The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 13 of 2017

18 October 2017

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Contents

Advice only

Chapter 2 – Concluded matters

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 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 *Odgers' 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:
  - (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, including by giving 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]

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2 Regulations and Ordinances Committee, *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 Regulations and Ordinances Committee, *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 18 August 2017 and 14 September 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 with respect to the following concerns.

Instrument	**ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 [F2017L01126]** **ASIC Corporations (Amendment) Instrument 2017/6 [F2017L01128]**
Purpose	Operate together to apply a single, consistent definition of 'approved foreign market' in 14 ASIC legislative instruments
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 6 September 2017) Notice of motion to disallow currently must be given by 28 November 2017
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The explanatory statement (ES) which must

1 See Regulations and Ordinances Committee, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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 (shared) ES for these instruments provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[2]

The committee requests the minister's advice as to the nature of consultation (if any) that was undertaken on the instrument; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Drafting

The ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 (the definition instrument) modifies the application of eight specified chapters or Parts of the *Corporations Act 2001* (the Act) to applicable ASIC legislative instruments. The instrument relies on separate provisions of the Act for authority to modify the application of each chapter or Part.

In this regard, the committee notes that the definition instrument and the ES identify only seven of the eight relevant authorities on which the definition instrument relies. The definition instrument modifies the application of Part 7.7 of the Act to the applicable legislative instruments, but does not cite subsection 951B(1) of the Act, which authorises it to do so.

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

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

Instrument	**ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]**
Purpose	Modifies the application of the *National Consumer Credit Protection Act 2009* to notionally insert new provisions prohibiting flexible credit cost arrangements
Authorising legislation	*National Consumer Credit Protection Act 2009*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 11 September 2017) Notice of motion to disallow currently must be given by 30 November 2017
Scrutiny principle	Standing Order 23(3)(d)

Matters more appropriate for parliamentary enactment

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). This includes legislation that fundamentally changes the law.

This instrument is made under subsection 109(3) of the *National Consumer Credit Protection Act 2009* (the Act). Subsection 109(3) falls within Part 2 of the Act, which deals with licensing of persons who engage in credit activities. It relevantly provides that:

> ASIC may, by legislative instrument:
>
> …
>
> (d) declare that provisions to which this Part applies apply in relation to a credit activity…or a class of persons or credit activities, as if specified provisions were omitted, modified or varied as specified in the declaration.

The Act is 'modified' in this instance by effectively inserting two new sections into it, 53A and 53B, as well as adding several new definitions to subsection 5(1) to support the new sections. The new provisions establish obligations on credit licensees not to pay benefits, including commissions, under arrangements where the higher the cost of credit the greater the commission earned.

In cases of significant change to the law, the committee's longstanding view has been that enactment via primary legislation is more appropriate than via delegated

legislation because it ensures that significant proposed changes are subject to the full legislative processes and consideration by the Parliament prior to commencement. In these instances, the committee generally requires a detailed justification for the inclusion of such matters in delegated legislation as opposed to primary legislation.

The committee recognises that broad instrument-making powers are granted to and exercised by ASIC under legislative provisions such as those in section 109(3) of the Act. In this regard, the committee notes that when the Act was before Parliament in 2009, the Scrutiny of Bills committee drew the Senate's attention to the 'large number of "Henry VIII" clauses in the bill which provide for regulations to change entitlements and obligations conferred by the principal legislation', stating its continuing concern about such 'reliance on the potential use of regulations to alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation'.[3]

The committee also understands that ASIC has previously stated that it would not use its broad regulatory powers to make rules that implement entirely new policies which are not already dealt with in the Act or Regulations.[4]

Importantly, the committee draws attention to provisions in the instrument creating offences, with significant civil and criminal penalties. There are five new civil penalties of 2000 penalty units (currently $420,000) each, and two criminal penalties of 100 penalty units ($21,000), or 2 years imprisonment, or both.

The committee notes that it is generally expected that penalties imposed through delegated legislation are authorised by a specific authority to do so in the empowering Act. Pearce and Argument observe that:

> the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act. In the absence of an explicit power, an attempt to enforce a legislative requirement contained in delegated legislation by the creation of an offence will be invalid.[5]

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that regulations

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3 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2009*, 9 September 2009, pp. 369-371.

4 See Stephen Bottomley, *The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker*, ANU College of Law Research Paper No. 12-04, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006053, p. 7.

5 DC Pearce and S Argument, *Delegated Legislation in Australia,* Lexis Nexis Butterworths, 2017, p. 291.

should not be authorised to impose fines exceeding 50 penalty units or create offences that are punishable by imprisonment. The Guide further states that:

> Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised.[6]

The committee received advice from the Office of Parliamentary Counsel in 2014 that:

> provisions dealing with offences and powers of arrest, detention, entry, search or seizure…are not authorised by a general rule-making power (or a general regulation-making power). If such provisions are required for an Act that includes only a general rule-making power, *it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[7] [emphasis added]

There appears to be no express power in the *National Consumer Credit Protection Act 2009* that authorises the imposition of these penalties, and there is no information provided in the explanatory statement which explains or justifies the imposition of such very high civil and criminal penalties, including terms of imprisonment, in delegated legislation.

The committee requests the minister's:

- **detailed justification for the imposition of high civil and criminal penalties in the instrument, rather than in primary legislation; and**
- **advice as to why it would not be more appropriate to impose the significant new policy implemented by this instrument in primary, rather than delegated, legislation.**

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6 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx.

7 See *Delegated legislation monitor 6 of 2014*, pp. 18 and 69 (response received from the First Parliamentary Counsel in relation to Australian Jobs (Australian Industry Participation) Rule 2014).

Instrument	**Auditing Standard ASA 250 Consideration of Laws and Regulations in an Audit of a Financial Report [F2017L01172]**
Purpose	Updates Auditing Standard ASA 250 to reflect changes to the equivalent international standards
Authorising legislation	*Australian Securities and Investments Commission Act 2001*; *Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow currently must be given by 7 December 2017
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instrument puts in place a new Auditing Standard ASA 250 *Consideration of Laws and Regulations in an Audit of a Financial Report* [F2017L01172]. The instrument will become operative for financial reporting periods commencing on or after 1 January 2018, although early adoption of the new standard by auditors is permitted.

The instrument and the explanatory statement (ES) state that the new standard 'will replace the current ASA 250', which was made in 2009, and amended in 2011. However, the committee notes that the instrument contains no provision for the repeal of the previous version of ASA 250, which remains in force and on the Federal Register of Legislation.[8] The ES contains no information with regard to repeal of the previous ASA 250.

The committee is interested in the effect, if any, of having two auditing standards simultaneously in force on the same subject matter. The committee is also conscious of the potential for confusion among those consulting or affected by the legislation, in the absence of any information in the ES or elsewhere indicating a date of cessation of the first instrument.

The committee requests the minister's advice as to:

- **the effect, if any, of having two auditing standards in force on the same subject; and**

8 ASA 250 - Consideration of Laws and Regulations in an Audit of a Financial Report - October 2009 [F2011C00607].

- **the intention of the government, if any, with regard to repealing the previous version of ASA 250.**

Instrument	**Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063]** **Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080]**
Purpose	Update the lists of designated persons, entities and declared persons on the autonomous sanctions lists for the Democratic People's Republic of Korea and Syria
Authorising legislation	Autonomous Sanctions Regulations 2011
Portfolio	Foreign Affairs and Trade
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)

Statements of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights. Paragraph 15J(2)(f) of the *Legislation Act 2003* requires that the statement of compatibility be included in the explanatory statement (ES) for the instrument.

The ESs for these instruments do not include a statement of compatibility.

The committee has observed that a statement of compatibility for each of the above instruments has been published on the Federal Register of Legislation: in one case as 'supporting material' and in the other as an 'incorporated document'. However, the committee notes that paragraph 15J(2)(f) of the *Legislation Act 2003* requires the ES to a disallowable legislative instrument to *contain* a statement of compatibility. Further, the ES to a legislative instrument must be tabled in each House of Parliament, but there is no such requirement for supporting material or incorporated documents. The committee therefore understands that the statements of compatibility for these instruments have not been tabled in either House of Parliament.

The committee requests the minister's advice as to why statements of compatibility were not included in the ESs to these instruments. The committee also requests that replacement ESs be provided to the committee and registered on the Federal Register of Legislation, in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

Instrument	**Competition and Consumer (Inland Terminals) Declaration 2017 [F2017L01077]**
Purpose	Declares specified facilities to be inland terminals, to facilitate the movement of containers away from ports to inland distribution centres
Authorising legislation	*Competition and Consumer Act 2010*
Portfolio	Infrastructure and Regional Development
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)

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 explanatory statement (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)).

Under the heading of consultation, the ES states:

> The Department of Infrastructure and Regional Development (the Department) provided the list of facilities specified in the instrument to the Australian Competition and Consumer Commission and a peak shipping body which represents international liner shipping firms operating on Australian trade routes. The Department also provided the list to the two peak shipper bodies (representing the customers of the shipping lines) designated under Part X.

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*.[9] In this case, the committee is unable to discern from the description in the ES whether the list of terminals was provided to the named organisations in the nature of consultation, prior to its finalisation, or was merely provided to them for information once the instrument had been finalised.

The committee requests the minister's advice as to the nature of the consultation undertaken on the instrument, and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2017 [F2017L01086]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on two new items in the Health portfolio
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Health and Aged Care
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) and (d)

Constitutional authority for expenditure

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

The committee notes that, in *Williams No. 2*,[10] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the explanatory statements (ES) for

9 The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

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

all instruments specifying programs or grants for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program or grant, the constitutional authority for the expenditure.

This instrument adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations), establishing legislative authority for initiatives in the health sector. One of these is item 242, the 'Prime Minister's Walk for Life Challenge'. In relation to the constitutional authority for item 242, the ES relies on the external affairs power in the Constitution as it states that the walk promotes rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). The ES states:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the external affairs power under section 51(xxix) of the Constitution.
>
> Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.
>
> Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, those Articles require States Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases'.
>
> Australia also has obligations regarding the rights of the child under Articles 4, 24 and 29 of the Convention on the Rights of the Child. Article 4 requires States Parties to 'undertake all appropriate…measures for the implementation of the rights recognised' in the Convention. Article 24, in particular, requires States Parties to take appropriate measures 'to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition'. Article 29 provides, in particular, that 'States Parties agree that the education of the child shall be directed to '[t]he development of the child's personality, talents and mental and physical abilities to their fullest potential'.
>
> The program will improve community participation in physical activity, and raise community awareness of the value of physical activity and its role in preventing chronic disease. It will increase access to walking and other physical activity programs, including for children in schools, and promote innovative uses of technology to support increased physical activity across the population.

The committee understands that, in order to rely on the external affairs power in connection with obligations under international treaties, legislation must be

appropriately adapted to implement relatively precise obligations arising under a treaty. The High Court set out this position in *Victoria v Commonwealth*:

> When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[11]

With regard to this requirement, the committee notes that the cited Articles of the ICESCR and the CRC do not prescribe specific means to be adopted by signatory states for the achievement of the rights identified.

The committee further notes that the statement of compatibility with human rights included in the ES states that the regulations 'do not engage any of the applicable rights or freedoms' and 'do not raise any human rights issues'. The committee finds it difficult to reconcile the location of constitutional authority for the Prime Minister's Walk for Life initiative solely in the implementation of international human rights obligations via the external affairs power, with the assessment in the statement of compatibility that the initiative does not engage any human rights.

The committee requests the minister's more detailed advice as to the constitutional authority for the Prime Minister's Walk for Life initiative in light of the discussion above.

Parliamentary scrutiny: ordinary annual services of the government

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).

Under the provisions of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), executive spending may be authorised by specifying schemes in regulations made under that Act. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the

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11 *Victoria v Commonwealth* (1996) 187 CLR 416, at 486. For further discussion of this point see also Glenn Ryall, 'Commonwealth Executive Power and Accountability following *Williams (No. 2)*' in Parliament of Australia, *Papers on Parliament no. 63,* July 2015, 109 at 120-121, available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop63.

regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[12] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[13]

This instrument adds two new items to Part 4 of Schedule 1AB to the FFSP Regulations, establishing legislative authority for initiatives in the health sector:

- item 241: General Practitioners Healthy Heart Partnership; and
- item 242: Prime Minister's Walk for Life Challenge.

While the ES indicates that these are to be funded under the Department of Health's existing Program 2.4, Preventative Health and Chronic Disease Support, it appears to the committee that the above items, presented as a new 'Healthy Heart Initiative' commencing in the 2017-18 financial year, are new policies not previously authorised by special legislation; and that the initial appropriation in relation to these new policies may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-18 (which is not subject to amendment by the Senate).

The committee's considerations 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.[14]

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12 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp. 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017*, pp 1-5.

13 See *Delegated legislation monitor* 5 of 2014, pp. 16-18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

14 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.

The committee draws the above to the attention of the minister, the Senate and the relevant Senate committees.

Instrument	**Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017 [F2017L01153]**
Purpose	Amends the Healthcare Identifiers Regulations 2010 to re-instate provisions unintentionally removed from the *Healthcare Identifiers Act 2010*, permitting use and disclosure of healthcare providers' healthcare identifiers
Authorising legislation	*Healthcare Identifiers Act 2010*
Portfolio	Health and Aged Care
Disallowance	15 sitting days after tabling (tabled Senate 13 September 2017) Notice of motion to disallow currently must be given by 5 December 2017
Scrutiny principle	Standing Order 23(3)(d)

Matters more appropriate for parliamentary enactment

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 explanatory statement (ES) to these regulations advises that their purpose is to restore, in part, a provision unintentionally removed from the *Healthcare Identifiers Act 2010* (the Act) when amendments were made to the Act in 2015. This instrument does not restore the removed provisions in full, due to limits on the regulation-making power, and the ES states that the provisions 'are intended to be restored in their entirety through amendments to the Act at a later date'.

The committee acknowledges that section 25D of the Act allows the regulations to authorise the use and disclosure of healthcare identifiers, subject to certain limitations, and that this instrument operates within the limits of that authority.

Nevertheless, the committee considers that these provisions are not insignificant, in as much as they permit the use and disclosure of identifiers with potential privacy and other implications for healthcare providers, and that it was originally considered appropriate to enact them in primary, rather than delegated legislation.

The committee is also conscious of the potential for confusion among those consulting or affected by the relevant legislation, when provisions which appear to have been removed from the Act are now enacted via regulations.

The committee seeks the minister's more detailed advice as to:

- **why it is appropriate to re-enact provisions previously contained in the Act via delegated rather than primary legislation; and**
- **when the government proposes to introduce a bill seeking to amend the relevant legislative provisions in the primary legislation.**

Instrument	**Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090]**
Purpose	Amends the medical services schedules relating to Medicare benefits coverage for obstetric care, to implement recommendations of the Medicare Benefits Schedule Review Taskforce
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health and Aged Care
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)(b)

Personal rights and liberties: privacy

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

The committee notes that two items scheduling obstetric services for the planning and management of a pregnancy have been amended to include, among other things, a new requirement that 'the service include a mental health assessment (including screening for drug and alcohol use and domestic violence) of the patient'. The explanatory statement (ES) states that this new requirement will improve mental health outcomes for patients by screening for perinatal anxiety and depression, consistent with Australian guidelines, and improving early detection and intervention.

The ES does not set out the nature of the alcohol and drug screening to be conducted, and does not address the connection between the alcohol and drug screening and the identified mental health objectives.

Further, the committee notes that the ES does not address whether patient consent is required for the mental health assessment, including the alcohol and drug screening. It is unclear to the committee whether the provisions would have the effect that a patient who did not consent to such screening may lose eligibility for Medicare benefits in relation to their obstetric care during pregnancy.

The committee requests the minister's advice in relation to:

- **the nature of the mental health assessment required to be conducted under the regulations, including alcohol and drug screening;**
- **how patients' consent will be managed with regard to the screening and its connection to Medicare benefits; and**
- **any relevant safeguards in place.**

Instrument	**Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017 [F2017L01093]**
Purpose	Amends the Legislation (Exemptions and Other Matters) Regulations 2015 to exempt a range of legislative instruments from sunsetting
Authorising legislation	*Legislation Act 2003*
Portfolio	Attorney-General's
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) and (d)

Exemptions from sunsetting

Under section 50 of the *Legislation Act 2003* (Legislation Act) all legislative instruments registered on the Federal Register of Legislation[15] after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.[16] This process is called 'sunsetting'.

The purpose of sunsetting is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed. If, after a review, it is assessed that an instrument is still required, it is usually re-made, with or without amendments. This process also provides an opportunity for Parliament to maintain effective and regular oversight of legislative instruments.

Section 54 of the Legislation Act provides for exemptions from sunsetting for certain instruments, including instruments prescribed as such by regulation. Certain legislative instruments are so prescribed under section 12 of the Legislation (Exemptions and Other Matters) Regulations 2015. The Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017 amend the

15 It is noted that prior to the commencement of the *Acts and Instruments (Framework Reform*) *Act 2015* on 5 March 2016, the Federal Register of Legislation was known as the Federal Register of Legislative Instruments.

16 The sunsetting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the date of sunsetting determined by the table set out in subsection 50(2).

principal regulations to add 19 further legislative instruments to the list of exempt instruments in section 12.

The committee notes that these regulations significantly expand both the number and scope of legislative instruments exempted from sunsetting. The new exemptions include, for example, the Corporations Regulations 2001, the Competition and Consumer Regulations 2010, and all regulations made under the *Australian Securities and Investments Commission* [ASIC] *Act 2001*.

In light of the implications for periodic review and parliamentary oversight of delegated legislation, where regulations provide exemptions from sunsetting for a particular instrument or class of instruments, the committee is concerned about the potential implications of the exemptions and why it is appropriate for them to be made.

The committee acknowledges that the explanatory statement (ES) to the regulations sets out the reasoning by which the minister has assessed each instrument as suitable for exemption, with reference to the long-standing principle that exemptions should only be granted where:

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunsetting;
- the instrument is part of an intergovernmental scheme; or
- the instrument is subject to a more rigorous statutory review process.[17]

The committee notes, however, that some of the arguments for exemption from sunsetting refer to problems or uncertainty which would result from the lapse of the relevant instrument. This reasoning does not acknowledge that such problems or uncertainties could largely be avoided by reviewing and re-making the instruments in a timely manner prior to their repeal, as envisaged by the sunsetting scheme.

In addition, the committee notes that the justification for exempting the Corporations Regulations 2001, which are made under the *Corporations Act 2001* (Corporations Act), relies in part on their facilitating an intergovernmental scheme. In this regard, the committee notes that subsection 54(1) of the Legislation Act specifically excludes instruments made under the Corporations Act from the general exemption from sunsetting for instruments that facilitate an intergovernmental

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[17] See Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments,* December 2016, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/ Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf, p. 34.

scheme between the Commonwealth and one or more states. This would appear to indicate that the view of Parliament was that the existence of an intergovernmental scheme was not a valid reason for exempting Corporations Act instruments from sunsetting.

For this reason, the committee considers that any exemption of instruments made under the Corporations Act, including the Corporations Regulations 2001, may be more appropriately made by amending the Legislation Act itself, rather than through delegated legislation.

Consistent with its recent comments on this issue in *Delegated Legislation Monitor 9 of 2017,* the committee reiterates its view that exemption from the sunsetting requirements of the Legislation Act is a significant matter, and the committee remains concerned about the executive use of delegated legislative power to exempt substantial pieces of delegated legislation from the sunsetting framework of the Legislation Act. The committee considers that the circumstances in which an exemption will be appropriate are limited, and will continue to analyse any such proposal carefully.

Further, the committee commented in *Delegated Legislation Monitor 9 of 2017* that it would expect future exemptions from sunsetting to specifically address how Parliament will retain oversight of the review process of the relevant delegated legislation.

The committee requests the minister's advice as to:

- **why it is appropriate to exempt significant pieces of delegated legislation, including the Corporations Regulations 2001, from sunsetting through delegated rather than primary legislation, particularly having regard to the terms of subsection 54(1) of the *Legislation Act 2003*; and**
- **why it is appropriate to remove Parliament's effective periodic oversight of each of the 19 instruments exempted by these regulations, and how Parliament will retain regular and effective oversight of those instruments.**

Instrument	**Motor Vehicle Standards (Road Vehicles) Determination 2017 [F2017L01175]**
Purpose	Repeals and replaces the previous determination, adding determinations in relation to new vehicle classes such as power-assisted pedal cycles and quad bikes
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow currently must be given by 7 December 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

Section 14 of the *Legislation Act 2003* (Legislation Act) 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 power-assisted pedal cycle in subsection 5(1) of the determination incorporates two European standards: 'European Committee for Standardization EN 15194:2009 or EN 15194:2009+A1:2011 Cycles - Electrically power assisted cycles - EPAC Bicycles'. However, neither the instrument nor the explanatory statement (ES) states the manner in which these documents are incorporated.

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[18]

The committee requests the advice of the minister in relation to the manner of incorporation of the above documents; and requests that the instrument and/or ES be updated to include information regarding the manner of incorporation.

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.

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.

The committee's expectations regarding access to an incorporated 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 subsection 5(1) of the determination incorporates two European standards. However, the ES does not contain a description of these documents, or indicate how they may be obtained.

The committee's research indicates that the relevant documents may only be able to be obtained from SAI Global, on payment of a fee.

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. 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

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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.

libraries, or by making the document available for viewing on 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[19]

The committee requests the minister's advice as to how the incorporated documents are or may be made readily and freely available to persons interested in or affected by the determination; and requests that the ES be updated to include this information.

Instrument	**VET Student Loans Amendment Rules (No. 2) 2017 [F2017L01121]**
Purpose	Amends the Vet Student Loans Rules 2016 to provide rules for the collection and recovery of an annual approved course provider charge imposed by the *VET Student Loans (Charges) Act 2016*
Authorising legislation	*VET Student Loans Act 2016*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 6 September 2017) Notice of motion to disallow currently must be given by 28 November 2017
Scrutiny principle	Standing Order 23(3)(d)

Matters more appropriate for parliamentary enactment

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 making of the principal Rules, and these amendments to them, is authorised by section 116 of the *VET Student Loans Act 2016*, which relevantly provides that:

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.

> (1) The Minister may, by legislative instrument, make rules providing for matters:
>
> (a) required or permitted by this Act to be provided; or
>
> (b) necessary or convenient to be provided in order to carry out or give effect to this Act.
>
> …
>
> (6) The rules may provide for the collection and recovery of approved course provider charge (within the meaning of the *VET Student Loans (Charges) Act 2016)*.
>
> …
>
> (8) Subsections (2) to (7) do not limit subsection (1).

In addition to setting out processes for the collection and recovery of the approved course provider charge established by the *VET Student Loans Charges Act 2016* (and quantified by regulations made under that Act), the present instrument imposes a 'late payment penalty' payable by an approved course provider if the charge remains unpaid after the day on which it is due and payable. It sets out a formula for determining the quantity of the penalty with reference to a percentage of the charge and the number of days it is overdue. The instrument further provides that the Secretary may recover both the charge and any late payment penalty from the provider as debts due to the Commonwealth.

The committee notes that, although it is described as a penalty, the late payment penalty is not drafted in the manner of a civil penalty, nor with reference to a fixed number of dollars or penalty units, but appears to be more in the nature of an additional fee or charge.

The committee's longstanding view is that fees should be limited to cost recovery, so that they could not properly be regarded as taxes and their establishment by an instrument would not be regarded as an inappropriate delegation of legislative power. Where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, the committee expects that the relevant ES will make clear the specific basis on which an individual imposition or change has been calculated.

If, on the other hand, fees and charges are levied on more than a cost recovery basis, such charges may be considered to be general taxation. The committee notes in this case that the *VET Student Loans (Charges) Act 2016* explicitly imposes the approved course provider charge as a tax.

The committee's views in this regard accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently stated that it is for the Parliament, rather than the makers of delegated legislation, to set a rate of

tax.[20] The committee considers that if the late payment penalty in this instrument is considered to be a fee or charge comprising part of or supplementary to the approved course provider charge, then it should be levied by, or under the authority of, the *VET Student Loans (Charges) Act 2016*.

Noting the above concerns regarding the imposition of penalties or levies in delegated legislation, the committee requests the minister's advice as to:

- **the specific legislative authority under which the late payment penalty is imposed;**
- **the specific basis on which the amount of the penalty has been calculated; and**
- **why it would not be more appropriate to impose the penalty—either as a civil penalty, a cost-recovery levy or taxation—through principal legislation.**

Instrument	**VET Student Loans (Approved Course Provider Application Fee) Determination 2017 [F2017L01060]**
Purpose	Prescribes a fee for making applications for approval as an approved course provider under the *VET Student Loans Act 2016*
Authorising legislation	*VET Student Loans Act 2016*
Portfolio	Education and Training
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)

No statement of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an

20 See Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2016,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Annual_Reports/Annual_Report_2016, p. 34. The committee goes on to state that if there is a compelling case for setting a rate of levy by subordinate legislation, the enabling Act should set limits on it: '[t]he vice to be avoided is delegating an unfettered power to impose fees'.

assessment of whether the instrument is compatible with human rights. Paragraph 15J(2)(f) of the *Legislation Act 2003* requires that the statement of compatibility be included in the explanatory statement (ES) for the instrument.

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

The committee requests the minister's advice as to why a statement of compatibility was not included in the ES; and requests that the ES be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

Further response required

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

Correspondence relating to these matters is published on the committee's website.[21]

Instrument	**Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]** **Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]**
Purpose	Amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the *Legislation Act 2003*; and amends the Migration Regulations 1994 to introduce a new statutory review process
Authorising legislation	*Legislation Act 2003*; *Migration Act 1958*
Portfolios	Attorney-General's; Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 7 February 2017 and 29 November 2016 respectively) The time to give a notice of motion to disallow expired on 31 March 2017 and 28 March 2017 respectively The committee gave notices of motion to disallow on 31 March 2017 and 28 March 2017 respectively The committee withdrew the notice of motion to disallow [F2016L01809] on 22 June 2017 The committee withdrew the notice of motion to disallow [F2016L01897] on 15 August 2017[22]
Scrutiny principle	Standing Order 23(3)(a) and (d)
Previously reported in	*Delegated legislation monitors 1, 3, 7, 8* and *9 of 2017*

21 See Regulations and Ordinances Committee, www.aph.gov.au/regords_monitor.

22 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Exemption from sunsetting

Extensive correspondence has been exchanged between the committee, the Attorney-General and the Minister for Immigration and Border Protection in relation to these instruments, since February 2017. The following provides extracts from the earlier communications, which are set out comprehensively in *Delegated Legislation Monitor 9 of 2017*.[23]

Committee's initial comment

The committee initially commented as follows:

The Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amends the Migration Regulations 1994 (Migration Regulations) to introduce a new statutory review process. The process requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations and to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

The explanatory statement (ES) to the review regulation states:

> The purpose of the review requirement is to ensure that the Migration Regulations are kept up to date and provisions are in force for so long as they are needed. In this way, the Regulation provides a rigorous integrity measure to ensure the Migration Regulations are examined, and determined fit for purpose, on a regular and ongoing basis. Specifically, this ensures that the Migration Regulations remain subject to ongoing monitoring for their impact and relevance, while also benefitting from appropriate deregulation, including the removal of unnecessary, confusing or outdated provisions.

Item 10 of the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption regulation) amends the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt the Migration Regulations from the sunsetting scheme under the *Legislation Act 2003* (Legislation Act).

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23 See also *Delegated Legislation Monitors 1, 3, 7* and *8 of 2017*, and the included or associated ministerial correspondence, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

The committee notes that pursuant to section 50 of the Legislation Act, but for the exemption regulation, the Migration Regulations would have been required to be re-made due to sunsetting on or before 1 October 2018.

The ES for the amending regulation states:

> The Migration Regulations contain an alternative statutory review mechanism inserted by the Migration Amendment (Review of the Regulations) Regulation 2016, which requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations, including to:
>
> - commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
>
> - commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.
>
> For this reason, it is appropriate to provide an exemption from sunsetting for the Migration Regulations.

Neither the ES to the review regulation nor the exemption regulation provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.[24]

The committee is concerned that neither the ES to the review regulation nor the exemption regulation provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

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

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24 Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (2016), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-april2014.doc (accessed 2 February 2016).

Attorney-General's first response

The Attorney-General advised:

> The purpose of the sunsetting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.
>
> The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunsetting exemption. However, there is a long standing principle that sunsetting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:
>
> - the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
> - the instrument is designed to be enduring and not subject to regular review;
> - commercial certainty would be undermined by sunsetting;
> - the instrument is part of an intergovernmental scheme; and
> - the instrument is subject to a more rigorous statutory review process.
>
> I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.
>
> The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.
>
> I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.
>
> Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.

> The Committee may be interested to know that the Migration Regulations are amended numerous times each year to update policy settings for the Australian immigration programmes. This has been the case since the Migration Regulations commenced in September 1994. Redundant provisions were removed from the Migration Regulations in 2012. The amendment history of the Migration Regulations is set out in the endnotes and now runs to more than 400 pages.

Committee's second comment

The committee noted the advice that the Department of Immigration and Border Protection has not commenced the review, and that timeframes for the initial review under the new process were put in place to ensure that adequate resources and time are allocated. However, the Attorney-General's response does not provide information as to why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sunsetting date for the Migration Regulations would have been 1 October 2018.

Recognising that the process to review and action review recommendations for instruments can be lengthy, the committee reiterated its expectation that departments and agencies plan for sunsetting well in advance of an instrument's sunset date. The committee remained concerned that the effect of the introduction of the new process for review of the Migration Regulations is that the timeframes set in place by the sunsetting regime under the Legislation Act are avoided.

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

Immigration minister's first response

The Minister for Immigration and Border Protection advised:

> The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change...
>
> I am advised by the Attorney General that the *Legislation Act 2003* provides the flexibility for sunsetting to be delayed. Relatively short delays such as 1 year are not inconsistent with the objective of the sun-setting regime, which is to ensure that legislative instruments are kept up to date and remain in force for only as long as they are needed.

Committee's third comment

The committee acknowledged the advice that the Legislation Act provides the flexibility for sunsetting to be delayed and that short delays such as one year are not inconsistent with the objective of the sunsetting regime. The committee also noted that the alternative statutory review mechanism inserted by the review regulation

requires the Department of Immigration and Border Protection (the department) to conduct periodic reviews of the Migration Regulations, similar to the 10-year sunsetting cycle.

However, it remained unclear to the committee why an extension was not sought to delay the sunsetting of the Migration Regulations for an additional year to allow time for the initial review of the Migration Regulations to be conducted as part of the sunsetting scheme of the Legislation Act rather than introducing the new sunsetting scheme contained in the review regulation.

In particular, the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to re-make the Migration Regulations after each review to ensure the Parliament maintains effective and regular oversight of the Migration Regulations.

The committee requested the further advice of the ministers in relation to its concerns regarding the exemption of the Migration Regulations from the sunsetting requirements of the Legislation Act, and the absence of a statutory requirement to re-make the Migrations Regulations after each review.

Immigration minister's second response

The Minister for Immigration and Border Protection advised:

> … the decisions to introduce a review process into the Migration Regulations, and to exempt these regulations from sunsetting, were not taken because there was insufficient time available to conduct a review of the Migration Regulations. Instead, these decisions were made because – for the reasons outlined below – it was considered inappropriate for the Migration Regulations to sunset.
>
> The Migration Regulations are large and complex, and underpin Australia's visa framework. This framework supports the Government's international priorities and obligations…
>
> Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.
>
> In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty…
>
> The Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime

> set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).
>
> There is no question that the Migration Regulations are still needed – as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.
>
> In addition, as a deregulation measure, in 2012-2013 the Migration Regulations were comprehensively reviewed and were amended in 2014…
>
> In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy…
>
> In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.

Committee's fourth comment

The committee noted the minister's advice that a remake of the Migration Regulations would require complex and administratively difficult transitional provisions; and would likely have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for visa holders, sponsors and industries where the conduct of business is reliant on migrants.

The committee also noted the minister's advice that 'the Migration Regulations are large and complex, and underpin Australia's visa framework' and that 'remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources'. However, the committee's focus where an exemption from sunsetting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated (including the opportunity to consider disallowance of instruments that have been remade due to sunsetting).

The committee remained concerned that exemption of the Migration Regulations from the sunsetting requirements of the Legislation Act reduces Parliament's

oversight of these regulations as there is no statutory requirement to remake the regulations after each review.

The committee further considered that a review of the Migration Regulations is a significant matter and that the processes and outcomes of such a review should be subject to parliamentary scrutiny.

The committee considered that an exemption from sunsetting of a significant piece of delegated legislation (such as the Migration Regulations) could be more appropriately contained in primary legislation (see for example section 54 of the Legislation Act). The committee reiterated its view that significant matters should be included in primary legislation unless a compelling justification is provided for their inclusion in delegated legislation.

The committee considered that the information provided by the Minister for Immigration and Border Protection and the Attorney-General did not adequately address the committee's request for a justification for the exemption of the Migration Regulations from the sunsetting requirements of the Legislation Act.

The committee requested that the Attorney-General provide detailed advice as to:

- why it is appropriate for the Migration Regulations to be exempt from the sunsetting requirements of the Legislation Act;
- why it is appropriate to provide for this exemption in delegated legislation; and
- why it is appropriate to reduce Parliament's oversight of these regulations, noting that there is no statutory requirement to re-make the regulations after each review (including the opportunity to consider disallowance of instruments that have been remade due to sunsetting).

Attorney-General's second response

The Attorney-General advised as follows:

> **Why it is appropriate for the Migration Regulations to be exempt from the sunsetting requirements of the Legislation Act**
>
> As mentioned in the letter to the Committee of 13 July 2017 from the Minister for Immigration and Border Protection, Hon Peter Dutton MP, the Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the Legislation Act, which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).

I am advised by Minister Dutton that the Migration Regulations are in constant use to support Australia's migration programme, and are unquestionably still needed. In addition, the Migration Regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments.

Amendments are also made several times each year to address changing policy and administrative requirements.

Further, a longstanding and accepted policy reason for granting an exemption from sunsetting is that an instrument is subject to a more stringent review process than is set out in the Legislation Act. Instruments that have already been exempted on this basis have not been required to be remade and subject to parliamentary scrutiny following the review.

For these reasons, the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act and it is appropriate that they be exempted from sunsetting.

Why it is appropriate to provide for this exemption in delegated legislation

The Legislation Act does not specify any conditions that must be fulfilled before the power to make this Regulation may be exercised…

The existence of paragraph 54(2)(b) indicates that, at the time the Legislation Act was enacted, Parliament considered it appropriate to allow certain instruments to be exempted from sunsetting in delegated legislation.

The fact that no criteria are set out in the Legislation Act for the purpose of determining when an instrument should be exempted, and no limitations are placed on the power to exempt an instrument from sunsetting, indicates this was intended to confer a broad discretion on the rule-maker.

Furthermore, the process of prescribing legislative instruments which are exempt from sunsetting is subject to Parliamentary scrutiny, including possible disallowance. For these reasons, it is appropriate to provide for the exemption for the Migration Regulations in delegated legislation, and this is consistent with other exemptions that have been provided.

Whether the exemption would reduce Parliament's oversight of these regulations

The Committee has indicated it is focused on ensuring that Parliament maintains effective and regular oversight of the legislative power it has delegated. However, the purpose of the sunsetting regime is only to ensure that legislative instruments are regularly reviewed, and remade

> or repealed, unless an exemption applies. As indicated above, section 49 of the Legislation Act provides that the purpose of the sunsetting regime is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. That is, the purpose of sunsetting is to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, are repealed. The explanatory memorandum for the *Legislative Instruments Act 2003*, which introduced the sunsetting regime and the explanatory statement for the Legislative Instruments Regulations 2004, which provided the first exemptions by way of legislative instrument, did not refer to the maintenance of parliamentary scrutiny over legislative instruments as a justification for the sunsetting regime.
>
> Further, I do not consider that Parliament's oversight of the Migration Regulations is reduced by the Sunsetting Exemption Regulation because, as outlined in Minister Dutton's letter of 13 July 2017; the Migration Regulations are regularly reviewed and updated. Indeed, I am advised that the Migration Regulations are one of the most frequently amended in force instruments on the Federal Register of Legislation. Each time such an amendment is made, it is subject to Parliamentary scrutiny and possible disallowance.
>
> I am advised by Minister Dutton that the Migration Regulations will continue to be reviewed and improved in future to ensure they are up to date and align with Government policy. In addition to the reforms referred to in Minister Dutton's previous correspondence, Minister Dutton has recently initiated a public consultation process on a new and modern visa framework to transform Australia's visa system. The intention of this consultation is to consider how to simplify the current visa system and better align it with Australia's economic, social and security priorities.
>
> …
>
> Transformative simplification will be central to the modernisation process, and it is anticipated that substantial legislative reform will be required. Any changes to the Migration Regulations made as part of this process will, as always, be subject to Parliamentary scrutiny.

Committee's fifth comment

The committee acknowledged that the regulations had been made in accordance with statute.

However, the committee commented that scrutiny principle 23(3)(d) of its terms of reference required that the committee seek to ensure that instruments do not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in the balance of what matters should be dealt with in primary as opposed to delegated legislation.

The committee's focus where an exemption from sunsetting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated (including an opportunity to consider the disallowance of an instrument as a whole, which is the process that applies where disallowable legislative instruments are remade due to sunsetting).

The committee acknowledged that the Migration Regulations are regularly amended, and that those amendments are subject to parliamentary scrutiny and disallowance. However, the committee considered that removing the requirement to remake the Migration Regulations every 10 years after a significant review does reduce Parliament's oversight of those regulations. This is because a requirement to remake the Migration Regulations every 10 years provides greater opportunity for the Parliament to ensure the content of the regulations is current as well as the possibility of parliamentary disallowance of the remade regulations.

The committee also noted that no other form of Parliamentary oversight has been introduced to replace the Legislation Act sunsetting process. The committee considers that a review of the Migration Regulations as a whole is a significant matter and that the processes and outcomes of such a review should be subject to parliamentary scrutiny (as provided for in the sunsetting framework of the Legislation Act).

The committee therefore considered that a legislative requirement should be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations. The committee's expectation is that the review and its report will be thorough and, at a minimum, will reflect the principles outlined in the Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments*.[25]

The committee considers that it is essential for Parliament to retain direct oversight of the outcomes of the review process of significant pieces of delegated legislation, including the Migration Regulations 1994. The committee therefore requested that a legislative requirement be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations.

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25 See, Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (2016), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf (accessed 2 February 2016), p. 13.

Attorney-General's third response

The Attorney-General advised as follows:

Policy oversight of significant instruments

As advised in my previous letter of 11 August 2017, the Migration Regulations were exempted from sunsetting on the basis that the review process contained in those Regulations met the objectives of the sunsetting regime as set out in section 49 of the Legislation Act. These objectives are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49 of the Legislation Act).

I acknowledge the Committee's position that careful consideration should be applied to granting exemptions from sunsetting where the instrument may be regarded as 'significant'.

In deciding whether to grant an exemption from the sunsetting regime, I give careful consideration to the longstanding policy criteria described in the Explanatory Statement to the Sunsetting Exemption Regulation.

I note that the Legislation Act does not distinguish between significant and non-significant instruments, and it is not clear that applying different considerations based on such a distinction would necessarily advance the objectives of the sunsetting regime.

Further, as the Committee is aware, parliamentary oversight of delegated legislation can occur in a variety of ways. This includes through the Committee's consideration of instruments at the time they are created, cooperation between the government and scrutiny bodies in relation to the implementation of instruments, and scrutiny of the application of instruments through Senate Estimates, Question Time, and other parliamentary processes.

Including exemptions in delegated legislation

I acknowledge that the Committee is concerned that it would be preferable to provide a sunsetting exemption for the Migration Regulations in the primary legislation. This concern arises in the context of scrutiny principle 23(3)(d) of the Committee's terms of reference, which includes consideration of whether an instrument contains matter more appropriate for parliamentary enactment.

It is critical that the sunsetting regime remain flexible, in order to ensure that it does not undermine the proper functioning of government. For this reason, the Legislation Act enables exemptions by legislative instrument, and the Legislation (Exemptions and Other Matters) Regulation 2015 (Exemptions Regulation) provides a list of all exemptions from sunsetting. This reflects the longstanding policy preference for maintaining a clear list of exemptions in a single piece of legislation.

> This flexibility ensures that all requests for exemptions from sunsetting are assessed within the framework of the Legislation Act. In particular, it ensures that all new exemptions are considered in light of the express purpose of Part 4 Chapter 3 of the Legislation Act and are granted on consistent grounds.
>
> Tabling requirement for the report following the review of the Migration Regulations
>
> The Committee has suggested that the Migration Regulations be amended to require that reports prepared for the purposes of regulation 5.44A of the Migration Regulations be tabled in the Parliament. I am supportive of measures that ensure that legislative instruments remain up to date and fit for purpose. However, as the Migration Regulations are administered by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, I am unable to respond to the Committee in relation to this matter.

Committee's sixth comment

The committee thanks the Attorney-General for his response, and again acknowledges the cooperation of both the Attorney-General and the Minister for Immigration and Border Protection in assisting the committee with its consideration of the issues raised in relation to these regulations.

The committee notes the Attorney-General's views with regard to appropriate oversight of significant legislative instruments.

However, the committee reiterates the concerns it has previously drawn to the attention of the Senate regarding:

- the use of delegated legislative power to exempt such a significant piece of delegated legislation from the sunsetting framework of the Legislation Act; and
- the removal of effective parliamentary oversight of the outcomes of the review process for the Migration Regulations (as is provided for under the sunsetting regime).

The committee remains of the view, as it expressed in *Delegated Legislation Monitor 9 of 2017*, that an exemption from the sunsetting requirements of the Legislation Act is a significant matter. The committee considers that the circumstances in which an exemption will be appropriate are limited, and will continue to analyse any such proposal carefully.

If future exemptions from sunsetting are proposed in delegated legislation, the committee will expect the accompanying justification to take its expectations into account and to provide a detailed justification of the need for an exemption from the existing sunsetting requirements of the Legislation Act. In particular, this should

address how Parliament will retain oversight of the review process of such delegated legislation.

In this regard, the committee notes the Attorney-General's advice that its request that a legislative requirement be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations, should be addressed to the Minister for Immigration and Border Protection.

The committee requests the advice of the Minister for Immigration and Border Protection in response to its request that a legislative requirement be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations.

Advice only

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

Instrument	**AD/CESSNA 400/120 - Fitting - Wing Attach - Lower Forward Carry Through Spar (Left and Right Wings) [F2017L01119]**
Purpose	Requires initial and repetitive visual inspections of certain wing fittings on Cessna 400 aircraft to ensure the continuing airworthiness of the aircraft
Authorising legislation	*Civil Aviation Act 1988*
Portfolio	Infrastructure and Regional Development
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)

Access to incorporated documents

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.

The instrument incorporates Cessna Service Kit SK 421-152 and Cessna Illustrated Parts Catalog (IPC) 53-40-00, as in force at the date of the instrument. The ES notes that these documents:

> are available from Textron Aviation however, any Australian airline or operator which operates the Cessna 400 series aircraft are provided with these documents by Textron Aviation by subscription.

The committee acknowledges that anticipated users of the instrument would be in possession of the incorporated documents. 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 access its terms readily and freely. 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 expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[26]

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 draws its concern regarding the lack of free access to documents incorporated in this instrument to the minister's attention.

Instrument	**Biosecurity (Ballast Water and Sediment) Determination 2017 [F2017L01123]**
Purpose	Provides ballast water and sediment management requirements to protect Australia's marine ecosystems and human health, and to comply with the *International Convention for the Control and Management of Ships' Ballast Water and Sediment*
Authorising legislation	*Biosecurity Act 2015*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 6 September 2017) Notice of motion to disallow currently must be given by 28 November 2017
Scrutiny principle	Standing Order 23(3)(a)

26 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.

Drafting: anticipated authority

Subsection 4(2) of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions.

The determination was made on 30 August 2017. Section 2 of the determination provides that it may only commence once Schedule 1 to the *Biosecurity Amendment (Ballast Water and Other Measures) Act 2017* (the Amendment Act) has commenced. Schedule 1 to the Amendment Act contained the provision which authorised the making of the determination. Schedule 1 to the Amendment Act—and therefore the determination—commenced on 8 September 2017.

The committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, instruments that rely on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying explanatory statement (ES).

The committee draws the omission of reference in the ES to subsection 4(2) of the *Acts Interpretation Act 1901* to the minister's attention.

Instrument	**Legislation (Motor Vehicle Standards Instruments) Sunset-altering Declaration 2017 [F2017L01157]**
Purpose	Aligns the sunsetting dates of five instruments relating to motor vehicle standards to enable them to be reviewed together in a single thematic review
Authorising legislation	*Legislation Act 2003*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 September 2017) Notice of motion to disallow currently must be given by 5 December 2017
Scrutiny principle	Standing Order 23(3)(a)

Deferral of sunsetting

Under section 50 of the *Legislation Act 2003* (Legislation Act) all legislative instruments registered on the Federal Register of Legislation[27] after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.[28] This process is called 'sunsetting'.

Section 51A of the Legislation Act allows the Attorney-General to align the sunsetting 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 sunsetting dates will facilitate the undertaking of the review and the implementation of its findings. The new sunsetting date must not be more than five years after the earliest day on which any of the relevant instruments would have been repealed.

The declaration aligns the sunsetting dates of five legislative instruments relating to motor vehicle standards, which would otherwise sunset on either 1 October 2017 or 1 April 2018. The committee notes that the declaration has the effect of deferring the sunsetting of all of the instruments, for the maximum period permitted by section 51A of the Legislation Act. They will now have a new sunsetting date of 1 October 2022.

The committee draws the extension of the sunsetting dates for five instruments, to 1 October 2022, to the attention of the Senate.

27 It is noted that prior to the commencement of the *Acts and Instruments (Framework Reform) Act 2015* on 5 March 2016, the Federal Register of Legislation was known as the Federal Register of Legislative Instruments.

28 The sunsetting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the date of sunsetting determined by the table set out in subsection 50(2).

Instrument	**Ozone Protection and Synthetic Greenhouse Gas Management (Non-grandfathered Quota—2018-19) Determination 2017 [F2017L01132]**
Purpose	Sets out requirements for persons to be entitled to a non-grandfathered quota for the import of hydrofluorocarbons into Australia in 2018 and 2019, and specifies the methods for working out the allocation of the quota
Authorising legislation	Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 7 September 2017) Notice of motion to disallow currently must be given by 29 November 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, the committee considers that 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 (SES).

Section 9 of the instrument provides that the Secretary (of the Department of Environment and Energy) may, in writing, delegate any or all of his or her functions or powers under the instrument to an employee in the department at SES, Acting SES, Executive Level (EL) 2 or Acting EL2 level. The delegate must comply with any written directions of the Secretary when exercising delegated powers or functions.

With respect to the sub-delegation, the explanatory statement (ES) states that:

> 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 OPSGGM Regulations. This will ensure that those persons exercising the functions and powers under the Determination ha[ve] the necessary expertise to do

> so. It is not necessary to expressly provide for this in the Determination as the instrument of delegation will provide for this.
>
> 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 OPSGGM 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 acknowledges the explanation in the ES as to why the sub-delegation in this instrument extends to EL2 officers, and the intended limitations and safeguards on such delegations. The committee notes the department's view that further limitations on the sub-delegation power are not required in the instrument as they will be set out in the instrument of delegation.

While this advice may reflect the department's approach to the relevant delegations, the committee remains concerned that there is no *legislative* requirement that a person below SES level to whom the powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee notes that written instruments of delegation are not legislative instruments.[29] The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the determination; rather, that the instrument include a requirement that the Secretary 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 legislative constraints on sub-delegation to Executive Level 2 officers, the committee draws this matter to the attention of the Senate.

29 Legislation (Exemptions and Other Matters) Regulation 2015, section 6(1), table item 1.

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	Aged Care Legislation Amendment (Financial Reporting) Principles 2017 [F2017L01163] ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141] Auditing Standard ASA 250 Consideration of Laws and Regulations in an Audit of a Financial Report [F2017L01172] Defence Force Retirement and Death Benefits Regulations 2017 [F2017L01095] Primary Industries (Customs) Charges (Designated Bodies) Declaration 2017 [F2017L01065] Primary Industries (Excise) Levies (Designated Bodies) Amendment Declaration 2017 [F2017L01066] Private Health Insurance (Prostheses) Rules 2017 (No. 2) [F2017L01094] Radiocommunications (Consequential Amendments) Instrument 2017 (No. 1) [F2017L01075] Social Security (Income Stream) Determination 2017 [F2017L01177] Southern and Eastern Scalefish and Shark Fishery (Closures) Direction No. 1 2017 [F2017L01162] Therapeutic Goods Information (Medical Devices) Specification 2017 [F2017L01114]
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 explanatory statements (ES) 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.[30]

The committee draws the above matter to the attention of ministers.

30 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	Aged Care Legislation Amendment (Financial Reporting) Principles 2017 [F2017L01163] ASIC Corporations (Amendment) Instrument 2017/6 [F2017L01128] Auditing Standard ASA 2017-2 Amendments to Australian Auditing Standards [F2017L01179] Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 (No. 2) [F2017L01118] Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063] Biosecurity (Ballast Water and Sediment) Determination 2017 [F2017L01123] CASA 84/17 [F2017L01068] Christmas Island Utilities and Services (Electricity Supply and Service Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L01159] Cocos (Keeling) Islands Utilities and Services (Electricity Supply and Service Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L01161] Competition and Consumer (Inland Terminals) Declaration 2017 [F2017L01077] Currency (Royal Australian Mint) Amendment Determination (No. 1) 2017 [F2017L01087] GST–free supply (National Disability Insurance Scheme Supports) Amendment Determination 2017 (No. 2) [F2017L01127] Health Insurance (Allied Health Services) Amendment (Health Care Homes) Determination 2017 [F2017L01092] Health Insurance (FTB(A) Family) Determination 2017 [F2017L01081] Insolvency Practice Rules (Corporations) Amendment 2017 (No. 1) [F2017L01088]

	Motor Vehicle Standards (Road Vehicles) Determination 2017 [F2017L01175] Norfolk Island Legislation Amendment (Diagnostic Imaging Transitional) Amendment (Cessation Date) Rule (No. 2) 2017 [F2017L01064] Primary Industries (Excise) Levies (Designated Bodies) Amendment Declaration 2017 [F2017L01066] Public Governance, Performance and Accountability Amendment (Listed Entities) Rules 2017 [F2017L01134] VET Student Loans Amendment Rules (No. 2) 2017 [F2017L01121]
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 explanatory statement (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.[31]

The committee draws the above matter to the attention of ministers.

31 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.

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

Instrument	**Airports (Protection of Airspace) Amendment Regulations 2017 [F2017L00969]**
Purpose	Amends 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	*Airports Act 1996*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

The committee previously commented in relation to two matters 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. 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

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

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 explanatory statement (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 requested 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 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

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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.

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).

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 drew the above to the minister's attention.

Minister's response

The Minister for Urban Infrastructure advised:

> 1. Manner of incorporation
>
> The airport plan is a non-legislative instrument that authorises the initial airport development for SWA. As the airport plan for SWA is not a legislative instrument, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Amending Regulations can only operate in relation to the airport plan for SWA as in force at the time the Amending Regulations commenced (27 July 2017), and not by incorporating the airport plan 'as in force or existing from time to time'.
>
> I note the Committee's comments on facilitating the public's ability to understand the operation of the Amending Regulations. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that the exemption provided for under 16A(4) relates to a controlled activity that is, or comprises part of, a development covered by Part 3 of the airport plan for SWA as in force at the date of commencement of the Amending Regulations.
>
> 2. Access to incorporated document
>
> I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents. As the Committee has noted, the airport plan for SWA is readily available for free online. In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the Department to amend the ES to include the website where the airport plan for SWA can be accessed.
>
> A marked up copy of the revised ES, as amended by the Department, to address the issues raised by the Committee is enclosed for your information.I understand the replacement ES will shortly be registered on the Federal Register of Legislation.
>
> Relevant extract from the replacement ES:

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.

> The Minister for Urban Infrastructure determined an airport plan for SWA under section 96B(1) of the Act on 5 December 2016. The airport plan for SWA is a transitional planning instrument that authorises the intial airport development for SWA and specifies the Australian Government's requirements for the airport. This exemption relates to a controlled activity that is, or comprises part of, a development covered by Part 3 of the airport plan for SWA as in force at the date of commencement of the Amending Regulations.
>
> …The airport plan for SWA is available to download free of charge at http://westernsydneyairport.gov.au/.

Committee's response

The committee thanks the minister for his response and notes that the replacement ES received by the committee has now been registered and published on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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	*National Consumer Credit Protection Act 2009*; *Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor 11 of 2017*

Timetable for making substantive amendments (Continuing exemption)

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 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 explanatory statement (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]

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

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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].

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

Minister's response

The Minister for Revenue and Financial Services advised:

> The two instruments raised in your letter concern relief provided by the Australian Securities and Investments Commission (ASIC) to a number of litigation funding schemes and proof of debt funding arrangements.
>
> Specifically, these instruments provide relief to these entities from the requirements to hold an Australian Financial Services Licence (AFSL) or Australian Credit Licence (ACL) as required under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2010*. They were originally created in response to a number of High Court decisions which declared certain litigation funding arrangements to be credit facilities and others a financial product. Both these instruments were set to expire in July 2017 and have been extended for a further two years.
>
> As you are aware, the conduct and regulation of the financial services industry has attracted substantial attention. The Government has sought to address these concerns by implementing an extensive legislative agenda, including reforms to the life insurance industry, increasing professional standards for advisers and making significant changes to the financial system's external dispute resolution (EDR) framework.
>
> The Government is committed to progressing all of its legislative and regulatory reform agenda where possible, however, the existing volume of work currently being undertaken has resulted in matters of urgency taking priority over others due to the limited resources that are available to implement those changes.
>
> In light of this, ASIC class orders are an effective interim mechanism to resolve some of the matters of concern and to provide certainty to industry.
>
> I can confirm that the Government does intend to progress both of these legislative instruments into primary regulation when additional resources become available.

Committee's response

The committee thanks the minister for her response. The committee notes the minister's advice that the Government intends to amend the primary regulations in relation to these matters when additional resources become available. However, the committee reiterates its concern that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation.

The committee also considers that information about the government's intentions and constraints with regard to addressing the exemptions through amendments to primary legislation or principal regulations would have been useful in the ES.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns to ensure that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation, the committee will continue to monitor this issue.

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	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Portfolio	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)
Previously reported in	*Delegated legislation monitor 12 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.

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.[8]

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

Minister's response

The Minister for the Environment and Energy advised:

> The Rule restricts eligibility of new plantation forestry projects under the Emissions Reduction Fund if the minister responsible for agriculture (referred to as the Agriculture Minister in the instrument) finds they would have an undesirable impact on agricultural production. It includes an

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

extensive consultative framework for the Agriculture Minister (the Minister) when considering whether to make an adverse impact finding. If the Minister intends to make an adverse impact finding, the project proponent must be advised in writing and given an opportunity to provide further written information for the Minister to consider before making a final decision. This framework ensures proponents are afforded natural justice before any adverse decision is taken. Proponents can also elect to submit a new or modified proposal at any point in time at no cost.

If the Minister does make an adverse impact finding about a proposed project after carrying out all required consultation steps, it will be an excluded offsets project. The Clean Energy Regulator cannot approve an excluded offsets project. An appeal of the Regulator's decision in the Administrative Appeals Tribunal does not reopen the merits of whether the Minister should have made an adverse impact finding. However, the legality of an adverse impact finding by the Minister remains subject to judicial review. Subsection 20B(4) of the Rule also gives the Minister the ability to remove an adverse impact finding if appropriate.

The Australian Government's view is that additional merits review processes are unnecessary and could delay decision-making. In particular, the Rule allows project proponents to submit a project notification to the Minister at the same time as they submit a project application to the Regulator. This ensures timely decisions on whether projects can proceed. The Australian Government received advice from forestry industry representatives during consultation that plantation forestry projects need certainty on a number of issues to secure financial close on their investments. Additional merits review steps would not allow the Regulator to meet its 90 day deadline for processing applications in subsection 27(14) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* and could delay investment certainty.

Further, the nature of the Minister's role is such that a decision under the legislative rules may be unsuitable to be subject to merits review. The decision may involve weighing up a number of important but competing considerations of an environmental and economic nature, and potentially competing government policies. The Minister is in a unique position to form a view as to the importance of the particular agricultural production in the region to the Australian economy and export markets.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the agriculture minister's decisions under the instrument may involve weighing up competing considerations of an environmental and economic nature, and potentially competing government policies, and that the minister is in a unique position to form a view as to the importance of the particular agricultural production in the region to the Australian economy and export markets. The committee considers that this information would have been useful in the ES.

The committee has concluded its examination of the instrument.

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
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

The committee previously commented in relation to two matters 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. 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 explanatory statement (ES) specifies the manner in which this document is incorporated.

The committee requested 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.[9] 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.[10]

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

Minister's response

The Minister for Infrastructure and Transport advised:

> The instrument provides alternative regulatory arrangements for the use of electronic devices around aircraft that are being refuelled. The instrument refers to devices that transmit on a frequency specified in an Institute of Electrical and Electronics Engineers (IEEE) 802.11 wireless standard. The wireless standards are freely available from the IEEE website at www.ieee.org.
>
> I am advised that the Civil Aviation Safety Authority will lodge a replacement explanatory statement to clarify the operation of the instrument, and this will be available by 15 September 2017.

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

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.

Committee's response

The committee thanks the minister for his response and notes that the replacement ES has now been registered and published on the Federal Register of Legislation. The relevant extract from the ES states that:

> In accordance with subregulation 98 (5D) of the [Civil Aviation] Act, the wi-fi standards referenced in the definition of PED are incorporated as they exist from time to time so that the instrument covers devices that transmit on frequencies specified on superseded as well as future versions of the standards…
>
> The wi-fi standards are freely available from the IEEE website at www.ieee.org.

The committee has concluded its examination of the above instrument.

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	*Charter of the United Nations Act 1945*
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

Drafting

The committee previously commented as follows:

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.[11] 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 explanatory statement (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.

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

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

Minister's response

The Minister for Foreign Affairs advised:

> The Committee is correct that following the adoption of UN Security Council (UNSC) Resolution 2288 (2016), the Liberia Regulations ceased to have effect.
>
> I will amend the Sanctions Law Declaration to remove the reference to these Regulations.

Committee's response

The committee thanks the minister for her response and notes the minister's undertaking to amend the instrument to remove the reference to the Charter of the United Nations (Sanctions — Liberia) Regulations 2008.

The committee has concluded its examination of the instrument.

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

Instrument	**Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843]**
Purpose	Provides an administrative framework to support the appointment of lawyers for young persons who are the subject of control order proceedings under the *Criminal Code Act 1995*
Authorising legislation	*Criminal Code Act 1995*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 10 of 2017*

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 explanatory statement (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 regulations provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[12]

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 Attorney-General advised:

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

Regulations to facilitate the appointment of legal representatives for young persons who are the subject of control order proceedings were drafted in consultation with the Australian Federal Police and state and territory Legal Aid Commissions.

Further, the Intergovernmental Agreement on Counter-Terrorism Laws (June 2004) (the IGA) requires that the Commonwealth Government consult the governments of the states and territories prior to the making of legislation that would amend or alter Chapter 2 or Part 5.3 of the Criminal Code. In the spirit of the IGA, my department wrote to the states and territories through the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee on the proposed Regulations.

Consistent with your request, my department has amended the Explanatory Statement supporting the Regulations to include information about the consultation which was carried out in accordance with the requirements of the *Legislation Act 2003*. A copy of the amended Explanatory Statement is enclosed and has been uploaded to the Federal Register of Legislative Instruments.

Committee's response

The committee thanks the Attorney-General for his response and notes that the replacement ES received by the committee has now been registered and published on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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	*Fisheries Management Act 1991*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

The committee previously commented in relation to two matters 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. 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);[13] and
- South Pacific Regional Fisheries Management Organisation (SPRFMO) Conservation and Management Measure 13-2016.[14]

13 See items 10, 13 and 14.

14 See item 50.

However, neither the regulations nor the explanatory statement (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 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.[15]

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 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 committee notes that the documents are available for free online.[16] Where an incorporated document is available for free online, the committee considers that

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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.

16 See Commission for the Conservation of Antarctic Marine Living Resources, C*onservation 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).

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.[17]

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

Minister's response

The Assistant Minister for Agriculture and Water Resources advised:

> The Instrument amended the Fisheries Management (International Agreements) Regulations 2009 (the Principal Regulations). The broad purpose of the Principal Regulations is to give effect, through the legislative framework for Commonwealth fisheries management, to international fisheries management measures (IFMMs) agreed by international fisheries management organisations (IFMOs) to which Australia is a party.
>
> …
>
> The Instrument prescribes in the Principal Regulations both new IFMMs, and amendments to existing IFMMs, that have come into force as a result of decisions made at meetings of five IFMOs held between 1 July 2015 and 30 June 2016. These IFMOs are the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the South Pacific Regional Fisheries Management Organisation (SPRFMO). The IFMMs that were prescribed by way of incorporation were incorporated as in force at the commencement of the Instrument. They relate to matters such as vessel monitoring systems, seabird bycatch mitigation and the management of exploratory fisheries.
>
> Copies of all IFMMs prescribed in the Instrument and the Principal Regulations can be accessed at no charge from the websites of the respective IFMOs, as follows:
>
> - CCAMLR: www.ccamlr.org
> - IOTC: www.iotc.org
> - WCPFC: www.wcpfc.int
> - CCSBT: www.ccsbt.org
> - SPRFMO: www.sprfmo.int

17 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 Explanatory Statement for the Instrument has been updated to clarify these matters and is enclosed. My department will arrange for the updated Explanatory Statement to be re-registered on the Federal Register of Legislation.
>
> …I have also reminded my department and the Australian Fisheries Management Authority of the importance of reflecting on the committee's feedback when preparing future instruments.

Committee's response

The committee thanks the minister for her response and notes that the replacement ES received by the committee has now been registered and published on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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	*Great Barrier Reef Marine Park Act 1975*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

Drafting

The committee previously commented as follows:

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

The explanatory statement (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 explanatory statements (ES) be drafted with sufficient care and precision to avoid potential confusion for anticipated users.

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 advise that the Instrument has been drafted in a way that refers to regulations made under the *Great Barrier Reef Marine Park Act 1975* (the Act) rather than to the Great Barrier Reef Marine Park Regulations 1983 (the 1983 Regulations) because the 1983 Regulations will be repealed and remade prior to their sunset date of 1 April 2018, and will no longer be called the Great Barrier Reef Marine Park Regulations 1983.
>
> If the Whitsundays Plan of Management 1998 (the Plan) was to instead, refer to the 1983 Regulations, it would almost certainly become outdated in less than seven months, which would be likely to cause confusion among affected or interested persons.
>
> It would be inappropriate for the Great Barrier Reef Marine Park Authority (the Authority) to delay updates to the Plan in order to align with the repeal and remaking of the 1983 Regulations. The Plan has been under review for approximately two years and the amendments were made to address stakeholder concerns in the area covered by the Plan. The amendments need to commence as soon as possible to respond to those concerns.
>
> To assist affected and interested persons to identify the relevant regulations, the Authority as the rule maker will prepare a supplementary Explanatory Statement which explicitly identifies the 1983 Regulations as containing the relevant definitions. The supplementary Explanatory Statement will explain that the 1983 Regulations are likely to be repealed

and replaced in 2018 with new regulations that are in substantially the same form, and which will contain the relevant definitions.

The supplementary Explanatory Statement for the Instrument will also make it clear, that if in future, separate regulations are made under the Act, the relevant definitions are likely in future, to be located in the regulations that replace the 1983 Regulations, and not in separate regulations. Additionally, the intention of the Authority is to work with the Office of Parliamentary Counsel toward consistent use of terminology and definitions across Great Barrier Reef Marine Park legislation, so the making of regulations with terminology or definitions that are inconsistent with the main Regulations, is unlikely to occur.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the instrument has been drafted to refer to 'the regulations' in a more general way because the Great Barrier Reef Marine Park Regulations 1983 will be repealed and remade in the near future. The committee also notes the minister's undertaking that a supplementary ES will be prepared which explicitly identify the 1983 Regulations and their successor regulations as containing the relevant definitions.

The committee has concluded its examination of the instrument.

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 *Inspector of Transport Security Act 2006*; and details the fee for attendance at a coronial inquiry and the due date for payment
Authorising legislation	*Inspector of Transport Security Act 2006*
Portfolio	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	*Delegated legislation monitors 6, 10* and *11 of 2017*

The committee previously commented on two matters as follows:

Manner of incorporation

Section 14 of the *Legislation Act 2003* (Legislation Act) 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 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 explanatory statement (ES) state the manner in which Annex 13 is incorporated.

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

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 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.[19]

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 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:

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19 The guideline is now available to view on the committee's webpage: 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.

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

The committee therefore requested 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).

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 on 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 second response

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

However, the committee noted 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 requested the further advice of the minister in relation to the above.

Minister's third response

The Minister for Infrastructure and Transport advised:

> I have sought advice from the Department of Infrastructure and Regional Development in relation to the Senate Regulations and Ordinances Committee's concerns regarding information on whether, and if so where, Annex 13 of The Convention on International Civil Aviation (Chicago Convention) may be accessed for free.
>
> The Department has raised this matter with the entity responsible for the Chicago Convention, the International Civil Aviation Organisation (ICAO). ICAO has advised that in accordance with the ICAO Publication Regulations (Doc 7231, Thirteenth edition, 2017), annexes are distributed free of charge to Member States. Member States are permitted to reproduce and distribute annexes internally for their own purposes. However, they may not resell or distribute them beyond the government, as doing so would violate the terms and conditions under which a Member State has access to the annexes. This is in part because annexes impose legal obligations on the states that are party to the Chicago Convention, not on members of the public directly.
>
> I would also note that the Inspector of Transport Security Regulations 2017 only have an impact on the Inspector of Transport Security and access to Annex 13 is available to the Inspector of Transport Security via the Department.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the instrument only has an impact on the Inspector of Transport Security and access to Annex 13 is available to the Inspector of Transport Security via the

department. However, the committee reiterates its concerns regarding the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The committee previously noted its expectation that, at a minimum, consideration be given by the department to any means by which the document may be made available to interested or affected persons. While the committee notes the minister's advice that reselling or distributing ICAO annexes beyond the government would violate the terms and conditions under which a Member State has access to the annexes, it remains unclear to the committee why it would not be possible for the department to make the document available for viewing on request. As previously stated by the committee, 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 committee reiterates its strong preference that consideration should be given to appropriate means to give effect to this principle, and should be reflected in the ES to any instrument that incorporates documents not readily and freely available to the public.

The committee has concluded its examination of the instrument. However, the committee draws its continued concern regarding the lack of free access to incorporated documents to the attention of the minister and the Senate.

Instrument	**Legal Services Directions 2017 [F2017L00369]**
Purpose	Repeals and remakes Legal Services Directions 2005 [F2006L00320] which sunsetted on 1 April 2017
Authorising legislation	*Judiciary Act 1903*
Portfolio	Attorney-General's
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 Notice given on 16 August 2017[20] Motion currently must be resolved by 14 November 2017
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitors 5, 6* and *8 of 2017*

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to seek to ensure that an instrument does not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in scrutinising whether matters are being appropriately dealt with as primary or delegated legislation. In this regard, the committee notes the following guidance from the Legislation Handbook:

> While it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation, the following are examples of matters generally implemented only through Acts of Parliament…provisions imposing obligations on individuals or organisations to…desist from activities (e.g. to prohibit an activity and impose sanctions for engaging in an activity).

With reference to the above, the committee notes that paragraph 14 in Part 3 of Schedule 1 and section 5 of Appendix G of the directions enables the Attorney-General to impose sanctions for non-compliance with the directions. A note to paragraph 14 in Part 3 of Schedule 1 of the directions provides:

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

> Examples demonstrating the range of sanctions and the manner in which OLSC [The Office of Legal Services Commissioner] approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that this guidance material does not appear to be available on the OLSC website and the explanatory statement (ES) provides no further information in relation to the range of sanctions that may be imposed by the Attorney-General for non-compliance with the directions.

With respect to section 5 of Appendix G, the ES to the Directions states:

> This provision ensures that the Attorney-General may continue to impose sanctions for non-compliance with the 2005 Directions after those Directions are repealed.

However, neither the directions nor the ES appear to:

- set any limitations or provide any guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; nor
- justify the need for the Attorney-General to be granted such broadly defined sanction powers; nor
- explain the reasons for enabling the Attorney-General to impose sanctions for non-compliance with the Directions in delegated as opposed to primary legislation.

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

Attorney-General's first response

The Attorney-General advised:

> The Committee has commented that neither the 2017 Directions nor the Explanatory Statement set any limitations or provide any guidance as to what sanctions could be imposed, justification of the need for such a broadly defined power, and the reasons for this power to be in the 2017 Directions rather than in primary legislation.
>
> Section 55ZG of the *Judiciary Act 1903* states, '[c]ompliance with a Legal Services Direction is not enforceable except by, or on the application of, the Attorney-General.' Compliance with the 2017 Directions (per paragraph 14) derives its legislative basis from section 55ZG of the *Judiciary Act 1903*.
>
> The OLSC website contains guidance material regarding its approach to compliance with the 2017 Directions in a document entitled the 'Compliance Framework'. It is available at https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-20Compliance%20Framework.pdf

Committee's first response

The committee acknowledged the Attorney-General's advice that compliance with the directions derives its legislative basis from section 55ZG of *Judiciary Act 1903*.

The committee also acknowledged that the note to paragraph 14 of Part 3 of Schedule 1 of the directions, which provides that the Attorney-General may impose sanctions for non-compliance with the Directions, states:

> Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee noted that the guidance material referred to by the Attorney-General does not provide information about the range of sanctions that may be imposed.

The committee therefore remained concerned that neither the Compliance Framework nor the Attorney-General's response:

- provides guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; or
- justifies the need for the Attorney-General to be granted such broadly defined sanction powers.

The committee requested the further advice of the Attorney-General in relation to the above.

Attorney-General's second response

The Attorney-General advised:

> The Committee acknowledges my advice about the legislative basis for the power to impose sanctions for non-compliance with the 2017 Directions. I also referred the Committee to a document published by the Office of Legal Services Coordination in my Department entitled 'Compliance Framework'.
>
> The Compliance Framework outlines the sanctions contemplated by the Directions 2017 at paragraph 20, which states:
>
> > *Pursuant to s 55ZF(1)(b) of the Judiciary Act, the Attorney-General may issue a direction to an agency that is to apply generally to Commonwealth legal work, or in relation to a particular matter. Such a direction may be made in order to enforce and/or direct compliance with an existing requirement under the Directions, or to address a risk not adequately addressed by the Directions.*
>
> The range of sanctions is thus set out in the Judiciary Act itself.

Committee's second response

The committee understood the Attorney-General's advice to mean that, pursuant to the Compliance Framework, the power to impose sanctions for non-compliance with

the 2017 directions is limited to issuing a direction to enforce and/or direct compliance:

- with an existing requirement under the 2017 directions; or
- to address a risk not adequately addressed by the 2017 directions.

While the above limits on the imposition of sanctions for non-compliance with the 2017 directions form part of the administrative framework for compliance across the Commonwealth with the 2017 directions, the committee remained concerned that these limitations are not contained in legislation.

The committee requested the further advice of the Attorney-General in relation to the above.

Attorney-General's third response

The Attorney-General advised:

> To the extent that the Attorney-General has a sanction power in respect of the 2017 Directions that goes beyond what is available at general law (for example the right to terminate a contract with a legal services provider for a breach of a condition of the deed of agreement executed with the Commonwealth), it is contained in sections 55ZF and 55ZG of the *Judiciary Act 1903.* The limitations on the grant of power are contained in the legislative provisions that grant the power, that is, the Attorney-General is granted the right to issue Legal Services Directions under section 55ZF, but those directions may only apply to the performance of Commonwealth legal work.
>
> The 2017 Directions and the *Compliance Framework* do not grant sanction powers further or in addition to those described under section 55ZF of the *Judiciary Act 1903.*
>
> The note to paragraph 14.1 of the 2017 Directions provides that examples of the range of sanctions are set out in the *Compliance Framework.* Paragraph 20 of the *Compliance Framework* restates that the power to sanction by way of issuing Legal Services Directions is contained in section 55ZF of the *Judiciary Act 1903.* That paragraph also makes clear that such a sanction may take the form of a further Legal Services Direction to direct compliance in a particular matter.
>
> I note that paragraph 21 of the *Compliance Framework* goes on to say that a "direction [in a particular matter to enforce and/or direct compliance] would only be made where there is no other more effective means of addressing the identified risk to the Commonwealth." It is rare that such a sanction is contemplated under the Directions. The most recent exercise of this power occurred in April 2010 when the then Attorney-General's delegate issued an instruction that copies of certain material be provided to the Australian Government Solicitor.
>
> Further, and by way of background, it may be useful to explain the purpose of reissuing the 2017 Directions in substantively the same form as

> the *Legal Services Directions 2005* (2005 Directions). The objective was to remake the 2005 Directions, which were due to sunset on 1 April 2017. The original sunsetting date had already been deferred in 2016. The certificate I issued under section 51 of the *Legislation Act 2003* to defer the sunsetting explained that the Secretary of my department was undertaking a review of how legal work could be delivered most effectively and efficiently to the Commonwealth. Potential changes to the 2005 Directions formed part of this review, the release of which has been delayed. The *Legislation Act 2003* does not allow for the making of a second certificate of deferral. Therefore, the 2017 Directions preserved all existing arrangements for the management of Commonwealth legal services while the review conducted by my Secretary was undertaken.
>
> The Committee's feedback regarding this temporary re-making of the existing terms of the Directions will be very useful for my department and office when they are engaged in redrafting the Directions following the review. Further, the engagement of the Committee secretariat with my office has been exemplary, and I thank the Committee for their very helpful comments on the 2017 Directions.
>
> I have also instructed my department to draft a supplementary Explanatory [Statement] for the 2017 Directions to clarify the limits of the sanctions power.

Committee's response

The committee thanks the Attorney-General for his response and notes his clarification that the 2017 Directions and the Compliance Framework do not grant sanction powers further or in addition to the power to direct compliance under sections 55ZF and 55ZG of the *Judiciary Act 1903*, and any remedies otherwise available at general law. The committee also notes the Attorney-General's advice that a review of the directions has been undertaken, and that the committee's feedback on this matter will inform the consequent re-drafting of the directions.

In the meantime, the committee notes the Attorney-General's undertaking to prepare a supplementary ES to the present directions to clarify the limits of the sanctions power.

The committee has concluded its examination of the instrument.

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	*Norfolk Island Act 1979*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 11 of 2017*

Sub-delegation

The committee previously commented as follows:

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 explanatory statement (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 requested the advice of the minister in relation to the above.

Minister's response

The Minister for Local Government and Territories advised:

> The purpose of these amendments is to allow the Commonwealth Director of Public Prosecutions (CDPP) to perform certain functions in relation to particular Norfolk Island enactments.
>
> The Department of Infrastructure and Regional Development has principal responsibility for administering Australian territories on behalf of the Commonwealth. The Australian Government has committed to providing to Norfolk Island a level of services comparable to those enjoyed by Australians in other similar-sized communities. The Ordinance contributes to delivering this commitment by allowing prosecutions against particular Norfolk Island laws, and related functions, to be dealt with by the CDPP, consistent with normal prosecution practices on mainland Australia and the other external Territories. The Ordinance complements the Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017.
>
> I note the Senate Standing Committee on Regulations and Ordinances' expectations in relation to the power of the CDPP to delegate all or any of his or her functions and powers under the Norfolk Island enactments to a member of the staff of the Office of the CDPP other than the Associate Director.
>
> In response to the matters raised by the Committee, the CDPP has advised through the Department that the approach to delegations in the Ordinance mirrors the approach taken to delegations in the *Director of Public Prosecutions Act 1983* (Cth) (the DPP Act). The large number and variety of powers and functions which must be exercised by the CDPP both under the DPP Act and other Commonwealth laws means their delegation to only nominated officers or members of the senior executive service (in accordance with the Committee's expectations) would not be practical from an operational perspective.

> These operational considerations include the small population and remote location of Norfolk Island. It is expected that the prosecutorial and related functions of the CDPP with respect to Norfolk Island will not ordinarily be undertaken by senior executive staff and/or holders of nominated offices, but by appropriately qualified officers within the Office of the CDPP. This practical constraint on the operational environment requires a power of sub-delegation to a broad category of officers within the Office of the CDPP.

Committee's response

The committee thanks the minister for her response and notes the minister's advice that the number and variety of powers and functions which must be exercised by the CDPP means their delegation to only nominated officers or members of the senior executive service would not be practical from an operational perspective. The committee further notes the minister's advice that it is expected that the prosecutorial and related functions of the CDPP with respect to Norfolk Island will ordinarily be undertaken by appropriately qualified officers within the Office of the CDPP.

The committee nevertheless reiterates its concerns regarding the delegation in this instrument to a large class of persons, with no legislative restriction as to their qualifications or attributes. As the committee previously stated, it is not its expectation that details of the qualifications and attributes for delegates—or identification of specific delegates—be set out in the ordinance. Rather, the committee's strong preference is that sub-delegation provisions in delegated legislation include a requirement that the holder of the powers 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, noting the concerns raised above with respect to broad sub-delegation of powers, the committee draws this matter to the attention of the Senate.

Senator John Williams (Chair)