The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 15 of 2017

29 November 2017

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Jane Hume	Victoria, LP
Senator Linda Reynolds	Western Australia, LP
Senator the Hon Lisa Singh	Tasmania, ALP

Secretariat

Ms Anita Coles, Secretary
Ms Shennia Spillane, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Morana Kavgic, Legislative Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

Contents

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 13 October 2017 and 2 November 2017 (new matters).

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

Response required

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

Instrument	**Aviation Transport Security Amendment (Airside Security – 2017 Measures No. 1) Regulations 2017 [F2017L01369]**
Purpose	Amends the Aviation Transport Security Regulations 2005 to introduce strengthened airside security measures at Australia's designated major international airports
Authorising legislation	*Aviation Transport Security Act 2004*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow currently must be given by 8 February 2018[2]
Scrutiny principle	Standing Order 23(3)(a)

Legislative authority: penalties

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

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

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

principle requires that instruments are made in accordance with their authorising legislation as well as any constitutional or other applicable legal requirements. This may include any limitations or conditions on the power to make the instrument conferred by the authorising legislation.

Subsection 3.16D(6) of the instrument creates an offence of failing to comply with a requirement in subsection 3.16D(1) or (4).[3] The offence applies to an aviation industry participant who controls an access control point into a security restricted area at a designated airport. Where the offence is committed by an airport operator or aircraft operator, subsection 3.16D(6) imposes a penalty of 200 penalty units. In any other case where the offence is committed, a penalty of 100 penalty units is imposed.

Subsection 3.16D(6) of the instrument was made under section 36 of the *Aviation Transport Security Act 2004* (ATS Act). Subsection 36(3) of the ATS Act provides that regulations made under section 36 may prescribe penalties for offences against those regulations, and that the penalties may not exceed:

(a) for an offence committed by an airport operator or aircraft operator – 200 penalty units;

(b) for an offence committed by an aviation industry participant, other than an accredited air cargo agent or a participant covered by paragraph (a) – 100 penalty units; or

(c) for an offence committed by an accredited air cargo agent or any other person – 50 penalty units.

In regard to the entities that may be captured by the offence in subsection 3.16D(6) of the instrument, the explanatory statement (ES) to the instrument states:

> An offence of 200 penalty units applies if an airport operator or aircraft operator fail to comply with these requirements.
>
> For another type of aviation industry participant who fails to comply with the requirements under regulation 3.16D, the offence is 100 penalty units. This includes any kind of business that controls an access point into the security restricted area other than from a cleared (sterile) area. Examples of these businesses are:…regulated air cargo agents, ground handling operators, catering providers, government agencies, charter operators or any other airport tenant.

It is not clear to the committee from this description whether it is possible that an accredited air cargo agent could commit the offence in subsection 3.16D(6).

3 Subsections 3.16D(1) and (4) relate to performing checks on persons and vehicles seeking to enter a security restricted area at a designated airport through an access control point.

The committee notes that, if the offence was committed by an accredited air cargo agent, paragraph 36(3)(c) of the ATS Act only permits the regulations to impose a maximum penalty of 50 penalty units. Consequently, if there were cases where the offence could be committed by an accredited air cargo agent, subsection 3.16D(6) would appear to exceed the power conferred by the ATS Act.

The committee requests the minister's advice as to:

- **whether it is possible that an accredited air cargo agent could commit the offence in subsection 3.16D(6) of the instrument; and**
- **if so, the legislative authority for the potential imposition on such an agent of the penalty set out in that subsection.**

Instrument	**Commercial Broadcasting (Tax) (Individual Transmitter Amounts) Determination 2017 [F2017L01375]**
Purpose	Sets the amount of tax payable, in relation to individual transmitters, by licensees on whom tax is imposed under the *Commercial Broadcasting (Tax) Act 2017*
Authorising legislation	*Commercial Broadcasting (Tax) Act 2017*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow currently must be given by 8 February 2018[4]
Scrutiny principle	Standing Order 23(3)(a) and (d)

Incorrect classification of instrument as exempt from disallowance

The instrument is a determination made under subsection 8(2) of the *Commercial Broadcasting (Tax) Act 2017* (CB (Tax) Act). It was classified as exempt from disallowance when received by Parliament and by the committee, and was tabled in the House of Representatives and the Senate on that basis.

Subsection 13(5) of the CB (Tax) Act provides that subsection 42 of the *Legislation Act 2003* (Legislation Act) — which provides for the disallowance of legislative

4 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

instruments — does not apply to determinations made under subsection 8(2) of the CB (Tax) Act.

However, subsection 13(2) of the CB (Tax) Act replaces disallowance under the Legislation Act with an alternative disallowance procedure, under which either House of Parliament may pass a resolution disallowing an instrument made under subsection 8(2). Consequently, although the instrument is not disallowable under the Legislation Act, it is a disallowable instrument. In this regard, the committee notes that the explanatory statement (ES) to the instrument states that 'the Determination is subject to disallowance under section 13 of the Tax Act'.

While the committee understands that the instrument has since been reclassified as subject to disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the committee is concerned that its initial misclassification as exempt from disallowance has potentially hindered the effective oversight of delegated legislation by Parliament.

This is because section 42 of the Legislation Act allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow that instrument. Where an instrument is initially and incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument during the period that it is incorrectly classified.

The committee remains concerned about the process for the classification of instruments and continues to monitor this issue.

The committee requests the minister's advice as to the incorrect classification of the instrument as exempt from disallowance.

Modified disallowance provisions

Subsection 13(2) of the CB (Tax) Act provides that either House of Parliament may, following a motion on notice, pass a resolution disallowing a determination made under subsection 8(2). The notice must be given within 15 sitting days of the determination being tabled, and the resolution to disallow must be passed within 15 sitting days of the notice being given. If neither House passes a resolution to disallow a determination (including where no notice is given), the determination takes effect.

The disallowance provisions in section 13 of the CB (Tax) Act reverse the standard disallowance procedure under the Legislation Act, which provides that where a

motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument is taken to be disallowed and ceases to have effect.[5]

The purpose of the standard disallowance procedure is to ensure that, once a motion to disallow has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved (e.g. because no time has been made available to consider it). This greatly strengthens Senate oversight of delegated legislation.[6]

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) previously considered the modified disallowance provisions in the CB (Tax) Act.[7] The Scrutiny of Bills committee expressed the view that those provisions would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider a motion to disallow within 15 sitting days.

The Scrutiny of Bills committee concluded that it would be appropriate for the disallowance provisions in section 13 of the CB (Tax) Act to be amended so as to apply the standard disallowance procedure to determinations made under subsection 8(2). Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of reversing aspects of the usual disallowance procedure, and drew its scrutiny concerns to the attention of senators and the committee.[8]

The committee takes this opportunity to share and reiterate the concerns of the Scrutiny of Bills committee in relation to the modified disallowance provisions in section 13 of the CB (Tax) Act. The committee also notes that it appears that in this case reliance on section 13 of the CB (Tax) Act may have resulted in the instrument being incorrectly classified as exempt from disallowance.

The committee draws the modification of the disallowance process applicable to this instrument to the attention of the Senate.

---

5 If the motion is to disallow only certain provisions of an instrument, those provisions are taken to be disallowed.

6 Rosemary Laing, ed, *Odgers' Australian Senate Practice As revised by Harry Evans*, 14th edition, Department of the Senate, 2016, p. 445.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, pp. 23-24; and *Scrutiny Digest 9 of 2017*, pp. 39-42.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2017*, pp. 41-42.

Matters more appropriate for parliamentary enactment: taxation

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 instrument was made under subsection 8(2) of the CB (Tax) Act. That provision confers on the minister the power to determine, by legislative instrument, the amount of tax payable in relation to each individual transmitter by the holder of a transmitter licence ('individual transmitter amount'). Pursuant to that provision, the instrument sets out a formula for determining the individual transmitter amount, and allows the minister to adjust the individual transmitter amount where there has been a variation to a licence.

The Scrutiny of Bills committee previously considered section 8 of the CB (Tax) Act.[9] The Scrutiny of Bills committee emphasised that one of the most fundamental functions of the Parliament is to levy taxation, and consequently it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The Scrutiny of Bills committee acknowledged that the CB (Tax) Act sets a cap on the rate of tax that may be imposed by delegated legislation, and that this partly addressed its scrutiny concerns. However, the Scrutiny of Bills committee emphasised that any delegation to the executive in relation to taxation represents a significant delegation of legislative power.

The Scrutiny of Bills committee concluded that it may be appropriate to amend section 8 of the CB (Tax) Act to require the positive approval of each House of Parliament before a determination made under that provision takes effect – in order to increase parliamentary oversight of delegated legislation purporting to set a rate of tax. Ultimately, the Scrutiny of Bills committee left the appropriateness of such an amendment to the Senate as a whole, and drew its scrutiny concerns in relation to the CB (Tax) Act to the attention of senators and the committee.[10]

The committee's views accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts enabling delegated legislation to set a rate of tax. While the committee acknowledges that the setting of a rate of tax in the instrument is in accordance with its empowering statute, and that the empowering statute sets a cap on the rate of tax that may be imposed, the committee's view remains that rates of tax are more appropriate for enactment in primary legislation.

---

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, pp. 21-22; and *Scrutiny Digest 9 of 2017*, pp. 36-39.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2017*, pp. 38-39.

The committee draws the attention of the Senate to the setting of a rate of tax in delegated legislation.

Instrument	**Marriage Regulations 2017 [F2017L01359]**
Purpose	Provides for procedural and administrative matters in support of the marriage framework established by the *Marriage Act 1961*
Authorising legislation	*Marriage Act 1961*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 19 October 2017) Notice of motion to disallow currently must be given by 7 February 2018[11]
Scrutiny principle	Standing Order 23(3)(a)

Classification of legislative instruments

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 legislation as well as any constitutional or other applicable legal requirements.

The committee has concerns in relation to the status of two provisions of the instrument, which authorise the Registrar of Marriage Celebrants (Registrar) to make determinations or written statements, and which the instrument or the explanatory statement (ES) state are not legislative instruments for the purposes of the *Legislation Act 2003* (Legislation Act).

Section 39C of the *Marriage Act 1961* (Marriage Act) sets out requirements a person must meet to be registered as a marriage celebrant. One of these requirements, pursuant to paragraph 39C(1)(b), is that the person 'has all the qualifications, and/or skills, determined in writing to be necessary by the Registrar in accordance with regulations made for the purposes of this paragraph'.

Section 39 of the regulations provides that for the purposes of paragraph 39C(1)(b) of the Marriage Act, a determination by the Registrar must specify certain matters

11 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

relating to qualifications. Subsection 39(5) of the regulations requires the Registrar to publish that determination on the internet, and in any other way the Registrar considers appropriate.

In its discussion of section 39 of the regulations, the explanatory statement (ES) states that 'a determination made under paragraph 39C(1)(b) of the Act is administrative in character only, and as such is not a legislative instrument for the purposes of the *Legislation Act 2003'.*

In addition, section 39G of the Marriage Act sets out obligations of each marriage celebrant. These include, at paragraph 39G(1)(b), that a celebrant 'undertake all professional development activities required by the Registrar of Marriage Celebrants in accordance with regulations made for the purposes of this paragraph'. Under section 39I, failure to comply with these obligations can result in disciplinary action by the Registrar against a celebrant, including their suspension or deregistration.

Subsection 53(3) of the regulations provides that the Registrar must, as soon as possible after the start of each calendar year, publish a written statement setting out details of the required professional development activities for the year, including compulsory activities. Subsection 53(5) requires the Registrar to publish the statement on the internet and in any other way the Registrar considers appropriate. Subsection 53(7) provides that 'a statement published under subsection (3) is not a legislative instrument'. The ES states that the written statement is not a legislative instrument because it is 'administrative in character only'.

With regard to the written instruments prescribed by both section 39 and section 53 of the regulations, the committee notes that the character of an instrument as a legislative instrument, or not, is determined by the Legislation Act. Relevantly, subsection 8(4) of the Legislation Act provides that:

> An instrument is a legislative instrument if:
>
> (a) the instrument is made under a power delegated by the Parliament; and
>
> (b) any provision of the instrument:
>
> (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Subsection 8(6) of the Legislation Act provides that:

> Despite subsections (4) and (5), an instrument is not a legislative instrument if it is:
>
> (a) declared by an Act not to be a legislative instrument; or
>
> (b) prescribed by regulation for the purposes of this paragraph.

The committee further notes guidance from the Office of Parliamentary Counsel (OPC) which states that:

> As a result of paragraph 8(6)(a) of the [Legislation Act], only an Act can declare an instrument not to be a legislative instrument (whether because it does not fall within the definition of legislative instrument or because the instrument is to be wholly exempted from the [Legislation Act]). If, in a subordinate instrument, you are including an instrument-making power, and the instrument (the relevant instrument) being made under that power is not of legislative character, you will need to remain silent on the relevant instrument's status as not being a legislative instrument or consider whether it is appropriate to make the relevant instrument a notifiable instrument.[12]

It appears to the committee that the written instruments provided for under both sections 39 and 53 of the regulations may satisfy the criteria in section 8 of the Legislation Act for classification as legislative instruments. Both determine the content of the law, in detailing mandatory qualifications and professional development requirements, respectively, which are necessary for persons' initial or ongoing registration as marriage celebrants. In doing so, they would also appear to affect the interests and obligations of prospective and registered marriage celebrants.

As such, the committee is concerned that the statement in the ES that a determination made under section 39 is not a legislative instrument, and the provision in subsection 53(7) that a statement made under subsection 53(3) is not a legislative instrument, may not be in compliance with the Legislation Act.

The committee requests the minister's advice regarding the appropriate classification of the written instruments prescribed by sections 39 and 53 of the regulations, in the context of the definition of 'legislative instrument' in the *Legislation Act 2003*.

---

12 Office of Parliamentary Counsel, *Drafting Direction No. 3.8 Subordinate Legislation*, http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf (accessed 24 November 2017), paragraph 78.

Instrument	**Norfolk Island Continued Laws Amendment (2017 Measures No. 2) Ordinance 2017 [F2017L01360]**
Purpose	Amends a number of Norfolk Island enactments (continued in force under the *Norfolk Island Act 1979)* in relation to the management of Norfolk Island airport, airport fees and charges, and related airport arrangements. Also amends Norfolk Island laws relating to the absentee landowners' levy, and the Norfolk Island Health and Residential Aged Care Service Facility
Authorising legislation	*Norfolk Island Act 1979*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 19 October 2017) Notice of motion to disallow currently must be given by 7 February 2018[13]
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

This ordinance amends the Norfolk Island Continued Laws Ordinance 2015 [F2017C01078] (Principal Ordinance) to further amend a number of enactments made by the former Norfolk Island Legislative Assembly, which were continued in force for Norfolk Island under section 16A of the *Norfolk Island Act 1979* (Norfolk Island Act). Subsection 17(3) of the Norfolk Island Act authorises the amendment (or repeal) of a continued law by an Ordinance made under section 19A of the Act.

Items 2M, 2N and 2Q of this ordinance increase certain fees levied on aircraft operators at Norfolk Island airport under one such continued law, the Airport Regulations 1992 (Norfolk Island), as follows:

- item 2M, fee for embarking and disembarking passengers on regular services, from $23.10 to $45.00 per person;
- item 2N, fee for after hours attendance by airport staff in relation to regular passenger services, from $41.10 to $45.00 per person per hour; and
- item 2Q, passenger facilitation fee for certain charter services, from $25.70 to $45.00 per person.

13 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

The explanatory statement (ES) states that the increases in airport fees made by items 2M, 2N and 2Q 'are intended to ensure the costs associated with maintaining the airport, including the need for future capital investment, are recovered from the airport users'.

The committee's longstanding view is that, unless there is specific authority in primary legislation to impose fees in delegated legislation, fees imposed by legislative instruments should be limited to cost recovery. Otherwise, there is a risk that such fees are more properly regarded as taxes, which require specific legislative authority. While the committee acknowledges the unusual circumstances of continued Norfolk Island laws in this instance, the committee understands that the effect of section 16A of the Norfolk Island Act is to make those laws Commonwealth laws, meaning any taxes imposed under them would now constitute Commonwealth taxation. The committee notes that there is no provision in the Norfolk Island Act which expressly authorises the imposition of taxation under that Act.

With reference to the above, the ES does not provide any details about what 'future capital investment' is envisaged to be funded by the increased airport fees. If such investment is intended to go beyond recovering the costs of operating and maintaining the airport, the committee considers that the increased fees may constitute a tax. If that is the case, it is not clear to the committee what legislative power enables the imposition of taxation (in this case, the increase in taxation) in the ordinance.[14]

If the relevant fees are not taken to be taxation, 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. In this instance, the committee is concerned that the ES does not explain the basis on which the specific amount of the increase in each of the fees has been calculated, with reference to the costs of maintaining the airport.

The committee requests the minister's advice as to:

- **whether the airport fees increased by items 2M, 2N and 2Q of the ordinance go beyond cost recovery and so constitute taxes, and if so, what is the legislative authority for the imposition of taxation by the ordinance; or**

14 The committee notes that section 6 of the Principal Ordinance provides that the minister may make rules amending the Ordinance so as to amend or repeal a continued law, but paragraph 6(2)(c) provides that such rules may not impose a tax. In this instance, however, the amendments to the Principal Ordinance have been made by an ordinance under section 19A of the Norfolk Island Act, rather than by rules under section 6 of the Principal Ordinance.

- **if not, what is the specific (cost recovery) basis on which the increases to each of the fees were calculated.**

Subdelegation

Item 2D of the ordinance replaces a provision of the *Airports Act 1991 (Norfolk Island)* relating to ministerial delegation, with a new provision, that the:

> Chief Executive Officer [of the Norfolk Island Regional Council, NIRC] may by written instrument delegate to an employee of the Administration any of the powers or functions of the Chief Executive Officer under this Act or the Regulations.

The committee's expectations in relation to subdelegation 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 delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

In relation to the broad delegation of powers to 'an employee of the Administration', the ES states that:

> The delegation power is necessary as it will often not be practicable for the [Chief Executive Officer] to personally discharge functions under the Act or the Regulations. It is also not practical from an operational perspective to restrict this power of delegation to senior officials of the NIRC, as powers may need to be exercised by NIRC employees who undertake the daily running of the airport.

While the committee acknowledges that there may be good reason not to specify particular NIRC officials to whom the Chief Executive Officer's powers may be delegated, the committee remains concerned that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the ordinance; rather, that it should include a requirement that the Chief Executive Officer be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee draws its concern about the broad subdelegation of power in the instrument to the minister's attention.

Instrument	**Privacy (Australian Government Agencies – Governance) APP Code 2017 [F2017L01396]**
Purpose	Sets out how Australian Privacy Principle 1.2 (contained in Schedule 1 to the *Privacy Act 1988*) is to be complied with by Australian government agencies
Authorising legislation	*Privacy Act 1988*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow currently must be given by 8 February 2018[15]
Scrutiny principle	Standing Order 23(3)(a)

Legislative authority: power to make instrument

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 legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under section 26G of the *Privacy Act 1988* (Privacy Act). Section 26G provides for the development of Australian Privacy Principle (APP) codes by the Information Commissioner (Commissioner). Subsection 26G(1) of the Privacy Act provides that section 26G applies (that is, the Commissioner may develop an APP code) if the Commissioner has made a request under section 26E for an APP code developer[16] to develop an APP code, and either:

- the request has not been complied with; or
- the request has been complied with but the Commissioner has decided not to register the APP code that was developed as requested.

It appears to the committee that subsection 26G(1) is a precondition to the exercise of the Commissioner's power to make an APP code under subsection 26G(2). This

15 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

16 Under section 6 of the Privacy Act, 'APP code developer' means an APP entity, a group of APP entities, or a body or organisation representing one or more APP entities; and 'APP entity' means an agency or organisation.

view is supported by the explanatory memorandum to the bill that inserted section 26G into the Privacy Act, which stated:

> The Commissioner can only develop an APP code in circumstances where a code developer has failed to comply with a request to develop a code, or where a code developer has produced a code as requested by the Commissioner, and the Commissioner has decided not to register the code.[17]

In relation to compliance with subsection 26G(1) of the Privacy Act, the explanatory statement (ES) to the instrument only states that 'the Commissioner has developed this APP code in compliance with section 26G of the Privacy Act'.

Neither the instrument nor the ES clarifies whether the Commissioner made a request, under subsection 26E of the Privacy Act, for an APP code developer to develop an APP code prior to making the instrument under subsection 26G(2). It is therefore unclear to the committee whether the precondition in subsection 26G(1) to the exercise of the Commissioner's power to develop a Code under subsection 26G(2) was satisfied.

The committee requests the minister's advice as to:

- **whether the Commissioner made a request under section 26E of the *Privacy Act 1988* for an APP code developer to develop an APP code prior to making the instrument under section 26G; and**
- **if the Commissioner did not make such a request, the legislative authority relied on to make the instrument.**

Drafting: unclear meaning of 'senior official'

Subsection 11(1) of the instrument provides that an agency must, at all times, have a designated Privacy Champion. Subsection 11(3) provides that the Privacy Champion must be a senior official within the agency.

The committee notes that neither the instrument nor the accompanying ES provides any definition of 'senior official', nor any guidance in relation to the level of official that the agency may designate as Privacy Champion under section 11 of the instrument. The committee also notes that 'senior official' is not defined within the Privacy Act.

17 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p. 205.

The committee is concerned that agencies may have different understandings of the term 'senior official'. For example, some agencies may consider that officers at the APS 5 and APS 6 levels (or equivalent) are sufficiently senior to be designated as Privacy Champion,[18] while others may view the term 'senior official' as restricting the role of Privacy Champion to SES officers.[19]

It is unclear to the committee whether the instrument envisages that an officer at or above a particular APS level (or equivalent) would be designated as Privacy Champion. The committee is concerned that the lack of clarity regarding the meaning of 'senior official' may make it difficult for agencies to ensure they comply with their obligations under section 11 of the instrument.

The committee requests the minister's advice as to the intended meaning of 'senior official' in section 11 of the instrument, and whether guidance in that regard could be included in the explanatory statement.

18 The Australian Public Service Commission (APSC) indicates that APS 5 and 6 officers hold 'senior administrative, technical, project and service positions, which may have supervisory roles'. See APSC, *Fact sheet 3: Understanding APS jobs* (May 2012), www.apsc.gov.au/publications-and-media/current-publications/cracking-the-code/factsheet-3.

19 Under subsection 11(4) of the instrument, the functions of the Privacy Champion include promoting a culture of privacy within the agency, providing strategic leadership on privacy issues, reviewing and/or approving the agency's privacy management plan. These functions appear broadly consistent with those of SES officers. See e.g. APSC, *Senior Executive Service (SES)* (July 2017), www.apsc.gov.au/managing-in-the-aps/ses.

Instrument	**Vehicle Standard (Australian Design Rule 3/04 – Seats and Seat Anchorages) 2017 [F2017L01344]**
Purpose	Specifies requirements for seats, their attachment assemblies, installation and any head restraint fitted, to minimise the possibility of occupant injury as a result of vehicle impact
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow currently must be given by 7 December 2017[20]
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation of documents

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.

In relation to this instrument, the committee notes that section 7A of the *Motor Vehicle Standards Act 1989* permits vehicle standards made under the Act to incorporate standards produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia, or by any other organisation determined by the minister by legislative instrument, as in force from time to time.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying explanatory statements (ES), to clearly state the manner in which they are incorporated (that is, either as in force from time to time, as in force at the commencement of the legislative instrument or as in force or existing at an earlier date). 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.

20 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

In this regard, the committee notes that the instrument appears to incorporate a number of documents which are not disallowable legislative instruments:

- Consolidated Resolution on the Construction of Vehicles (R.E.3), document ECE/TRANS/WP.29/78/Rev.3 [Appendix A, paragraphs 1(a) and (b), footnote 1, Annex 3];
- Regulation No.21 "Uniform Provisions concerning the Approval of Vehicles with regard to their Interior Fittings" (E-ECE/324-E/ECE/TRANS/505/Rev.1/Add.20/Rev.2, as last amended) [Appendix A, paragraphs 5.2.3.2 and 5.2.4.1.2];
- 'Regulation No. 80' [Appendix A, paragraph 5.3];
- 'Regulation No. 25, as amended by 04 series of amendments' [Appendix A, paragraph 5.4.2];
- the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2) [Appendix A, paragraph 7];
- ISO Standard 6487 (1980) [Appendix A, Annex 6, paragraph 1.3.1]; and
- International Standard ISO 6487 (2002) [Appendix A, Annex 7, paragraph 1.5].

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.[21]

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 explanatory statement be updated to include information regarding the manner of incorporation.

Description of and access to incorporated documents

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

With reference to the above, the committee notes that the instrument incorporates several documents. However, neither the instrument nor the ES provides a

21 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.

description of the following documents, nor an indication as to where they can be freely accessed:

- Regulation No.21 "Uniform Provisions concerning the Approval of Vehicles with regard to their Interior Fittings" (E-ECE/324-E/ECE/TRANS/505/Rev.1/Add.20/Rev.2, as last amended) [Appendix A, paragraphs 5.2.3.2 and 5.2.4.1.2];
- 'Regulation No. 80' [Appendix A, paragraph 5.3];
- 'Regulation No. 25, as amended by 04 series of amendments' [Appendix A, paragraph 5.4.2];
- the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2) [Appendix A, paragraph 7];
- ISO Standard 6487 (1980) [Appendix A, Annex 6, paragraph 1.3.1]; and
- International Standard ISO 6487 (2002) [Appendix A, Annex 7, paragraph 1.5].

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[22]

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 explanatory statement be updated to include this information.

22 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	**Vehicle Standard (Australian Design Rule 34/03 – Child Restraint Anchorages and Child Restraint Anchor Fittings) 2017 [F2017L01351]**
Purpose	Specifies requirements for child restraint anchorages and anchor fittings in specified vehicle types
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow currently must be given by 7 December 2017[23]
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation of documents

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.

In relation to this instrument, the committee notes that section 7A of the *Motor Vehicle Standards Act 1989* permits vehicle standards made under the Act to incorporate standards produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia, or by any other organisation determined by the minister by legislative instrument, as in force from time to time.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying explanatory statements (ES), to clearly state the manner in which they are incorporated (that is, either as in force from time to time, as in force at the commencement of the legislative instrument, or as in force or existing at an earlier date). 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.

23 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

In this regard, the committee notes that the instrument appears to incorporate a number of documents which are not disallowable legislative instruments:

- technical drawings produced by the TNO (Research Institute for Road Vehicles) – Netherlands for a *50th Percentile 6 Year Old Child* [paragraph 10.1.3.1];
- Society of Automotive Engineers J879b Motor Vehicle Seating Systems, July 1968 [paragraph 11.1.1.3];
- Consolidated Resolution on the Construction of Vehicles (R.E.3) – (Document TRANS/WP.29/78/Rev.4) [paragraph 12.2, footnote 1]; and
- United Nations Regulation No. 44 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF RESTRAINING DEVICES FOR CHILD OCCUPANTS OF POWER-DRIVEN VEHICLES ("CHILD RESTRAINT SYSTEMS"), incorporating the 04 series of amendments [paragraph 13.1].

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.[24]

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 explanatory statement be updated to include information regarding the manner of incorporation.

Description of and access to incorporated documents

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

The committee notes that the instrument incorporates the four documents set out above. However, neither the instrument nor the ES indicates where those documents can be freely accessed.

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

---

24 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.

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[25]

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 explanatory statement be updated to include this information.

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

Advice only

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

Instrument	**AD/DHC-8/11 Amdt 2 – Engine and Cowl Door Retention and Pressure Relief [F2017L01388]** **AD/DHC-8/34 Amdt 2 – Black Thermal Insulation [F2017L01363]** **AD/DHC-8/36 Amdt 1 – Electrical Power – Battery Temperature Monitor [F2017L01379]** **AD/DHC-8/40 Amdt 1 – Black Thermal Insulation Retrofit Kits [F2017L01382]**
Purpose	Correct and update airworthiness directives relating to safety checks and procedures on DHC-8 series aircraft
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow currently must be given by 8 February 2018[26]
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with those of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that

26 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

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 readily 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 each of the instruments incorporates one or more Bombardier Service Bulletins (SBs), as follows:

- AD/DHC-8/11 Amdt 2 incorporates SB 8-71-13;
- AD/DHC-8/34 Amdt 2 incorporates SB 8-25-89, SB 8-25-90, SB 8-25-91, SB 8-25-92 and SB 8-25-93;
- AD/DHC-8/36 Amdt 1 incorporates SB 8-24-53; and
- AD/DHC-8/40 Amdt 1 incorporates SB 8-21-68.

The ES to each instrument states that:

> [t]he Bombardier Service Bulletin[s] referred to in the AD, as in force from time to time, can be obtained from Bombardier, however, any Australian airline or operator which operates the DHC-8 aircraft are provided with these documents by Bombardier via subscription.

The committee acknowledges that anticipated users of the instruments would be in possession of the incorporated documents. However, in addition to access for operators of relevant aircraft in Australia, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

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 agency 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. 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.[27]

---

27 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 draws the above matter 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	**Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]** **Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]**
Purpose	Amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the *Legislation Act 2003*; and amends the Migration Regulations 1994 to introduce a new statutory review process
Authorising legislation	*Legislation Act 2003*; *Migration Act 1958*
Portfolios	Attorney-General's; Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 7 February 2017 and 29 November 2016 respectively) The time to give a notice of motion to disallow expired on 31 March 2017 and 28 March 2017 respectively The committee gave notices of motion to disallow on 31 March 2017 and 28 March 2017 respectively The committee withdrew the notice of motion to disallow [F2016L01809] on 22 June 2017 The committee withdrew the notice of motion to disallow [F2016L01897] on 15 August 2017[2]
Scrutiny principle	Standing Order 23(3)(a) and (d)

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

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

Previously reported in	*Delegated legislation monitors 1, 3, 7, 8, 9 and 13 of 2017*

The committee previously commented as follows:

Exemption from sunsetting

Extensive correspondence has been exchanged between the committee, the Attorney-General and the Minister for Immigration and Border Protection in relation to these instruments, since February 2017. The following provides extracts from the earlier communications, which are set out comprehensively in *Delegated legislation monitor 9 of 2017*.[3]

Committee's initial comment

The committee initially commented as follows:

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

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

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

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

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

---

3 See also *Delegated legislation monitors 1, 3, 7, 8 and 13 of 2017*, and the included or associated ministerial correspondence, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

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

The ES for the review regulation states:

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

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

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.[4]

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

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

Attorney-General's first response

The Attorney-General advised:

> The purpose of the sunsetting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.

4 Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (December 2016), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf (accessed 21 November 2017).

The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunsetting exemption. However, there is a long standing principle that sunsetting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:

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

I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.

The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.

Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.

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

Committee's first response

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

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

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

Immigration minister's first response

The Minister for Immigration and Border Protection advised:

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

Committee's second response

The committee acknowledged the advice that the Legislation Act provides the flexibility for sunsetting to be delayed and that short delays such as one year are not inconsistent with the objective of the sunsetting regime. The committee also noted that the alternative statutory review mechanism inserted by the review regulation requires the Department of Immigration and Border Protection (the department) to conduct periodic reviews of the Migration Regulations, similar to the 10-year sunsetting cycle.

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

In particular, the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to remake the Migration

Regulations after each review to ensure the Parliament maintains effective and regular oversight of the Migration Regulations.

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

Immigration minister's second response

The Minister for Immigration and Border Protection advised:

> … the decisions to introduce a review process into the Migration Regulations, and to exempt these regulations from sunsetting, were not taken because there was insufficient time available to conduct a review of the Migration Regulations. Instead, these decisions were made because – for the reasons outlined below – it was considered inappropriate for the Migration Regulations to sunset.
>
> The Migration Regulations are large and complex, and underpin Australia's visa framework. This framework supports the Government's international priorities and obligations…
>
> Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.
>
> In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty…
>
> The Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).
>
> There is no question that the Migration Regulations are still needed – as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.
>
> In addition, as a deregulation measure, in 2012-2013 the Migration Regulations were comprehensively reviewed and were amended in 2014…

> In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy…
>
> In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.

Committee's third response

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

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

The committee remained concerned that exemption of the Migration Regulations from the sunsetting requirements of the Legislation Act reduces Parliament's oversight of these regulations as there is no statutory requirement to remake the regulations after each review.

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

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

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

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

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

Attorney-General's second response

The Attorney-General advised as follows:

> **Why it is appropriate for the Migration Regulations to be exempt from the sunsetting requirements of the Legislation Act**
>
> As mentioned in the letter to the Committee of 13 July 2017 from the Minister for Immigration and Border Protection, Hon Peter Dutton MP, the Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the Legislation Act, which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).
>
> I am advised by Minister Dutton that the Migration Regulations are in constant use to support Australia's migration programme, and are unquestionably still needed. In addition, the Migration Regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments.
>
> Amendments are also made several times each year to address changing policy and administrative requirements.
>
> Further, a longstanding and accepted policy reason for granting an exemption from sunsetting is that an instrument is subject to a more stringent review process than is set out in the Legislation Act. Instruments that have already been exempted on this basis have not been required to be remade and subject to parliamentary scrutiny following the review.
>
> For these reasons, the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act and it is appropriate that they be exempted from sunsetting.
>
> **Why it is appropriate to provide for this exemption in delegated legislation**
>
> The Legislation Act does not specify any conditions that must be fulfilled before the power to make this Regulation may be exercised…
>
> The existence of paragraph 54(2)(b) indicates that, at the time the Legislation Act was enacted, Parliament considered it appropriate to allow

certain instruments to be exempted from sunsetting in delegated legislation.

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

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

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

The Committee has indicated it is focused on ensuring that Parliament maintains effective and regular oversight of the legislative power it has delegated. However, the purpose of the sunsetting regime is only to ensure that legislative instruments are regularly reviewed, and remade or repealed, unless an exemption applies. As indicated above, section 49 of the Legislation Act provides that the purpose of the sunsetting regime is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. That is, the purpose of sunsetting is to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, are repealed. The explanatory memorandum for the *Legislative Instruments Act 2003*, which introduced the sunsetting regime and the explanatory statement for the Legislative Instruments Regulations 2004, which provided the first exemptions by way of legislative instrument, did not refer to the maintenance of parliamentary scrutiny over legislative instruments as a justification for the sunsetting regime.

Further, I do not consider that Parliament's oversight of the Migration Regulations is reduced by the Sunsetting Exemption Regulation because, as outlined in Minister Dutton's letter of 13 July 2017; the Migration Regulations are regularly reviewed and updated. Indeed, I am advised that the Migration Regulations are one of the most frequently amended in force instruments on the Federal Register of Legislation. Each time such an amendment is made, it is subject to Parliamentary scrutiny and possible disallowance.

I am advised by Minister Dutton that the Migration Regulations will continue to be reviewed and improved in future to ensure they are up to date and align with Government policy. In addition to the reforms referred to in Minister Dutton's previous correspondence, Minister Dutton has recently initiated a public consultation process on a new and modern visa framework to transform Australia's visa system. The intention of this consultation is to consider how to simplify the current visa system and better align it with Australia's economic, social and security priorities.

> …
>
> Transformative simplification will be central to the modernisation process, and it is anticipated that substantial legislative reform will be required. Any changes to the Migration Regulations made as part of this process will, as always, be subject to Parliamentary scrutiny.

Committee's fourth response

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

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

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

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

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

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

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

Attorney-General's third response

The Attorney-General advised as follows:

> Policy oversight of significant instruments
>
> As advised in my previous letter of 11 August 2017, the Migration Regulations were exempted from sunsetting on the basis that the review process contained in those Regulations met the objectives of the sunsetting regime as set out in section 49 of the Legislation Act. These objectives are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49 of the Legislation Act).
>
> I acknowledge the Committee's position that careful consideration should be applied to granting exemptions from sunsetting where the instrument may be regarded as 'significant'.
>
> In deciding whether to grant an exemption from the sunsetting regime, I give careful consideration to the longstanding policy criteria described in the Explanatory Statement to the Sunsetting Exemption Regulation.
>
> I note that the Legislation Act does not distinguish between significant and non-significant instruments, and it is not clear that applying different considerations based on such a distinction would necessarily advance the objectives of the sunsetting regime.
>
> Further, as the Committee is aware, parliamentary oversight of delegated legislation can occur in a variety of ways. This includes through the Committee's consideration of instruments at the time they are created, cooperation between the government and scrutiny bodies in relation to the implementation of instruments, and scrutiny of the application of instruments through Senate Estimates, Question Time, and other parliamentary processes.
>
> Including exemptions in delegated legislation
>
> I acknowledge that the Committee is concerned that it would be preferable to provide a sunsetting exemption for the Migration Regulations in the primary legislation. This concern arises in the context of scrutiny principle 23(3)(d) of the Committee's terms of reference, which includes consideration of whether an instrument contains matter more appropriate for parliamentary enactment.

> It is critical that the sunsetting regime remain flexible, in order to ensure that it does not undermine the proper functioning of government. For this reason, the Legislation Act enables exemptions by legislative instrument, and the Legislation (Exemptions and Other Matters) Regulation 2015 (Exemptions Regulation) provides a list of all exemptions from sunsetting. This reflects the longstanding policy preference for maintaining a clear list of exemptions in a single piece of legislation.
>
> This flexibility ensures that all requests for exemptions from sunsetting are assessed within the framework of the Legislation Act. In particular, it ensures that all new exemptions are considered in light of the express purpose of Part 4 Chapter 3 of the Legislation Act and are granted on consistent grounds.
>
> Tabling requirement for the report following the review of the Migration Regulations
>
> The Committee has suggested that the Migration Regulations be amended to require that reports prepared for the purposes of regulation 5.44A of the Migration Regulations be tabled in the Parliament. I am supportive of measures that ensure that legislative instruments remain up to date and fit for purpose. However, as the Migration Regulations are administered by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, I am unable to respond to the Committee in relation to this matter.

Committee's fifth response

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

However, the committee reiterated the concerns it had previously drawn to the attention of the Senate regarding:

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

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

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

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

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

Immigration minister's third response

The Minister for Immigration and Border Protection advised:

> As the Committee would be aware, both the Department of Immigration and Border Protection and the migration legislation are undergoing a significant programme of reform at present.
>
> …
>
> The transformation of Australia's visa system is likely to require amendment of the Migration Regulations. This body of work may take place over a number of years.
>
> As a result of the above, I anticipate documentation relating to the review of the Migration Regulations, and the final report, are likely to encompass matters that are still under consideration by Government. I therefore do not consider it appropriate or necessary to insert a legislative requirement for either the documentation prepared in relation to the review of the Migration Regulations, or the final review report, to be tabled in Parliament.
>
> I note the Committee's concerns that significant legislation should be subject to Parliamentary oversight. I also note the report of the Sunsetting Review Committee on the Operation of Sunsetting Provisions in the *Legislation Act 2003*, which was recently released. The report noted the Committee's position that the outcomes of the review of the Migration Regulations should be tabled. Ultimately, the Sunsetting Review Committee concluded that it is a matter for the responsible minister to determine, in prescribing a statutory review requirement, whether it is appropriate for the outcomes of the review to be tabled in Parliament.
>
> Regardless of the above, any future amendments to the migration legislation would be subject to the usual Parliamentary oversight. Where amendments are made to the Migration Regulations it would, as always, be open to Parliament to disallow the amendments if this was considered appropriate.

Committee's final response

The committee thanks the minister for his response and notes the minister's advice that he does not consider it appropriate or necessary to insert a legislative requirement for either the documentation prepared in relation to the review of the Migration Regulations, or the final review report, to be tabled in Parliament.

The committee notes that this means no other form of parliamentary oversight will replace the Legislation Act's sunsetting process in relation to the Migration Regulations.

The committee acknowledges that amendments to the Migration Regulations will remain subject to parliamentary scrutiny and disallowance, including any amendments which result from the review of the regulations currently underway. The committee considers, however, 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 sunsetting regime.

The committee is conscious that these instruments have been the subject of an extensive dialogue over a long period, and acknowledges the cooperation of both the Attorney-General and the Minister for Immigration and Border Protection in assisting the committee with its consideration of this matter. The committee recognises that there is a difference of view between the committee and the relevant ministers in relation to these issues, which is unlikely to be resolved through further correspondence.

The committee nonetheless reiterates its concern that these instruments have effectively removed from comprehensive parliamentary scrutiny a significant body of delegated legislation, in an area of law which engages a large number of Australia's national and international legal obligations, and has significant ramifications for individuals as well as the national interest. The committee reiterates its considered view that it is essential that Parliament retain direct oversight of the outcomes of the review of significant pieces of delegated legislation, including the Migration Regulations 1994.

The committee also reiterates its expectation that the review of the Migration Regulations, and the resulting report, would be thorough and, at a minimum, reflect the principles outlined in the Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments*.

The committee has concluded its examination of the instruments. However, the committee draws its concerns regarding the exemption of the Migration Regulations from sunsetting, and the absence of alternative arrangements for appropriate parliamentary oversight of those regulations, to the attention of the Senate.

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	*Migration Agents Regulations 1998*
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[5]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

The committee previously commented on two matters as follows:

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 explanatory statement (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 (FRL) 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 reclassified 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 requested the minister's advice in regard to the misclassification of the instrument as exempt from disallowance, and requested that the ES be amended to correct the reference to the instrument's authorising regulations.

5 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

Minister's response

The Assistant Minister for Immigration and Border Protection advised that:

> In accordance with the Committee's request, a replacement Explanatory Statement, correcting the reference to the Instrument's authorising regulations, has been prepared and is attached. This replacement Explanatory Statement has been uploaded on the FRL.
>
> …
>
> The misclassification of the Instrument as exempt from disallowance was an administrative error made at the time of registering the Instrument on the FRL. I agree with the Committee that an administrative error of this nature has the potential to hinder the effective oversight of the Instrument by Parliament. The area of my department that is responsible for registering instruments on the FRL has impressed on staff the importance of ensuring information is entered accurately and implications if it is not and processes have been revised to ensure a senior officer reviews all registrations on the FRL to prevent administrative errors like this recurring.

Committee's response

The committee thanks the Assistant Minister for his response. At the time of this report the replacement ES provided to the committee had not yet been registered and published on the Federal Register of Legislation, but the committee notes the minister's undertaking to do so.

The committee notes the Assistant Minister's advice that the misclassification of the instrument as exempt from disallowance was an administrative error, and that steps have been taken to prevent this from occurring in the future.

The committee remains concerned about the classification process for instruments more generally, and the potential for administrative errors to hinder the effective oversight of instruments by Parliament. This is because section 42 of the *Legislation Act 2003* allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow that instrument. Where an instrument is initially and incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument during the period that it is incorrectly classified.

The committee has concluded its examination of this matter. As set out above, however, the committee is concerned that the initial incorrect classification of the instrument as exempt from disallowance may have hindered the effective oversight of the instrument by Parliament.

In these circumstances, the committee has resolved to place a protective notice of motion on the instrument to extend the disallowance period by 15 sitting days. The committee will continue to monitor the classification of instruments.

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

Minister's response

The Assistant Minister for Immigration and Border Protection advised:

> Prior to the commencement of the Instrument, the Migration Agents Registration Authority (MARA) assessed applications for approval as a CPD provider free of charge. The process for assessment meant that each CPD provider submitted an application for approval of every CPD activity they intended to deliver. This, in turn, became an 'approved activity' as defined in the Migration Agent[s] Regulations. The MARA charged $99 per activity assessed and each CPD Provider lodged approximately 20 activities for approval over a two-year period.
>
> The process is simplified considerably under the Instrument. Rather than charging multiple small fees on a per-activity basis, the MARA now charges a single, up-front fee for a person who makes an application for approval as a CPD Provider. Once approved, the CPD Provider can then offer as many CPD activities as they want, provided they accord with the standards and conditions set out in the Migration Agent[s] Regulations.
>
> The application fee of $1240 (including GST) represents the cost to the MARA in receiving and assessing an application, requesting further information, and approving or refusing the application. The fee aligns with the Australian Government Charging Framework and Cost Recovery Guidelines, administered by the Department of Finance. Although the application fee of $1240 is a change to the existing charging structure, it continues to apply to the same cohort and merely adjusts the mechanism by which CPD activities are charged, from the individual activity to the provider.

Committee's response

The committee thanks the assistant minister for his response and notes his advice that the application fee of $1240 is calculated to cover the costs to the MARA of dealing with CPD provider applications, and aligns with the government's charging framework and cost recovery guidelines. The committee considers that this information would have been useful in the ES.

The committee has concluded its examination of the instrument.

Instrument	**Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 6) [F2017L00894]**
Purpose	Amends the Private Health Insurance (Benefit Requirements) Rules 2011 by increasing the minimum benefit payable per night by private health insurers for nursing-home type patients in South Australian public hospitals
Authorising legislation	*Private Health Insurance Act 2007*
Portfolio	Health and Aged Care
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017 Notice given on 16 October 2017[6] Motion currently must be resolved by 7 December 2017
Scrutiny principle	Standing Order 23(3)(a) and (b)
Previously reported in	*Delegated legislation monitor 11 of 2017*

Description of consultation

The committee previously commented as follows:

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

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

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

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

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

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[7]

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

Effect of drafting error

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

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

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

Nevertheless, the committee emphasises the importance of ensuring that individuals are not disadvantaged by drafting errors. The committee also considers that the onus should not be placed on policyholders to identify any shortfall. The committee

---

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

requests that this continuing concern be taken into account when similar circumstances arise in future.

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

Minister's response

The Minister for Health advised:

> My Department was contacted by the South Australian Department of Health immediately following publication of circular PHI 33/17 on 30 June 2017. This circular advised key stakeholders, including the South Australian Department of Health, of registration of the Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No.5) (No.5 Rules).
>
> Shortly after this circular was released, the South Australian Department of Health advised of an error in the minimum benefit payable per night for nursing-home type patients by private health insurers in South Australian public hospitals.
>
> This error potentially disadvantaged nursing-home type patients in South Australian public hospitals who may have received a lower benefit for their hospital accommodation than that to which they were entitled. In recognition of this potential disadvantage, my Department immediately corrected the error through the No.6 Rules rather than through the next routine amendment to the principal rules. Following your letter my Department will also seek to update the consultation component of the explanatory statement.
>
> This prompt action reduced, to one week, the period the incorrect benefit was in effect. In addition, my Department's use of circulars to advise stakeholders of changes to private health insurance legislation enabled health service providers, including the South Australian Department of Health, to identify any potential shortfall when providing patients with informed financial consent.

Committee's response

The committee thanks the minister for his response and notes the minister's undertaking to register a replacement ES describing any consultation undertaken in making the instrument. The committee notes that this description should be in a form which ensures compliance with section 17 of the Legislation Act.

With regard to the error in the instrument, the committee acknowledges that this was rectified by issuing a replacement instrument soon after it was detected. The committee notes its view that errors which could potentially disadvantage individuals should be avoided; and that when they do occur, proactive action should be taken to identify and redress any shortfall.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)