The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

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

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

Publications

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

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

preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded following the receipt of additional information from ministers, including by giving an undertaking to review, amend or remake a given instrument at a future date.

Ministerial correspondence

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

Guidelines

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

Acknowledgement

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

General information

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

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

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2 Regulations and Ordinances Committee, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

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

4 See 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 3 November 2017 and 16 November 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

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

Response required

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

Instrument	**Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456]**
Purpose	Amends the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] to add two new documents issued by a committee of the UN Security Council in August and September 2017
Authorising legislation	*Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008*
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[2]
Scrutiny principle	Standing Order 23(3)(a) and (b)

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.

Unclear meaning of export and import sanctioned goods

The instrument amends the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea)(Documents) Instrument 2017 [F2017L00539] (primary instrument), to replace Schedule 1 in the primary instrument with a new Schedule 1. The new schedule contains the same list of documents as the previous Schedule 1, with the addition of two documents issued by the United Nations Security Council Committee Established Pursuant to UNSC Resolution 1718 (2006) in August and September 2017.

Goods described in the documents in Schedule 1 are included in the definition of 'export and import sanctioned goods' for the purposes of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008, which establishes offences for the export or import of sanctioned goods.

The committee previously considered the primary instrument, and noted that the documents listed in Schedule 1 to the primary instrument did not contain a precise description of the sanctioned goods, such as would generally meet the committee's expectations in relation to appropriate drafting standards for the framing of an offence.

The committee noted advice previously provided by the minister in relation to a similar UN sanctions instrument,[3] that such documents were an internationally accepted reference standard for the industries, persons and companies that trade in such goods, and that the Department of Foreign Affairs and Trade (the department) provides a free service which, in doubtful cases, can make a determination as to whether a good is an import or export sanctioned good. The committee requested that the minister confirm that that advice also applied to the principal instrument.[4]

The minister provided such a confirmation, and the committee noted that this information would have been useful in the explanatory statement (ES) to the instrument. The committee also requested that ESs to future similar instruments include a statement that:

- the goods listed in the documents specified by the instrument are an internationally accepted reference for those industries, persons and companies that trade in such goods; and

3 That is, the Charter of the United Nations (Sanctions – Iran) Document List Amendment 2016 [F2016L00116]. See *Delegated legislation monitor 5 of 2016*, p. 53.

4 *Delegated legislation monitor 7 of 2017,* pp. 1-3.

- the department provides a free service which can make determinations as to whether a good is an import or export sanctioned good under the instrument.[5]

With reference to the present instrument, the committee notes that Schedule 1 lists the same documents previously listed in Schedule 1 to the primary instrument, along with two new documents, in the same form as had previously caused the committee to raise the above concerns. The committee notes that the ES to the instrument does not include a statement of the kind requested by the committee.

The committee requests the minister's advice as to why the statement previously requested by the committee was not included in the explanatory statement to the instrument; and requests that the ES be updated to include such a statement.

Instrument	**Child Care Subsidy Minister's Rules 2017 [F2017L01464]**
Purpose	Deals with matters prescribed, permitted, necessary or convenient to enable the operation of the new child care subsidy payment and approval regime introduced by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*
Authorising legislation	*A New Tax System (Family Assistance) (Administration) Act 1999; A New Tax System (Family Assistance) Act 1999; Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 15 November 2017) Notice of motion to disallow must be given by 13 February 2018[6]
Scrutiny principle	Standing Order 23(3)(b) and (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

5 *Delegated legislation monitor 8 of 2017,* pp. 80-83.

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

legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that paragraph 13(7)(c)(ii) of the instrument appears to incorporate the Skills Shortage List maintained by the department administered by the minister administering the *Fair Work Act 2009;* and subsection 49(9) appears to incorporate the *National Quality Standard of the National Quality Framework*. However, neither the instrument nor its explanatory statement (ES) specifies the manner in which these documents are incorporated.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying ESs, 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.

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

The committee 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.

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. 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.

With reference to the above, the committee notes that the definition of 'eligible ISP child' in section 8 of the instrument appears to incorporate the *Inclusion Support*

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7 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.

Programme Guidelines 2016–17 to 2018–2019 (ISP Guidelines). However, neither the instrument nor its ES indicates how the ISP Guidelines may be accessed.

In this case the committee has observed that the ISP Guidelines are available for free online.[8] Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

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

Drafting: anticipated authority

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

Most provisions of the instrument are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act).[10] That provision is inserted into the Family Assistance Act by item 40 of Schedule 1 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Amendment Act). Schedule 1 to the Amendment Act commences on 2 July 2018.

The instrument was made on 7 November 2017 and registered on 13 November 2017. Section 2 of the instrument provides that all provisions of the instrument except section 41 commence immediately after the commencement of Schedule 1 to the Amendment Act. Therefore, the instrument (except section 41) will also commence on 2 July 2018.

The committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, instruments that rely on

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8 Department of Education and Training, Inclusion Support Programme Guidelines, June 2017, https://docs.education.gov.au/documents/inclusion-support-programme-guidelines (accessed 4 December 2017).

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

10 Section 41 of the instrument is made under subsection 194(5) of the Family Assistance Act, and Part 7 of the instrument is made under item 12 of Schedule 4 to the Amendment Act. Both of these authorising provisions are already in force.

subsection 4(2) of the Interpretation Act should be clearly identified in the accompanying explanatory statement. In this case, all provisions of the instrument other than section 41 and Part 7 fall within this category.

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

Instrument	**Competition and Consumer Amendment (Competition Policy Review) Regulations 2017 [F2017L01431]**
Purpose	Makes consequential amendments to the Competition and Consumer Regulations 2010 following amendments made to the *Competition and Consumer Act 2010* by a number of amending Acts
Authorising legislation	*Competition and Consumer Act 2010*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[11]
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The instrument makes consequential amendments to the Competition and Consumer Regulations 2010 (Competition Regulations), following a suite of amendments made to the *Competition and Consumer Act 2010* (Competition Act).

Section 37 of the instrument repeals Schedule 1B of the Competition Regulations, which currently sets the fees payable to the Australian Competition and Consumer Commission or the Australian Competition and Consumer Tribunal (the Tribunal) for certain applications and notices, and replaces it with a new Schedule 1B. The new schedule removes or alters a number of fees payable under the Competition Regulations, and adds one additional fee.

In relation to these matters, the explanatory statement (ES) to the instrument states:

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

> Item 37 updates the table of fees payable in relation to applications and notices, at Schedule 1B to the [Competition Regulations].
>
> The table is updated to:
>
> - remove reference to the Tribunal, as the Tribunal will no longer receive applications for merger authorisation;
> - update references to the relevant provisions under which authorisation may be sought or notification given, following changes [made] by the [*Competition and Consumer Amendment (Competition Policy Review) Act 2017*];
> - remove the concessional fee for additional applications for authorisation, on the basis that subsection 88(5) of the [Competition Act] now allows for a single application to seek authorisation for several types of conduct;
> - add a fee for notification of resale price maintenance conduct, and set that fee at $1,000 ($0 for an additional notice); and
> - apply the same fee and concessional fee to all notifications for exclusive dealing, consistently with the fact that third line forcing is now assessed under the same test as other types of exclusive dealing.

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

The committee notes that sections 89, 93 and 93AB of the Competition Act appear to have the effect of authorising the imposition of fees via regulations, and acknowledges that the majority of the changes made by section 37 of the instrument appear to consolidate existing fees or remove obsolete references.

However, the committee notes that while the ES explains the substantive effect of section 37 of the instrument, it does not specify the basis on which any changes to relevant fees have been calculated; for example, whether they are calculated on the basis of cost recovery, or on another basis. Further, the ES states that one new fee has been added by this regulation (a fee for notification of resale price maintenance conduct), without specifying the basis on which this new fee has been imposed.

It is unclear to the committee exactly what fees in Schedule 1B are new and what changes are being made. The committee expects that the ES should specify the basis on which all of the fees included in new Schedule 1B (as inserted by section 37) have been calculated.

The committee requests the minister's advice as to the basis on which each of the fees in new Schedule 1B to the instrument has been calculated.

Further response required

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

Correspondence relating to these matters is published on the committee's website.[12]

Instrument	**Torres Strait Regional Authority Election Rules [F2017L01279]**
Purpose	Sets rules for the conduct of elections for the Torres Strait Regional Authority
Authorising legislation	*Aboriginal and Torres Strait Islander Act 2005*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[13]
Scrutiny principle	Standing Order 23(3)(a) and (b)
Previously reported in	*Delegated legislation monitor 14 of 2017*

The committee previously commented on three matters as follows:

Drafting

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

- In rule 4, 'liaison officer' is defined as 'an Aboriginal and Torres Strait Islander liaison officer appointed under rule 4'. It appears that this reference should be to rule 12 as it is rule 12, not rule 4, which provides for the appointment of liaison officers.

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

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

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

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

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

Minister's response

The Minister for Indigenous Affairs advised:

> I acknowledge the three incorrect cross-references identified by the Committee. In each case, I consider the correct cross-reference is easily identifiable. However, I will take the earliest possible opportunity to amend the TSRA Election Rules and correct the cross-references the Committee has identified.
>
> I note the courts have adopted the approach of reading a provision containing an incorrect cross-reference as if it contained the correct cross-reference. On this basis, I am confident these minor incorrect cross-references will not undermine the intended legal effect of the respective provisions.

Committee's response

The committee thanks the minister for his response and notes the minister's undertaking to amend the instrument to address the incorrect cross-references identified by the committee.

The committee also notes the minister's views that the correct cross-references are easily identifiable, and that the incorrect cross-references would not undermine the intended legal effect of the relevant provisions.

The committee reiterates its expectation that, irrespective of the possible substantive legal effect of any drafting errors, instruments and their accompanying ESs should be drafted with sufficient care to avoid potential confusion for anticipated users.

The committee has concluded its examination of this matter.

Subdelegation

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, a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

Rule 166 of the instrument provides that:

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

The ES provides no information about this provision.

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

The committee requested the minister's advice in relation to the broad subdelegation of the powers delegated to the Electoral Commissioner under the instrument.

Minister's response

The Minister for Indigenous Affairs advised:

> I advise rule 166 is similar to section 16 of the *Commonwealth Electoral Act 1918*, providing a consistent approach to elections conducted under both legislative schemes. On this basis, the broad power of delegation is necessary and extends to individuals with relevant qualifications, and attributes to exercise the powers or functions.
>
> As this rule is consistent with the Electoral Act, no amendment is necessary to the TSRA Election Rules.
>
> The Department of the Prime Minister and Cabinet will revise the Explanatory Statement to provide further information about rule 166.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's view that the broad power of delegation in rule 166 of the instrument is necessary to provide consistency acrosss electoral regimes and extends to individuals with the relevant qualifications and attributes to exercise the delegated functions or powers.

The committee also notes the minister's advice that the broad delegation of power in rule 166 of the instrument is similar to the delegation in section 16 of the *Commonwealth Electoral Act 1918*. However, the committee does not consider the existence of similar provisions in other legislation to be a sound justification for the broad delegation of power in rule 166 of the present instrument.

Finally, the committee notes the minister's advice that the Department of the Prime Minister and Cabinet will revise the ES to provide further information about rule 166.

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

The committee has concluded its examination of this matter. However, in light of the committee's concerns regarding the absence of a legislative requirement that persons to whom functions and powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of those functions and powers, the committee draws this matter to the attention of the Senate.

Offences: strict liability

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

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

> that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

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

Given the potential consequences for individuals of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences, that is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Offences Guide).[14]

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

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

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

Minister's response

The Minister for Indigenous Affairs advised:

> I note the Committee's request and the importance of providing additional information about the use of strict liability elements in the TSRA Election Rules and consideration of any associated human rights issues.
>
> I note the respective provisions are consistent with [the] *Guide to framing Commonwealth offences, infringement notices and enforcement powers*.
>
> …
>
> My Department will revise the Explanatory Statement to provide further information about the strict liability offences and the reversal of the burden of proof and consideration of any associated human rights issues.

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

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the strict liability offences in the instrument are consistent with the Offences Guide.

The committee also notes the minister's advice that the Department of the Prime Minister and Cabinet will revise the ES to provide futher information about the strict liability offences. However, the committee notes that no information about the justification for the application of strict liability to the offences has been provided in the minister's response, and at the time of this report a replacement ES had not yet been registered on the Federal Register of Legislation.

Until such time as the committee receives further advice from the minister as to the justification for the application of strict liability to each of the offences in the instrument, or receives a replacement ES that addresses these matters, the committee is unable to be satisfied that the application of strict liability in each of the offences in the instrument is appropriate.

In the absence of a replacement explanatory statement being provided to the committee, the committee requests a further response from the minister as to the justification for the application of strict liability in subrules 154(2) and 155(2) of the instrument.

Offences: evidential and legal burdens of proof on the defendant

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

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

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

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

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

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

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

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

Minister's response

The Minister for Indigenous Affairs advised:

> I note the Committee's request and the importance of providing additional information about the reversal of the burden of proof for a number of offence provisions in the TSRA Election Rules and consideration of any associated human rights issues.
>
> I note the respective provisions are consistent with [the] *Guide to framing Commonwealth offences, infringement notices and enforcement powers*.
>
> My Department will revise the Explanatory Statement to provide further information about the strict liability offences and the reversal of the burden of proof and consideration of any associated human rights issues.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the provisions reversing the burden of proof are consistent with the Offences Guide.

The committee also notes the minister's advice that the Department of the Prime Minister and Cabinet will revise the ES to provide further information about the reversal of the burden of proof and consideration of any associated human rights issues. However, the committee notes that no information about the justification for the reversal of the evidential and legal burdens of proof has been provided in the minister's response, and at the time of this report a replacement ES had not yet been registered on the Federal Register of Legislation.

Until such time as the committee receives further advice from the minsiter as to the justification for the reversal of the evidential and legal burdens of proof in each of the offences in the instrument, or receives a replacement ES that addresses these matters, the committee is unable to be satisfied that the reversals of the burdens of proof have been sufficiently justified.

In the absence of a replacement explanatory statement being provided to the committee, the committee requests a further response from the minister as to the justification for reversing the burden of proof in each of the provisions previously identified by the committee.

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-8/138 Amdt 1 - Fuel System Safety [F2017L01417]** **AD/DHC-8/48 Amdt 3 - Provision of Separate Instrument Grounds [F2017L01426]**
Purpose	Repeals and replaces AD/DHC-8/138 to correct a Maintenance Requirements Manual Temporary Revision number referenced in the Requirement section of the Airworthiness Directive Updates the revision status of a referenced document and amends the model applicability
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 must be given by 8 February 2018[15]
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* (Legislation Act) requires the explanatory statement (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'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 incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents

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

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

AD/DHC-8/138 Amdt 1 incorporates the Bombardier DHC-8-400 Maintenance Requirements Manual and the Temporarary Revisions (TR) ALI-55 and ALI-56, as in force at the time of issue of AD-DHC-8/138. The ES to the instrument states:

> The Bombardier Maintenance Requirements Manual and Temporary Revisions referred to in the AD, as in force at the time of issue of AD/DHC-8/138, 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.

AD/DHC-8/48 Amdt 3 incorporates de Havilland Service Bulletin A8-34-117, as in force from time to time. The ES to the instrument states:

> The de Havilland Service Bulletin 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 (that is, AD/DHC-8/138 Amdt 1 and AD/DHC-8/48 Amdt 3) would likely 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.[16]

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

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16 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	**Child Care Subsidy Secretary's Rules 2017 [F2017L01463]**
Purpose	Deals with administration and machinery matters to enable the operation of the new child care subsidy payment and approval regime introduced by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*
Authorising legislation	*A New Tax System (Family Assistance) Act 1999*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 15 November 2017) Notice of motion to disallow must be given by 13 February 2018[17]
Scrutiny principle	Standing Order 23(3)(a)

Drafting: anticipated authority

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

The instrument was made under subsection 85GB(2) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act). That provision is inserted into the Family Assistance Act by item 40 of Schedule 1 of the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Amendment Act). Schedule 1 to the Amendment Act commences on 2 July 2018.

The instrument was made on 7 November 2017 and registered on 13 November 2017. Section 2 of the instrument provides that the instrument commences immediately after the commencement of Schedule 1 to the Amendment Act. Therefore, the instrument will also commence on 2 July 2018.

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

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

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

Instrument	**Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 [F2017L01425]**
Purpose	Amends the Migrations Regulations 1994 to update immigration policy and administrative practice
Authorising legislation	*Migration Act 1958*
Portfolio	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Instrument disallowed on 5 December 2017[18]
Scrutiny principle	Standing Order 23(3)(d)

Parliamentary oversight of delegated legislation

The Senate disallowed this instrument on 5 December 2017.

Section 1 of the instrument inserted a new definition of 'adequate arrangements for health insurance' into the Migration Regulations 1994 (Migration Regulations).

This definition provided that 'adequate arrangements for health insurance' meant an arrangement to be covered by health insurance:

(a) that meets requirements specified by the Minister under regulation 1.15K; or

(b) if no such requirements are specified, that the Minister considers adequate in the circumstances.

Section 2 of the instrument also inserted a new section 1.15K into Part 1 of the Migration Regulations, which provided that the minister may, by legislative instrument, specify requirements for health insurance for the purposes of the definition of 'adequate health insurance' in regulation 1.03. The committee notes that maintaining adequate arrangements for health insurance is a condition imposed on a large number of temporary visas.[19]

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

19 See Migration Regulations Schedule 8, item 8501. The requirement to maintain adequate arrangements for health insurance is, for example, a condition imposed on all student visas. See www.border.gov.au/Trav/Stud/More/Visa-conditions/visa-conditions-students.

Instruments made under Part 1 of the Migration Regulations are, under the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation), exempt from disallowance. Therefore, any instrument made under new section 1.15K would have been exempt from disallowance, and would not be subject to parliamentary oversight. The explanatory statement (ES) to the instrument confirmed that such an instrument would not be subject to disallowance:

> The instrument would not be disallowable because it is made under Part 2 [*sic*] of the Migration Regulations, and therefore is exempted from disallowance by section 10 of the *Legislation (Exemptions and Other Matters) Regulations 2015* (see table item 20).

The committee acknowledges that the intention of section 1.15K was to provide clarity to visa holders as to the meaning of 'adequate arrangements for health insurance' and it could thereby improve visa holders' understanding of their obligations, as what constitutes 'adequate arrangements for health insurance' is currently only explained in departmental policy guidance. The committee also acknowledges that a comprehensive explanation of these matters was included in the ES to the instrument.

However, the committee notes that the ES did not provide an explanation as to why an instrument specifying requirements for health insurance should not be subject to disallowance.

In this regard, the committee draws attention to its consideration of the LEOM Regulation when it was made in 2015, and in particular its consideration of section 10 of that instrument.[20] The committee noted that while the ES to the LEOM Regulation provided a justification for exempting the majority of the instruments covered by section 10 from disallowance, the ES did not provide any information on:

- the nature of the instruments covered by the exemption in table item 20 (that is, instruments made under the *Migration Act 1958* (Migration Act) and Migration Regulations);
- the broader justification for the exemption of instruments made under the Migration Act and Migration Regulations from disallowance; or
- whether, taking into account the nature of the instruments to which the exemption applies, it is appropriate to include this broad exemption from disallowance (thereby removing the instruments from the oversight of the Parliament).

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20 See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 14 of 2015*, pp. 8-9; *Delegated legislation monitor 16 of 2015*, pp. 30-33.

The committee requested the advice of the minister in relation to these matters. In response to the committee's concerns, the Attorney-General advised that:

> It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.
>
> Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act.
>
> I am also concerned that if these instruments were subject to disallowance, the Government would be less agile in addressing issues relating to trends in global population movements.[21]

The Attorney-General also provided a table of examples of the nature of instruments made under the Migration Act and Migration Regulations. Relevantly, the table indicates that instruments made under Part 1 of the Migration Regulations include eligible passports for internet application lodgement; specified occupations for certain visa eligibility; appropriate English language test results; and course qualifications for certain visas. The committee accepted the Attorney-General's justification as to why relevant instruments (particularly those outlined in the table) should continue to be exempt from disallowance.[22]

However, it does not appear to the committee that instruments prescribing requirements for health insurance are captured by the examples given by the Attorney-General. It is therefore unclear to the committee that the justification previously provided by the Attorney-General for exempting instruments made under Part 1 of the Migration Regulations would extend to instruments which define the meaning of specified terms which affect visa holders' obligations.

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21 Senate Standing Committee for Regulations and Ordinances, *Delegated legislation monitor 16 of 2015*, pp. 31-32.

22 Senate Standing Committee for Regulations and Ordinances, *Delegated legislation monitor 16 of 2015,* pp. 32-33.

Noting that the instrument has been disallowed by the Senate, the committee draws the above concerns to the minister's attention and makes no further comment.

Instrument	**Superannuation (PSSAP – Former Commonwealth Ordinary Employer-Sponsored Member) Determination 2017 [F2017L01441]**
Purpose	Precludes Judges of the Federal Circuit Court of Australia and members of Parliament to whom Division 1 of Part 2 of the *Parliamentary Superannuation Act 2004* applies from membership of the Public Sector Superannuation Accumulation Plan as 'former Commonwealth ordinary employer-sponsored members' under the new extended membership arrangements
Authorising legislation	*Superannuation Act 2005*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[23]
Scrutiny principle	Standing Order 23(3)(a)

Drafting: anticipated authority

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

The instrument was made under subsection 18(10) of the *Superannuation Act 2005*. That provision is inserted by item 7 of Schedule 1 to the *Superannuation Amendment (PSSAP Membership) Act 2017* (Amendment Act). Schedule 1 to the Amendment Act commences on 4 December 2017, pursuant to the Superannuation (PSSAP Membership) Commencement Proclamation 2017 [F2017N00087].

The instrument was made on 25 October 2017 and registered on 6 November 2017. Section 2 of the instrument provides that the instrument commences immediately

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

after the commencement of Schedule 1 to the Amendment Act. Therefore, the instrument will also commence on 4 December 2017.

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

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

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

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

Instrument	**ASIC Corporations (Factoring Arrangements) Instrument 2017/794 [F2017L01198]**
Purpose	Exempts sellers and purchasers of accounts receivable under factoring arrangements from legal requirements relating to derivatives under the *Corporations Act 2001*, where the factoring arrangement would otherwise fall within the definition of a derivative
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[2]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Access to incorporated document

The committee previously commented as follows:

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

Section 6 of the instrument incorporates Australian Standard AS ISO 10002-2006 *Customer satisfaction – Guidelines for complaints handling in organizations*

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

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

(ISO 10002:2004 MOD) published by SAI Global Limited on 5 April 2006. The committee's research indicates that the relevant standard in its entirety may be obtained from SAI Global, on payment of a fee. However, neither the instrument nor its ES states whether and where the standard can be accessed for free.

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

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. The committee's expectation, at a minimum, is that consideration be given by the department to any means by which the document is or may be made available free of charge to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request to the department. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

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

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

Minister's response

The Minister for Revenue and Financial Services advised:

> I have received advice that the incorporation by reference of the standard reflects the incorporation of the standard in the Corporations Regulations 2001 at regulations 7.6.02 and 7.9.77.
>
> Additionally, any persons interested in or affected by the instrument are able to access this information in a number of ways, including in:
>
> - ASIC Regulatory Guide 165: *Licensing: Internal and external dispute resolution*, which provides substantial guidance on how ASIC will apply the standard; and

3 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.

- several state libraries, including the State Library of New South Wales and the State Library of Queensland, which may be viewed by persons interested in, or affected by, the instrument.

Noting the Committee's concerns that the *Legislation Act 2003* requires that an explanatory statement for a legislative instrument that incorporates a document must contain a description of that document and indicate how it may be obtained, ASIC have also advised that they will amend the explanatory statement to refer readers to the guidance in ASIC Regulatory Guide 165 and the ability to access the standard at public libraries.

Committee's response

The committee thanks the minister for her response. The committee notes that a supplementary ES, which references the free availability of the incorporated standard at public libraries including the state libraries of NSW and Queensland, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]**
Purpose	Modifies the application of the *National Consumer Credit Protection Act 2009* to notionally insert new provisions prohibiting flexible credit cost arrangements
Authorising legislation	*National Consumer Credit Protection Act 2009*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 11 September 2017) The time to give a notice of motion to disallow expired on 30 November 2017 Notice given on 30 November 2017[4] Motion must be resolved by 21 March 2018[5]
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitors 13 and 14 of 2017*

Matters more appropriate for parliamentary enactment

The committee previously commented as follows:

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

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

> ASIC may, by legislative instrument:
>
> …

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

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

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

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

In cases of significant change to the law, the committee's longstanding view has been that enactment via primary legislation is more appropriate than via delegated legislation because it ensures that significant proposed changes are subject to the full legislative processes and consideration by the Parliament prior to commencement. In these instances, the committee generally requires a detailed justification for the inclusion of such matters in delegated legislation as opposed to primary legislation.

The committee recognises that broad instrument-making powers are granted to and exercised by ASIC under legislative provisions such as those in section 109(3) of the Act. In this regard, the committee notes that when the Act was before Parliament in 2009, the Scrutiny of Bills committee drew the Senate's attention to the 'large number of "Henry VIII" clauses in the bill which provide for regulations to change entitlements and obligations conferred by the principal legislation', stating its continuing concern about such 'reliance on the potential use of regulations to alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation'.[6]

The committee also understands that ASIC has previously stated that it would not use its broad regulatory powers to make rules that implement entirely new policies which are not already dealt with in the Act or Regulations.[7]

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

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

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

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

> the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act. In the absence of an explicit power, an attempt to enforce a legislative requirement contained in delegated legislation by the creation of an offence will be invalid.[8]

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that regulations should not be authorised to impose fines exceeding 50 penalty units or create offences that are punishable by imprisonment. The Guide further states that:

> Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised.[9]

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

> provisions dealing with offences and powers of arrest, detention, entry, search or seizure…are not authorised by a general rule-making power (or a general regulation-making power). If such provisions are required for an Act that includes only a general rule-making power, *it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[10] [emphasis added]

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

The committee requested the minister's:

- detailed justification for the imposition of high civil and criminal penalties in the instrument, rather than in primary legislation; and

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

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

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

- advice as to why it would not be more appropriate to impose the significant new policy implemented by this instrument in primary, rather than delegated, legislation.

Minister's first response

The Minister for Revenue and Financial Services advised:

> Prior to making the decision to make this legislative instrument, ASIC consulted broadly with industry bodies on the problems raised by flex commissions; possible regulatory options, including the appropriate penalties; and on the form of the instrument itself.
>
> This included extensive consultation with key industry bodies, such as the car finance sector and loan distribution sector, lenders, car dealers and consumer groups (both in writing and in numerous meetings).
>
> There were two rounds of written submissions across 2016 on the question of whether or not flex commissions should be prohibited. A detailed Regulation Impact Statement was prepared on the basis of these responses.
>
> There was a further round of written submissions in the first half of 2017 in respect of the form of the legislative instrument, and ongoing engagement with a number of affected entities (in particular motor vehicle finance lenders who would be subject to the prohibition and the industry body representing car dealers) during the finalisation of the terms of the instrument.
>
> In these consultations, there was broad (but not unanimous) agreement that: flex commissions caused harm; it was desirable to have a collective and competitively neutral response to address the 'first mover problem'; and if ASIC did prohibit flex commissions, there was a substitution risk, in that car dealers may seek to recoup lost revenue by charging higher dealer fees.
>
> The penalties included in the instrument reflect this broad agreement by stakeholders. Given that they were explicitly consulted on and agreed to by stakeholders, their inclusion in the instrument was considered appropriate rather than inclusion in the primary legislation.
>
> Additionally, ASIC's use of its modification powers was seen to be the most appropriate mechanism for implementing these changes given their effectiveness in providing a timely response to concerns surrounding flex commissions.
>
> Given the high volume of work currently being undertaken as a result of the Government's extensive legislative agenda in relation to the financial services sector, the use of an ASIC legislative instrument is the most effective way in addressing this issue in the short-term.
>
> ASIC will be monitoring credit licensees regarding the annual percentage rate and the credit fees and charges under their contracts. Should any

operational issues arise, ASIC will be in a position to implement any necessary changes to the instrument in the short-term, while any possible legislative change can be considered by the Government.

Committee's first response

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

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

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

The committee remained concerned that the minister's response did not address the absence of specific legal authority for the enactment of civil and criminal penalties. In this respect the committee reiterated its previous comments, including the analysis of legal experts that 'the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act'. The committee also noted its previous references to the clear and consistent advice of the Attorney-General's Department and the Office of Parliamentary Counsel in that regard.

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

Minister's second response

The Minister for Small Business advised:

> I have received advice that the penalties imposed under the instrument are consistent with legal authority granted to ASIC under the *National Consumer Credit (Protection) Act 2009* (the Credit Act).
>
> Specifically, the instrument is made under the statutory power given by s109(3)(d) of the Credit Act. That provision provides that ASIC may, by legislative instrument, declare that provisions to which Part 2-6 of the Act applies apply in relation to a credit activity, or class of persons or credit activities, as if specified provisions were omitted, modified or varied as specified in the declaration.
>
> The Credit Act does not enumerate any particular criteria governing the exercise by ASIC of the modification powers conferred by s109. In accordance with general principle, a power or discretion that is in its terms unconfined is limited only by the context, scope and purpose of the statute of which it forms a part: *R v Australian Broadcasting Tribunal*; *Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50; see also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.
>
> The High Court has considered both the need and the scope of ASIC's modifications powers in *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 (DB Management). That case required consideration of s730 of the Corporations Law (as it was then). This provision contained a modification power similar to the power in s109 of the Credit Act relied on to make the instrument.
>
> ASIC considers that the prohibition, related offences and penalties imposed under the instrument are consistent with the subject matter, scope and purpose of Ch 2 of the Credit Act. In particular they note:
>
> - one of the objects of the Credit Act is to ensure that holders of an Australian credit licence meet minimum standards of conduct in their dealings with consumers. These include requirements to act honestly, fairly and efficiently, and to have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives: ss47(1)(a) and (b) of the National Credit Act;
> - the instrument is consistent with the objectives of ss47(1)(a) and (b) of the National Credit Act. This view was tested through an extensive consultation process, as set out in ASIC's Regulation Impact Statement (Attachment 2 to Consultation Paper 279 Flex commission arrangements in the car finance industry);
> - subsections 109(6) and (7) of the Credit Act expressly recognise that the modification power can be used to create an offence. These subsections provide that: if conduct of a person would not have

constituted an offence if a particular declaration had not been made, that conduct does not constitute an offence unless, before the conduct occurred, the text of the declaration had been published in a specified way; and in a prosecution for such an offence, the prosecution must prove that the text had been published as required before the conduct occurred; and

- the penalties imposed under the instrument are consistent with penalties imposed by other provisions in Ch 2 of the Credit Act (e.g. ss 69 and 70).

ASIC further note that the use of a modification power to create an offence and related penalties through subordinate legislation is not unique. Regulation 7.6.02AGA of the Corporations Regulations 2001 – made under a modification power in s926B of the *Corporations Act 2001* (the Corporations Act) – creates a prohibition on providing financial services in relation to specified products unless the person is licensed or registered.

A breach of this prohibition is subject to a civil penalty of 2,000 penalty units and a criminal penalty of 200 penalty units, or 2 years imprisonment or both. Again, the relevant modification powers in the Corporations Act (both ASIC powers in s926A and regulation powers in s926B) are substantially the same as those in the Credit Act.

Committee's final response

The committee thanks the minister for his response, and notes the minister's advice in relation to the scope of the powers conferred upon ASIC by the Credit Act, and precedent for the use of such powers to impose similar penalties via delegated legislation. The committee also notes the minister's assessment that the prohibition, related offences and penalties imposed under the instrument are consistent with the subject matter, scope and purpose of chapter 2 of the Credit Act.

The committee nonetheless remains concerned, for the reasons it has previously outlined, that high civil and criminal penalties should not be imposed by delegated legislation, especially where there is no express provision in the enabling legislation authorising the creation of a criminal offence in the instrument. The committee reiterates its long-standing view, consistent with that of the Senate Standing Committee for the Scrutiny of Bills, that such matters are more appropriate for parliamentary enactment through primary legislation.

The committee has concluded its examination of the instrument. However, the committee draws its concern regarding the imposition of high civil and criminal penalties in delegated legislation to the attention of the Senate.

Instrument	**Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) [F2017L01302]** **Radiocommunications (Spectrum Licence Allocation – Multi-band Auction) Determination 2017 [F2017L01255]**
Purpose	Amends two television licence area plans Determines the procedures to be applied in allocating spectrum licences in specific parts of certain frequencies; and fixes the spectrum access charges payable by the persons to whom such licences are allocated
Authorising legislation	*Radiocommunications Act 1992*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[11]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Incorrect classification of legislative instruments as exempt from disallowance

The committee previously commented as follows:

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

The Radiocommunications (Spectrum Licence Allocation – Multi-band Auction) Determination 2017 is also made under two enabling provisions in the Radiocommunications Act: section 60 and section 294. Table item 29 of section 10 of the LEOM Regulation provides that instruments made under subsection 60(1) of the

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

Radiocommunications Act are exempt from disallowance. However, instruments made under section 294 are not exempted under the LEOM Regulation, and the committee is not aware of any other exemption from disallowance applying to instruments made under section 294. In this regard, the committee also notes that the explanatory statement (ES) to the instrument states that '[t]o the extent that the Determination is made under subsection 294(1) of the Act, it is a disallowable instrument'.

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

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

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

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

Minister's response

The Minister for Communications advised:

> I am advised that due to an administrative error, both instruments were wrongly classified as exempt from disallowance when received by Parliament and the Committee. I understand that the error was rectified by OPC after the Committee secretariat drew it to OPC's attention.
>
> I agree that this is a serious issue, and I thank the Committee for drawing it to my attention. I am confident that officers in my portfolio understand the significance of ensuring that instruments tabled in the Parliament are correctly classified, so as not to hinder Parliament's effective oversight of delegated legislation.

The ACMA has also carefully noted the Committee's expectations that 'disallowable and nondisallowable provisions should not be combined in the same instrument unless this is entirely unavoidable', and that, in the event that it is necessary to combine disallowable and nondisallowable provisions in the same instrument, any such instrument should be classified as disallowable and the instruments or their ESs should clearly specify the provisions which are able to be disallowed. With respect to the two instruments in question, the ACMA has provided the following advice.

- The Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) was made under subsection 106(1) and paragraph 107(1)(f) of the *Radiocommunications Act 1992* (the Act). The amendments made under the powers arising from these two provisions were made in the same instrument for convenience and efficiency only. The ACMA notes that the amendments made under the different sections were made in separate Schedules, so, had Parliament been minded to disallow the amendment made under paragraph 107(1)(f), it might readily have done so. Now that the ACMA understands the Committee's expectations, the ACMA has undertaken, in any similar future case, to give effect to such amendments in separate instruments rather than separate schedules.
- The Radiocommunications (Spectrum Licence Allocation – Multi-band Auction) Determination 2017 was made under sections 60 and 294 of the Act. The ACMA has provided the following advice about why a single instrument was necessary in this case:

> That instrument governs a forthcoming auction of spectrum. Matters dealt with by s.294, being the determination of the amount of spectrum access charge and the timing and other arrangements for its payment are central to, and not easily severable from, the other rules about conducting the auction. The amount of charge payable depends entirely upon the result of the auction and the result of the auction depends upon its rules...The timing of the payment depends fundamentally upon the rules about when the auction closes. It would be a difficult matter to meaningfully separate rules about price and timing of payment from rules about the auction in general, which include, as fundamental elements, establishing the price and determining when it needs to be paid. Severance of those matters into separate instruments would also cause extra costs for participants in the auction (who need to familiarise themselves with its rules) and for the ACMA and the auction manager in conducting the auction.

In similar future cases, the ACMA has indicated that it would prefer to maintain the current practice of keeping the auction instrument as an

integrated whole, but would meet the Committee's expectation that the relevant Explanatory Statement should clearly specify the particular provisions of it which rely on section 294, and which are therefore subject to disallowance.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the instruments were misclassified as exempt from disallowance due to an administrative error, and that officers within his portfolio understand the significance of ensuring that instruments are correctly classified.

The committee further notes the minister's advice that, in future, disallowable and non-disallowable provisions will be enacted in separate instruments where possible, and where this is not practicable, any instruments which contain both disallowable and non-disallowable provisions will clearly distinguish the provisions which are subject to disallowance.

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 these instruments. As set out above, however, the committee is concerned that the initial incorrect classification of the instruments as exempt from disallowance may have hindered the effective oversight of the instruments by Parliament.

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

Instrument	**CASA EX120/17 – Exemption – requirements for helicopter aerial application endorsements [F2017L01332]** **CASA EX143/17 – Exemption – DAMP organisations to provide information to CASA [F2017L01300]**
Purpose	Exempts applicants for helicopter aerial application ratings and endorsements from training requirements under the Civil Aviation Safety Regulations 1998, subject to certain conditions Exempts organisations that have implemented a drug and alcohol management plan from the requirement to report information to CASA every six months, subject to the organisation keeping records of the information
Authorising legislation	Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[12]
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Matters more appropriate for parliamentary enactment: exemptions

The committee previously commented as follows:

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with principal or enabling legislation.

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

CASA EX120/17 exempts an applicant from these requirements, subject to the applicant having at least 10 hours of dual flight in a helicopter while receiving

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

training, and 20 hours direct supervision within the first 110 hours of aerial application operations (the alternative requirements).

In relation to these matters, the explanatory statement (ES) states:

> [The requirements in the CASR] have been reviewed and it has been concluded that it would be more effective if the person has 10 hours of dual flight in a helicopter while receiving training but, within the first 110 hours of aerial application operations, has 20 hours of operations under direct supervision.

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

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

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

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

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

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

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

The committee requested the minister's advice as to:

- why it is considered more appropriate to establish or extend exemptions to the CASR in each of the above instruments, rather than making amendments to the regulations; and

- whether and when government proposes to introduce amendments to the CASR to address the matters covered in the two instruments above.

Minister's response

The Minister for Infrastructure and Transport advised:

> CASA has utilised exemptions in this case as a means to provide more timely relief to industry for provisions that are intended to be implemented through regulation amendment.
>
> However, CASA agrees that it is preferable to amend regulations rather than make exemptions. The process for making regulation amendments that will cover these exemptions is underway with CASA expecting to bring forward amending regulations in either 2018 or 2019. More specific information is included below relating to each exemption instrument.
>
> CASA EX120/17 - Exemptions- requirements for helicopter aerial applications endorsements [F2017L01332]
>
> Since Civil Aviation Safety Regulation 1998 (CASR) Parts 61, 141 and 142 commenced in September 2014, CASA has identified various issues or unintended consequences that were then the subject of general exemptions. CASA proposes to amend these Parts (in particular Part 61) to deal with these issues with drafting instructions for an amendment regulation expected in 2018, for making of the regulation in 2019.
>
> CASA EX143/17 - Exemption - DAMP organisations to provide information to CASA [F2017L01300]
>
> CASA has been intending to progress regulation amendments to deal with this exemption but the work has been delayed in order to address higher profile safety critical regulation amendments.
>
> However, CASA has worked with the Office of Parliamentary Counsel during 2016 and 2017 to finalise an amendment package to CASR Part 99 relating to drug and alcohol management, and proposes to introduce the amendment package in early 2018 (together with a Part 99 Manual of Standards). The amendments will deal with the reporting requirements that are the subject of the exemption.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that CASA is working to address the unintended consequences of the identified provisions of the CASR, presently covered by the exemptions in these instruments, through amendments to the principal regulations in 2018 and 2019.

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

The committee has concluded its examination of these instruments.

Instrument	**Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311]**
Purpose	Provides for matters necessary for the effective operation and administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Authorising legislation	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[13]
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Personal rights and liberties: privacy

The committee previously commented as follows:

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

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

The explanatory statement (ES) to the instrument states:

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

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

> of the CATSI Act on a similar basis to that which existed under the ACA Act.

The ES does not provide any further information about the nature of the documents and information that the Registrar may make available to the public. Further, bearing in mind the express provision permitting the publication of personal information, the committee notes that the ES does not describe any safeguards that may be in place to ensure that personal privacy will be appropriately protected.

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

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

Minister's response

The Minister for Indigenous Affairs advised:

> The Committee can be assured that the Registrar is aware of, and takes seriously, the protection of the personal privacy of individuals, and this applies equally to any documents covered under section 55 of the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations) that are currently held by the Registrar…
>
> Section 55 of the CATSI Regulations deals with information and documents that were created in the context of the predecessor to the [CATSI Act], namely the [ACA Act]. Chapter 9 of the Registrar's policy statement *PS-12: Registers and the use and disclosure of information held by the Registrar* specifically provides for this issue:
>
> > **9 Information under the *Aboriginal Councils and Associations Act 1976* (ACA Act)**
> >
> > 9.1 Another function of the Registrar is to make documents and information relating to the registration of a corporation under the ACA Act available to the public, if the Registrar considers it appropriate. This includes documents and information that before the CATSI Act began were:
> >
> > - filed or lodged with the Registrar or served on the Registrar under the ACA Act
> > - kept by the Registrar under the ACA Act or
> > - given to or served on a person by the Registrar under the ACA Act.
> >
> > 9.2 In determining whether it is appropriate to release information or documents relating to the registration of an Aboriginal and Torres Strait Islander corporation under the ACA Act, the Registrar will consider:

- whether the information or document would be exempt under the CATSI Act
- whether a third party gave the information to the Registrar and the information related to a particular corporation – for example, information provided by a liquidator or administrator
- whether there is a public interest or benefit in releasing the information.

9.3 The Registrar will not release information or documents which relate to a corporation under the ACA Act if they would be exempt information under the CATSI Act.

9.4 Any personal information contained in a document may be removed before its release.

The Registrar's policy statement, *PS-01: Providing information and advice* outlines the nature of the information that the Registrar may make public as follows:

4.2 Information [that] is by its nature uncontroversial. Often information given will be 'public information'. It includes the following:

- the name or Indigenous Corporation Number of a corporation
- publicly available details about a corporation appearing on the Registrar's website
- publicly available information or documents on the Register of Aboriginal and Torres Strait Islander Corporations
- providing copies of a corporation's rule book to its members
- the address and contact details of the Registrar or staff
- general information about what functions the Registrar performs
- information about the Registrar's public education programs
- official publications produced by the Registrar
- standard responses covered by the Registrar's publications.

4.3 Information may include telling people what forms to complete or procedures to follow.

4.4 Telling a person which part of the CATSI Act, the regulations, a corporation's rule book or a publication is relevant to their concern or query would also be information.

4.5 In some straightforward cases, providing an explanation of part of the CATSI Act, the Regulations or a corporation's rule book may be classified as information – for example, where the information:

- is a plain English explanation of a straightforward and uncontroversial clause which is well understood
- relates to provisions of the CATSI Act, the Regulations or model rule book for which the Registrar is responsible
- is information which is included in a Registrar's publication.

Relevant safeguards in place for the protection of individuals' privacy:

Paragraph 4.15 of *PS-01: Providing information and advice* states that the Registrar is bound in all these matters by the Information Privacy Principles in the *Privacy Act 1988*, which regulate the collection, use, storage and collection of personal information. Information received from individuals will be dealt with in accordance with these statutory requirements.

Paragraphs 7.1 to 7.8 of the Registrar's policy statement *PS-15: Privacy*, outlines the privacy obligations of the Registrar with respect to the use and disclosure of protected information. This applies to any equivalent material contained in documents created under the ACA Act that are held by the Registrar.

The Office of the Registrar of Indigenous Corporations (ORIC) has also published a privacy statement on its website to demonstrate its commitment to protect the privacy of officers of Aboriginal and Torres Strait Islander corporations. This statement can be found at http://www.oric.gov.au/privacy-statement. As ORIC is part of the Department of the Prime Minister and Cabinet (PM&C), it is also bound by PM&C's Privacy Policy.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice regarding the nature of the documents and information that the Registrar may make available under the instrument, and the safeguards in place to ensure that personal information is adequately protected. The committee further notes that these matters are outlined in the Registrar's policy statements *PS-01, PS-12* and *PS-15*.

The committee also acknowledges that the documents and information that the Registrar may make available under the instrument are 'by [their] nature uncontroversial', and would include details of corporations, the functions of the Registrar and the operation of the CATSI Act and associated regulations.

The committee considers that the information above, including information regarding how the Registrar's policy statements may be obtained, would have been useful in the ES.

The committee has concluded its examination of the instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 5) Regulations 2017 [F2017L01211]**
Purpose	Establishes legislative authority for spending on two activities administered by the Department of Agriculture and Water Resources
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[14]
Scrutiny principle	Standing Order 23(3)(c), (a) and (d)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Merits review

The committee previously commented as follows:

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

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

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

website advises potential applicants for the grants that their applications will be assessed based on merit.[15]

The ES to the instrument states:

> Decisions in relation to each application are made without reference to the comparative merits of other applications…
>
> There is no merits review for decisions in connections with the approval of grants due to the non-competitive nature of the funding and targeted projects under the Program.

While the committee acknowledges that grant funding decisions under the Program are made on a rolling basis, it is not clear to the committee that the absence of a competitive or comparative element of decision-making is an established ground for the exclusion of merits review.[16] Accordingly, the committee considers that the ES does not provide sufficient information to establish that grant funding decisions made under the Program possess characteristics that would justify their exclusion from merits review.

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

Minister's response

The Minister for Finance provided the following advice, received from the Assistant Minister for Agriculture and Water Resources:

> Justification for exclusion from merits review
>
> The Agricultural Trade and Market Access Cooperation (ATMAC) grants program has a two-tiered internal merits assessment process: individual merit assessment by a five-member panel of departmental officials and then a merit discussion at the assessment panel meeting. The assessment panel assesses applications on an ongoing, non-competitive basis in the order they are received.
>
> As set out in the program guidelines available on the Department of Agriculture and Water Resources' website (http://www.agriculture.gov.au/SiteCollectionDocuments/market-access-trade/atmac/atmac-grant-programme-guidelines.pdf), the assessment panel assesses eligible applications on their own merit against the weighted assessment criteria,

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

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

as per the scoring regime and in accordance with the assessment plan. The assessment panel makes a recommendation to the program delegate as the final decision-maker on whether to approve a grant or a targeted project.

Funding decisions are made in accordance with the assessment process set out in the grant program guidelines and the applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines*.

There is no secondary or external merits review for decisions to approve or not approve a grant in this program.

The program involves allocation of finite resources (individual grants of up to $1.5 million to a total program funding of $5 million) that have been specifically allocated across four financial years (see program guidelines for funding allocation across the four years).

A merits review decision made in relation to one grant would affect decisions in relation to others, because a review of an application to be successful could require a reduction in funding to other recipients.

The program guidelines outline the consideration of targeted applications:

> The department may seek an application for a project where a trade issue arises that needs urgent resolution and no applications have been already submitted for a project that would address the issue. The department may also decide to seek an application where, for example, none of the applications received to date address an identified gap or a challenge that the department considers needs to be addressed.
>
> Any applications sought by the department will be considered in isolation of the applications accepted on an ongoing, non-competitive basis and will take precedence. An invitation to submit an application is no guarantee that funding will be provided.

An applicant may lodge a complaint about the handling of their application by the department to the program manager for consideration. Persons who are otherwise affected by decisions or who have complaints about the program also have recourse to the department. The department will investigate any complaints about the program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the department handles the complaint they may lodge a complaint with the Commonwealth Ombudsman.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that, because the Agricultural Trade and Market Access Coorperation (ATMAC) grants program involves the allocation of finite resources, a merits review decision

made in relation to one grant would affect decisions in relation to others, including potentially requiring a reduction in funding for other grant recipients.

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

The committee has concluded its examination of this matter.

Legislative authority for spending

The committee previously commented as follows:

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

The committee notes that the instrument establishes legislative authority for the government's spending on the Agricultural Trade and Market Access Cooperation Program, including the grants scheme under that Program, by adding item 244 to Schedule 1AB of the FF(SP) Regulations. The instrument commenced on 20 September 2017. The ES states that grant funding of $3.1 million has been available under the Program over four years since 2015-16, and that applications for the grants scheme opened in March 2016. The department's website indicates that grants were made under the scheme amounting to $55,000 in financial year 2015-16, $1.65 million in 2016-17, and an unspecified amount so far in 2017-18.[17]

The committee notes that, in *Williams No. 1,* the High Court held that in most circumstances, the Commonwealth executive requires statutory authority before it can enter into contracts with private parties and spend public money.[18] The committee is unclear in this instance as to the legislative authority under which spending on the grants scheme was funded prior to 20 September 2017, and if such legislative authority previously existed, why it is necessary to establish a new legislative authority by inserting item 244 into Schedule 1AB of the FF(SP) Regulations now.

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

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

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

Minister's response

The Minister for Finance, on behalf of the Assistant Minister for Agriculture and Water Resources, advised:

> Prior legislative authority
>
> Prior to 20 September 2017, legislative authority for the ATMAC program was sourced from item 401.011 of Schedule 1AA of the Financial Framework (Supplementary Powers) Regulations 1997 which relevantly provides:
>
> | | |
> |---|---|
> | 401.011 | Agriculture Advancing Australia – International Agricultural Cooperation Objective: To maintain and improve international market access opportunities for Australia's agriculture, food, fisheries and forestry industries |
>
> Item 244 was added to the Regulations as a measure for the avoidance of doubt to ensure the existence of legislative authority for the payment of funds as part of the ATMAC grants scheme.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that, prior to 20 September 2017, legislative authority for spending under the ATMAC grants program was sourced from item 401.011 of Schedule 1AA to the FF(SP) Regulations. The committee also notes the minister's advice that item 244 was inserted into the FF(SP) Regulations to remove doubt that spending under the ATMAC grants program is authorised.

The committee has concluded its examination of the instrument.

Instrument	**Guidelines Relating to the Registration and Cancellation of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator [F2017L01308]**
Purpose	Provides information on the factors that will be considered by the Inspector-General in Bankruptcy, under the *Bankruptcy Act 1966*, in deciding whether to approve an application for registration as a debt agreement administrator; whether to cancel an existing registration; and whether to declare a person ineligible to act as a debt agreement administrator
Authorising legislation	*Bankruptcy Act 1966*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[19]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

No statement of compatibility

The committee previously commented as follows:

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

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

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

19 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 Attorney-General advised:

> In response to the Committee's first request, the rule-maker has advised me that a Statement of Compatibility was omitted because of an administrative oversight. The rule-maker has advised me that he will update the ES in accordance with the requirements of the Parliamentary Scrutiny Act.

Committee's response

The committee thanks the Attorney-General for his response, and notes the Attorney-General's undertaking to register a replacement ES that will contain a statement of compatibility with human rights.

The committee considers that it would have been useful for the Attorney-General's response to include the proposed statement of compatibility.

The committee has concluded its examination of this matter.

Description of consultation

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

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

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

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act.

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

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[20]

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

Minister's response

The Attorney-General advised:

> In response to the Committee's second request, the rule-maker has advised me that no consultation was undertaken in relation to the Guidelines. The rule-maker determined that this was appropriate because I am currently pursuing reform of the debt agreement system which will require amendment of the Guidelines in the near future. It was necessary for the rule-maker to make the Guidelines in advance of finalising reform of the debt agreement system because the Guidelines replaced an instrument that sunsetted on 1 October 2017. The rule-maker has advised me that he will consult with stakeholders on amendments to the Guidelines as part of finalising reform of the debt agreement system. The rule-maker has also advised me that he will update the ES in accordance with the requirements of the Legislation Act.

Committee's response

The committee thanks the Attorney-General for his response, and notes his advice regarding the reason why no consultation was undertaken in making this instrument. The committee notes the Attorney-General's undertaking that the rule-maker will register a replacement ES which amends the consultation information to comply with the Legislation Act.

The committee further notes the Attorney-General's advice that consultation will be undertaken on future amendments to the instrument, which are expected to result from the government's reform of the debt agreement system.

The committee has concluded its examination of the instrument.

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

Instrument	**Health Insurance (Approved Pathology Undertakings) Approval 2017 [F2017L01293]**
Purpose	Places obligations on pathology practitioners and pathology providers to ensure that they are accountable for services rendered by them or on their behalf
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health and Aged Care
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[21]
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Personal rights and liberties: privacy

The committee previously commented as follows:

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

Section 7 of Schedule 1 (Approved Pathology Practitioner Undertaking) and section 12 of Schedule 2 (Approved Pathology Authority Undertaking) to the instrument require pathology practitioners and authorities, respectively, to comply with requests for information by specified government officials.[22] The relevant sections also provide that such information may then be made available to other specified entities.

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

The committee notes that the ES does not address the nature of the information that may be requested under subsection 7(1) of Schedule 1, nor does it set out any means

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

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

by which the privacy of any information provided under the instrument — particularly information relating to a patient's clinical details, which it seems may be provided by pathology practitioners under Schedule 1 — will be appropriately protected.

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

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

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

Minister's response

The Minister for Health advised:

> I am confident that the requirements in the legislative instrument do not infringe on individual's personal rights or liberties.
>
> The Commonwealth introduced a compulsory accreditation system in relation to Medicare benefits for pathology in 1986. In order to be accredited, a pathology laboratory must meet specified quality standards. Medicare benefits are only payable for pathology services if:
>
> - approved services are performed in a laboratory within an appropriate Accredited Pathology Laboratory category;
> - the service is rendered by or on behalf of an Approved Pathology Practitioner; and
> - the proprietor of the laboratory is an Approved Pathology Authority.
>
> Section 7(1) of Schedule 1 of the Health Insurance (Approved Pathology Undertakings) Approval 2017 allows for relevant information related to pathology services provided by an Approved Pathology Practitioner or on behalf of the Approved Pathology Practitioner, to be provided to the Australian Government Department of Human Services, who manage the administration of laboratory status and Medicare payments for pathology services.
>
> Alternatively, the information may be provided to the Australian Government Department of Health, who has responsibility for compliance activities. For example, the information may include records of pathology services claimed to have been rendered by the Approved Pathology Practitioner or on their behalf that may inform the monitoring of Medicare payments for the purposes of ensuring the appropriate use of public funds

or compliance activities. The requestor of the information is considered to have the responsibility of determining whether any clinical information is relevant to any issues arising from the Undertaking.

Section 12(1) of Schedule 2 of the Health Insurance (Approved Pathology Undertakings) Approval 2017 enables the Approved Pathology Authority, or the proprietor of the laboratory, to provide any requested relevant information to the Australian Government Department of Human Services relating to the pathology laboratory or pathology services provided at the laboratory or services provided by the Approved Pathology Practitioner that has signed the Undertaking. The example provided for section 7(1) would be relevant to this provision.

In terms of safeguards addressing disclosure of personal information or clinical information, as part of the national pathology accreditation program, laboratories are required to have protocols and procedures relating to the tracking of specimens and test results and the disclosure of test results. In addition, a pathology request form and laboratory records often are identified with a patient name and up to two other unique identifiers, such as unique medical record number or date of birth.

There are also legal safeguards in place relating to the disclosure of this information. To the extent that the information requested would include information patient clinical details, the secrecy provision in section 130(1) of the *Health Insurance Act 1973* (the Act) prohibits a person from directly or indirectly divulging or communicating to any person any information with respect to the affairs of another person acquired by him or her in the performance of his or her duties, or in the exercise of his or her powers or functions under the Act. This secrecy provision extends to information acquired by the requestors under section 7 (1) of Schedule 1 to the instrument from Approved Pathology Practitioners, and the sharing of that information with recipients. Therefore, once the requestors and recipients have been provided with the information about the affairs of a person (e.g. identified clinical information), the requestors and recipients are bound by section 130(1) of the Act not to divulge or communicate that information, unless an exception applies. A general exception allowing information to be divulged in the exercise of powers, functions and duties under the Act is included in section 130(1) itself. Any disclosure that occurs outside these exceptions is prohibited and could constitute an offence, attracting criminal penalties.

Section 135A of the *National Health Act 1953* (NH Act) is the secrecy provision that applies to information acquired under the NH Act. For relevant purposes, this secrecy provision mirrors the secrecy provision in the HI Act (i.e. section 130(1) of the Act). This provision may be invoked subject to whether information is shared and disclosed. If the NH Act should apply, section 135A will prohibit disclosure of information (unless an exception applies) in the event that information is acquired for the purposes of the NH Act (in addition to the Act).

> Furthermore, the Department and other recipients/requestors are 'APP entities' for the purposes of the *Privacy Act 1988* and are therefore subject to the principles regarding the handling of personal information arising from that Act.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice regarding the nature of the information that may be requested under subsection 7(1) of Schedule 1 and subsection 12(1) of Schedule 2 to the instrument, and the entities to whom that information may be provided.

The committee further notes the minister's advice as to the legal and policy safeguards in place to protect patients' personal information and clinical details. In particular, the committee notes the secrecy provisions in section 130(1) of the *Health Insurance Act 1973* and section 135A of the *National Health Act 1953,* as well as relevant provisions of the *Privacy Act 1988* that apply to the recipients of information provided under the instrument.

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

The committee has concluded its examination of the instrument.

Instrument	**Industry Research and Development (Cooperative Research Centres Projects Program) Instrument 2017 [F2017L01202]**
Purpose	Establishes legislative authority for government funding of industry-led research through the Cooperative Research Centres Projects Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[23]
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Merits review

The committee previously commented as follows:

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

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

Section 13 of the instrument provides for project applications to be assessed by Innovation and Science Australia (the Board), which then makes recommendations to the minister for decision. Subsection 13(1) provides that compliant applications must be considered on merit, and against all other compliant applications. Neither the instrument nor the explanatory statement (ES) sets out whether the minister's decisions are subject to external merits review; and if not, what characteristics justify their exclusion from merits review.

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

The committee considers that the ES should include a description of the policy considerations and program or grant characteristics relevant to the question of whether or not decisions made pursuant to programs and grants regulations should be subject to independent review. This expectation is consistent with the committee's expectations in relation to programs or grants authorised under the Financial Framework (Supplementary Powers) Regulations 1997.[24]

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

Minister's response

The Acting Minister for Industry, Innovation and Science advised:

> Funding decisions made under the Program are not subject to external merits review. Merits review would not be appropriate within the context of the Program, as funding decisions involve the allocation of finite resources, and overturning an original funding decision could affect an allocation for another party. This is consistent with the Administrative Review Council guide, *What decisions should be subject to merits review?* available at https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx. The Program is subject to a robust and extensive assessment process, an enquiry and feedback process, and an existing complaints mechanism for affected applicants.
>
> Funding for the Program is provided under the broader Cooperative Research Centres (CRC) Program. The CRC Program provides funding of $710 million over the forward estimates to support:
>
> - CRC grants (which are supported by item 418.004 of Schedule 1AA of the Financial Framework (Supplementary Powers) Regulations 1997, and for which there is no maximum value, but which are typically $30-50 million); and
> - grants for CRC Projects (which are supported by the Instrument, and which may be up to a maximum of $3 million).
>
> There is no specified annual amount allocated to each of these two funding streams. The number of CRC grants and grants for CRC Projects that will be funded in each selection round will depend on the number of applications received, the relative merits of applications, the amount of

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

available funding and the need to ensure sufficient funding is available for future selection rounds.

Program funding is provided through a competitive, merit based process in accordance with the Commonwealth Grants Rules and Guidelines

https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines.pdf

and the Cooperative Research Centres Projects Guidelines (the Program Guidelines) available at https://www.business.gov.au/CRC-P.

To be eligible to receive funding, applicants must meet the eligibility criteria and rank competitively on the selection criteria against all other compliant applications. The selection criteria are set out in section 12 of the instrument and further guidance is outlined in the Program Guidelines.

At first instance, applications are assessed by the Department of lndustry, Innovation and Science (the department) against the eligibility criteria, with the program delegate determining each application's compliance with the eligibility criteria.

Following this, the merit selection process outlined in section 13 of the instrument applies. Innovation and Science Australia (the Board) considers eligible applications against each of the six selection criteria. To be competitive, applications must score highly against each selection criterion.

After considering the applications, the Board makes recommendations to the Minister on: which projects are suitable for funding; the national benefits to be delivered through funding the projects; the level of program funding proposed for each project; and any conditions that should apply to any offers of funding.

The Minister makes the final decision about which grants to approve and the level of funding for each project, taking into consideration the Board's recommendations, and the availability of grant funds. Funding will not be approved if there are insufficient Program funds available across relevant financial years for the Program.

Both successful and unsuccessful applicants are informed in writing. Unsuccessful applicants are given feedback and may request an opportunity to discuss the outcome with the department. Unsuccessful applicants can submit a new application for the same or similar project in future funding rounds if weaknesses identified in their previous application are addressed.

Persons who are otherwise affected by decisions or who have complaints about the Program also have recourse to the department. The department will investigate any complaints about the Program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman.

I have approved a replacement Explanatory Statement containing this explanation (copy attached), and my department has amended its processes to ensure future Explanatory Statements contain such detail.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that funding decisions involve the allocation of finite resources, and that overturning an original funding decision could affect an allocation to another party.

The committee notes that the replacement ES provided to the committee has now been registered on the Federal Register of Legislation, and further notes the minister's advice that the department has amended its processes to ensure that future ESs provide information in relation to merits review of decisions.

The committee has concluded its examination of the instrument.

Instrument	**Marine Orders (Navigation Act) Administrative Amendment Order 2017 [F2017L01336]**
Purpose	Makes amendments of an administrative or editorial nature to a number of marine orders
Authorising legislation	*Navigation Act 2012*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[25]
Scrutiny principle	Standing Order 23(3)(b) and (a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Offences: strict liability

The committee previously commented as follows:

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

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

Given the potential consequences for individuals of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such provisions, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.[26]

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

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

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

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

Minister's response

The Acting Minister for Infrastructure and Regional Development advised:

> The Committee noted that the Order amends Marine Order 12 (Construction - subdivision and stability, machinery and electrical installations) 2016 (MO12) to remake an offence already contained in MO12. As the Committee acknowledges, the remaking of the offence was only intended to correct a numbering error. However, as this was achieved by remaking the offence in its entirety, the Committee has asked for advice about the justification for this strict liability offence and has also requested that the explanatory statement be updated.
>
> Section 23 of MO12 requires a person boarding or leaving a vessel to use the means of access provided or identified by the master of the vessel. Subsection 23(2) provides that non-compliance with Subsection 23(1) is an

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

offence and that strict liability applies to the offence. Subsection 23(3) provides that a person is liable to a civil penalty.

Strict liability offences allow for the imposition of criminal liability without the need to prove fault (see section 6.1 of the Criminal Code). Subsection 341(1) of the *Navigation Act 2012* (the Navigation Act) provides that the regulations may provide for penalties of not more than 50 penalty units for an individual and 250 penalty units for a body corporate for a contravention of the regulations. Under Section 342 of the Navigation Act, marine orders may deal with any matter for which provision may be made by the regulations.

Section 23 of MO12 is an important measure designed to achieve the safety of persons boarding or leaving vessels. Strict liability is imposed for offences in marine orders including in circumstances where there are risks to the life and safety of persons arising from breach of the offences. In this context it is considered that the strict liability offence is warranted as a deterrent.

The penalty (5O penalty units) is relatively low and is within the limitation imposed by paragraph 341(1)(a) of the Navigation Act. The Order also creates a civil penalty for failure to comply with the offence. The civil penalty is regulatory rather than punitive in nature and is authorised by paragraph 341(1)(b) of the Navigation Act.

In framing the offence, regard was given to the Guide [to] Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) published by the Attorney General's Department and is consistent with the principles outlined in the Guide.

To the extent that there is a limitation on human rights as a result of the imposition of the strict liability offence, this is considered to be reasonable, necessary and proportionate to ensure the safety of persons boarding or leaving vessels.

Justification for this strict liability offence will be included in a replacement explanatory statement for the Order as the Committee has requested.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that the imposition of strict liability is warranted as a detterent in circumstances where there are risks to life and safety, and that the penalty amount imposed (50 penalty units) is within the limitation imposed by paragraph 341(1)(a) of the *Navigation Act 2012* (the enabling legislation).

The committee also acknowledges that the penalty for the strict liability offence is consistent with the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

The committee notes that a replacement ES, containing a justification for the imposition of the strict liability offence, has now been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Access to incorporated documents

The committee previously commented as follows:

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

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

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

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

The committee's research indicates that the documents appear to be freely available online.[27] However, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.

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

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

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

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

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

Minister's response

The Acting Minister for Infrastructure and Regional Development advised:

> The Committee also noted that the Order incorporates the following documents without indicating in the explanatory statement where they may be obtained:
>
> - the International Life-Saving Appliance Code (referred to in the instrument as the LSA Code);
> - the Revised guidelines for the on board operational use of shipborne automatic identification systems; and
> - the Revised guidelines and specifications for pollution prevention equipment for machinery space bilges of ships.
>
> As the Committee's research indicates, these documents are all available for free online.
>
> Guidance as to how and where they may be accessed is provided in the marine orders being amended (see note 1 under Subsection 4(1) of Marine Order 25 (Equipment - lifesaving) 2014, note 3 under Subsection 4(1) of Marine Order 63 (Vessel reporting systems) 2015 and note 5 under Section 4 of Marine Order 91 (Marine pollution prevention - oil) 2014).
>
> However, the replacement explanatory statement for the instrument will also specify the websites where these documents are available free of charge.

Committee's response

The committee thanks the minister for his response, and notes that a replacement ES, which specifies the website where the relevant documents are available free of charge, has now been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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

Instrument	**Retirement Savings Accounts Tax File Number approval No. 1 of 2017 [F2017L01270]**
Purpose	Approves the manner of quoting and requesting tax file numbers by retirement savings account (RSA) holders, applicants to become RSA holders and RSA providers
Authorising legislation	*Retirement Savings Accounts Act 1997*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[29]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Incorrect classification of legislative instrument as exempt from disallowance

The committee previously commented as follows:

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

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

In this respect, however, the committee notes that this instrument shares an ES with another instrument, the Superannuation Industry (Supervision) Tax File Number Approval No. 1 of 2017 [F2017L01262] (superannuation instrument). The ES notes that the retirement instrument remakes a substantively similar instrument which was to be automatically repealed under the 'sunsetting' provisions of the Legislation

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

Act 2003 on 1 October 2017.[30] In its discussion of sunsetting, the ES states that unlike the superannuation instrument, the retirement instrument is not exempt from sunsetting under table item 6 of section 11 of the LEOM Regulation, which provides for exemption from sunsetting for '[a]n instrument (other than a regulation) relating to superannuation'.

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

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

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

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

Minister's response

The Minister for Revenue and Financial Services advised:

> This instrument was originally made by the Australian Prudential Regulation Authority (APRA) in 2007 and was recently remade by APRA.
>
> APRA has advised me that at the time this legislative instrument was lodged for registration on the Federal Register of Legislation (FRL), it was correctly marked as not being exempt from disallowance. As the Office of Parliamentary Counsel (OPC) is the agency charged with registration of legislative instruments and with arrangement of their tabling before Parliament, it appears that the misclassification occurred due to an error while the legislative instrument was with OPC.
>
> I have asked APRA to bring the issue raised by the Committee to the attention of OPC to address this misclassification.

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

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that she was advised by APRA that, when the instrument was lodged for registration on the FRL, it was correctly marked as not being exempt from disallowance.

The committee also notes the minister's view that the relevant misclassification occurred while the instrument was with OPC, and notes that the minister has asked APRA to bring the issue raised by the committee to OPC's attention.

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 instrument. As set out above, however, the committee is concerned that the initial incorrect classification of the instruments 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.

Instrument	**Taxation Administration Regulations 2017 [F2017L01227]**
Purpose	Sets out detailed rules and processes for the administration of taxation matters under the *Taxation Administration Act 1953*
Authorising legislation	*Taxation Administration Act 1953*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) Notice of motion to disallow must be given by 7 December 2017[31]
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Personal rights and liberties: offences

The committee previously commented as follows:

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

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

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

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

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

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

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

Minister's response

The Minister for Revenue and Financial Services advised:

> Section 7 of the Taxation Administration Regulations 2017 provides for evidentiary certificates to be issued in prosecutions of persons in respect of offences under section 8C and 8D of the *Taxation Administration Act 1953* for refusing or failing to do specified things under a taxation law, or when attending before the Commissioner of Taxation (Commissioner) or another person pursuant to a taxation law.
>
> Section 7 was remade as part of the sunsetting of the Taxation Administration Regulations 1976. The former section 5 of the Taxation Administration Regulations 1976 provided that the certificate was evidence of the facts stated in the certificate. The remade section 7 of the Taxation Administration Regulations 2017 provides that a certificate is prima facie evidence of the matters set out in the certificate.
>
> Providing for a certificate to establish prima facie evidence of the matter is appropriate in this case, since the certificates would be issued by a Commissioner, a Second Commissioner or a Deputy Commissioner and are based on interactions that the person has had with the Commissioner or the Commissioner's employees. Specifically, section 8C is about whether a person has refused or failed to provide the Commissioner with information in certain circumstances, or had an interaction with the Commissioner on a specified event. Section 8D is about whether a person has failed to answer questions when attending before the Commissioner. In cases in which there are no disputes about the facts, requiring these administrative facts to be proved in court would be an unnecessary imposition on the courts.
>
> In the event there is any dispute about the matters set out in a certificate, as it is only 'prima facie' evidence of the matters described above, it can be rebutted by evidence to the contrary provided by the defendant and the prosecution must prove any contested matters beyond reasonable doubt.

> Moreover, if there is a dispute over whether a person has refused or failed to do a thing required by those sections, evidence of this is likely to be peculiarly within the knowledge of the defendant. In such circumstances, it is appropriate that the defendant be required to adduce the matters that are peculiarly within their knowledge.
>
> I note that the provisions of section 7 are consistent with those of the prior section 5, with the only substantive change being the clarification that the certificate was only prima facie evidence.

Committee's response

The committee thanks the minister for her response, and notes her advice that providing a certificate that establishes prima facie evidence of matters set out in the certificate is appropriate as the certificate would be issued by a Commissioner, a Second Commissioner or a Deputy Commissioner and would be based on interactions a person has had with the Commissioner or the Commissioner's employees. The committee also notes the minister's view that in cases where there are no disputes about the facts, requiring the facts to be proved in court would be an unnecessary imposition on the courts, and if there is any dispute, it is only 'prima facie' evidence of the matters, which can be rebutted by evidence to the contrary by the defendant. The committee further notes the minister's view that if there is a dispute over whether a person has refused or failed to do something, evidence of this is likely to be peculiarly within the defendant's knowledge.

The committee notes that, at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Providing that a matter is prima facie evidence of a particular fact, in effect, reverses the burden of proof and so interferes with this common law right. The committee notes that the *Guide to Framing Commonwealth Offences* provides, in relation to offences that reverse the burden of proof, that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[32]

The committee notes that this requires more than just that the defendant knows that a certain fact exists; it must be a matter that is *peculiarly* within their knowledge. In this instance, while a defendant may be in a position to know whether they have refused or failed to do a thing required by the legislation, this is not a matter that appears to be *peculiarly* within their knowledge and would ordinarily be something that the prosecution would need to prove beyond reasonable doubt.

32 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

The committee does not consider that the fact that the certificate is issued by a senior official, and that a similar provision existed in the previous regulations, is a sufficient basis for reversing general common law principles.

As such, it is not clear to the committee that it is appropriate to provide that, in the prosecution of an offence, a certificate issued by taxation Commissioners is prima facie evidence of the commission of an element of the offence.

The committee has concluded its examination of the instrument. However, the committee draws its concerns regarding the impact of a certificate on the right of a defendant to be presumed innocent until proven guilty to the attention of the Senate.

Instrument	**Vehicle Standard (Australian Design Rule 88/00 – Electric Stability Control (ESC) Systems) 2017 [F2017L01229]**
Purpose	Specifies requirements for Electronic Stability Control systems on passenger cars and light commercial vehicles
Authorising legislation	*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 must be given by 7 December 2017[33]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor 14 of 2017*

Manner of incorporation of documents

The committee previously commented as follows:

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

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

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

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

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

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[34]

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

Minister's response

The Minister for Urban Infrastructure advised:

> Clause 7 of the Determination incorporates references to the United Nations (UN) Regulation No. 140 (R 140) and the UN Global Technical Regulation No. 8 (GTR 8). These are international standards, which specify equivalent requirements and test methods to Appendix A of the Determination.

34 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.

Appendix A of the Determination incorporates references to the Consolidated Resolution on the Construction of Vehicles (R.E.3), a number of other UN Regulations, ISO 15037 Part 1: 2005, ISO 15037 Part 2: 2002, ASTM E1136 and ASTM E1337-90.

As these standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced (22 September 2017), and not 'as in force or existing from time to time'.

I note the Committee's comments on facilitating the public's ability to understand the operation of the Determination. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that these standards are incorporated as in force at the commencement of the Determination.

Appendix A, Section 11 of the Determination also incorporates the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2). However, in accordance with clause 6 (Exemptions and Alternative Procedures) of the Determination, compliance with Appendix A Section 11 is not required.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the relevant documents are incorporated as in force at the commencement of the instrument.

The committee notes that the replacement ES it has received contains a description of the manner in which the documents are incorporated, and notes the minister's undertaking to register the replacement ES on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Access to incorporated documents

The committee previously commented as follows:

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

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

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

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document may fail to satisfy the requirements of the Legislation Act.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[35]

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

Minister's response

The Minister for Urban Infrastructure advised:

> I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents.
>
> The Consolidated Resolution on the Construction of Vehicles (R.E.3.), the UN Regulations and the UN Global Technical Regulations are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is:
>
> www.unece.org/trans/main/welcwp29.html.
>
> ISO 15037 Part 1 and Part 2 are freely available through the National Library of Australia (NLA) eResources system, which provides access to the British Standards Online database. As a licensed resource, a library card is required to access the database and anyone with an Australian residential address is eligible to request one.

35 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.

> ASTM E1136 and ASTM E1337-90 are freely available online through the ASTM International Reading Room. This requires registration using an email and password. The ASTM International Reading Room website is:
>
> www.astm.org/readinglibrary/.
>
> In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the Department to amend the ES to include a description of these standards as well as details of how to access them through the WP.29 website, the NLA and the ASTM International Reading Room.
>
> A marked up copy of the revised ES, as amended by the Department, to address the issues raised by [the committee] is provided for your information at Attachment A. I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's undertaking to register the replacement ES received by the committee, which specifies where the relevant documents are available free of charge, on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)