

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister 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

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 http://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 15 September 2017 and 12 October 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 (Factoring Arrangements) Instrument 2017/794 [F2017L01198]
Purpose	Exempts sellers and purchasers of accounts receivable under factoring arrangements from legal requirements relating to derivatives under the <i>Corporations Act 2001</i> , where the factoring arrangement would otherwise fall within the definition of a derivative
Authorising legislation	<i>Corporations Act 2001</i>
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)

Access to incorporated document

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

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.

Section 6 of the instrument incorporates Australian Standard AS ISO 10002-2006 *Customer satisfaction – Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD) published by SAI Global Limited on 5 April 2006. The committee's research indicates that the relevant standard in its entirety may be obtained from SAI Global, on payment of a fee. However, neither the instrument nor its ES states whether and where the standard can be accessed for free.

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

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. 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 free of charge 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 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.²

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

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

Instrument	Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) [FL2017L01302] Radiocommunications (Spectrum Licence Allocation – Multi-band Auction) Determination 2017 [F2017L01255]
Purpose	Amends two television licence area plans Determines the procedures to be applied in allocating spectrum licences in specific parts of certain frequencies; and fixes the spectrum access charges payable by the persons to whom such licences are allocated
Authorising legislation	<i>Radiocommunications Act 1992</i>
Portfolio	Communications and the Arts
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)

Incorrect classification of legislative instruments as exempt from disallowance

The Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) is made under two enabling provisions in the *Radiocommunications Act 1992* (Radiocommunications Act): subsection 106(1) and paragraph 107(1)(f). Table item 29 of section 10 of the Legislation (Exemptions and Other Measures) Regulation 2015 (LEOM Regulation) provides that instruments made under subsection 106(1) of the Radiocommunications Act are exempt from disallowance. However, instruments made under paragraph 107(1)(f) are not exempted under the LEOM Regulation, and the committee is not aware of any other exemption from disallowance applying to instruments made under that paragraph.

The Radiocommunications (Spectrum Licence Allocation – Multi-band Auction) Determination 2017 is also made under two enabling provisions in the Radiocommunications Act: section 60 and section 294. Table item 29 of section 10 of the LEOM Regulation provides that instruments made under subsection 60(1) of the Radiocommunications Act are exempt from disallowance. However, instruments made under section 294 are not exempted under the LEOM Regulation, and the committee is not aware of any other exemption from disallowance applying to instruments made under section 294. In this regard, the committee also notes that

the ES to the instrument states that '[t]o the extent that the Determination is made under subsection 294(1) of the Act, it is a disallowable instrument'.

Both instruments were classified as exempt from disallowance when received by Parliament and the committee, and were tabled in the House of Representatives and the Senate on 16 October 2017 on that basis. The committee is concerned that classifying both instruments in their entirety as exempt from disallowance has potentially hindered Parliament's effective oversight of delegated legislation, by purporting to remove Parliament's ability to disallow the provisions of the instruments which are made under section 294 and paragraph 107(1)(f) respectively, and are therefore disallowable.

The committee's expectation is that disallowable and non-disallowable provisions should not be combined in the same instrument unless this is entirely unavoidable. Should it be necessary to combine disallowable and non-disallowable provisions in the same instrument, the committee expects at a minimum that any such instrument should be classified as disallowable, and the instruments or their ESs should clearly specify the provisions which are able to be disallowed, in order to ensure that Parliament's prerogative to disallow those provisions is preserved.

While the committee understands that both instruments have now been re-classified as subject to disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the committee remains concerned about the processes for classification of instruments, and will continue to monitor the issue.

The committee requests the minister's advice in regard to the classification of these instruments as exempt from disallowance, and the combination of disallowable and non-disallowable provisions in legislative instruments.

Instrument	CASA EX120/17 – Exemption – requirements for helicopter aerial application endorsements [F2017L01332] CASA EX143/17 – Exemption – DAMP organisations to provide information to CASA [F2017L01300]
Purpose	Exempts applicants for helicopter aerial application ratings and endorsements from training requirements under the Civil Aviation Safety Regulations 1998, subject to certain conditions Exempts organisations that have implemented a drug and alcohol management plan from the requirement to report information to CASA every six months, subject to the organisation keeping records of the information
Authorising legislation	Civil Aviation Safety Regulations 1998
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)(d)

Matters more appropriate for parliamentary enactment: exemptions

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 may include instruments that grant or extend exemptions from compliance with principal or enabling legislation.

The Civil Aviation Safety Regulations 1998 (CASR) require applicants for helicopter aerial application ratings and endorsements to have at least 15 hours of dual flight in a helicopter while receiving training in aerial application operations, and at least 10 hours direct supervision within the first 110 hours of aerial application operations.

CASA EX120/17 exempts an applicant from these requirements, subject to the applicant having at least 10 hours of dual flight in a helicopter while receiving training, and 20 hours direct supervision within the first 110 hours of aerial application operations (the alternative requirements).

In relation to these matters, the ES states:

[The requirements in the CASR] have been reviewed and it has been concluded that it would be more effective if the person has 10 hours of

dual flight in a helicopter while receiving training but, within the first 110 hours of aerial application operations, has 20 hours of operations under direct supervision.

It appears that the exemption granted by CASA EX120/17 has been used to introduce these improvements, rather than amending relevant provisions of the CASR to remove the less effective requirements and replace them with the alternative requirements. The ES does not provide a justification for this approach.

CASA EX143/17 exempts organisations required to have a drug and alcohol management plan (DAMP) from compliance with reporting obligations in subregulations 99.100(1) and (2) of the CASR, subject to certain conditions. The instrument extends, until 30 September 2020, a previous three-year exemption from compliance with those reporting obligations provided by CASA EX39/15 [F2015L00225]. The ES for CASA EX143/17 states that the continuing exemption is necessary because:

CASA continues to consider that the reporting requirements in those subregulations are not necessary and their removal will have no identifiable impact on safety. Consistent with this policy, the instrument exempts DAMP organisations from compliance with those reporting requirements.

The ES further states, under the heading of consultation, that:

Prior to the making of instrument CASA EX39/15 CASA received substantial feedback from industry about the burdensome nature of the DAMP reporting requirements.

No explanation is provided in the ES as to why an exemption continues to be used to effectively amend the DAMP reporting requirements, rather than amending regulation 99.100 of the CASR.

In cases such as those outlined above (i.e. in relation to both CASA EX120/17 and CASA EX143/17), the committee's general preference is that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation (in this case to the regulations).

The committee requests the minister's advice as to:

- **why it is considered more appropriate to establish or extend exemptions to the CASR in each of the above instruments, rather than making amendments to the regulations; and**
- **whether and when government proposes to introduce amendments to the CASR to address the matters covered in the two instruments above.**

Instrument	Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311]
Purpose	Provides for matters necessary for the effective operation and administration of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> .
Authorising legislation	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
Portfolio	Prime Minister and Cabinet
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)(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. This includes the right to privacy.

Subregulation 55(1) of the instrument provides that, for the purposes of paragraph 658-1(1)(k) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the Registrar of Aboriginal and Torres Strait Islander Corporations (Registrar) has the function of making certain documents, and information in those documents, available to the public. Subregulation 55(3) provides that these documents may include documents containing personal information within the meaning given by subsection 6(1) of the *Privacy Act 1988*.

The ES to the instrument states:

The additional function provided under section 55 of the Regulations allows the Registrar to make available, to the public, documents or information in documents that were previously held by the Registrar of Aboriginal Corporations under the *Aboriginal Councils and Associations Act 1976* (ACA Act), which was repealed and replaced by the CATSI Act. This preserves public access to these documents after the commencement of the CATSI Act on a similar basis to that which existed under the ACA Act.

The ES does not provide any further information about the nature of the documents and information that the Registrar may make available to the public. Further, bearing in mind the express provision permitting the publication of personal information,

the committee notes that the ES does not describe any safeguards that may be in place to ensure that personal privacy will be appropriately protected.

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

- **the nature of the documents and information that the Registrar may make available to the public under the regulations; and**
- **any relevant safeguards in place for the protection of individuals' privacy.**

Instrument	Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 5) Regulations 2017 [F2017L01211]
Purpose	Establishes legislative authority for spending on two activities administered by the Department of Agriculture and Water Resources
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
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)(c), (a) and (d)

Merits review

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

The instrument adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations), establishing legislative authority for activities in the agriculture sector. One of these is item 244, the Agricultural Trade and Market Access Cooperation Program. The ES explains that the Program will include provision of grants to eligible individuals and organisations for activities that build relationships with trading partners, neighbouring countries and international organisations in support of access to overseas markets for Australian agricultural products. The Department of Agriculture and Water Resources will consider and determine applications for grants as they are received, until all funds have been allocated. Applications are assessed

by a five-member panel of departmental officials, against criteria and considerations set out in the program guidelines. The department's website advises potential applicants for the grants that their applications will be assessed based on merit.³

The ES to the instrument states:

Decisions in relation to each application are made without reference to the comparative merits of other applications...

There is no merits review for decisions in connections with the approval of grants due to the non-competitive nature of the funding and targeted projects under the Program.

While the committee acknowledges that grant funding decisions under the Program are made on a rolling basis, it is not clear to the committee that the absence of a competitive or comparative element of decision-making is an established ground for the exclusion of merits review.⁴ Accordingly, the committee considers that the ES does not provide sufficient information to establish that grant funding decisions made under the Program possess characteristics that would justify their exclusion from merits review.

The committee requests the minister's advice regarding the characteristics of the grant scheme offered under the Agricultural Trade and Market Access Cooperation Program that would justify its exclusion from merits review.

Legislative authority for spending

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 the instrument establishes legislative authority for the government's spending on the Agricultural Trade and Market Access Cooperation Program, including the grants scheme under that Program, by adding item 244 to Schedule 1AB of the FF(SP) Regulations. The instrument commenced on 20 September 2017. The ES states that grant funding of \$3.1 million has been

3 See <http://www.agriculture.gov.au/market-access-trade/atmac#apply-for-a-grant> (accessed 9 November 2017), which states that applications will be assessed by a panel based on: merit in accordance with the ATMAC grant program guidelines; and the order in which applications are received.

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

available under the Program over four years since 2015-16, and that applications for the grants scheme opened in March 2016. The department's website indicates that grants were made under the scheme amounting to \$55,000 in financial year 2015-16, \$1.65 million in 2016-17, and an unspecified amount so far in 2017-18.⁵

The committee notes that, in *Williams No. 1*, the High Court held that in most circumstances, the Commonwealth executive requires statutory authority before it can enter into contracts with private parties and spend public money.⁶ The committee is unclear in this instance as to the legislative authority under which spending on the grants scheme was funded prior to 20 September 2017, and if such legislative authority previously existed, why it is necessary to establish a new legislative authority by inserting item 244 into Schedule 1AB of the FF(SP) Regulations now.

The committee requests the minister's advice as to the legislative authority under which funds were spent on the Agricultural Trade and Market Access Cooperation Program grants scheme prior to 20 September 2017; and if such legislative authority was already in existence, the rationale for the addition of item 244 into the Financial Framework (Supplementary Powers) Regulations.

Parliamentary scrutiny: ordinary annual services of 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 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

5 See <http://www.agriculture.gov.au/market-access-trade/atmac#available-funding> (accessed 9 November 2017).

6 *Williams v Commonwealth* (2012) 248 CLR 156, pp. 190-191.

appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.⁷ 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. The committee's considerations in this regard are set out in the guideline relating to the Financial Framework (Supplementary Powers) Regulations published on the committee's website.⁸

This instrument adds two new items to Part 4 of Schedule 1AB to the FF(SP) Regulations, establishing legislative authority for activities in the agriculture sector. One of these is item 243, the Livestock Global Assurance Program. The instrument describes this program as establishing and supporting an entity for certification and assurance of overseas importers and facilities used by livestock exporters. The ES indicates that funding for the Program commenced in 2017-18 for four years, under the department's Program 2.1, Biosecurity and Export Services.

It appears to the committee that item 243 implements a new policy, in establishing a new entity not previously authorised by special legislation, and that the initial appropriation in relation to this new policy 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 draws this matter to the attention of the minister, the Senate and the relevant Senate committees.

7 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.

8 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.

Instrument	Guidelines Relating to the Registration and Cancellation of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator [F2017L01308]
Purpose	Provide information on the factors that will be considered by the Inspector-General in Bankruptcy, under the <i>Bankruptcy Act 1966</i> , in deciding whether to approve an application for registration as a debt agreement administrator; whether to cancel an existing registration; and whether to declare a person ineligible to act as a debt agreement administrator
Authorising legislation	<i>Bankruptcy Act 1966</i>
Portfolio	Attorney-General's
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)

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

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

Description of consultation

Section 17 of the Legislation Act directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to

describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e) of the Legislation Act).

The ES explains that the instrument implements new requirements inserted into the *Bankruptcy Act 1966* by the *Bankruptcy Legislation Amendment (Debt Agreements) Act 2007* (Debt Agreements Act). With regard to consultation, the ES states that:

The Guidelines incorporate stakeholder comment concerning the changes contained in the Debt Agreements Act and public comment received in 2006 and early 2007.

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 may be insufficient to satisfy the requirements of the Legislation Act.

In this case, the committee's view is that a general statement concerning stakeholder comment on changes contained in the Debt Agreement Act, and public comment received about that Act in 2006 and early 2007, may be insufficient to meet the requirements of the Legislation Act. The committee notes that the ES does not provide any information on consultation undertaken on this instrument, or if no consultation was undertaken, set out reasons why not.

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

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

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

Instrument	Health Insurance (Approved Pathology Undertakings) Approval 2017 [F2017L01293]
Purpose	Places obligations on pathology practitioners and pathology providers to ensure that they are accountable for services rendered by them or on their behalf.
Authorising legislation	<i>Health Insurance Act 1973</i>
Portfolio	Health and Aged Care
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)(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, which includes the right to privacy.

Section 7 of Schedule 1 (Approved Pathology Practitioner Undertaking) and section 12 of Schedule 2 (Approved Pathology Authority Undertaking) to the instrument require pathology practitioners and authorities, respectively, to comply with requests for information by specified government officials.¹⁰ The relevant sections also provide that such information may then be made available to other specified entities.

Subsection 12(4) of Schedule 2 provides that an approved pathology authority is not required to provide information containing clinical details relating to a patient. That caveat is not included in section 7 of Schedule 1 with respect to information requested from an approved pathology practitioner.

The committee notes that the ES does not address the nature of the information that may be requested under subsection 7(1) of Schedule 1, nor does it set out any means by which the privacy of any information provided under the instrument – particularly information relating to a patient's clinical details, which it seems may be provided by pathology practitioners under Schedule 1 – will be appropriately protected.

10 The government officials specified in the instrument are the Director, Medicare Provider Eligibility and Accreditation, or an Assistant Secretary in the Provider Benefits Integrity Division of the Department of Health.

Without information regarding these matters, the committee is unable to be satisfied that the instrument will not unduly trespass on the personal rights and liberties of individuals.

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

- **the nature of information that may be requested under subsection 7(1) of Schedule 1 to the instrument; and**
- **any relevant safeguards in place in relation to the collection and sharing of personal information under the instrument, particularly information concerning patients' clinical details.**

Instrument	Industry Research and Development (Cooperative Research Centres Projects Program) Instrument 2017 [F2017L01202]
Purpose	Establishes legislative authority for government funding of industry-led research through the Cooperative Research Centres Projects Program
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Portfolio	Industry, Innovation and Science
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)(c)

Merits review

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.

Under section 33 of the *Industry Research and Development Act 1986*, executive spending may be authorised by prescribing schemes in instruments made under that Act. This instrument prescribes the Cooperative Research Centres Projects Program, and establishes the conditions and procedures under the Program for government grants to organisations conducting collaborative research in support of Australian industry.

Section 13 of the instrument provides for project applications to be assessed by Innovation and Science Australia (the Board), which then makes recommendations

to the minister for decision. Subsection 13(1) provides that compliant applications must be considered on merit, and against all other compliant applications. Neither the instrument nor the ES sets out whether the minister's decisions are subject to external merits review; and if not, what characteristics justify their exclusion from merits review.

The committee considers that the ES should include a description of the policy considerations and program or grant characteristics relevant to the question of whether or not decisions made pursuant to programs and grants regulations should be subject to independent review. This expectation is consistent with the committee's expectations in relation to programs or grants authorised under the Financial Framework (Supplementary Powers) Regulations 1997.¹¹

The committee requests the minister's advice as to whether funding decisions made under the Cooperative Research Centres Projects Program are subject to independent review of their merits; and if not, what characteristics of the Program justify the exclusion of such decisions from external merits review.

Instrument	Marine Orders (Navigation Act) Administrative Amendment Order 2017 [F2017L01336]
Purpose	Makes amendments of an administrative or editorial nature to a number of marine orders
Authorising legislation	<i>Navigation Act 2012</i>
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)(b) and (a)

Offences: strict liability

In a criminal law offence, proving fault is usually a basic requirement. However, offences of strict liability remove the fault element that would otherwise apply.

11 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.

This means a person could be punished for doing something, or for failing to do something, whether or not they have a guilty intent. This should only occur in limited circumstances.

Given the potential consequences for individuals of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such provisions, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.¹²

Item 2 of Schedule 2 to the instrument sets out a strict liability offence in section 23 of Marine Order 12 (Construction – subdivision and stability, machinery and electrical installations) 2016 [F2016L01049] (Marine Order 12). The offence is boarding or leaving a vessel otherwise than by the means of access provided or identified by the master.

The ES to the instrument provides no justification for the imposition of strict liability. It states that the instrument does not create any new offences to which strict liability applies, because the offence is already in Marine Order 12 and is being remade in the present instrument to correct a numbering error.

The committee acknowledges that the intent of item [2] of Schedule 2 to the instrument is to remake an offence already contained in Marine Order 12, in order to correct a numbering error in that Order. However, given that the item remakes the offence in Marine Order 12 in its entirety, it is the committee's expectation that the ES include a justification for the standard of liability imposed.

The committee requests the minister's advice in relation to the justification for the strict liability offence in the instrument, and requests that the ES be updated to include that information.

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* (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 those of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public.

12 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), <http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (accessed 9 November 2017).

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 these matters, the committee notes that the instrument incorporates the following documents without indicating in the ES where they may be obtained:

- the *International Life-Saving Appliance Code* (referred to in the instrument as the LSA Code);
- the *Revised guidelines for the onboard operational use of shipborne automatic identification systems (AIS)*; and
- the *Revised guidelines and specifications for pollution prevention equipment for machinery space bilges of ships*.

The committee's research indicates that the documents appear to be freely available online.¹³ However, 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.¹⁴

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

13 The LSA Code is available online at <http://treaties.fco.gov.uk/docs/pdf/1998/TS0044.pdf>

The *Revised guidelines for the onboard operational use of shipborne automatic identification systems (AIS)* are available online at http://www.safety4sea.com/wp-content/uploads/2016/02/IMO-Revised-guidelines-for-onboard-operational-use-of-AIS-2015_12.pdf.

The *Revised guidelines and specifications for pollution prevention equipment for machinery space bilges of ships* are available online at [www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-\(MEPC\)/Documents/MEPC.107\(49\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.107(49).pdf).

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

Instrument	Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017 [F2017L01236]
Purpose	Specifies matters relating to the provision of Continuing Professional Development for registered migration agents
Authorising legislation	<i>Migration Agents Regulations 1998</i>
Portfolio	Immigration and Border Protection
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)

Incorrect classification of legislative instrument as exempt from disallowance

The instrument is made under specified empowering provisions in the Migration Agents Regulations 1998, as set out in its sections 3 and 4. However, the ES to the instrument states that it is made under the Migration Regulations 1994. At the time of the instrument's tabling, the Federal Register of Legislation also listed the enabling regulations for the instrument as the Migration Regulations 1994.

The instrument was classified as exempt from disallowance when received by both Parliament and the committee, and was tabled in the House of Representatives and the Senate on 16 October 2017 on that basis.

While the committee understands that the instrument has since been re-classified correctly, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the incorrect classification of instruments has the potential to hinder the effective oversight of the instrument by Parliament.

The committee requests the minister's advice in regard to the misclassification of the instrument as exempt from disallowance, and requests that the ES be amended to correct the reference to the instrument's authorising regulations.

Unclear basis for determining fees

Section 8 of the instrument imposes an application fee of \$1240 for persons seeking approval as Continuing Professional Development (CPD) providers under the Migration Agents Regulations 1998.

The committee's longstanding view is that fees imposed by legislative instruments should be limited to cost recovery, so that they could not properly be regarded as taxes and the setting of their amount by 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.

The committee requests the minister's advice as to the basis on which the application fee for CPD providers has been calculated.

Instrument	Retirement Savings Accounts Tax File Number approval No. 1 of 2017 [F2017L01270]
Purpose	Approves the manner of quoting and requesting tax file numbers by retirement savings account (RSA) holders, applicants to become RSA holders and RSA providers
Authorising legislation	<i>Retirement Savings Accounts Act 1997</i>
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)

Incorrect classification of legislative instrument as exempt from disallowance

The instrument (retirement instrument) is made under sections 135, 136, 138, 139 and 142 of the *Retirement Savings Accounts Act 1997*. The committee is not aware of any specific exemption from disallowance applying to instruments made under those provisions. However, there is a 'class exemption' from disallowance under table item 3 of section 9 of the Legislation (Exemptions and Other Measures) Regulation 2015 (LEOM Regulation), for '[a]n instrument (other than a regulation) relating to superannuation'.

The retirement instrument was classified as exempt from disallowance when received by Parliament and the committee, and tabled in the House of Representatives and the Senate on 16 October 2017 on that basis.

In this respect, however, the committee notes that this instrument shares an ES with another instrument, the Superannuation Industry (Supervision) Tax File Number Approval No. 1 of 2017 [F2017L01262] (superannuation instrument). The ES notes that the retirement instrument remakes a substantively similar instrument which was to be automatically repealed under the 'sunsetting' provisions of the Legislation Act 2003 on 1 October 2017.¹⁵ In its discussion of sunsetting, the ES states that unlike the superannuation instrument, the retirement instrument is not exempt from sunsetting under table item 6 of section 11 of the LEOM Regulation, which provides for exemption from sunsetting for '[a]n instrument (other than a regulation) relating to superannuation'.

The committee notes that the sunsetting exemption in table item 6 of section 11 of the LEOM Regulation and the disallowance exemption in table item 3 of section 9 of the LEOM Regulation are identically worded. It is therefore unclear to the committee, if the retirement instrument does not fall within the sunsetting exemption for instruments relating to superannuation, how it could fall within the disallowance exemption for instruments relating to superannuation.

While the committee understands that the instrument has now been re-classified as subject to disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the incorrect classification of instruments has the potential to hinder the effective oversight of the instrument by Parliament.

The committee remains concerned about the processes for classification of instruments generally, and will continue to monitor the issue.

The committee requests the minister's advice in regard to the misclassification of the instrument as exempt from disallowance.

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

Instrument	Taxation Administration Regulations 2017 [F2017L01227]
Purpose	Sets out detailed rules and processes for the administration of taxation matters under the <i>Taxation Administration Act 1953</i>
Authorising legislation	<i>Taxation Administration Act 1953</i>
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)(b)

Personal rights and liberties: offences

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. This principle requires the committee to ensure that where instruments may reverse the onus of proof in the trial of an individual, this infringement on well-established and fundamental rights is justified.

Subsection 8C(1) of the *Taxation Administration Act 1953* (the Act) establishes offences for failure to comply with various requirements under taxation law, including refusing or failing to give information or documents to the Commissioner or another person, lodge an instrument for tax assessment, or attend before the Commissioner or another person. These offences are absolute liability offences. Section 8D creates offences when attending before the Commissioner or another person pursuant to a taxation law: refusing or failing to answer a question or produce a document (8D(1), a strict liability offence), and refusing or failing to make an oath or affirmation (8D(2)).

Section 7 of the instrument provides that, in a prosecution of a person for any of the above offences, the Commissioner of Taxation, Second Commissioner or Deputy Commissioner may issue a certificate in writing certifying that the person refused or failed to do the matter or thing constituting the offence, and that such a certificate 'is prima facie evidence of the facts stated in the certificate'.

It is of concern to the committee that the issuance of such a certificate would appear to purport to establish, prima facie, the commission of the necessary element of the offence. In so doing, this seems to effectively put the onus on a defendant to contest the facts stated in the certificate, going to the question of whether they had as a matter of fact committed the offence.

The explanatory statement does not explain the legal implication of the issuance of such a certificate, nor provide any justification for the apparent constraint on the right of persons prosecuted for one of the offences for which the certificate may be issued to be presumed innocent until proven guilty.

The committee requests the minister's advice as to the impact of any certificate provided under section 7 of the instrument on the operation of the offences to which the section applies, and the justification for any resulting constraint on a defendant's right to be presumed innocent until proven guilty.

Instrument	Torres Strait Regional Authority Election Rules [F2017L01279]
Purpose	Sets rules for the conduct of elections for the Torres Strait Regional Authority
Authorising legislation	<i>Aboriginal and Torres Strait Islander Act 2005</i>
Portfolio	Prime Minister and Cabinet
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) and (b)

Drafting

The committee has identified what appear to be drafting errors in three provisions of the instrument. All three relate to incorrect cross-references to other provisions within the instrument, as follows:

- In rule 4, 'liaison officer' is defined as 'an Aboriginal and Torres Strait Islander liaison officer appointed under rule 4'. It appears that this reference should be to rule 12 as it is rule 12, not rule 4, which provides for the appointment of liaison officers.
- Subrule 99(b) refers to 'such scrutineers as have been duly appointed under rule 99...'. It appears that this reference should be to rule 98 as it is rule 98, not rule 99, which provides for the appointment of scrutineers.
- Subrule 101(5) requires a Returning Officer to determine the outcome of an election 'by applying the principles set out in Schedule 2 or 3 to the Act'. The committee notes that there is no Schedule 3 to the Act, defined by rule 4 as the *Aboriginal and Torres Strait Islander Act 2005*. It appears that the reference should be to Schedule 2 or 2A to the Act.

In the interests of promoting the clarity and intelligibility of instruments, the committee expects that instruments and their accompanying ESs should be drafted with sufficient care to avoid potential confusion for anticipated users. In this instance, the committee is also concerned that these errors may have the potential to undermine the intended legal effect of the respective provisions. In the case of subrule 101(5), in particular, this would be very significant.

The committee requests the minister's advice in relation to the above drafting errors in the instrument.

Sub-delegation

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

Rule 166 of the instrument provides that:

Where under these Rules a power or function is conferred on the Electoral Commissioner, the Electoral Commissioner may by notice in writing delegate that power or function to the Deputy Electoral Commissioner or a member of staff of the Electoral Commission.

The ES provides no information about this provision.

The committee is concerned that the delegation includes no requirement that a delegate who exercises the powers of the Electoral Commissioner be at a certain level in the Australian Public Service, or possess any training or attributes to ensure the appropriate exercise of the powers. The committee's expectation is that delegation provisions include a requirement that the principal delegate be satisfied that a person to whom powers are sub-delegated has the relevant qualifications and attributes to properly exercise the powers.

The committee requests the minister's advice in relation to the broad sub-delegation of the powers delegated to the Electoral Commissioner under the instrument.

Offences: strict liability

The committee notes that the instrument contains two offences with elements of strict liability:

- Paragraph 154(1)(a) creates an offence where a person in a polling booth on polling day engages in conduct that disrupts, or tends to disrupt, the operation of the poll. Subrule 154(2) provides that strict liability applies to whether the conduct disrupts, or tends to disrupt, the operation of the poll; and
- Subrule 155(1) creates an offence where a person has been removed from a polling booth at the direction of the presiding officer given under subrule 154(3), and re-enters the booth without permission. Subrule 155(2) provides that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

In a criminal law offence the proof of fault is usually a basic requirement. Offences of strict liability remove the fault element that would otherwise apply. This means a person could be punished for doing something, or failing to do something, whether or not they have a guilty intent. This should only occur in limited circumstances.

Given the potential consequences for individuals of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences, that is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Offences Guide).¹⁶

The ES to the instrument provides no discussion of the strict liability offences in the instrument, nor any justification for their imposition. The statement of compatibility for the instrument similarly fails to identify and address the imposition of strict liability as a human rights issue.

The committee draws the minister's attention to the discussion of strict liability offences in the Offences Guide as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

The committee requests the minister's advice in relation to the justification for each of the strict liability offences within the instrument, and requests that the ES be amended to include that information.

16 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>.

Offences: evidential and legal burdens of proof on the defendant

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in their individual capacities, this infringement on well-established and fundamental rights is justified.

The committee notes that four provisions in the instrument set out a defence to an offence, but impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence:

- Subrule 73(3), defence to unlawfully entering a polling booth without permission if the person had permission from the Presiding Officer;
- Rule 135, defence to divulging information about the vote of a voter if done for the purposes of Part 4 (scrutiny of the votes);
- Subrule 139(2), defence to distributing certain electoral advertising material if the material is of specified kinds; and
- Subrule 144(2), defence to leaving voting directions in polling booths if the document is an official instruction displayed by proper authority.

Five further offences also specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:

- Subrule 140(3), defence to offences in relation to the publication and distribution of misleading or deceptive material if the person proves that they did not know, or could not be reasonably expected to know, that the thing was likely to mislead a voter;
- Subrule 140(4), defence to offences in relation to publication of false representations of ballot papers if the person proves that they did not know, or could not be reasonably expected to know, that the representation was likely to induce a voter to vote informally;
- Subrules 153(4) and (5), defences to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority; and
- Subrule 156(2), defence to offence of defamation of candidates if the person proves that he or she had reasonable grounds for believing and did in fact believe the statement made to be true.

The ES to the instrument provides no discussion of the reversed burdens of proof in the instrument, nor any justification for their imposition. The statement of compatibility for the instrument similarly fails to identify and address the reversal of the burden of proof as a human rights issue.

The committee's expectation is that the appropriateness of provisions which reverse evidential and legal burdens of proof should be explicitly addressed in the ES, with reference to the relevant principles as set out in the Offences Guide.

The committee requests the minister's advice in relation to the justification for the placement of the evidential or legal burdens of proof upon defendants in each of the instances noted above, and requests that the ES be amended to include that information.

Instrument	Vehicle Standard (Australian Design Rule 88/00 – Electric Stability Control (ESC) Systems) 2017 [F2017L01229]
Purpose	Specifies requirements for Electronic Stability Control systems on passenger cars and light commercial vehicles
Authorising legislation	<i>Motor Vehicle Standards Act 1989</i>
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 of documents

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

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.

In this regard, the committee notes that the instrument appears to incorporate a number of documents. These include:

- Consolidated Resolution on the Construction of Vehicles (R.E.3.), document ECE/TRANS/WP.29/78/Rev.4 [Appendix A, paragraph 1.1 and footnote 1];
- American Society for Testing and Materials (ASTM) E1136 and ASTM Method E1337-90 [Appendix A, paragraph 8.2.2.1];
- 'Appendix 2 to Annex 6 of Regulation No. 13-H' [Appendix A, paragraph 8.2.2.2];
- 'the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2)' [Appendix A, paragraph 11]; and
- ISO 15037 Part 1:2005: General conditions for passenger cars and Part 2:2002: General conditions for heavy vehicles and buses [Appendix A, Annex 4, paragraph 2.1].

Neither the instrument nor the ES states the manner in which these documents are incorporated.

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 requests the minister's advice 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.

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.

17 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.

With reference to the above, the committee notes that the instrument incorporates several documents. However, neither the instrument nor the ES indicates where the following documents can be freely accessed:

- American Society for Testing and Materials (ASTM) E1136 and ASTM Method E1337-90;
- 'Appendix 2 to Annex 6 of Regulation No. 13-H';
- 'the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2)'; and
- ISO 15037 Part 1:2005: General conditions for passenger cars and Part 2:2002: General conditions for heavy vehicles and buses.

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*.

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 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 instrument, and requests that the instrument and/or ES be updated to include this information.

18 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.

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.¹⁹

Instrument	ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]
Purpose	Modifies the application of the <i>National Consumer Credit Protection Act 2009</i> to notionally insert new provisions prohibiting flexible credit cost arrangements
Authorising legislation	<i>National Consumer Credit Protection Act 2009</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Matters 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 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

¹⁹ See www.aph.gov.au/regords_monitor.

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'.²⁰

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.²¹

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

21 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.

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.²²

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that regulations 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.²³

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.*²⁴ [emphasis added]

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

23 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>.

24 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).

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 requested 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.

Minister's response

The Minister for Revenue and Financial Services advised:

Prior to making the decision to make this legislative instrument, ASIC consulted broadly with industry bodies on the problems raised by flex commissions; possible regulatory options, including the appropriate penalties; and on the form of the instrument itself.

This included extensive consultation with key industry bodies, such as the car finance sector and loan distribution sector, lenders, car dealers and consumer groups (both in writing and in numerous meetings).

There were two rounds of written submissions across 2016 on the question of whether or not flex commissions should be prohibited. A detailed Regulation Impact Statement was prepared on the basis of these responses.

There was a further round of written submissions in the first half of 2017 in respect of the form of the legislative instrument, and ongoing engagement with a number of affected entities (in particular motor vehicle finance lenders who would be subject to the prohibition and the industry body representing car dealers) during the finalisation of the terms of the instrument.

In these consultations, there was broad (but not unanimous) agreement that: flex commissions caused harm; it was desirable to have a collective and competitively neutral response to address the 'first mover problem'; and if ASIC did prohibit flex commissions, there was a substitution risk, in that car dealers may seek to recoup lost revenue by charging higher dealer fees.

The penalties included in the instrument reflect this broad agreement by stakeholders. Given that they were explicitly consulted on and agreed to by stakeholders, their inclusion in the instrument was considered appropriate rather than inclusion in the primary legislation.

Additionally, ASIC's use of its modification powers was seen to be the most appropriate mechanism for implementing these changes given their effectiveness in providing a timely response to concerns surrounding flex commissions.

Given the high volume of work currently being undertaken as a result of the Government's extensive legislative agenda in relation to the financial services sector, the use of an ASIC legislative instrument is the most effective way in addressing this issue in the short-term.

ASIC will be monitoring credit licensees regarding the annual percentage rate and the credit fees and charges under their contracts. Should any operational issues arise, ASIC will be in a position to implement any necessary changes to the instrument in the short-term, while any possible legislative change can be considered by the Government.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's view that significantly changing the law and imposing high penalties in the instrument, rather than in primary legislation, is appropriate because these provisions reflect broad agreement with stakeholders.

The committee emphasises that its concerns about the instrument are not related to the merits of the policy being implemented, nor the level of consultation with stakeholders. Rather, the committee's comments were based on long-standing principles of parliamentary democracy and the rule of law, under which neither fundamental changes to the law nor high civil and criminal penalties should be imposed by delegated legislation, which is not subject to the full process of parliamentary debate and consideration. The committee considers that this is especially the case where there is no express provision in the enabling legislation authorising the creation of a criminal offence in the delegated legislation.

The committee further notes the minister's advice that a legislative instrument was seen to be the most appropriate mechanism for responding to its concerns about flexible credit cost commissions in a timely way. In this regard, the committee considers that the minister's comments regarding the significance of this problem could equally be taken as supporting a conclusion that the matters are more appropriately subject to the parliament's full deliberative process. The committee is concerned that citing timeliness to justify the use of delegated legislation in these circumstances should not set a precedent for other cases in which, given the uncertainty and timeframes associated with the full legislative process, governments may regard it as preferable or convenient to effect significant change to the law via delegated legislation.

The committee remains concerned that the minister's response does not address the absence of specific legal authority for the enactment of civil and criminal penalties. In this respect the committee reiterates its previous comments, including the analysis of legal experts 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'. The committee also notes its previous references to the clear and consistent advice of the Attorney-General's Department and the Office of Parliamentary Counsel in that regard.

The committee requests the further advice of the minister regarding the specific legal authority for the imposition of civil and criminal penalties, including penalties of up to two years' imprisonment, in the instrument.

Advice only

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

Instrument	ASIC Client Money Reporting Rules 2017 [F2017L01333]
Purpose	Imposes record-keeping, reconciliation and reporting requirements on Australian financial services licensees in relation to their use of derivative retail client money
Authorising legislation	<i>Corporations Act 2001</i>
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)(d) and (a)

Matters more appropriate for parliamentary enactment: penalties

The instrument establishes a series of requirements for financial services licensees. These include requirements in relation to record-keeping, reconciliation and reporting, as well as requirements to establish, maintain and implement certain policies and procedures. Nine provisions of the instrument impose civil penalties, of up to \$1 million each, for non-compliance.

The instrument is made under section 981J of the *Corporations Act 2001* (Corporations Act). Section 981J was inserted into the Corporations Act by the *Treasury Laws Amendment (2016 Measures No. 1) Act 2017* (Treasury Act). The Treasury Act also inserted section 981K into the Corporations Act, which provides (in subsection 981K(3)) that the rules may include a penalty amount for a rule, and that the penalty amount must not exceed \$1 million.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) previously considered Sections 981J and 981K of the Corporations Act.²⁵ The Scrutiny of Bills committee noted that section 981K(3) represents a significant delegation of

²⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2017*, pp. 42-44.

legislative power, in that it allows rules (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose a very significant civil penalty. The Scrutiny of Bills committee expressed the view that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

The Scrutiny of Bills committee noted explanations provided in the explanatory memorandum as to why rules can be made setting a maximum civil penalty of \$1 million, and why the rules are provided in delegated legislation. Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of the proposed delegation of legislative power.²⁶

The committee's views accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts enabling delegated legislation to impose significant financial penalties. While the committee acknowledges that the imposition of the penalty in the instrument is in accordance with its empowering statute, the committee's view remains that significant financial penalties are more appropriate for enactment in primary legislation. Where significant penalties are imposed in delegated legislation, the committee would expect a detailed justification. In this case, the committee notes that the ES to the instrument does not include a justification for the magnitude of the penalties imposed.

In light of the issues raised by the Scrutiny of Bills committee in relation to sections 981J and 981K of the Corporations Act, the committee takes this opportunity to note the use of those provisions to impose significant penalties in delegated legislation.

The committee draws the imposition of significant penalties in delegated legislation to the attention of the Senate.

Drafting: anticipated authority

Section 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 instrument is made under subsection 981J(1) of the Corporations Act. That provision will be inserted by item 14 of Schedule 5 to the Treasury Act.

The instrument was made and registered on the Federal Register of Legislation on 9 October 2017. Section 1.1.3 of the instrument provides that the instrument commences on the later of: the day after it is registered on the FRL, or the day

26 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2017*, p. 43.

Schedule 5 to the Treasury Act commences. Schedule 5 to the Treasury Act is to commence on 4 April 2018. Therefore, the instrument will also commence on that date.

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 ES.

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

Instrument	FEE-HELP Guidelines 2017 [F2017L01286]
Purpose	Specifies professional occupations and assessing bodies for the purposes of FEE-HELP for overseas-trained professionals undertaking bridging studies to become accredited in Australia; and specifies requirements for Open Universities Australia to offer Higher Education Loan Program assistance
Authorising legislation	<i>Higher Education Support Act 2003</i>
Portfolio	Education and Training
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)

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 guidelines appear to incorporate version 1.2 of the Australian and New Zealand Standard Classification of Occupations (ANZSCO), which is described in the instrument as 'the classification system that provides for the standardised collection, analysis and dissemination of occupation data administered by the Australian Bureau of Statistics'. However, neither the instrument nor the ES indicates how this document may be obtained.

In this case the committee has observed that the document is available for free online.²⁷ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²⁸

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

27 Australian Bureau of Statistics, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/1220.02013,%20Version%201.2?OpenDocument> (accessed 8 November 2017).

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

Instrument	Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 3) Regulations 2017 [F2017L01210] Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 3) Regulations 2017 [F2017L01209]
Purpose	Establish legislative authority for spending activities administered by the Department of Communications and the Arts and the Department of Defence, respectively
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
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)(d)

Parliamentary scrutiny: ordinary annual services of 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 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.²⁹ 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. The committee's considerations in this regard are set out in the guideline relating to the Financial Framework (Supplementary Powers) Regulations (FF(SP) Regulations) published on the committee's website.³⁰

The Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 3) Regulations 2017 adds new item 245 to Part 4 of Schedule 1AB to the FF(SP) Regulations, establishing legislative authority for 'Television Coverage for Women's Sport and Niche Sport'. The ES explains that this activity will provide grant funding of \$30 million over four years via direct offer to Fox Sports Australia Pty Limited, to develop relationships with relevant sporting bodies and cultivate an ongoing audience for under-represented sports, build their profile, boost participation, and improve sponsorship opportunities. Funding for the activity commenced in 2017-18, under the department's Program 1.1, Digital Technologies and Communications.

The Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 3) Regulations 2017 adds new item 246 to Part 4 of Schedule 1AB to the FF(SP) Regulations, establishing legislative authority for the US-Australia International Multidisciplinary University Research Initiative (AUSMURI). The ES explains that the initiative will provide funding support of up to \$25 million over nine years for Australian universities to collaborate with their US counterparts on projects designated by the US Department of Defense under its Multidisciplinary University Research Initiative (MURI). Funding for the initiative commenced in 2017-18, under the department's Program 2.4, Vice Chief of the Defence Force.

It appears to the committee that the above programs are new policies not previously authorised by special legislation; and that the initial appropriation in

29 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.

30 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.

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 draws this matter to the attention of the minister, the Senate and the relevant Senate committees.

Instrument	Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulations 2017 [F2017L01208]
Purpose	Establishes legislative authority for spending on two activities administered by the Department of Education and Training
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
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)(c)

Merits review

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 a review of their merits by a judicial or other independent tribunal.

The instrument adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations), establishing legislative authority for activities in the education sector. One of these is item 252, Rural and Regional Enterprise Scholarships. These scholarships will be provided to students from rural and regional areas for education and training in science, technology, engineering or mathematics (STEM), and for internships related to those studies.

The ES states that:

Decisions made in connection with the [scholarship] program will not be subject to merits review as funding will be provided to a contracted service provider selected through a procurement process ...The service provider will determine which applicants will be offered scholarships.

It is not clear to the committee that the contracting out of decision-making to a private company is an established ground for the exclusion of merits review.³¹ The committee notes that the company will be allocating public funds for public services, and the same accountability mechanisms should therefore apply as those which apply to public decision-makers. The committee notes that the Administrative Review Council has expressed the view that:

when a contractor exercises statutory decision-making powers...the decisions of the contractor should be subject to merits review and agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision taken by a merits review tribunal reviewing the contractor's decision.³²

The committee further understands that in other areas of government, such as the migration sector, merits review has been provided for the decisions of private companies contracted to provide government services.

Another reason stated in the ES for the exclusion of merits review is that '[t]he scholarships will not be legal entitlements, and scholarship decisions will not be decisions under an enactment that affects any person's legal rights or liabilities.' Again, it is not clear to the committee that the nature of the decisions as discretionary rather than based in legal entitlements is an established ground for the exclusion of merits review.³³ On the contrary, the committee recognises that one reason for merits review is to ensure that there is accountability for discretionary decisions. The fact that decisions are not made under an enactment has similarly not previously been considered a basis for excluding merits review.

The committee notes, however, that the ES also articulates other reasons for the exclusion of merits review. Reasons other than those discussed above – such as that the scholarship scheme will allocate finite resources between competing applicants – which the committee does regard as reflecting established grounds which may justify the exclusion of merits review.

31 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (accessed 13 November 2017).

32 Attorney-General's Department, Administrative Review Council, *Report to the Attorney-General: The Contracting Out of Government Services*, Report No. 42, August 1998, <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo42.aspx>, Recommendations 20 and 21 (accessed 13 November 2017).

33 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (accessed 13 November 2017).

The committee draws its concerns about reliance on certain grounds to justify the exclusion of merits review to the minister's attention.

Instrument	Health Insurance (Accredited Pathology Laboratories – Approval) Principles 2017 [F2017L01291]
Purpose	Sets out the criteria for different categories of accredited pathology laboratories, and specifies the standards that must be met as part of the accreditation assessment for each category of laboratory and kind of service provided
Authorising legislation	<i>Health Insurance Act 1973</i>
Portfolio	Health
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

Section 5(2) of the instrument provides that, in the instrument, independent body means:

- (a) NATA;³⁴ and
- (b) in relation to a category M laboratory – any other organisation approved under subsection 5(2) by the Minister.

However, the power of the Minister to approve an organisation as an independent body in relation to a category M laboratory appears in subsection 5(3) of the instrument, not in subsection 5(2). The committee notes that the correct reference to subsection 5(3) appears in the ES.

In the interests of promoting the clarity and intelligibility of instruments, the committee expects that instruments and their accompanying ESs should be drafted with sufficient care to avoid potential confusion for anticipated users.

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

34 Subsection 5(2) of the instrument provides that NATA refers to the National Association of Testing Authorities, being the body recognised by the Commonwealth through a Memorandum of Understanding as the national body in Australia for laboratory accreditation.

Instrument	Reporting of event-based transfer balance account information in accordance with the Taxation Administration Act 1953 [F2017L01273]
Purpose	Sets out the timeframe for providing reporting of transaction data relating to members of superannuation funds and life insurance companies
Authorising legislation	<i>Taxation Administration Act 1953</i>
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)

Incorrect classification of legislative instrument as exempt from disallowance

The instrument is made under sections 390-5 and 390-20 of Schedule 1 to the *Taxation Administration Act 1953*. The instrument was incorrectly classified as exempt from disallowance when first received by Parliament and by the committee.

While the committee understands that the instrument was re-classified as disallowable prior to its tabling in Parliament, the committee remains concerned about the classification process generally, and the potential for classification errors to hinder the effective oversight of instruments by Parliament.

The committee will continue to monitor this issue.

The committee draws this matter to the attention of ministers, instrument-makers, and the Office of Parliamentary Counsel.

Instrument	Variation to Licence Area Plan – Sale Radio – 2017 (No. 1) [F2017L01292]
Purpose	Varies the characteristics, including technical specifications, of radio broadcasting services in the Sale area of Victoria
Authorising legislation	<i>Broadcasting Services Act 1992</i>
Portfolio	Communications and the Arts
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

Section 2 of the instrument provides that the instrument commences at the same time as the Broadcasting Services (Technical Planning) Guidelines 2017 (Guidelines). The instrument was registered on the Federal Register of Legislation on 28 September 2017, and the Guidelines commenced on 30 September 2017.

However, in its description of section 2, the ES to the instrument states that:

This section provides for the instrument to commence at the start of the day after it is registered on the Federal Register of Legislation.

The committee understands that the instrument commenced on 30 September 2017, in accordance with the commencement date provided for in the instrument. However, the committee expects that ESs should be drafted with sufficient care to avoid potential confusion for anticipated users of instruments which may be caused by discrepancies between the text of an instrument and its ES.

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

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	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	<i>Corporations Act 2001</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

The committee previously commented on two matters as follows:

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)).

The committee noted that the (shared) ES for these instruments provides no information regarding consultation.

¹ See www.aph.gov.au/regords_monitor.

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

The committee requested the minister's advice as to the nature of consultation (if any) that was undertaken on the instrument; and requested 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 noted 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 drew the above drafting error to the minister's attention.

Minister's response

The Minister for Revenue and Financial Services advised:

On 24 August 2017, ASIC made two legislative instruments that together amend 14 of ASIC's legislative instruments to ensure they have a single, consistent definition of an 'approved foreign market'. The instruments also add two new markets (Euronext Brussels and Euronext Lisbon) to the definition of an approved foreign market and update the names of a number of the markets in the definition that have merged or changed name.

The substantive effect of the instruments is to add two markets to ASIC's list of an approved foreign market. The addition of these two markets is consistent with ASIC's policy in *Regulatory Guide 72: Foreign securities disclosure relief*, which explains at paragraphs 56 to 58 that ASIC may approve additional foreign markets and sets out the criteria ASIC will take into account for that purpose. The other changes made by the instruments are technical in nature. Consequently, ASIC determined that these changes would not benefit from public consultation.

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

ASIC intends to lodge a replacement explanatory statement outlining its approach to consultation for the legislative instruments.

The Committee also noted that the explanatory statement to the instruments does not cite section 951B of the *Corporations Act 2001* (the Act) as the source of authority for ASIC to modify the application of Part 7.7 of the Act. The reference to Part 7.7 in paragraph 5 of the ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 is an error, as none of the instruments amended by instrument 2017/669 uses section 951B of the Act as a source of power. ASIC will correct this drafting error in a subsequent amending instrument.

Committee's response

The committee thanks the minister for her response and notes the minister's undertaking to register a replacement ES outlining ASIC's approach to consultation for the instruments.

The committee also notes the minister's undertaking to address the drafting error in a subsequent amendment to the relevant instrument.

The committee has concluded its examination of the instruments.

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	<i>Australian Securities and Investments Commission Act 2001; Corporations Act 2001</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Drafting

The committee previously commented as follows:

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 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.³ The ES contains no information with regard to repeal of the previous ASA 250.

The committee was interested in the effect, if any, of having two auditing standards simultaneously in force on the same subject matter. The committee was 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 requested the minister's advice as to:

- the effect, if any, of having two auditing standards in force on the same subject; and
- the intention of the government, if any, with regard to repealing the previous version of ASA 250.

Minister's response

The Minister for Revenue and Financial Services advised:

Regarding the Committee's query on 'the effect, if any, of having two auditing standards in force on the same subject', the Auditing and Assurance Standards Board (AUASB) has in force multiple principal versions of individual standards, as each one applies to different financial reporting periods in comparison with any other principal version of the standard. The financial reporting period to which a principal standard applies is set out in the Operative Date paragraph of an individual standard. This has been the consistent approach across AUASB's suite of standards since becoming legislative instruments in 2006. In relation to ASA 250:

- October 2009 principal version (amended to June 2011):
The standard's operative date is for financial reporting periods commencing on or after 1 January 2010. The issue of the May 2017 principal version means that the 2009 principal version applies to financial reporting periods commencing on or after 1 January 2010 but before 1 January 2018;

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

- May 2017 principal version: The standard's operative date is for financial reporting periods commencing on or after 1 January 2018 with early adoption permitted.

Auditing Standard ASA 100 *Preamble to AUASB Standards* includes the following paragraphs in relation to the operative date of an AUASB Standard:

Operative Date

25. The operative date stipulates the date from which the AUASB Standard is to be applied. The operative date is stated in relation to the commencement date of the financial reporting period. The requirements of an AUASB Standard remain in force until:

- a. the operative date of any amendment to those requirements;
- b. in relevant circumstances, the early adoption of such amendment; or
- c. the AUASB Standard is withdrawn by the AUASB.

26. When early adoption of an AUASB Standard is allowed, a statement to that effect is included in the operative date paragraph of the AUASB Standard.

Financial reports may be required to be prepared for prior financial reporting periods. In order [to] facilitate the conduct of an audit for these periods, the earlier principal version of a standard does not cease, but remains applicable to audits to the covered financial reporting periods.

Regarding the Committee's query on 'the intention of the government, if any, with regard to repealing the previous version of ASA 250', earlier principal versions of standards are of enduring importance. While not common, in the event that a need arises for an audit in relation to a prior financial reporting period, the audit must be conducted in accordance with the standards that applied at that time. Accordingly, the AUASB did not intend to repeal the previous version of ASA 250, as no repeal is required. The use of the wording 'replace' in the Explanatory Statement and in the instrument itself is not intended to be read as a 'repeal' of the previous principal version of the standard.

Committee's response

The committee thanks the minister for her response.

The committee notes the advice that the financial reporting period to which a principal AUASB standard applies is set out in the 'operative date' paragraph of an individual standard, and that earlier principal versions of standards are of enduring importance for auditing purposes.

Further, the committee notes the advice that the use of the wording 'replace' in the ES and in the instrument itself is not intended to be read as a 'repeal' of the previous principal version of the standard.

The committee considers that a clearer explanation of the interaction between new and previous standards, including reference to the operative date information provided in Auditing Standard 100, could have been usefully included in the ES.

The committee has concluded its examination of the instrument.

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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Statements of compatibility

The committee previously commented as follows:

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

Minister's response

The Minister for Foreign Affairs advised:

As the Committee notes, a statement of compatibility with human rights (SCHR) for each of these two instruments has been published on the Federal Register of Legislation. However, due to the method of lodgement of the two instruments and their associated documents with the Office of Parliamentary Counsel, each SCHR was treated as a separate document from the relevant instrument's explanatory statement. Accordingly, the explanatory statements that were tabled in Parliament did not include the corresponding SCHRs.

I have instructed the Department of Foreign Affairs and Trade to lodge an explanatory statement containing the SCHR for each of these two instruments with the Office of Parliamentary Counsel. Copies of these two replacement explanatory statements containing SCHRs are enclosed with this letter for the Committee's perusal as requested.

Committee's response

The committee thanks the minister for her response and notes that replacement ESs that contain statements of compatibility with human rights have been received by the committee. The committee notes the minister's undertaking to register the replacement ESs on the Federal Register of Legislation so that they may be tabled in Parliament.

The committee has concluded its examination of the instruments.

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	<i>Competition and Consumer Act 2010</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Description of consultation

The committee previously commented as follows:

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

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*.⁴ In this case, the committee was unable to discern from the

4 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.

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

Minister's response

The Minister for Infrastructure and Transport advised:

The Department [of Infrastructure and Regional Development] has advised that stakeholders were provided with a copy of the proposed new instrument, along with an analysis of the proposed changes, prior to finalisation of the instrument. The stakeholders also had the opportunity to provide feedback to the Department on the proposed new instrument. The Department has further advised that the Explanatory Statement will be replaced with a new one that clarifies how the consultation occurred.

Committee's response

The committee thanks the minister for his response and notes that a replacement ES containing a description of the consultation undertaken in preparing the instrument has now been registered and published on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	Determination 2017/15: Official Travel by Office Holders [F2017L01036]
Purpose	Revokes and supercedes Determination 2016/07 – Official Travel by Office Holders, updating the provisions and allowances for public office holders travelling on official business
Authorising legislation	<i>Remuneration Tribunal Act 1973</i>
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 4 September 2017) Notice of motion to disallow currently must be given by 16 November 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 12 of 2017</i>

Manner of incorporation

The committee previously commented as follows:

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

With reference to the above, the committee noted that at paragraph 3.11 the instrument appears to incorporate the ‘Taxation Determination TD 2017/19 (or its successor)’.

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

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁵

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

Minister's response

The Minister for Employment advised:

I am advised that the Remuneration Tribunal has been requested to issue an amending determination at its next formal meeting on 26 October 2017 that will delete the reference to '(or its successor)' in Clause 3.11 of Remuneration Tribunal Determination 2017/15: Official Travel by Office Holders.

The attached revised Explanatory Statement has been amended consistent with the Committee's Guideline on Incorporation. In particular I draw your attention to paragraphs 6-11 of the Explanatory Statement. The Tribunal's secretariat will arrange for its registration on the Federal Register of Legislative Instruments.

Relevant excerpt from the ES:

9. In conducting its travel review the Remuneration Tribunal exercises its powers under sub-sections 5(2A), 7(3) and 7(4) of the *Remuneration Tribunal Act 1973*. In making Remuneration Tribunal Determination 2017/15 the Tribunal decided that the arrangements set out at Table 9 (Table of countries) of TD 2017/19 are appropriate for office holders in its jurisdiction to cover meal and incidental expenses incurred while travelling overseas. Rather than replicate the detailed tables and related allowance rates in its determination the Tribunal has incorporated these by reference to TD 2017/19. The Tribunal has aligned the cost groups contained in TD 2017/19 to the travel tiers that it sets from time to time for office holders.

10. Taxation Determination TD 2017/19 is available online for free at <http://law.ato.gov.au/atolaw/view.htm?docid=%22TXD%2FTD201719%2FNAT%2FATO%2F00001%22>.

Committee's response

The committee thanks the minister for her response and notes that an amending instrument has now been made and registered on the Federal Register of Legislation (Determination 2017/19: Official Travel by Office Holders [F2017L01409]), which removes the words 'or its successor' from clause 3.11 of the principal instrument. The committee also notes that a replacement ES to the principal instrument addressing the committee's concerns has been registered and published on the Federal Register of Legislation.

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

The committee has concluded its examination of the instrument.

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	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Constitutional authority for expenditure

The committee previously commented as follows:

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

The committee notes that, in *Williams No. 2*,⁶ the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ESs for 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

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

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.⁷

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 requested 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.

Minister's response

The Minister for Finance, on behalf of the Minister for Health, advised:

External affairs power

Item 242 references the external affairs power (section 51(xxix) of the Constitution). The external affairs power supports legislation which implements a treaty to which Australia is a party. In particular, the power supports Commonwealth legislation:

- to implement the particular terms of a relevant treaty
- providing for the partial implementation of a treaty.

Many treaties to which Australia is a party leave it to the individual parties to choose the precise measures they will take to fulfil their obligations.

Item 242 relates to a measure being taken to fulfil Australia's obligations under the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (ICESCR) and the *Convention on the Rights of the Child* [1991] ATS 4 (CRC).

Article 12(1) of the ICESCR recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Pursuant to Article 2(1), Australia relevantly undertakes to 'take steps... to the maximum of its available resources, with a view to achieving

7 *Victoria v Commonwealth* (1996) 187 CLR 416, at 486. For further discussion of this point see 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.

progressively the full realization' of this right by all appropriate means. Article 12(2) provides a non-exhaustive list of 'steps' to be taken by the State Parties to achieve the full realisation of the right to health recognised in Article 12(1).

The particular steps listed in Article 12(2) define with a degree of specificity that which the State Parties to the ICESCR are obliged to do with respect to the right to health recognised in Article 12(1). One category of steps listed in Article 12(2) is 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' (Art 12(2)(c)). The Prime Minister's Walk for Life Challenge is directed at preventing, treating or controlling diseases.

Article 24(1) of the CRC recognises the 'right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. Art 28(1) provides 'States Parties recognize the right of the child to education'. Pursuant to Article 4, Australia is required to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'.

The particular steps listed in Article 24(2) define with a degree of specificity that which the State Parties to the CRC are obliged to do with respect to the right to health recognised in Article 24(1). The steps listed in Article 24(2) include '[ensuring] 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 24(2)(e)) and '[developing] preventive health care' (Article 24(2)(f)).

The Prime Minister's Walk for Life Challenge is directed in part to ensuring that parents and children are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition.

The objectives listed in Article 29(1) define with a degree of specificity that which the State Parties to the CRC agree to do with respect to the right to education recognised in Article 28(1). The steps listed in Article 29(1) include ensuring that education is directed to 'the development of the child's ... mental and physical ability to their fullest potential' (Article 29(1)(a)). The Prime Minister's Walk for Life Challenge is directed in part to ensuring that education is directed to the development of the child's mental and physical ability.

Committee's response

The committee thanks the ministers for their response and notes the government's view as to the constitutional authority for the Prime Minister's Walk for Life in relation to the obligations imposed by the international human rights treaties cited. The committee is cognisant that questions of constitutional authority are ultimately for the High Court to determine. The committee also notes, however, that the minister's response did not address the discrepancy between the reliance upon

Australia's obligations under international human rights law as the constitutional authority for the initiative, and the view expressed in the statement of compatibility for the instrument that it engages no human rights.

The committee has concluded its examination of the instrument. However, the committee draws its observations in relation to the constitutional authority for the Prime Minister's Walk for Life initiative to the attention of the Senate.

Instrument	Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017 [F2017L01153]
Purpose	Amends the Healthcare Identifiers Regulations 2010 to reinstate provisions unintentionally removed from the <i>Healthcare Identifiers Act 2010</i> , permitting use and disclosure of healthcare providers' healthcare identifiers
Authorising legislation	<i>Healthcare Identifiers Act 2010</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Matters 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 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 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 sought 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.

Minister's response

The Minister for Health advised:

The Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017 (the Amendment Regulations) reinstate, in part, authorisations that were inadvertently removed as part of the 2015 changes [to the *Healthcare Identifiers Act 2010* (HI Act)]. The absence of these authorisations began having adverse effects on the effectiveness of healthcare identifiers – for example, primary health networks could not collect healthcare providers' healthcare identifiers as part of managing healthcare delivery in their region, which is important in enabling primary health networks to work together to facilitate and evaluate the delivery of healthcare. It also created a barrier to the delivery of certain types of mobile apps that could connect to the My Health Record system – apps that would otherwise help individuals to manage their health information.

The Amendment Regulations were made as an interim measure to provide these much needed authorisations until they could be reinstated in their entirety through amendments to the HI Act. A review of the HI Act is scheduled to begin in coming months for delivery by November 2018 and it is likely to recommend amendments to the HI Act. It is intended that the removed authorisations be reinstated as part of those amendments as soon as practicable after the review is delivered.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that the Amendment Regulations were made as an interim measure and that the Act is to be reviewed by November 2018, which is likely to result in amendments to the Act, providing an opportunity to reinstate the relevant provisions into the Act.

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

The committee has concluded its examination of the instrument.

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	<i>Health Insurance Act 1973</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Personal rights and liberties: privacy

The committee previously commented as follows:

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 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 requested 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.

Minister's response

The Minister for Health advised:

I note the Committee's request for information around the nature of the mental health assessment required to be conducted for amended antenatal items 16590 and 16591 and new postnatal item 16407. The Government does not intend to prescribe the method by which practitioners undertake mental health assessments of their patients, as this should be a matter of clinical judgement based on the individual needs of the patient. However, it is recommended that when conducting mental health assessment screening practitioners have regard to the appropriate and current Australian Clinical Practice guidelines.

Alcohol or drug misuse are significant risk factors that can negatively affect both the mental health of the patient and the wellbeing of infants. As part of an antenatal (16590 and 16591) or postnatal (16407) service, it is expected that a medical practitioner be required to enquire about the mental wellbeing of the patient and undertake a more comprehensive assessment where agreed to by the patient. This would include a discussion about factors that pose a significant risk to mental health, such as drug and alcohol use and domestic violence. This would then enable monitoring or referral for appropriate assessment, support and treatment, and facilitate education about the inherent risks of drug and alcohol misuse in pregnancy.

It is not intended that the screening for drug and alcohol use would require diagnostic testing of the patient. It is also not intended that a patient would be ineligible for Medicare benefit if the patient declines to receive a comprehensive mental health assessment. In that scenario, a Medicare benefit would still be payable providing the medical practitioner had enquired about the patient's mental wellbeing. This is outlined in the explanatory notes that are available on www.mbsonline.gov.au to assist practitioners when seeking information

and guidance around the billing of items under Medicare. A copy of this note is attached.

I acknowledge that the explanatory statement for this instrument is not clear with regards to consent. My Department will look to correct this in the explanatory statement when the Health Insurance (General Medical Services Table) Regulations are remade in mid-2018.

Committee's response

The committee thanks the minister for his response.

The committee notes the advice that the method by which practitioners undertake mental health assessments of their patients is not prescribed, but should adhere to Australian Clinical Practice guidelines, and that it is not intended that the screening for drug and alcohol use would require diagnostic testing of patients, or that they would be ineligible for Medicare benefit if they declined to receive a comprehensive mental health assessment.

The committee notes the minister's undertaking to amend the ES when the regulations are remade in mid-2018, to provide a clarification of the issues that the committee has raised in relation to patients' consent.

The committee has concluded its examination of the instrument.

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 sunseting
Authorising legislation	<i>Legislation Act 2003</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Exemptions from sunseting

The committee previously commented as follows:

Under section 50 of the *Legislation Act 2003* (Legislation Act) all legislative instruments registered on the Federal Register of Legislation⁸ after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.⁹ This process is called 'sunseting'.

The purpose of sunseting 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 sunseting 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) Regulation 2015. The Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017 amend the

8 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.

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

principal regulation 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 sunseting. 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 Act 2001*.

In light of the implications for periodic review and parliamentary oversight of delegated legislation, where regulations provide exemptions from sunseting 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 sunseting;
- the instrument is part of an intergovernmental scheme; or
- the instrument is subject to a more rigorous statutory review process.¹⁰

The committee notes, however, that some of the arguments for exemption from sunseting 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 sunseting 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 sunseting for instruments that facilitate an intergovernmental 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

¹⁰ See Attorney-General's Department, *Guide to Managing Sunseting of Legislative Instruments*, December 2016, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunseting-of-legislative-instruments-december-2016.pdf>, p. 34.

scheme was not a valid reason for exempting Corporations Act instruments from sunseting.

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 sunseting 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 sunseting 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 sunseting to specifically address how Parliament will retain oversight of the review process of the relevant delegated legislation.

The committee requested the minister's advice as to:

- why it is appropriate to exempt significant pieces of delegated legislation, including the Corporations Regulations 2001, from sunseting 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.

Minister's response

The Attorney-General advised:

Exempting significant instruments in delegated legislation

I acknowledge that the Committee, in considering whether the instrument contains matter more appropriate for parliamentary enactment, remains concerned about the use of delegated legislative power to exempt substantial pieces of delegated legislation from the sunseting framework.

As outlined in my letter to the Committee of 4 October 2017 in relation to the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 (the 2016 Exemptions Regulations), it is critical that the sunseting regime remain flexible, in order to ensure that it does not undermine the proper functioning of government. For this reason, the *Legislation Act 2003* (the Legislation Act) enables exemptions by legislative instrument, and the Legislation

(Exemptions and Other Matters) Regulation 2015 (the 2015 Exemptions Regulation) provides a list of all specific exemptions from sunseting. The combined effect of these provisions is to ensure that all exemptions are identified in a clear and transparent manner, and that all new exemptions are considered in light of the express purpose of Part 4 of Chapter 3 of the Legislation Act and are granted on consistent grounds.

Accordingly, when deciding whether or not to grant an exemption from sunseting, I give careful consideration to whether at least one of the following five longstanding policy grounds is made out in relation to the relevant instrument:

- 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 sunseting;
- the instrument is part of an intergovernmental scheme; or
- the instrument is subject to a more rigorous statutory review process.

I am satisfied that at least one ground has been made out in relation to the instruments included in the 2017 Exemptions Regulations.

The Corporations Regulations 2001

In respect of the proposed exemption of the Corporations Regulations 2001 (the Corporations Regulations) more specifically, I acknowledge the Committee's observation that subsection 54(1) of the Legislation Act exempts legislative instruments from sunseting if the enabling Act facilitates an intergovernmental scheme involving the Commonwealth and one or more States, except if the relevant Act is the *Corporations Act 2001* (the Corporations Act). The effect of subsection 54(1) of the Legislation Act is that instruments made under the Corporations Act are not automatically exempted from the sunseting framework by reason only that the instrument facilitates the establishment or operation of an intergovernmental scheme.

However, I do not consider that this prevents an instrument made under the Corporations Act from otherwise being exempted from sunseting through delegated legislation. This is particularly so as there is no suggestion that Parliament intended that subsection 54(1) should override the operation of paragraph 54(2)(b). As such, while the Corporations Regulations are not automatically exempt from sunseting under subsection 54(1), I consider that Parliament's intention was that they could nonetheless be exempted by other means, including through delegated legislation.

The Corporations Regulations do not merely form part of an 'intergovernmental scheme involving the Commonwealth and one or

more States'. They are integral to the Corporations Agreement 2002 between the Australian Government and State and Northern Territory Ministers on corporate regulation in Australia (the Agreement) and, ordinarily, amendments to the Corporations Regulations must be approved by the Legislative and Governance Forum for Corporations. Allowing the Corporations Regulations to sunset would bypass this requirement, contrary to the Commonwealth's obligations under the Agreement.

Further, allowing the Corporations Regulations to sunset would significantly undermine commercial certainty, as the Agreement is intended to be an enduring arrangement and is integral to long-term decision making by the relevant stakeholders. These stakeholders include corporations, investors, banks and other parties.

I acknowledge the Committee's comment that problems or uncertainties caused by sunseting could be avoided by reviewing and remaking the relevant instrument prior to its scheduled repeal. However, I consider that this approach is not practicable (or, indeed, even necessarily desirable) in respect of many of the delegated legislative instruments included in the 2017 Exemptions Regulations given their scope and complexity. This is particularly so in the case of the Corporations Regulations.

I also note that the Corporations Regulations have been subject to regular amendment since they were made, providing an opportunity for parliamentary oversight. However, remaking the Corporations Regulations in their entirety would be unnecessarily costly for both the Commonwealth and relevant stakeholders, in circumstances where the regulations are otherwise considered fit for purpose.

I consider these factors provide further strong justification for exempting the Corporations Regulations from sunseting.

Parliamentary oversight of exempted instruments

The Committee has sought advice about Parliament's oversight of each of the instruments exempted from sunseting by the 2017 Exemptions Regulations. As noted by the Committee, the purpose of sunseting is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed. Where an instrument is remade, this provides Parliament with the opportunity to maintain oversight of legislative instruments. However, this oversight is the by-product, rather than the purpose, of sunseting. It is not inconsistent with the purpose of sunseting to grant an exemption where one of the longstanding policy criteria justifying an exemption is met.

As stated above, when deciding whether or not to grant an exemption from sunseting, I give careful consideration to the key relevant question of whether at least one of the longstanding policy grounds that may justify an exemption from sunseting is met. In relation to the 2017

Exemptions Regulations, and as explained in the Explanatory Statement, I was satisfied that each exemption was justified on at least one of these grounds. Taking this approach ensures that clarity and consistency in relation to sunseting exemptions can be maintained.

Further, as the Committee is aware, and as stated in my correspondence to the Committee of 4 October 2017 in relation to the 2016 Exemptions Regulations, parliamentary oversight of delegated legislation can occur in a variety of ways. This includes the Committee's consideration of instruments at the time they are made, 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. These processes will continue to apply in relation to each of the instruments exempted by the 2017 Exemptions Regulations.

I appreciate that an exemption from the sunseting requirements of the Legislation Act is a significant matter. For this reason, I can assure the Committee that I am satisfied that each exemption prescribed by the 2017 Exemptions Regulations was justified on the grounds described in the Explanatory Statement.

Committee's response

The committee thanks the Attorney-General for his response.

The committee notes the Attorney-General's advice that he is satisfied that each of the instruments exempted from sunseting by the regulations satisfy at least one of the long-standing criteria for exemption. The committee also notes the Attorney-General's view that remaking many of the instruments prior to their sunseting date would not be practicable or necessarily desirable due to their scope and complexity.

In relation to the Corporations Regulations, the committee notes the Attorney-General's advice about the particular nature of the intergovernmental arrangements under which they operate, and his view that remaking them in their entirety would be unnecessarily costly for both the Commonwealth and relevant stakeholders, in circumstances where the regulations are otherwise considered fit for purpose.

The committee remains of the view that exemptions from the sunseting requirements of the Legislation Act are significant matters, and that the circumstances in which an exemption will be appropriate are limited. The committee's focus where an exemption from sunseting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated.

The committee acknowledges that the Corporations Regulations are regularly amended, and that those amendments are subject to parliamentary scrutiny and disallowance. However, the committee considers that removing the requirement to remake the Corporations Regulations every ten years, after a significant review, reduces Parliament's oversight of those regulations. The committee considers that

Parliament's opportunity to consider amendments to an instrument on an *ad hoc* basis, as they arise, is not the same as comprehensive periodic oversight of an instrument in its entirety, as envisaged by the sunseting regime.

The committee notes that no other form of parliamentary oversight has been introduced to replace the Legislation Act sunseting process in relation to the instruments being exempted, including the Corporations Regulations.

The committee has concluded its examination of the instrument. However, the committee draws the exemption of several additional and significant legislative instruments from sunseting, including the Corporations Regulations, and the lack of alternative arrangements for appropriate parliamentary oversight of those instruments, to the attention of the Senate.

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	<i>Motor Vehicle Standards Act 1989</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Manner of incorporation

The committee previously commented as follows:

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 noted 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 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.¹¹

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

Minister's response

The Minister for Urban Infrastructure advised:

European Standards EN 15194:2009 and EN 15194:2009+A1:2011, Cycles - Electrically power assisted cycles - EPAC Bicycles, specify safety requirements and test methods for the design and assembly of electrically power assisted bicycles. As the standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced (14 September 2017), and not '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 Determination. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that the Determination incorporates the European standards as in force at its date of commencement.

Relevant excerpt from the ES:

The Determination incorporates references to European Standards EN 15194:2009 and EN 15194:2009+A1:2011, Cycles - Electrically power assisted cycles - EPAC Bicycles...

11 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.

In accordance with subsections 14(1)(b) and 14(2) of the Legislation Act 2003 these standards are incorporated as in force at the commencement of the Determination.

Committee's response

The committee thanks the minister for her response and notes the minister's undertaking to register a replacement ES which states that the European standards are incorporated as in force at the date of commencement of the instrument.

The committee has concluded its examination of this matter.

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 noted 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 indicated 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 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.¹²

The committee requested 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 requested that the ES be updated to include this information.

Minister's response

The Minister for Urban Infrastructure advised:

I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents. The European standards incorporated in the Determination are freely available through the National Library of Australia (NLA) eResources system, which provides access to the British Standards Online database. As a licensed resource, a library card is required to access the database and anyone with an Australian residential address is eligible to request one.

In line with best-practice and consistent with section 151 of the Legislation Act, I instructed the Department to amend the ES to include a description of these standards as well as details of how to access them through the NLA.

Relevant excerpt from the ES:

The Determination incorporates references to European Standards EN 15194:2009 and EN I 5 I 94:2009+A 1:2011, Cycles - Electrically power assisted cycles - EP AC Bicycles. These standards specify safety requirements and test methods for the design and assembly of electrically power assisted bicycles. They are intended to cover electrically power assisted cycles of a type which have a maximum continuous rated power of 250 Watts, of which the output is progressively reduced and finally cut off as the bicycle reaches a speed of 25 km/h; or sooner, if the cyclist stops pedalling.

...

The standards may be freely accessed online through the National Library of Australia (NLA) eResources system, which provides access to the British Standards Online database. A library card is required and can be obtained by anyone with an Australian residential address.

The NLA website is <https://www.nla.gov.au/>.

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

Committee's response

The committee thanks the minister for her response and notes the minister's undertaking to register a replacement ES which includes a description of the incorporated standards and details about how to access them through the National Library of Australia.

The committee has concluded its examination of the instrument.

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 <i>VET Student Loans (Charges) Act 2016</i>
Authorising legislation	<i>VET Student Loans Act 2016</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

Matters 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 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:

(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.¹³ The committee considers that if the late payment penalty in this instrument

13 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'.

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 requested 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.

Minister's response

The Assistant Minister for Vocational Education and Skills advised:

The legislative basis for the penalty associated with late payment of the approved course provider charge is subsection 116(6) of the *VET Student Loans Act 2016* (VSL Act). As noted by the Committee, subsection 116(6) of the Act states:

(6) The rules [i.e. VET Student Loans Rules 2016] may provide for the collection and recovery of approved course provider charge (within the meaning of the *VET Student Loans (Charges) Act 2016*).

I note the Committee's concern that the late payment penalty, 'although it is described as a 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 late payment penalty does not form part of the approved course provider charge itself, which is imposed under the *VET Student Loans (Charges) Act 2016*, the amount of which is set out in the VET Student Loans (Charges) Regulations 2017.

Rather, the late payment penalty is in the nature of an administrative measure, which is imposed to assist with the recovery of the approved course provider charge, and in particular the timely collection of the charge. Accordingly, the late payment penalty forms part of the collection and recovery process dealt with in the provisions of the VET Student Loans Amendment Rules (No.2) 2017.

The formula contained in section 159 of the Rules (inserted by the VET Student Loans Amendment Rules (No. 2) 2017) was developed to allow for calculation of a penalty that aligns with the intent of a recovery measure, whilst also fairly and transparently taking into account the specific circumstances of each provider in determining the amount of the penalty.

This formula is calculated based on the unpaid amount and number of days which the approved course provider charge is unpaid, as opposed to

prescribing a uniform penalty. This provides an incentive for providers to pay in a timely manner, whilst ensuring that the amount of the penalty is appropriate and specific to each provider.

The use of a formula to calculate a late payment penalty that is appropriate and proportionate to the amount owed has precedents in a number of other pieces of legislation considered during the development of the VET Student Loans Amendment Rules (No.2) 2017, including the *Education Services for Overseas Students Act 2000* and the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011*.

Committee's response

The committee thanks the Assistant Minister for her response and notes her advice that the late payment penalty is in the nature of an administrative measure imposed to assist with the recovery of the approved course provider charge and the timely collection of the charge, and as such, is considered part of the 'collection and recovery' process authorised by section 116 of the *VET Student Loans Act 2016*. The committee also notes the minister's advice as to the basis on which the penalty was calculated.

The committee has concluded its examination of the instrument.

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 <i>VET Student Loans Act 2016</i>
Authorising legislation	<i>VET Student Loans Act 2016</i>
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)
Previously reported in	<i>Delegated legislation monitor 13 of 2017</i>

No statement of compatibility

The committee previously commented as follows:

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

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

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

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

Minister's response

The Assistant Minister for Vocational Education and Skills advised:

The absence of a Statement of Compatibility with Human Rights accompanying the Explanatory Statement to the VET Student Loans (Approved Course Provider Application Fee) Determination 2017 [F2017L01060] was due to an inadvertent omission. I apologise for this oversight.

A human rights assessment of the instrument has been undertaken and the instrument has been assessed as compatible with human rights and meeting the requirements under the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

A replacement Explanatory Statement including a Statement of Compatibility with Human Rights will be lodged for registration with the Federal Register of Legislation as soon as practicable.

Committee's response

The committee thanks the Assistant Minister for her response and notes that a replacement ES containing the statement of compatibility with human rights has now been registered and published on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)