

This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.¹⁹

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

Minister's response

The Minister for the Environment and Energy advised:

The Committee has requested the Explanatory Statement for the Regulations be updated to reflect the nature of consultation undertaken. A Supplementary Explanatory Statement for the Regulations is also attached.

Relevant extract from the supplementary ES:

Consultation was undertaken with relevant industry stakeholders with respect to the consequential measures as part of the development of the Amendment Act. This included the release of an Issues Paper in June 2012 through which industry and other interested stakeholders were provided an opportunity to comment. In 2015 the Department of the Environment and Energy engaged a consultant to seek input from public and private sector hazardous waste stakeholders on priorities for hazardous waste reform. Feedback from these processes was considered in the development of the final amendments to the Act. As the consequential measures were required as a consequence of the Amendment Act, no further consultation on the consequential measures for the Regulations was considered necessary.

The cost recovery measures included in the Regulations reflect the Cost Recovery Implementation Statement (CRIS) for Hazardous Waste Permitting. In 2015 and 2016 the Department consulted with relevant

19 See Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

businesses on a draft cost recovery implementation statement outlining options for changing permit scheme fees and charges. A Draft CRIS outlining various cost recovery options was circulated among targeted stakeholders by email on 20 May 2015. All stakeholders were invited to provide written comments by 2 June 2015. The Centre for International Economics, working on behalf of the Department, conducted direct consultation with selected stakeholders in mid-2015.

A revised draft of the CRIS was circulated among recent applicants for hazardous waste permits by email on 16 January 2016. Stakeholders were invited to provide written comments by 15 February 2016. Their feedback was incorporated into the final cost recovery implementation statement.

Committee's response

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

Sub-delegation

The committee previously commented as follows:

Schedule 1, item 5 of the regulation amends paragraph 44(b) of the Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996 (OECD Regulations) to provide that the minister's functions and powers can be delegated to an Australian Public Service (APS) employee who holds, or is acting in, an Executive Level 2 (or equivalent) position in the Department of Environment and Energy (the department).

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), 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 in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

The committee acknowledges that amended paragraph 44(b) of the OECD Regulations is similar to section 60 in the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act),²⁰ which extends delegations to Executive Level 2 officers within the department. However, the committee notes that the rationale for this item in the ES indicates that it may be possible to limit the delegated decision-

20 The committee notes that the Senate Standing Committee for the Scrutiny of Bills commented on item 14 of the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016, which amended section 60 of the Act, in *Scrutiny Digest 1 of 2017*, pp 83-86.

making powers of the Executive Level 2 officers to certain types of decisions. In this regard, the committee notes that the ES states:

The Minister would only delegate powers and functions to an Executive Level 2 officer where the officer had day-to-day responsibility for the administration of the Act (including the OECD Regulations). This would not prevent significant decisions being made by persons of a higher classification, but would enable Executive Level 2 officers to exercise Ministerial functions and powers where it was appropriate for decisions to be made at this level. This may include:

- administrative actions that are required under the OECD Regulations (some of which are required within relatively short statutory timeframes) that do not influence how hazardous wastes are to be managed, such as the notification and acknowledgement of permit applications; and
- permitting decisions that are routine in nature, non-controversial, and low-risk.

However, these limitations on the types of powers and functions that may be exercised by Executive Level 2 officers are not included in the regulation; nor does the regulation include a general legislative requirement that the minister be satisfied that the Executive Level 2 officer have the appropriate qualifications and attributes to ensure the proper exercise of the delegated powers.

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for the Environment and Energy advised:

While I note the Committee's concerns, I do not think it is necessary to specify the qualifications and attributes of Executive Level 2 officers exercising my functions and powers in the OECD Regulations

As reflected in the Explanatory Statement for the Regulations, it is my intention to only delegate functions and powers under the OECD Regulations to Executive Level 2 employees within the Department who have day-to-day responsibility for the administration of those Regulations. This would be reflected in the Instrument of Delegation that I make. This approach is consistent with the approach taken more broadly with respect to my Department, including for example, the *Environment Protection and Biodiversity Conservation Act 1999* and the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

This approach ensures that only those Executive Level 2 officers who have a detailed understanding of the operation of the OECD Regulations are able to exercise my functions and powers under those Regulations.

It is also unnecessary to specify the limitations on the types of functions and powers that may be exercised by Executive Level 2 officers in the OECD Regulations. Delegates, at whatever level, will be able to exercise

functions and powers under the OECD Regulations where it is appropriate for decisions to be made at that particular level. This will not prevent significant decisions being made by persons of a higher classification, including myself where necessary. This approach is consistent with the delegation of my functions and powers under the Act.

As stated in the Explanatory Statement, this approach is also consistent with the Australian Administrative Law Guide which documents that it may be appropriate for junior officers to make decisions involving a limited exercise of discretion, or under legislative provisions that give rise to a high volume of decisions to be made.

The committee thanks the minister for his response.

The committee notes that this information would have been useful in the ES.

The committee acknowledges the minister's advice that the intended approach to sub-delegation in the regulation is consistent with the approach taken more broadly with respect to the department, and ensures that only those Executive Level 2 officers who have a detailed understanding of the operation of the OECD Regulations are able to exercise the minister's functions and powers under those regulations.

While this advice may reflect the department's approach to the relevant delegations, the committee remains concerned that there is currently no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the regulation; rather, that the regulation include a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the absence of a legislative requirement that an Executive Level 2 officer to whom the relevant powers of the minister are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the power, the committee draws this matter to the attention of the Senate.

Instrument	Higher Education (HELP Program Commonwealth Officers) Instrument 2017 [F2017L00622]
Purpose	Specifies 'HELP program Commonwealth officers' for the purposes of paragraph 180-28(7)(c) of the <i>Higher Education Support Act 2003</i>
Authorising legislation	<i>Higher Education Support Act 2003</i>
Department	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) The time to give a notice of motion to disallow expired on 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Sub-delegation

The committee previously commented as follows:

Section 4 of the instrument specifies the Australian Government Actuary (AGA) and Commonwealth officers employed by the Office of the AGA as 'HELP program Commonwealth officers' for the purposes of paragraph 180-28(7)(c) of the *Higher Education Support Act 2003* (HESA Act). While the committee acknowledges that subsection 180-28(8) of the HESA Act permits the minister to specify such officers, the term 'Commonwealth officer' is defined very broadly in the HESA Act.

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 in legislation 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 the absence of specific qualification requirements of a delegate, the committee expects instruments to include a general requirement that the person delegating a power be satisfied that a delegate has the appropriate qualifications or attributes to perform the delegated functions.

With respect to specifying 'Commonwealth officers' employed by the AGA, the ES states:

Commonwealth officers employed by the Office of the Australian Government Actuary are included in this determination to ensure

designated officers within that Office are able to use and disclose HESA information.

However, the ES provides no further justification for the need to specify all 'Commonwealth officers' employed by the AGA as 'HELP program Commonwealth officers' who, pursuant to subsection 180-28(5) of the HESA Act, may use and disclose HESA information to assist in the development or administration of the higher education loan program.

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Education and Training advised:

The purpose of the Instrument is to allow various officers employed by the AGA to be able to use and disclose Higher Education Support Act information (HESA information) for the purpose of maintaining a Higher Education Loan Program (HELP) debtor and earnings database. The HELP debtor and earnings database is important to the Department of Education and Training (Education) because it addresses recommendations in the Australian National Audit Office's (ANAO) report on the *Administration of Higher Education Loan Program Debt and Repayments* (report no. 31 of 2015-16, published on 5 May 2016). The ANAO recommended that 'Education and the Australian Taxation Office (ATO) expand the information provided publicly to include a broader range of information such as the growth in HELP debt and collection of repayments' (Recommendation 4) and that 'Education more fully analyses characteristics of debt and repayments, and consider this information to inform program design' (Recommendation 5).

The HELP debtor and earnings database is created from data provided by the AGA, Education and the ATO. The database contains de-identified information on HELP debtors, including demographic, educational, income and occupation-related information. Information from the HELP debtor and earnings database will enhance Education's ability to analyse HELP debt and debtors, including analysing differences between those who repay and those who are below the repayment threshold. Information from the HELP debtor and earnings database will be critical in addressing the abovementioned ANAO recommendations.

The specification of 'Commonwealth officers' employed by the AGA as 'HELP program Commonwealth officers' must be sufficiently broad as to capture the various classes of officers employed by the AGA who need to use and disclose HESA information in the development, use and maintenance of the HELP debtor and earnings database at any time. There is a need to specify all 'Commonwealth officers' employed by the AGA as 'HELP program Commonwealth officers' in the instrument as the AGA is a small functional unit that does not have sufficiently well-defined positions and hierarchies to allow further specificity within the instrument. As the AGA employs a small number of officers (currently 12 individuals)

who all have similar qualifications, skill sets and job roles, this makes it impractical to limit delegation to a specific sub-set of these Commonwealth officers. The Instrument must be sufficiently flexible to allow for movement of specific AGA officers who are required to access, use and disclose HESA information from within the HELP debtor and earnings database. I am satisfied that the Commonwealth officers employed by the AGA hold the appropriate qualifications and attributes to perform the delegated functions and that the instrument is not excessively wide in its application.

I note the Committee's view that the term 'Commonwealth officer' is defined very broadly in subsection 179-15(2) of the Act. Such a broad delegation may bring into question whether a person's right to privacy is being limited to the extent that it expands the category of specified officers that are authorised to use and disclose personal information. However, I consider that there are existing safeguards in place that provide strong protections in relation to such privacy matters. The instrument's explanatory statement states that this delegation is limited to only those Commonwealth officers who are exercising functions identified in subsection 180-28(5) of the Act, namely to assist in the development or administration of the HELP program. All persons specified as 'HELP program Commonwealth officers' are bound by the Australian Privacy Principles (APPs) in the *Privacy Act 1988* when dealing with personal information.

The APPs regulate how agencies may collect, use, disclose and store personal information and how individuals may access and correct personal information held about them.

Having regard to the matters noted above, I consider that the delegation has been drafted with the maximum level of specificity possible in relation to the term 'Commonwealth officer'. Therefore, I recommend that the Instrument be maintained in its current form.

Committee's response

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

The committee notes the minister's advice that the specification of 'Commonwealth officers' employed by the AGA as 'HELP program Commonwealth officers' must be sufficiently broad as to capture the various classes of officers employed by the AGA who need to use and disclose HESA information in the development, use and maintenance of the HELP debtor and earnings database. The committee notes the minister's advice that the AGA is a very small unit that does not have sufficiently well-defined positions and hierarchies to allow further specificity within the instrument – but, importantly, that delegation will be limited to only those officers exercising the relevant functions under the Act.

The committee notes the minister's description of the safeguards in place in relation to privacy matters, and his advice that he is satisfied that these safeguards ensure the necessary protection of personal privacy.

Instrument	Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017 [F2017L00576]
Purpose	Amends the Migration Regulations 1994 to provide for a visa application charge of \$440 for the Subclass 417 (Working Holiday) visa and Subclass 462 (Work and Holiday) visa
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) The time to give a notice of motion to disallow expired on 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 7 and 8 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

As noted above, item 1 of the regulation increases the VAC for working holiday makers by \$50, to \$440. As the regulation reverses a previous reduction in the VAC which had not yet commenced, the committee notes that the regulation may therefore be described as maintaining the current VAC.

While the ES briefly notes a government decision to maintain the VAC when finalising the working holiday maker reform package, it does not appear to state the basis on which the VAC has been calculated, other than to indicate:

The revenue of not proceeding with the planned \$50 reduction in the visa application charge will fund the Seasonal Worker Incentives Trial which will provide incentives for eligible Australian job seekers to undertake horticultural seasonal work.

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

The committee requested the advice of the minister in relation to the above.

Minister's first response

The Minister for Immigration and Border Protection advised:

As noted by the Committee, the effect of the WHM VAC Regulations is to maintain the VACs for Working Holiday Maker visas at \$440. This has been the VAC amount for these visas since 1 July 2015, when the VACs were indexed from \$420 to \$440. Continuation of the VAC of \$440 is not expected to have a negative impact on demand as the VAC is relatively small compared to the costs and expenses of travel to and staying in Australia. The pricing of the Working Holiday Maker visa products is not expected to change Australia's relative position against similar international countries. In addition, I note that this VAC amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. I therefore consider that \$440 is an appropriate VAC for these visas.

Committee's first response

The committee thanked the minister for his response.

The committee noted the minister's advice that the regulation maintains the current VAC amount for working holiday makers and that the amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*.

While the VAC amount remains unchanged, the minister's response does not address the question of the specific basis on which the amount has been calculated; for example, whether the VAC is calculated on the basis of cost recovery or on another basis.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge (including where an instrument maintains a current charge) is that the relevant ES make clear the specific basis on which the charge has been calculated.

The committee requested the further advice of the minister in relation to the above.

Minister's second response

The Minister for Immigration and Border Protection advised:

As noted at pages 62-3 of the Consolidated Financial Statements for the Australian Government for the financial year ended 30 June 2016, a review of the classification of VACs determined that the revenue for these charges had increased over a number of years without a commensurate increase in costs. As a result, VACs were reclassified from non-taxation to taxation revenue to reflect the sustained change in the nature of the revenue in accordance with principles contained in the Australian Bureau of Statistics *Australian System of Government Finance Statistics: Concepts, Sources and Methods 2005 – ABS Catalogue No. 5514.0* (ABS GFS Manual). This reclassification took effect from the 2015-16 Mid-Year Economic and Fiscal Outlook.

In particular, the reclassification is consistent with the principle that fees from regulatory services are designed to cover all or part of the cost of providing a regulatory function. If the revenue collected is clearly out of proportion to the costs of providing the regulatory service, then the fee is classified as taxation revenue.

The VAC amount for individual visa subclasses is set by Government as part of the Budget process. The *Migration Act 1958* provides that the amount of the VAC is to be prescribed in the Migration Regulations 1994 and must not exceed the limit determined under the *Migration (Visa Application) Charge Act 1997*.

The amounts of the VACs for the referenced visas are consistent with the above principles. I further consider the VAC amounts are appropriate for the reasons outlined in my previous letters to the Committee.

Committee's second response

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

The committee notes the minister's advice that VACs were reclassified from non-taxation to taxation revenue following the review of their classification effective from the 2015-16 Mid-Year Economic and Fiscal Outlook. The committee notes that imposing taxation via VACs is enabled by the *Migration (Visa Application) Charge Act 1997*. The committee considers that it would have been useful to provide this information in the ES.

Instrument	Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549]
Purpose	Amends the Migration Regulations 1994 to create a new permanent visa stream for certain New Zealand citizens, lower the maximum age permitted to apply for a Subclass 189 (Skilled – Independent) visa in the Points-tested stream, and remove the requirement for certain persons departing Australia to complete a passenger card
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) The time to give a notice of motion to disallow expired on 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 7 and 8 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

Item 2 of the Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549] (the regulation) inserts new subitems 1137(3), (4), (4E) and (4F) into the Migration Regulations 1994, which set out various visa application charges (VAC) for the Subclass 189 (Skilled—Independent) visas in the Points-tested stream and permanent visa stream for certain New Zealand citizens.

In this regard, the ES to the regulation provides the following general information about the VAC :

The total amount of the visa application charge (VAC) will be consistent with the General Skilled Migration Programme, however concessional arrangements have been introduced to the New Zealand stream, allowing 20 per cent of the VAC to be paid at time of lodgement and the remainder to be paid before the visa grant.

With reference to the VAC for the new Points-tested stream the committee notes that the regulation substantially replicates the current Subclass 189 visa.

With reference to the VAC for the new permanent visa stream for certain New Zealand citizens, the ES states:

Subitems 1137(4E) and (4F) set out the first and second instalment of the visa application charge ('VAC') payable for the New Zealand stream. The overall VAC payable (first and second instalments) is the same as the

first instalment of the VAC payable for the Points-tested stream, which is \$3600. However, consistent with the announcement on 19 February 2016, applicants are only required to pay 20% of the overall VAC at the time of application (as the first instalment of the VAC). The remaining 80% of the overall VAC is charged as the second instalment of the VAC, which is only payable by the applicant before the visa is granted.

However, the ES does not appear to state the basis on which the VAC for either stream has been calculated. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

The committee requested the advice of the minister in relation to the above.

Minister's first response

The Minister for Immigration and Border Protection advised:

The Australia-New Zealand bilateral relationship is one of the closest and most comprehensive bilateral relationships Australia has with any country. It has been built on the Trans-Tasman Travel Arrangement (TTTA) and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER).

In line with the 2016 Government announcement, the Skilled Independent (subclass 189) (New Zealand stream) visa pathway was created within the Skilled Independent category of the General Skilled Migration (GSM) component of Australia's annual Migration Programme. The pathway is directly aimed at New Zealand citizens who have made, and continue to make, a demonstrated economic contribution to Australia, which is consistent with the GSM parameters.

The visa application charge (VAC) imposed on the New Zealand stream under the Skilled Independent (subclass 189) is the lowest of the range of skilled visas. Other pathways to permanent residence for New Zealand citizens under other skilled or family streams attract a higher VAC.

Further, in recognition of the special bilateral relationship, concessional arrangements to the VAC were introduced solely for the New Zealand stream. Applicants need only pay 20 per cent of the overall VAC at the time of application (as the first instalment of the VAC). The remaining 80 per cent of the overall VAC is charged as the second instalment of the VAC, which is only payable by the applicant before the visa is granted.

I note that the amount of the VAC does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. For this reason, and in light of the above, I consider the VAC for these visas is appropriate.

Committee's first response

The committee thanked the minister for his response.

The committee noted the minister's advice about the Australia-New Zealand bilateral relationship; that the VAC for the New Zealand stream under the Skilled Independent (subclass 189) is the lowest of the range of skilled visa; and that the amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*.

However, the minister's response does not address the question of the specific basis on which the charges have been calculated; for example, whether the VAC is calculated on the basis of cost recovery or on another basis.

The committee requested the further advice of the minister in relation to the above.

Minister's second response

The Minister for Immigration and Border Protection advised:

As noted at pages 62-3 of the Consolidated Financial Statements for the Australian Government for the financial year ended 30 June 2016, a review of the classification of VACs determined that the revenue for these charges had increased over a number of years without a commensurate increase in costs. As a result, VACs were reclassified from non-taxation to taxation revenue to reflect the sustained change in the nature of the revenue in accordance with principles contained in the Australian Bureau of Statistics *Australian System of Government Finance Statistics: Concepts, Sources and Methods 2005 – ABS Catalogue No. 5514.0 (ABS GFS Manual)*. This reclassification took effect from the 2015-16 Mid-Year Economic and Fiscal Outlook.

In particular, the reclassification is consistent with the principle that fees from regulatory services are designed to cover all or part of the cost of providing a regulatory function. If the revenue collected is clearly out of proportion to the costs of providing the regulatory service, then the fee is classified as taxation revenue.

The VAC amount for individual visa subclasses is set by Government as part of the Budget process. The *Migration Act 1958* provides that the amount of the VAC is to be prescribed in the Migration Regulations 1994 and must not exceed the limit determined under the *Migration (Visa Application) Charge Act 1997*.

The amounts of the VACs for the referenced visas are consistent with the above principles. I further consider the VAC amounts are appropriate for the reasons outlined in my previous letters to the Committee.

Committee's second response

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

The committee notes the minister's advice that VACs were reclassified from non-taxation to taxation revenue following the review of their classification effective from the 2015-16 Mid-Year Economic and Fiscal Outlook. The committee notes that imposing taxation via VACs is enabled by the *Migration (Visa Application) Charge Act 1997*. The committee considers that it would have been useful to provide this information in the ES.

Instrument	National Health (Weighted average disclosed price – October 2017 reduction day) Determination 2017 (PB 44 of 2017) [F2017L00676]
Purpose	Determines a weighted average disclosed price for certain brands of pharmaceutical items with a data collection period ending 31 March 2017
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Consultation

The committee previously 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 this instrument states:

This instrument affects certain pharmaceutical companies with medicines listed on the PBS [pharmaceutical benefits scheme]. Pharmaceutical companies were consulted in relation to the introduction of price disclosure requirements during the policy development for introduction of price disclosure in 2007 during implementation phases, and during the development and implementation of the further PBS reforms of 2010,

pricing changes in 2012, simplified price disclosure amendments in 2014 and measures announced in the 2015 PBS Access and Sustainability Package. Consultation occurred through meetings with peak industry bodies. Further information on price disclosure was also disseminated through peak industry bodies, during meetings with the Price Disclosure Working Group and directly to companies through information sessions conducted in March 2011, June 2012, and March 2016, and distribution of associated educational material at the time of amendments.

Pharmaceutical companies with a listed or delisted brand subject to the price disclosure requirements for the 2017 October Cycle disclosed information relevant to this determination directly to Australian Healthcare Associates Pty Ltd (AHA), known as the Price Disclosure Data Administrator (PDDA). AHA is prescribed in subregulation 85(6) as the person to whom, in accordance with paragraph 99ADC(1)(a), a responsible person is to provide price disclosure information. The PDDA provided responsible persons with an opportunity to check that the information disclosed to the PDDA was translated correctly to PDDA data files. This was done prior to that data being used to apply the method set out in the Regulations to arrive at the WADP [weighted average disclosed price] for listed brands.

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 ES primarily describes historical consultation that took place in relation to the introduction and implementation of price disclosure. The remainder of the consultation description discusses a process for disclosing data, and the provision of an opportunity for the supplier of a particular brand of a medicine on the PBS (the responsible person) to check that data has been translated correctly. 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 for this determination was considered unnecessary (or inappropriate) for this reason.²¹

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.²²

The committee requested the advice of the minister in relation to the above.

21 The committee notes that it previously commented on a similar issue on an advice-only basis. See *Delegated legislation monitor 1 of 2017, National Health (Weighted average disclosed price – April 2017 reduction day) Determination 2016* [F2016L01963], pp 61-62.

22 See Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

Minister's response

The Assistant Minister for Health advised:

The Committee's preferred approach was for the description used in the Explanatory Statement of the consultation undertaken by the Department of Health to explicitly state that consultation for the WADP Determination was considered unnecessary (or inappropriate) for stated reasons. The Department accepts the Committee's recommendations, and will update the Explanatory Statement for the WADP Determination accordingly. The Department will ensure all future applicable explanatory statements follow the Committee's advice.

Committee's response

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

The committee notes the minister's undertaking to provide and register on the Federal Register of Legislation a replacement ES which will describe the nature of any consultation that was undertaken in making this instrument or, if none was undertaken, to explicitly state so and provide the reasons for it in the ES.

The committee also notes the minister's assurance that all future applicable ESs will accord with the committee's advice on this issue.

Instrument	Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2017 [F2017L00673] Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2017 [F2017L00674]
Purpose	Declare that a ship or vessel only engaged in intra-state trade will be subject to the work health and safety legislation of the state in which it operates
Authorising legislation	<i>Occupational Health and Safety (Maritime Industry) Act 1993;</i> <i>Seafarers Rehabilitation and Compensation Act 1992</i>
Department	Employment
Disallowance	15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 September 2017
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Relationship of instruments to a bill that is currently before the Parliament

The committee previously commented as follows:

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

The Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2017 prescribes ships or vessels only engaged in intrastate trade as non-prescribed ships or units for the purposes of the *Occupational Health and Safety (Maritime Industry) Act 1992*.

The Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2017 declares that a certain type of ship which is only engaged in intrastate trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992*.

The committee notes that key elements of the instruments may be described as 'mirroring' amendments in the Seafarers and Other Legislation Amendment Bill 2016 (seafarers bill). The seafarers bill was introduced in the House of Representatives on 13 October 2016.

The statements of compatibility (SOCs) to the instruments explain that the instruments do not create any change and continue interim measures taken in 2015, while legislative reform is being pursued. The SOCs state:

The Seafarers and Other Legislation Amendment Bill 2016 (Seafarers Bill) is currently before the Parliament and would remove the need for continued reliance on the instrument to clarify the coverage of the Seacare scheme...

However, the ESs for the instruments provide no further information as to the relationship of the instruments with the seafarers bill. The committee is concerned that the pre-emptive use of delegated legislation in this way may have the capacity to circumvent the will of the Parliament as expressed through the enactment of primary legislation.²³

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Employment advised:

The Committee has sought my advice on the relationship of the Declarations to legislation currently before the Parliament, namely the Seafarers and Other Legislation Amendment Bill 2016 (Bill). As set out in the Explanatory Statements, the Declarations replaced a set of interim declarations made following the Federal Court decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (the Aucote decision). This decision substantially broadened coverage of the Seacare scheme from what it was historically understood to be.

The Declarations continue a necessary interim measure, pending a legislative fix proposed by the Bill. All stakeholders supported the continuation of the declarations, intended to provide some stability to the Seacare scheme pending Parliament's consideration of a legislative fix.

Committee's response

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

However, the committee notes that scrutiny principle (d) of its 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).

23 The committee notes that it has previously commented on a similar issue. See *Delegated legislation monitor* 6 of 2015, Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 [F2015L00335]; and Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 [F2015L00336], pp 21-24.

The committee's inquiry in relation to the instruments arose from the fact that key elements of the declarations may be described as 'mirroring' the amendments in the bill currently before Parliament.

As the committee has previously noted, the pre-emptive use of delegated legislation may give rise to concerns about its capacity to circumvent the will of the Senate as expressed through the enactment of primary legislation.

While the minister advises that the declarations 'continue a necessary interim measure, pending a legislative fix proposed by the Bill', the committee is conscious that this not only pre-empts parliamentary consideration, but could also allow delegated legislation to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were not passed or were passed with amendments not complemented by the operation of the delegated legislation).

In light of these concerns about the inclusion in delegated legislation of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of the Senate.

Instrument	Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 4) [F2017L00603]
Purpose	Amends the Private Health Insurance (Benefit Requirements) Rules 2011 to insert, move and remove Medicare Benefits Schedule items
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) The time to give a notice of motion to disallow expired on 5 September 2017
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Drafting

The committee previously commented as follows:

Item 2 of this instrument adds a Medicare Benefits Schedule (MBS) item to Schedule 1 of the Private Health Insurance (Benefit Requirements) Rules 2011 (the benefit requirements rules).

With reference to this item, the ES states:

This MBS item was listed on the MBS as of 1 May 2017, however this number was not included in the 1 May 2017 Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 3) due to a timing error within the Department.

However, the committee notes that, as this instrument commenced on 27 May 2017, it appears possible that patients covered by private health insurance who received treatment covered by the omitted MBS item between 1 May to 26 May 2017 would not have been paid hospital accommodation benefits during this period.

The committee is concerned about the effect, if any, on individuals during the period in which the MBS item was not included in the benefit requirements rules.

The committee requested the advice of the minister in relation to the above.

Minister's response

The Assistant Minister for Health advised:

It is technically possible that private health insurance policyholders who, in the period 1 to 26 May 2017, received treatment covered by Medicare Benefits Schedule item 42702 may not have received private health insurance benefits covering the costs of hospital accommodation charges. However, insurers are able to make benefit payments in these circumstances, and the Department has not received any correspondence, or other advice, that policyholders experienced out-of-pocket costs due to the amendment not being in effect on 1 May 2017.

Committee's response

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

The committee notes the minister's advice that it appears possible that patients covered by private health insurance who received treatment covered by the omitted MBS item in the given period may not have been paid hospital accommodation benefits.

The committee also notes the minister's advice that the department has not received any correspondence, or other advice, that policyholders experienced out-of-pocket costs due to the amendment not being in effect on 1 May 2017.

The committee remains concerned, however, that it appears that the onus is being placed on policyholders to identify any shortfall. The committee draws this continuing concern to the minister's attention and requests that it be taken into account when similar circumstances arise in future.

Instrument	Social Security (Exemptions from Non-payment and Waiting Periods - Activities) Specification 2017 [F2017L00719]
Purpose	Revokes and replaces the Social Security (Exemptions from Non-payment and Waiting Periods – Activities) Specification 2015 to reflect the extension of the ordinary waiting period to new payment types from 1 July 2017
Authorising legislation	<i>Social Security Act 1991</i>
Department	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2017</i>

Manner of incorporation

The committee previously 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 the definition of ***Stream C employment services*** in section 5 of the instrument incorporates the *jobactive Deed 2015-2020*. However, neither the instrument nor the ES state the manner in which this document 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 a particular time). 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²⁴

The committee requested the advice of the minister in relation to the above.

Minister's response

The Minister for Social Services advised:

In response to the Committee's concerns, a replacement explanatory statement that includes a description of the incorporated document and how it may be obtained will be registered on the Federal Register of Legislation and tabled prior to the expiration of the disallowance period.

Committee's response

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

The committee notes that a replacement ES that addresses the committee's concerns regarding incorporation of the document has been registered on the Federal Register of Legislation. The relevant extract from the ES states:

Stream C employment services means those services specified as Stream C in the 'jobactive Deed 2015-2020'. Stream C employment services are provided to the most disadvantaged or long-term unemployed jobseekers. The jobactive Deed 2015-2020 can be accessed on the Department of Employment's website at https://docs.employment.gov.au/system/files/doc/other/jobactive_deed_2015-2020_-_general_deed_variation_5.pdf. The version of the Deed to be applied under this instrument is the Deed available on the Department of Employment's website on the commencement day for the 2017 Specification.

24 See Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Instrument	VET Student Loans (Charges) Regulations 2017 [F2017L00821]
Purpose	Prescribes the charge payable by an approved course provider for a financial year
Authorising legislation	<i>VET Student Loans (Charges) Act 2016</i>
Department	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

Section 8 of the regulations prescribes the charge payable by an approved course provider for a financial year. The fees range between \$1,280 and \$62,870, depending on whether the provider is a small, medium or a large provider for the financial year. However, the ES does not specify the basis on which these fees have been calculated.

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

The committee requested the advice of the minister in relation to the above.

Minister's response

The Assistant Minister for Vocational Education and Skills advised:

Consistent with the Australian Government Cost Recovery Guidelines, all details regarding the methodology for setting the annual charge rates are set out in a Cost Recovery Implementation Statement.

The annual charge applies to all approved VET Student Loans providers and assists with recovering the costs associated with program administration. These include compliance and auditing, payments, processing and actioning complaints, and provider and student management costs.

As outlined in the Cost Recovery Implementation Statement, the annual charge rates were determined according to the following methodology:

- Identifying the activities that comprise the administration of VET Student Loans;
- Determining whether the regulatory effort for each activity applies equally across all providers, or whether some providers will require more regulatory effort than others;
- Estimating the effort (time, skill and resources) required to complete each activity; and
- Calculating the total cost of each activity.

A key driver in setting the annual charge rates was that the regulatory effort required to administer the program was proportionate to the enrolment numbers at any particular provider. As a result, three annual charge amounts of \$1,280, \$12,480 and \$62,870, based on student enrolments, were arrived at.

I have enclosed the Cost Recovery Implementation Statement for your information. The Statement is also available at www.education.gov.au/vet-student-loans.

In drafting future explanatory statements, I will endeavour to ensure that information of this nature is more clearly presented and that links to relevant documents are provided.

Committee's response

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

The committee notes that this information would have been useful in the ES, and further notes the minister's advice that, in drafting future explanatory statements, she will endeavour to ensure that information of this nature is more clearly presented and that links to relevant documents are provided.

Senator John Williams (Chair)