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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 11 August 2017 and 17 August 2017 (new 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	Carbon Credits (Carbon Farming Initiative) Amendment Rule (No. 2) 2017 [F2017L01039]
Purpose	Amends the principal Rule to detail additional administrative procedures relating to methodology determinations for crediting the storage of carbon in plantation forestry projects; and to restrict the eligibility of new projects where the minister responsible for agriculture assesses that they would have an undesirable impact on agricultural production in the surrounding region
Authorising legislation	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 4 September 2017) Notice of motion to disallow currently must be given by 16 November 2017
Scrutiny principle	Standing Order 23(3)(c)

Merits review

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

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

Item 3 of the Carbon Credits (Carbon Farming Initiative) Amendment Rule (No. 2) 2017 [F2017L01039] (amendment rule) inserts new section 20B into the Carbon Credits (Carbon Farming Initiative) Rule 2015 (principal rule). Section 20B sets out a process whereby all applications for new plantation projects to be declared eligible for the carbon credits scheme must be notified to the Department of Agriculture and Water Resources. The minister responsible for agriculture, or their delegate (the 'Agriculture Minister') then assesses each application and, following further correspondence with the applicant, may issue an 'adverse impact finding' to the Clean Energy Regulator (the Regulator).

Under section 20B, if an adverse impact finding is made by the Agriculture Minister and notified to the Regulator, the project is deemed to be an 'excluded offsets project'. Under section 27(4)(m) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act), the Regulator must not find a project to be eligible for the carbon credits scheme if it is an excluded offsets project.

The committee notes that an adverse impact finding by the Agriculture Minister therefore has the effect of compelling the Regulator to reject an application. While the Act provides that decisions of the Regulator may be subject to independent review by the Administrative Appeals Tribunal, it is not clear to the committee whether this would extend to independent review of the merits of an adverse impact finding made by the Agriculture Minister.

The explanatory statement (ES) does not provide any information about merits review of the Agriculture Minister's decision. The committee notes that the Department of Agriculture and Water Resources' guidance document for applicants on the notification process states that:

Proponents are provided with an opportunity to respond to the Agriculture Minister's written statement of intent to exclude a project. Proponents may take this opportunity to provide further information to support their notification before a final decision is made.

The Agriculture Minister's final decision is not subject to merits review by the Administrative Appeals Tribunal.

Unsuccessful proponents may submit a new notification.²

2 Department of Agriculture and Water Resources, *Emissions Reduction Fund Plantation Forestry Notification Guidelines: Guidance for proponents*, 22 August 2017, p. 12.

The committee considers that the ES does not provide sufficient information to establish whether the decisions of the Agriculture Minister are subject to independent merits review; and if not, whether they possess characteristics that would justify their exclusion from merits review.

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

Instrument	Determination 2017/15: Official Travel by Office Holders [F2017L01036]
Purpose	Revokes and supercedes Determination 2016/07 – Official Travel by Office Holders, updating the provisions and allowances for public office holders travelling on official business
Authorising legislation	<i>Remuneration Tribunal Act 1973</i>
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 4 September 2017) Notice of motion to disallow currently must be given by 16 November 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 at paragraph 3.11 the instrument appears to incorporate the ‘Taxation Determination TD 2017/19 (or its successor)’.

However, pursuant to section 14 of the *Legislation Act 2003*, the committee understands that, as taxation determinations are not disallowable legislative instruments, they may only be incorporated as in force at the commencement of the determination, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*.

The ES does not address the manner in which the taxation determination is incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.³

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 Taxation Determination TD 2017/19. However, the ES does not indicate how this document may be obtained.

In this instance, the committee notes that Taxation Determination TD 2017/19 is available for free online.⁴ 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.⁵

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

3 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.

4 See Australian Taxation Office Legal Database, <http://law.ato.gov.au/atolaw/view.htm?docid=%22TXD%2FTD201719%2FNAT%2FATO%2F0001%22> (accessed 11 September 2017).

5 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.

Advice only

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

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>Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2017 [F2017L01022]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2017 [F2017L01026]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2017 [F2017L01028]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2017 [F2017L01033]</p> <p>Therapeutic Goods Order No. 91A - Therapeutic Goods Order No. 91 (Standard for labels of prescription and related medicines) Amendment Order 2017 [F2017L01019]</p> <p>Therapeutic Goods Order No. 92A – Therapeutic Goods Order No. 92 (Standard for labels of non-prescription medicines) Amendment Order 2017 [F2017L01023]</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.⁶

The committee draws the above to the attention of ministers.

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

Instruments	Approved Occupational Clothing Guidelines 2017 [F2017L01012] Carbon Credits (Carbon Farming Initiative) Amendment Rule (No. 2) 2017 [F2017L01039] Health Insurance Legislation Amendment (Group Numbers) Determination 2017 [F2017L01007]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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

⁶ 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 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.⁷

The committee draws the above to the attention of ministers.

⁷ 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	Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017 [F2017L00826]
Purpose	Establishes a framework for restrictions on the export of liquefied natural gas to be imposed where the Resources Minister determines there is a reasonable prospect of a supply shortage in the domestic market
Authorising legislation	<i>Customs Act 1901</i>
Department	Immigration and Border Protection
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)(c)
Previously reported in	<i>Delegated legislation monitor</i> 10 of 2017

Merits review

The committee previously commented as follows:

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

The regulations provide for the minister administering the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (minister) to make decisions regarding when a year will be a domestic shortfall year (section 13GE) and when to grant permissions to liquefied natural gas (LNG) exporters to export LNG in a domestic shortfall year (section 13GC).

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

The ES to the regulations states:

The ADGSM [regulations] does not provide for merits review of the Resources Minister's decisions. Decisions of the Resources Minister under new Division 6 would be judicially reviewable.

The committee acknowledges that the decisions of the minister made under the regulations may be subject to judicial review. However, the committee does not consider that a decision is inappropriate for merits review merely because that decision may also be the subject of judicial review. This approach is consistent with the guidance contained in the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?*. In this regard, the publication states:

The Council's view follows from the fact that the judicial review powers vested in the Federal Court are complementary to, but distinct from, merits review powers. Judicial review involves the exercise of the Commonwealth's judicial power and results in findings in law. Merits review involves the exercise of administrative powers and results in a correct and preferable decision. The different realms of operation of the two forms of review mean that they can, and often do, co-exist.²

The committee therefore considers that the ES does not provide sufficient information to establish that decisions of the minister possess characteristics that would justify their exclusion from merits review.

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

Minister's response

The Minister for Immigration and Border Protection advised:

The Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017 inserted a new Division 6 into Part 3 of the Customs (Prohibited Exports) Regulations 1958 (the Regulations). Division 6 establishes a framework for restrictions on the export of liquefied natural gas (LNG) from LNG projects, to be imposed where the Resources Minister determines there is a reasonable prospect of a gas supply shortage in the domestic market. This mechanism is known as the Australian Domestic Gas Security Mechanism (ADGSM).

The Resources Minister and the Department of Industry, Innovation and Science (Department) have portfolio responsibility for administering the ADGSM.

2 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjectto meritreview1999.aspx> (accessed 15 August 2017).

The absence of merits review of decisions made by the Resources Minister (or an authorised officer) under Division 6 in relation to the ADGSM is justified by the characteristics of such decisions. Division 6 provides for several types of decisions to be made by the Resources Minister:

1. a decision to determine a forthcoming calendar year as a domestic shortfall year (section 13GE);
2. decisions in relation to permissions to export LNG during a domestic shortfall year, including to grant, refuse, vary, impose conditions on, or revoke, export permissions (section 13GC);
3. decisions to consent to the assignment of export permissions (section 13GD); and
4. a decision to publish guidelines (section 13GF).

1. Resources Minister's decision to determine a year as a domestic shortfall year

Under r 13GE, the Resources Minister may determine that the forthcoming calendar year will be a domestic shortfall year. In a domestic shortfall year, exports of LNG are prohibited unless written permission from the Resources Minister is provided (per section 13GC(1)).

The Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?* (ARC Guide) sets out exceptions from merits review for policy decisions of a high political content (at 4.22), for financial decisions with a significant public interest element (at 4.34), and for decisions involving extensive inquiry processes (at 4.53). The Resources Minister's determination of a domestic shortfall year falls within the requirements for these exceptions.

In relation to the first exception, the decision to make a determination is politically sensitive, as it is likely to have a significant effect on the Australian economy, and to affect Australia's relations with other countries.

The imposition of export controls on LNG exports is likely to have significant implications for the Australian economy, including in relation to the availability of natural gas in the market. It will also affect the economic activities of LNG projects and exporters, natural gas suppliers, major gas users (for example, power stations and large manufacturers), gas wholesalers, and other domestic consumers of natural gas, as well as investors in each of these.

Any determination will affect Australia's relations with other countries, particularly those countries with which Australia has free trade agreements, and which are relevant to trading partners and foreign investors in LNG projects.

In relation to the second and third exceptions, a decision to make a determination will involve an evaluation of complex and competing facts and policies to assess whether there is likely to be a domestic shortfall of

gas in any part of Australia in the forthcoming calendar year, which will go beyond mere fact finding. Details of this process are set out in the Customs (Prohibited Exports) (Operation of the Australian Domestic Gas Security Mechanism) Guidelines 2017 (the Guidelines), made by the Resources Minister under section 13GF.

The process will involve an evaluation of complex supply, demand, and export data sourced from market participants, submissions from members of the public, and advice from the Australian Energy Market Operator (AEMO), the Australian Competition and Consumer Commission (ACCC), and the Northern Territory Government (which has regulatory responsibility for the Northern gas market). The Regulations and Guidelines also require the Resources Minister to consult with the Prime Minister, Energy Minister, Industry Minister, Trade Minister, and Minister for Foreign Affairs.

These factors support the significant level of public interest, as well as the extensive inquiry process, involved with the decision. Where the Resources Minister determines a year as a domestic shortfall year, the Guidelines require a statement of reasons be published on the Department's website.

2. Resources Minister's decisions in relation to export permissions

Under section 13GC, the Resources Minister (or an authorised officer) may grant permission to export LNG in a domestic shortfall year. The ARC Guide sets out exceptions from merits review for decisions allocating a finite resource between competing applicants (at 4.11), decisions involving extensive inquiry processes (4.53), and decisions where there is no appropriate remedy (4.50). The Government considers export permissions decisions fall within these exceptions.

The Guidelines establish a process and identify considerations relevant to making export permissions decisions. It is anticipated that every entity which seeks to export LNG in a domestic shortfall year would be granted an export permission. However, conditions may be imposed on permissions, including the volume of LNG which may be exported and requirements to report export volumes to the Department. These conditions would depend on whether the LNG exporter is located in a market experiencing a shortfall, and whether the associated LNG project is drawing down from the market in net terms (that is, exporting more gas than it contributes to the domestic market).

LNG exporters in markets which are not experiencing a shortfall would be granted unlimited volume permissions. This type of permission allows the exporter to export an unlimited volume of LNG over the permission term, and is anticipated to involve very limited reporting requirements. LNG exporters in a market experiencing a shortfall would be granted an allowable volume permission. This type of permission limits the volume of LNG which may be exported to a set maximum, and would involve stronger reporting requirements to allow the Department to monitor

exports. The volume limits applied to permissions for exporters in a shortfall market are calculated using information sought as part of the comprehensive process for making a decision to determine a domestic shortfall year, described above.

The volume limits reflect a calculation of the proportion of the shortfall that would be attributable to LNG exporters, which is allocated to net-deficit exporters on a pro rata basis. In other words, LNG exporters that are in net-deficit will be allowed to export their desired export volumes, minus the amount of their pro rata contribution to the shortfall. Exporters which are not in net-deficit would be allowed to export their projected LNG export volumes for the year.

Thus, in a shortfall market, the total amount of LNG which may be exported is finite, and shared between exporters. The volume limits imposed on exporters are interdependent, such that an allocation of a volume to one exporter would be affected if a decision regarding an allocation of a volume to another exporter were overturned. As such, allowing merits review would create a level of uncertainty for all exporters. Allowing merits review would also necessitate revisiting the extensive inquiry process associated with the decision to determine a domestic shortfall year.

The Government considers the process for determining volume limits, as set out in the Guidelines, is fair, with clear and objective criteria. Furthermore, once volume limits are determined and permissions are in place, the Resources Minister cannot unilaterally vary a condition of a permission without the consent of the permissionholder, unless the permission holder breaches a condition. A breach of a condition will be a readily assessable, objective matter: the permission-holder will either have exceeded their export volume or failed to report information to the Department.

Permission decisions would also be limited in time. It is anticipated that allowable volume permissions would only be granted for the period of a domestic shortfall year (that is, one calendar year), or slightly longer (to provide additional certainty to the permission-holder). As such, they are likely to expire while any merits review process is under consideration. Additionally, the Department understands that, due to the detailed logistics required for the transport of LNG overseas (including shipping contracts), there is likely to be limited scope for exporters to make changes to their exports during the permission period. The benefits of merits review in this situation would therefore be marginal.

Permission decisions are subject to judicial review. The requirements of lawful decision making include observing the rules of natural justice (or procedural fairness). The process followed by the Department would ensure that an applicant, or permission-holder, in respect of whom an adverse decision is proposed to be made would be fully informed of the basis for that decision, and, where that proposed decision flows from non-

compliance by the applicant or permission-holder, given an opportunity to rectify it.

3. Decisions to consent to assignments

It is anticipated that assignments of permissions would only occur due to machinery changes (e.g. a change in entity structure). Accordingly, there would not be a need for merits review.

4. Minister's decision to publish guidelines

The ARC Guide provides that merits review is not required for 'legislation-like' decisions which apply generally to the community, rather than being directed towards the circumstances of any particular persons (at 3.3). The Minister's decision to publish guidelines falls within this exception.

Committee's response

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

The committee notes that the minister has provided information about decisions made under new Division 6 of Part 3 of the Customs (Prohibited Exports) Regulations 1958 which describes characteristics of those decisions that may justify their exclusion from merits review.

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

In relation to point 4 above, the committee notes that despite the minister's view that guidelines made under the regulations would not require merits review because they would be 'legislation-like' in character, such guidelines would not be legislative instruments. However, in this instance the committee does not consider the minister's power to publish guidelines as central to its merits review concerns.

Instrument	Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Boggomoss Snail) (21/06/2017) [F2017L00736]
Purpose	Adopts a recovery plan for the boggomoss snail
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</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>

Drafting

The committee previously commented as follows:

The instrument adopts a recovery plan for the boggomoss snail made by the Queensland Department of Environment and Heritage Protection. The instrument states:

This recovery plan replaces the recovery plan which was adopted under subsection 269A(7) of the *Environment Protection and Biodiversity Conservation Act 1999* [F2008L02578] for the species specified below:

Species	Recovery Plan
<i>Adclarkia dawsonensis</i>	Dr Stanistic, J., Queensland Museum (2008) Recovery Plan for the Boggomoss Snail <i>Adclarkia dawsonensis</i> .

However, it is unclear to the committee how this instrument replaces the previous boggomoss snail recovery plan, which was adopted in Environment Protection and Biodiversity Conservation Act 1999 - section 269A - Instrument Adopting Recovery Plans (06/07/2008) (WA, QLD) [F2008L02578] (the 2008 instrument). In this regard, the committee notes that the 2008 instrument is still in operation, and has not been amended to remove the reference to the previous plan.

The committee is interested in the effect, if any, of having two instruments in operation which both appear to adopt a recovery plan for the same species.

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

Minister's response

The Minister for the Environment and Energy advised:

The interaction of the [Environment Protection and Biodiversity Conservation] Act, the *Legislation Act 2003*, and the *Acts Interpretation Act 1901*, limits the Minister's power to revoke a recovery plan that has been made or adopted under the Act. Section 283A of the Act has the effect that a recovery plan may only be revoked if the Minister has decided not to have a recovery plan for the species. When a new recovery plan is made or adopted under the Act, any previous recovery plan that had been made or adopted for the species is not revoked, but rather, displaced. Consequently it is the most recently made or adopted plan that is 'in force' for the purposes of the Act (see for example, section 201(3)(b) of the Act).

Consistent with this approach, I am informed it is the Department of the Environment's (the Department) practice to consider adopting the most recent recovery plan, made by a state or territory, for a particular species as the only recovery plan in force for that species. So, when Queensland made a new recovery plan for the boggomoss snail, the Department recommended I adopt this plan under the EPBC Act. I accepted this recommendation. My adoption of the new plan has the effect of displacing the previous recovery plan for the species.

This displacement does not constitute an amendment to the Environment Protection and Biodiversity Conservation Act 1999 - section 269A - Instrument Adopting Recovery Plans (06/07/2008) (WA, QLD) [F2008L02578] (the 2008 instrument), which adopted the previous recovery plan for the boggomoss snail. However, the Department has informed me that it is currently examining whether there are any options to amend the 2008 instrument to remove the reference to the previous recovery plan.

There is the potential for confusion in having two recovery plans on the Federal Register of Legislation that ostensibly appear to be in force for the same species. To resolve this issue, the Department has informed me it is working closely with the Office of Parliamentary Counsel regarding the publication of recovery plans that displace a previous plan for a species on the Federal Register of Legislation and the description of their status. This will ensure that it is clear from the Register which recovery plan is in force for a particular species.

I also bring to the Committee's attention that I recently adopted, and jointly made, the following recovery plans under section 269A of the Act:

- Instrument Adopting Recovery Plan (Threatened Tasmanian Orchids) (9 August 2017) [F2017L01043]; and
- Instrument Jointly Making the Recovery Plan for the Giant Freshwater Crayfish (7 July 2017) [F2017L01040].

These two instruments operate in a similar way to the Boggomoss Snail Recovery Plan, in that they both displace a previous recovery plan for one or more species. These instruments are likely to be tabled in the Senate in the week commencing 4 September 2017.

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 when a new recovery plan is made or adopted, any previous recovery plan for the species is not revoked, but is instead displaced. Therefore, it is the most recently made or adopted plan that is 'in force' for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999*.

The committee further notes the minister's advice regarding two other recovery plans recently adopted under section 269A of the Act which displace previously-adopted plans:

- Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (09/08/2017) [F2017L01043]; and
- Instrument Jointly Making the Recovery Plan for the Giant Freshwater Crayfish [F2017L01040].

The committee notes that it has received and reviewed the above instruments, and, in light of the minister's advice, makes no further comment on these instruments. However, the committee considers that it would be useful to include the information provided by the minister in ESs for any future instruments which, in effect, replace previous recovery plans.

The committee also notes that the department is exploring options to amend the 2008 instrument to remove reference to the previous recovery plan, and that the department is working with the Office of Parliamentary Counsel to ensure that the Federal Register of Legislation provides clear information as to which recovery plan is in force for a particular species. Finally, the committee notes that (only) the current versions of the three plans discussed above are provided on the department's website.

Instrument	Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 3) Regulations 2017 [F2017L00790]
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Veterans' Affairs
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
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)(c)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Merits review

The committee previously commented as follows:

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

The regulation adds new item 237 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) establishing legislative authority for spending activities in relation to the Prime Minister's Veterans' Employment Program. While the ES is generally helpful in providing information about the proposed administration of the program, the committee notes that the program will not be subject to merits review. The ES states:

Spending decisions under the Program will not be subject to merits review arrangements. In accordance with the Commonwealth Procurement Rules, tenderers will be selected on the basis of technical expertise, capability and value for money.

In order to assess whether a program in Part 4 of Schedule 1AB possesses characteristics justifying the exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new program added to Part 4 of Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of

whether or not decisions should be subject to merits review. In this instance, the ES does not provide sufficient information to justify the exclusion of merits review.

The committee's expectations in this regard are set out in the guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 published on the committee's website.³

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

Minister's response

The Minister for Finance, on behalf of the Minister for Veterans' Affairs, advised:

Under the Program, funding will be provided to:

- establish and support an Industry Advisory Committee on Veterans' Employment to develop and provide advice on practical measures to embed veterans' employment strategies into the recruitment practices of Australian business and promote the skills and professional attributes offered by veterans to employers;
- establish annual awards to recognise the achievements of small, medium and large businesses in creating employment opportunities for veterans; and
- create an Ex-service Organisation Industry Partnership Register to enable ex-service organisations to register their interest in partnering with industry on projects to promote the employment of veterans.

Industry Advisory Committee on Veterans' Employment

The Industry Advisory Committee on Veterans' Employment (the Committee) was established in March 2017 to develop and provide advice on practical measures to embed veterans' employment strategies into the recruitment practices of Australian business and promote the skills and professional attributes offered by veterans to employers.

The Committee is comprised entirely of industry representatives. The Chair, Deputy Chair and a representative of small businesses were directly appointed by the Minister for Veterans' Affairs. Ten companies and the Australian Chamber of Commerce and Industry were each invited to nominate a representative to serve on the Committee. Members serve on a voluntary basis and are not remunerated.

The Government is providing subject matter expertise and support staff to assist the Committee.

3 See Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

Expenditure on this initiative includes the cost of support staff; travel for subject matter experts, support staff and the small business representative to attend Committee meetings; venue hire; catering; and associated meeting expenses. Apart from staffing costs, the nature of the expenditure is for the procurement of goods and services. This expenditure is subject to the requirements of the Commonwealth's resource management framework, including the Commonwealth Procurement Rules and the *Public Governance, Performance and Accountability Act 2013*. Given the targeted purpose and nature of the expenditure, merits review of spending decisions related to supporting the Committee is not considered appropriate.

Annual Awards

The Prime Minister's Veterans' Employment Awards (the Awards) will recognise the achievements of small, medium and large businesses in creating employment opportunities for veterans. The Awards will be held annually, with the inaugural Awards to be held in March 2018.

Government funding will be spent on enabling and managing online nominations through a dedicated Program website, conducting the Awards event, and promoting the work of the Committee and wider Program with a particular focus on the Awards. Government funding for the Awards will be supplemented by industry sponsorship and in-kind support. There will be no payments to the winners of the Awards, although payment of travel costs for their attendance may be covered.

Government funds will be used to procure goods and services and spending decisions will be made in accordance with the requirements of the Commonwealth's resource management framework, including the Commonwealth Procurement Rules and the *Public Governance, Performance and Accountability Act 2013*. Under this framework, contracts will be awarded through open, competitive processes and will be reported on AusTender.

Promotion of the Awards is likely to include an advertising campaign. If such a campaign is conducted, it will be conducted, as far as is applicable given the utilisation of industry sponsorship and in-kind support, in accordance with the Department of Finance's Whole-of-Australian Government Advertising Arrangement.

Given the finite amount and nature of the expenditure, merits review of spending decisions is not considered appropriate. In addition, allowing further review of these decisions would substantially delay the implementation of the Awards.

Nominations for awards will be made by businesses, other organisations and individuals. Eligibility will vary across the Award categories, depending on the nature of the category. The criteria for each category of awards will be made publicly available so that organisations and individuals are able to consider those criteria when making a decision as to whether they are

eligible to submit a nomination. As eligibility will not be a discretionary decision, merits review of whether a nominator is eligible to submit a nomination is not appropriate.

Nominations will be reviewed by judging panels allocated to each category, made up of independent judges and possibly also DVA representatives. Independent judges are not expected to be remunerated, although costs associated with their attendance at the event may be covered. Allowing review of the decisions of judging panels about finalists and winners would result in the potential for significant uncertainty that could undermine the integrity and standing of this and similar Awards processes, and has the potential to delay the Awards event with resulting reputational damage and additional costs. In recognition of this, a high level of probity will be implemented to manage the judging process, including management of conflicts of interest and ensuring that the judging panels are impartial. Unsuccessful nominators will be notified in writing of the panels' decisions and will be able to obtain limited feedback on the reasons why the nomination was unsuccessful.

Ex-service Organisation Industry Partnership Register

The Register will enable ex-service organisations to register their interest in partnering with industry on projects to promote the employment of veterans. The Register will be delivered through a dedicated Program website, utilising and modifying existing DVA and Department of Human Services ICT assets. Contractors will be engaged to work with existing departmental staff to develop the register.

Apart from payments to contractors, spending will be limited to the procurement of goods and services. Accordingly, it will be subject to the requirements of the Commonwealth's resource management framework, including the *Commonwealth Procurement Rules and the Public Governance, Performance and Accountability Act 2013*. Given the nature and purpose of the expenditure on the development of the Register, merits review is not appropriate.

Review of decisions under the Program

The main objectives of the Program will be largely achieved by an industry-led Committee, which is expected to fund the implementation of its own recommendations. Any proposals of the Committee pursued by Government would be considered in a future Budget process.

Apart from staffing and contractor costs, spending decisions under the Program will be for the purpose of procuring goods and services to support the Committee, run an Awards process and event, and establish a Partnership Register. Such spending decisions will be made under the Commonwealth's resource management framework.

In addition, the review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review Government spending decisions and report any concerns to the Parliament. These

requirements and mechanisms help to ensure the proper use of Commonwealth resources, and appropriate transparency around decisions relating to making, varying or administering arrangements to spend public money. Further, the right of review under section 75(v) of the Australian Constitution, and review under section 398 of the *Judiciary Act 1903*, may also be available. Persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

Committee's response

The committee thanks the ministers for their response and has concluded its examination of the above.

The committee notes the ministers' advice that spending decisions under the program will primarily relate to the procurement of goods and services, which is subject to the requirements of the Commonwealth's resource management framework, including the Commonwealth Procurement Rules and the *Public Governance, Performance and Accountability Act 2013*.

The committee considers that the information provided in the ministers' response would have been useful in the ES.

Instrument	Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L00811] Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Regulations 2017 [F2017L00803]
Purpose	Introduces new exemption certificates for acquisitions of securities and residential land and recognises a greater range of commercial uses of land as acquisitions of commercial land Amends the fee structure that applies to foreign investors in Australian property
Authorising legislation	<i>Foreign Acquisitions and Takeovers Act 1975</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) and (b)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Retrospective commencement

The committee previously commented as follows:

Subsection 12(2) of the *Legislation Act 2003* provides that a provision that commences retrospectively does not apply retrospectively in relation to a person (other than the Commonwealth) if it would disadvantage their rights or impose a liability on the person for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

The Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L00811] (exemption regulations) and the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Regulations 2017 [F2017L00803] were made on 27 June 2017, and commenced retrospectively on 24 June 2017. However, the ESs to both regulations provide no information about the effect of their retrospective commencement on individuals.

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

Minister's response

The Treasurer advised:

Some of the provisions in each instrument are introduced to give effect to the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Bill 2017 which commenced on the day after Royal Assent which was 24 June 2017. The commencement provisions in each regulatory instrument provide that the regulations commence at the time the Bill provisions commence. At the time it was envisaged that Royal Assent would not occur until after the regulations were made. There was no intention that the regulations would operate retrospectively which is why the Explanatory Statements did not address this issue. The retrospective commencement of the two regulations is due to an oversight and technical error in the drafting of the commencement provisions of both instruments.

As the Committee has acknowledged, subsection 12(2) of the *Legislation Act 2003* prevents the provision being applied retrospectively to persons who would be disadvantaged. At the time of writing, no foreign persons have been disadvantaged because no applications received during this timeframe required the application of the new provisions. The relevant timeframe in which this provision could have been incorrectly enforced has now passed.

Committee's 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 applications received in the relevant timeframe required the application of the new provisions, and therefore no persons were disadvantaged by the retrospective commencement of the regulations.

No statement of compatibility

The committee previously commented as follows:

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

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

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 *Human Rights (Parliamentary Scrutiny) Act 2011*.

Minister's response

The Treasurer advised:

The absence of a human rights compatibility statement in the Explanatory Statement for the Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L00811] was a technical oversight due to advice received from the Executive Council Secretariat.

An assessment however was undertaken and the instrument is assessed as compatible with human rights. A revised Explanatory Statement providing a statement of compatibility will be registered with the Federal Register of Legislation and tabled through their processes.

Committee's 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 the lack of a statement of compatibility in the ES was an oversight, and further notes that a replacement ES containing a statement of compatibility has been registered on the Federal Register of Legislation and received by the committee.

Instrument	Migration Amendment (Specification of Occupations) Regulations 2017 [F2017L00818] Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017 [F2017L00848]
Purpose	Clarifies the power of the Minister for Immigration and Border Protection to specify, in a legislative instrument, the occupations which may be nominated, and the applicability of those occupations to identified persons, in relation to four visas; and provides that such an instrument may apply to nominations made before or after the commencement date of the instrument Specifies occupations for nominations that relate to a Subclass 457 – Temporary Work (Skilled) Visa
Authorising legislation	<i>Migration Act 1958</i> ; Migration Regulations 1994
Department	Immigration and Border Protection
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)(b)
Previously reported in	<i>Delegated legislation monitor</i> 10 of 2017

Retrospective effect

The committee previously commented as follows:

Item 8 of the schedule to the Migration Amendment (Specification of Occupations) Regulations 2017 [F2017L00818] (specification regulations) amends the Migration Regulations 1994 (Migration Regulations) to provide that, in relation to a legislative instrument made for the purpose of paragraph 2.72(10)(aa) of the Migration Regulations, an instrument may specify that it applies to nominations made on or after the day the instrument commences, or made and not finally determined before the day the instrument commences, regardless of whether the application was made before, on or after that day.⁴

The Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017 [F2017L00848] (IMMI 17/060) is made under para. 2.72(10)(aa) of

4 Paragraph 2.72(10)(aa) of the Migration Regulations relates to nominations by standard business sponsors for the purpose of the Subclass 457 (Temporary Work) (Skilled) visa (457 visa).

the Migration Regulations, and commenced on 1 July 2017. Section 9 of IMMI 17/060 provides that the instrument will apply in relation to nominations of occupations made and not finalised before 1 July 2017. The ES states, in relation to section 9:

This is regardless of whether, for a nomination in relation to an application for a 457 visa, the application was made before, on or after 1 July 2017. This provision is expressly provided for in Migration Amendment (Specification of Occupations) Regulations 2017 and inserts regulation 6601 to the Regulations. It is noted that the Regulations provide for the refund of a fee in regard to a nomination in 2.73 and an application in 2.12F.

The committee notes that, although IMMI 17/060 is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that a person whose application for a visa was made on or before 1 July 2017 may now be subject to criteria for the grant of the visa that did not apply at the time of their application.

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The ESs to the specification regulations and IMMI 17/060 do not address this issue.

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

Minister's response

The Minister for Immigration and Border Protection advised:

The Migration Amendment (Specification of Occupations) Regulations 2017 and the Migration (IMMI 17/060: Specification of Occupations-Subclass 457 visa) Instrument 2017 do not unduly trespass on personal rights and liberties.

The Temporary Work (Skilled) (subclass 457) visa addresses critical skills shortages that cannot be met by Australian workers. As an uncapped, demand-driven programme, it is designed for approved employers to sponsor temporary skilled workers to meet short-term skills needs. As a result, the size and composition of the programme fluctuates according to changes in the Australian economy and labour market.

Specifying a list of eligible occupations for the subclass 457 visa is one mechanism to ensure that foreign workers are being sponsored for jobs experiencing genuine shortages. Regular recalibration of the list maintains public confidence in skilled migration while continuing to support Australian businesses. The Government announced on 18 April 2017 that eligible occupations would be reviewed every six months, based on labour market analysis and informed by stakeholder consultation. The 1 July 2017 amendment is the first of these regular reviews, to be led by the Department of Employment in future.

A legislative instrument made for the purpose of paragraph 2.72(10)(aa) of the Migration Regulations 1994 may specify that the new occupations list applies to nominations made on or after the day the instrument commences, or made and not finally determined before the day the instrument commences, regardless of whether the nomination, if it relates to an applicant for a visa, was made before, on or after that day (Part 66 of Schedule 13 of the Migration Regulations 1994).

Applying the updated occupation list to unfinalised nominations ('the pipeline') aims to strike a balance between the public interest in maintaining control over access to the Australian labour market and the interests of sponsoring businesses and individual visa applicants. The changes were applied in this manner to ensure that access to Australia's labour market over the next four years (the maximum period for which a Subclass 457 visa can be granted) is afforded only where there is a genuine skills need. To ensure businesses and applicants were not unduly disadvantaged by these changes, refunds of nomination fees and visa application charges were made available where the applications could not proceed because an occupation had been removed from eligibility.

Applying the changes to unfinalised applications also prevents significant spikes in visa lodgements prior to changes taking effect, which would distort the programme's intent. Visa applicants who are seeking to enter or remain in Australia on a temporary basis would be aware that Australia's temporary skilled migration programme reflects labour market needs which will fluctuate over time and there is no guarantee that a visa will be granted. In some cases, non-citizens may have to leave Australia, but this is inherent in any temporary visa programme and does not amount to an undue interference with the rights or liberties of those non-citizens.

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 applying the changes to un-finalised applications is intended to preserve the intent of the government's skilled migration program, and also prevents significant spikes in visa lodgements prior to changes taking effect. The committee further notes the minister's advice that refunds of nomination fees and visa application charges were made available where the applications could not proceed because an occupation had been removed from eligibility.

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

Instrument	National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 [F2017L00827]
Purpose	Specifies the knowledge, qualifications and experience requirements to be met by applicants for registration as greenhouse and energy auditors
Authorising legislation	National Greenhouse and Energy Reporting Regulations 2008
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</i> 10 of 2017

The committee previously commented on two issues as follows:

Description of consultation

Section 17 of the *Legislation Act 2003* (Legislation Act) 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 the ES, in addressing the requirements of 15J(2)(c) of the Legislation Act, refers to public consultation conducted with respect to industry access to audit Standards.⁵ However, with reference to the consultation requirements in the Legislation Act, the ES does not provide information regarding consultation undertaken in relation to the instrument itself.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.⁶

5 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.

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

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*.

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 the definitions of **ISAE 3000** and **ISAE 3410** in section 4 incorporate the following documents:

- *Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements*, published by the International Federation of Accountants, October 2014, ISBN 978-1-60815-185-1, as amended from time to time (the Handbook); and
- *Assurance Engagements on Greenhouse Gas Statements*, issued by the International Auditing and Assurance Standards Board, March 2012, as amended from time to time (the International Statement).

However, pursuant to section 14 of the *Legislation Act 2003*, the committee understands that, as the Handbook and the International Statement are not Commonwealth disallowable legislative instruments, they may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁷

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

Minister's response

The Minister for the Environment and Energy advised:

I am advised by the Clean Energy Regulator (CER) that it notes the issues identified by Senate Regulations and Ordinances Committee, in relation to the National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 ('the Instrument') and its explanatory statement.

7 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 CER will remake the Instrument and amend the explanatory statement, as soon as practicable, to correct both of the identified issues and maintain compliance with the *Legislation Act 2003*. This is expected to occur by the end of September 2017. The explanatory statement will make explicit reference to the consultation that was undertaken in June 2017.

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 undertaking that the CER will remake the instrument and amend the explanatory statement to address the committee's concerns, and that the committee will have the opportunity to examine the new instrument (and ES) once it is re-made.

Instrument	Radio Licence Fees Regulations 2017 [F2017L00778] Television Licence Fees Amendment Regulations 2017 [F2017L00780]
Purpose	Enable eligible commercial radio and television broadcasting licensees to claim a 100 per cent rebate of licence fees payable in the accounting period ending on 31 December 2016, or a day in 2017 other than 31 December
Authorising legislation	<i>Radio Licence Fees Act 1964; Television Licence Fees Act 1964</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)(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).

These regulations provide for eligible commercial radio and television broadcasting licensees to claim a 100 per cent rebate of licence fees payable in the accounting period ending on 31 December 2016, or a day in 2017 other than 31 December.

The committee notes that key elements of the regulations may be described as 'mirroring' amendments in the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (the broadcasting bill) which proposes the abolition of radio and television licence fees payable after 31 December 2016. The broadcasting bill was introduced in the House of Representatives on 15 June 2017 and the third reading agreed to on 21 June 2017. The regulations were made on 27 June 2017, at which time the bill was still being considered by the Senate.⁸

The ESs to the regulations explain that the regulations have been made to ensure 'the policy objective of the [broadcasting] Bill is achieved in the interim in the event it does not receive Royal Assent by 30 June 2017'.

However, the ESs for the regulations provide no further information as to the relationship of the regulations with the broadcasting 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.

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

Minister's response

The Minister for Communications advised:

This [broadcasting] Bill implements a number of the elements of the Government's Broadcasting and Content Reform Package (the Package) – an integrated suite of reforms designed to enable the Australian media industry to compete on a level playing field in the digital media landscape. One of the key components of the Package, which I announced on 6 May 2017, is the permanent abolition of broadcasting licence fees and datacasting charges.

Once passed, the Broadcasting Reform Bill will give effect to this change, with application for licence fees that would otherwise be payable for the 2016-17 accounting period. Consistent with my announcement of 6 May 2017 and the associated measure included in the 2017-18 Budget, commercial broadcasting licensees will not pay any licence fees for the 2016-17 year, which would otherwise be payable on 31 December 2017.

The Broadcasting Reform Bill and the related Commercial Broadcasting (Tax) Bill 2017 passed the House on 21 June 2017 and were introduced into the Senate the following day. Although the abolition of licence fees,

8 The committee notes that the broadcasting bill was introduced in the Senate on 22 June 2017 and was in second reading debate at the time of this report.

as proposed by the Schedule 5 to the Broadcasting Reform Bill, will apply to the fees payable for the 2016-17 accounting period, the delays in the passage of the Bill in the Senate beyond 30 June 2017 meant that relevant licensees were unable to account for and recognise the cut in their financial statements for the 2016-17 year.

Commercial television and radio broadcasting licensees are operating in a particularly challenging environment and are facing acute pressures as a result of falling audiences and advertising revenues and rising costs. It is the Government's view that broadcasting licence fees are an outdated and unnecessary tax on our commercial broadcasters, and should be repealed with effect from the 2016-17 financial year. The Regulations, which were made by the Governor-General on 27 June and took effect on 30 June 2017, remove fees payable for the 2016-17 accounting period by setting the effective rate of fees for that year at zero per cent.

The making of the Regulations in this manner does not circumvent or otherwise erode the intent of Parliament in relation to the imposition of licence fees, as the effective removal of the licence fees is time limited and only applies to one financial period (the 2016-17 accounting year or equivalent). The Regulations do not permanently abolish the fees. Absent the passage of the Broadcasting Reform Bill, licence fees will continue to be imposed for 2017-18 accounting period and beyond under the *Television Licence Fees Act 1964* and the *Radio Licence Fees Act 1964*. In this regard, the Regulations were not made with the purpose of permanently ending licence fees without Parliamentary approval. For completeness, I would also note that Regulations were made under the *Television Licence Fees Act 1964* on many occasions over recent years to provide for reductions in the licence fees payable by commercial television broadcasting licensees.

Committee's response

The committee thanks the minister for his response.

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).

The committee's inquiry in relation to the instruments arose from the fact that their operational provisions may be described as 'mirroring' 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.

In this regard, the minister's comments regarding the importance of implementing the government's policy to repeal licence fees could be equally taken as supporting

a conclusion that the matters are more appropriately subject to the Senate's full deliberative process. The committee is concerned that citing policy imperatives to justify the use of regulations in these circumstances should not set a precedent for other cases in which, given the uncertainty and timeframes associated with the full legislative process, governments may regard it as preferable or convenient to effect policy change via delegated legislation.

The committee acknowledges the minister's advice that the removal of licence fees by the regulations only applies to the 2016–17 financial year, and, as such, is not intended to permanently end licence fees without Parliamentary approval. Nevertheless, the committee considers that questions of duration are secondary to the fundamental question of whether the Parliament approves the legislative approach. The committee is conscious that implementing these measures via regulations not only pre-empts parliamentary consideration, but could also allow delegated legislation to operate in contradiction to 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).

While the committee has concluded its examination of the above, in light of its 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	<p>Therapeutic Goods (Authorised Supply of Specified Biologicals) Rules 2017 [F2017L00868]</p> <p>Therapeutic Goods (Authorised Supply of Specified Medical Devices) Rules 2017 [F2017L00867]</p> <p>Therapeutic Goods (Authorised Supply of Specified Medicines) Rules 2017 [F2017L00859]</p>
Purpose	Authorise specified classes of health practitioners to supply specified biologicals, medical devices, and medicines
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)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Unclear meaning of the term 'good medical practice'

The committee previously commented as follows:

These rules authorise health practitioners to supply specified biologicals, medical devices and medicines which have not been approved for inclusion on the therapeutic goods register. The supply of these items to patients is subject to conditions which are set out in paragraph 4(1)(f) of each of the rules.

Sub-paragraph 4(1)(f)(iii) requires the health practitioner to ensure that the items are supplied in accordance with 'good medical practice'. However, neither the rules nor their ESs expressly define the term 'good medical practice'.

The committee is concerned that the term 'good medical practice' is insufficiently precise, such that it may be difficult for a health practitioner or patient to know how the unapproved items may be appropriately supplied.

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

Minister's response

The Minister for Health advised:

The effect of the above Rules instruments is to list unapproved products that health practitioners can supply to their patients by notifying the Therapeutic Goods Administration (TGA), rather than (as was the case before these instruments were made) through pre-approval.

The term 'good medical practice' has been used in regulation 12A of the *Therapeutic Goods Regulations 1990* since 1991. This provision authorises medical practitioners to supply unapproved medicines to persons who are 'Category A' patients (persons who are seriously ill), and supply under this mechanism must be in accordance with good medical practice.

The TGA document *Special Access Scheme: Guidance for health practitioners and sponsors* (July 2017), which includes guidance on the supply of unapproved goods under these Rules, explains that 'good medical practice' refers to a series of standards that health practitioners should adhere to when treating patients. These standards are generally patient-centred and comprise ethical and professional benchmarks expected by a health practitioner's professional peers, as well as the community. For example, registered medical practitioners operate in accordance with the principles in the Medical Board of Australia's *Good Medical Practice: A Code of Conduct for Doctors in Australia*, and dental practitioners would be expected to comply, in most cases, with the Dental Board of Australia's *Code of Conduct for registered health practitioners*.

Given the above, it is expected that health practitioners in particular, and patients, would be familiar with, and understand, the meaning of this term.

It is anticipated that the above Rules for medicines and biologicals will shortly be re-made to include additional products, and that the explanatory statements for those re-made Rules will incorporate the above explanation. A replacement explanatory statement for the medical devices Rules that incorporates the above will also be provided.

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 meaning of 'good medical practice' is well established within the health sector, and also that it is explained in the Therapeutic Goods Administration's guidance document on the special access scheme. In this case, the committee further notes that the supply of items under these instruments is subject to a set of safeguards: supply is limited to specified circumstances, and the requirement that the supply be in accordance with 'good medical practice' is one of a range of specified conditions.

The committee notes nonetheless that patients and practitioners who use or are affected by the instruments should not be expected, without guidance in the instrument, or, at a minimum, the ES, to rely on an external document to fully understand their content.

In this regard the committee notes the minister's advice that the rules relating to medicines and biologicals are expected to be remade shortly, and that the

explanatory statements for those remade rules will incorporate an explanation of the term 'good medical practice'.

The committee also notes the minister's undertaking to provide a replacement explanatory statement for the medical devices rules that incorporates this information.

Instrument	Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853]
Purpose	Sets out the arrangements for priority review of prescription medicines, lists variations that medicines sponsors may notify to the Therapeutic Goods Administration, and introduces new fees to support these measures
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)
Previously reported in	<i>Delegated legislation monitor 10 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

Items 6, 8 and 9 of Schedule 8 to the regulations set application fees for certain requests to have medical devices, therapeutic goods, or biologicals reinstated on the therapeutic goods register. The items set a fee of \$150 if the reinstatement request relates only to one entry and, where such a request relates to more than one entry, a fee of \$150 for the first entry plus \$50 for each additional entry. However, the ES to the instrument 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 charge has been calculated.

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

Minister's response

The Minister for Health advised:

Reinstatement fees

The Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 introduced application fees for the purposes of a number of provisions recently added to the *Therapeutic Goods Act 1989* (the Act) that allow sponsors whose goods were cancelled from the Australian Register of Therapeutic Goods (the Register) because they failed to pay the annual charge for their goods to apply to the Secretary for their products to be reinstated to the Register (sections 30AA, 32GDA and 41GLB of the Act refer).

These application fees (in items 6, 8 and 9 of Schedule 8 to the Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017), which in each case comprise a fee of \$150 if the request relates to a single entry in the Register and a fee of \$50 for any additional entries covered by the same request, reflect the administrative work involved in processing requests of this nature.

In relation to the fee of \$150 for a request relating to only one entry, this fee reflects the TGA's costs, and includes direct staff time of one hour (on average), and the relative allocation of support and corporate costs. For a request that relates to more than one entry, it is estimated that whilst one hour of staff time will be required for the first entry, around 20 minutes of additional time will be required to complete the administrative tasks associated with each additional entry. Therefore, where a request relates to more than one entry, a fee of \$150 for the first entry, plus \$50 for each additional entry, applies.

The explanatory statement for these regulations will be updated accordingly as soon as possible to incorporate the above explanation.

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 have been calculated to reflect the cost of the administrative work involved in processing reinstatement requests. The committee notes the minister's undertaking to amend the ES to incorporate this information.

Senator John Williams (Chair)