

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

Monitor 2 of 2017

15 February 2017

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ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

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

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

Publications

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

1 For further information on the disallowance process and the work of the committee see *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 or instrument-maker:
 - (a) seeking an explanation/information; or
 - (b) seeking further explanation/information subsequent to a response; or
 - (c) on an advice only basis.
- **Chapter 2 Concluded matters:** sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Guidelines on consultation and incorporation of documents:** includes the committee's guidelines on addressing the consultation requirements of the *Legislation Act 2003*³ and its expectations in relation to instruments that incorporate material by reference.
- **Appendix 2 Correspondence:** contains the correspondence relevant to the matters raised in Chapters 1 and 2.

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.⁴

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.⁵

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

3 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

4 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.⁶

5 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

6 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 23 December 2016 and 2 February 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

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

Instrument	Amendment of List of Exempt Native Specimens (11/01/2017) [F2017L00045]
Purpose	Amends the List of Exempt Native Specimens to exclude Nautilidae from the mollusc exemption
Last day to disallow	9 May 2017
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

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

With reference to these requirements, the committee notes that the ES for Amendment of List of Exempt Native Specimens (11/01/2017) [F2017L00045] (the instrument) provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Instrument	CASA EX183/16 - Exemption - provision of a wind direction indicator [F2016L02022]
Purpose	Exempts aerodrome operators from compliance with the requirement to have a wind direction indicator near the end or ends of a runway used in instrument non-precision approach operations
Last day to disallow	9 May 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

With reference to these requirements, the committee notes that the ES for CASA EX183/16 - Exemption - provision of a wind direction indicator [F2016L02022] (the instrument) provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Instrument	Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2017 - Reporting Standard SRS 534.0 Derivative Financial Instruments [F2017L00046]
Purpose	Determines Reporting Standard SRS 534.0 Derivative Financial Instruments to clarify reporting regarding directly held over the counter derivatives
Last day to disallow	9 May 2017
Authorising legislation	<i>Financial Sector (Collection of Data) Act 2001</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)

Retrospective commencement

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the determination commenced retrospectively on 1 July 2016. However, the ES to the determination provides no information about the effect of the retrospective commencement on individuals.

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

Instrument	Higher Education Provider Approval No. 5 of 2016 [F2016L02008]
Purpose	Approves Proteus Technologies Pty Ltd as a higher education provider under section 16-25 of the <i>Higher Education Support Act 2003</i>
Last day to disallow	9 May 2017
Authorising legislation	<i>Higher Education Support Act 2003</i>
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

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

With reference to the above, the committee notes that section 5 of Higher Education Provider Approval No. 5 of 2016 [F2016L02008] (the instrument) appears to incorporate the 'Financial Viability Instructions' (FVI). However, neither the text of the instrument nor the ES states the manner in which the FVI are incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (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.

While the committee notes that the FVI are available for free online,¹ neither the instrument nor the ES states exactly where they can be accessed. 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 draws the above to the minister's attention.

Instrument	Indigenous Student Assistance Grants Guidelines 2017 [F2017L00036]
Purpose	Makes the Indigenous Students Assistance Grants Guidelines 2017, which provide a framework to deal with grants under Part 2-2A of the <i>Higher Education Support Act 2003</i>
Last day to disallow	9 May 2017
Authorising legislation	<i>Higher Education Support Act 2003</i>
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(c)

Merits review

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

Section 26 of the guidelines provides that a higher education provider must terminate an Indigenous Commonwealth Scholarship if the scholarship recipient ceases to be 'enrolled in a course of study' with the provider; and may terminate a scholarship if the recipient fails to comply with a condition of the scholarship.

1 Australian Government, Department of Education and Training, *Financial Viability Instructions*, <https://docs.education.gov.au/documents/financial-viability-instructions> (accessed 3 February 2017).

However, neither the instrument nor the ES provides any information as to whether the decision to terminate a scholarship under section 26 of the guidelines will be subject to merits review, or whether it is appropriate for such decisions to be excluded from merits review.

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

Instrument	National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017 [F2017L00088]
Purpose	Amends the National Disability Insurance Scheme (Becoming a Participant) Rules 2016 to align the age requirements for South Australian residents more closely with other jurisdictions
Last day to disallow	9 May 2017
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Department	Social Services
Scrutiny principle	Standing Order 23(3)(b)

Retrospective commencement

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the rules commenced retrospectively on 1 January 2017. However, the ES to the rules provides no information about the effect of the retrospective commencement on individuals.

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

Instrument	National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016 [F2017L00087]
Purpose	Sets out the ways in which the requirements of the Regulations in relation to auditing knowledge and experience may be met
Last day to disallow	9 May 2017
Authorising legislation	National Greenhouse and Energy Reporting Regulations 2008
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

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

With reference to the above, the committee notes that the instrument incorporates a number of Australian and international standards, as well as the 'International Handbook of Universities' (the handbook). While the ES is generally helpful in providing information about where documents incorporated into the instrument can be obtained, the ES states that the Australian and international standards and the handbook are available to purchase from the relevant publishers and does not provide information as to where these documents can be accessed for free.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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

Instrument	Renewable Energy (Method for Solar Water Heaters) Determination 2016 [F2017L00028]
Purpose	Determines a new method for calculating the number of certificates that may be created for a particular model of solar water heater and revokes all previous determinations made for that purpose
Last day to disallow	9 May 2017
Authorising legislation	Renewable Energy (Electricity) Regulations 2001
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

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

With reference to the above, the committee notes that the determination incorporates a number of Australian Standards. While sections 5 and 7 of the determination specify the manner in which each of the standards is incorporated, with respect to accessibility, the ES states:

Australian Standards are available for purchase from Standards Australia Limited.

The ES does not provide further information as to where the standards incorporated into the determination can be accessed for free.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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

Further response required

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

Correspondence relating to these matters is included at Appendix 2.

Instrument	Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672]²
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Industry, Innovation and Science
Last day to disallow	21 November 2016
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2016</i>

Constitutional authority for expenditure

The committee commented as follows:

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

The committee notes that, in *Williams No. 2*,³ the High Court confirmed that a constitutional head of power is required to support Commonwealth spending

² The committee notes that it deferred consideration of this instrument in *Delegated legislation monitors 6 and 7 of 2016*.

³ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672] (the regulation) adds three new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) to establish legislative authority for spending in relation to these items. New table item 159 establishes legislative authority for the Commonwealth government to fund the National Science Week and strategic science communication activities.

The committee notes that the objective of the 'National Science Week and strategic science communication activities' initiative is to fund a broad range of activities that are part of National Science Week, and which seek to enhance the community's understanding of, and interest in, science, technology, engineering and mathematics. The regulation provides that the objectives of the scheme also have the effect they would have if they were limited to providing funding in relation to eleven purposes tied to a Constitutional head of power. The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the trade and commerce power (section 51(i));
- the communications power (section 51(v));
- the astronomical and meteorological observations power (section 51(viii));
- the statistics power (section 51(xi));
- the power to make special laws for people of any race (section 51(xxvi));
- the external affairs power (section 51(xxix));
- the power to make grants to the States (section 96);
- the Territories power (section 122); and
- the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)).

The committee notes that the objective of the National Science Week initiative, when read in conjunction with the constitutional authority set out in the regulation, appears to be drafted in a manner similar to 'severability provisions' in primary legislation. Severability provisions are designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power under the Constitution.

Severability provisions operate in conjunction with section 15A of the *Acts Interpretation Act 1901*, which provides that Acts shall be read and construed so as not to exceed the legislative power of the Commonwealth. Section 13(1)(a) of the *Legislation Act 2003* applies section 15A of the *Acts Interpretation Act 1901* to legislative instruments.

With respect to section 15A of the *Acts Interpretation Act 1901*, the committee notes that the Office of Parliamentary Counsel, Drafting Direction No. 3.1 on constitutional law issues, provides the following guidance for drafting severability provisions:

Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.⁴

Noting that section 15A is subject to limitations, the committee's consideration of legislative instruments that appear to rely on the ability of a court to read down provisions must involve an assessment of the effectiveness of any severability or reading down provisions to enable a legislative instrument to operate within available heads of legislative power.

Drafting Direction 3.1 also provides the following example of one of the limitations of section 15A:

...if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did

4 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

not exhaust the purported operation of the operative provision in question.⁵

With reference to the committee's ability to effectively undertake its scrutiny of regulations adding items to Part 4 of Schedule 1AB to the FFSP Regulations, the committee notes its preference that an ES to a regulation include a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulation supports the funding for the National Science Week initiative, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for Finance, on behalf of the then Minister for Industry, Innovation and Science the Hon Greg Hunt MP and with the endorsement of the current minister, Senator the Hon Arthur Sinodinos, advised:

National Science Week is Australia's preeminent national celebration of science, held annually in August. It provides high profile science engagement across the nation, in which the whole of the Australian community can participate. It aims to reach as many Australians as possible - and has reached more than 1.5 million people each year - with a positive message about the impact science has on our lives, the Australian economy, our nation's society, and on the rest of the world. It is also an important opportunity for the Australian science community to celebrate and showcase science to the Australian public and the rest of the world.

The Australian Government supports National Science Week in a variety of ways, including through National Science Week Grants supported by this item. The Australian Government has allocated \$2 million over 4 years (\$500,000 each year) from 2016-17 to 2019-20 to National Science Week Grants. National Science Week Grants provide funding to meritorious and high profile science engagement projects across all states and territories, and support projects that stimulate and leverage further contributions to science by organisations across Australia.

5 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

Given its truly national focus on advancing the Australian community's engagement and participation in science, technology, engineering and mathematics (STEM) across all state and territory jurisdictions, it is considered that National Science Week is a nationally significant activity which could only be carried out for the benefit of Australia by the Commonwealth.

National Science Week Grants also support projects with a particular focus on engaging Indigenous Australians. In 2016, this included support for the Indigenous Science Experience Family Science Fund Day, which celebrated Indigenous and Western science and Indigenous youth and elder achievements, and demonstrated the value of traditional and customary Indigenous knowledge in science and technology and the relevance of science to our daily lives.

The National Science Week Grants support certain citizen science projects. Citizen science involves amateur or non-professional scientists collecting or analysing data, and formulating research questions and design, usually working with a professional scientist. Funding of \$85,000 per year is allocated to support a national online citizen science project as part of National Science Week. Funding is provided for citizen science projects that are designed to collect and disseminate science data (for example in relation to bird and mammal populations).

Citizen science also has a focus on the use of the internet as a means of engaging and communicating with Australians about science projects. In 2016, funding under this initiative supported the Wildlife Spotter citizen science project, which involved the establishment of an online web portal available to all sectors of the Australian community. Individuals across Australia were encouraged to register online to classify images of wildlife taken by movement-triggered cameras set up by scientists. The project resulted in over 2.8 million images being processed, with more than 3.4 million animals identified, all using the internet.

National Science Week Grants projects (including relevant citizen science projects) may span a vast range of scientific subject matters. These include, amongst other things, projects related to documenting and recording data from astronomy projects.

National Science Week Grants projects can also include a variety of activities which give effect to Australia's obligations under international agreements which are noted in item 159. The international agreements discussed below are relevant.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to enjoy the benefits of scientific progress and its applications, and for government parties to take steps necessary for the conservation, development and diffusion of science and culture.

Articles 7, 12 and 13 of the Convention on Biological Diversity obliges parties to conduct activities which are directed to promoting the community's understanding of the importance of biodiversity, measures that can be undertaken to conserve biodiversity, and projects directed at contributing to the identification, conservation or sustainable use of biodiversity.

Articles 4 and 6 of the United Nations Framework Convention on Climate Change requires parties to undertake activities directed at improving knowledge and understanding of climate change and its effects.

Article 4 of the Ramsar convention requires parties to conduct activities directed towards improving knowledge of wetlands and their flora and fauna.

Articles 5, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, obliges parties to conduct activities which contribute to an increased knowledge of the processes leading to desertification and drought, investigating ways of mitigating the effects of drought, and sustainable use and management of the natural resources of affected areas.

New item 159 is also drafted with reference to funding in relation to places, persons, matters or things external to Australia. Citizen science projects (including nationally significant citizen science projects supported through National Science Week) may include activities outside Australia, for example activities directed at water quality, plants or animals seaward of the low water mark.

Strategic science communication activities

Beyond National Science Week Grants, the strategic science communication activities under this item include three further elements:

1. Science tourism capacity building;
2. Decision-maker engagement; and
3. Equity of access.

1. Science tourism capacity building

The primary purpose of this element is to develop and implement a national framework for science tourism that helps to build Australia's profile as a science and innovation nation. Funding of \$49,500 (incl. GST) has been provided to the Canberra Innovation Network, based in the ACT, to develop this national framework. Once the national framework is complete, roundtables will be hosted in the ACT and Northern Territory to discuss local implementation in other states and territories. A pilot may also be undertaken in the ACT to demonstrate implementation strategies to other states and territories.

Funding under this element will have a strong focus on the use of the internet and development of online resources. The science tourism roundtables mentioned above will be streamed online to enable individuals and organisations in other locations to participate via the internet. Funding may also be provided to support the development of web-based applications and other downloadable resources to enable local state and territory tourism experiences to be made available from other parts of Australia, or otherwise enhanced, via the internet. A further key aim of the science tourism activities is to facilitate international and inter-jurisdictional tourism.

Funding under this element can also give effect to Australia's obligations under international agreements that are noted in item 159. For example, Article 6(2) of ICESCR relates to supporting technical and vocational guidance and training programmes, policies and techniques to support full and productive employment. By way of further example, Articles 1 and 2 of the International Labour Organization's Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources also requires parties to adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training.

Funding under this initiative may also be provided to the states or territories to support specific science tourism activities and to support the implementation of the abovementioned national science tourism framework.

2. Decision-maker Engagement

This element aims to increase the interaction between Australia's scientists and leading decision makers, for the purpose of improving dialogue in relation to science and innovation in public policy and evidence-based decision making.

Funding under this element has been provided to Science Technology Australia to undertake events wholly in the ACT which will bring together scientists and decision makers like Parliamentarians. Funding may also be provided to the states or territories to support other activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

3. Equity of Access

The Equity of Access element comprises three separate funding components. The first supports the Questacon Transport Assistance Programme (QT AP). This programme subsidises the costs associated with transportation to and from Questacon from within the ACT for socially disadvantaged groups including migrants, refugees, people with a disability and people in aged care.

The second component of the Equity of Access programme provides support for the development of a low vision project, also to be undertaken

wholly at Questacon in the Australian Capital Territory. Questacon is currently working with the Royal Blind Society to develop a community engagement project to open Questacon exhibitions in the ACT to the low vision community.

The final component of the Equity of Access programme provides funding for a travelling outreach programme focusing on STEM, namely the Shell Questacon Science Circus.

Questacon provides funding to the Australian National University to deliver pop-up interactive exhibits and learning experiences for children in preschools, primary schools, and secondary schools in remote and regional communities across Australia. It delivers teacher professional development workshops to support students' STEM outcomes. It also aims to benefit children by contributing to their development, as well as assisting school teachers or parents (or a child's legal guardian) to undertake activities in the classroom or at home to improve a child's understanding of science.

Funding is also provided to support the Shell Questacon Science Circus to conduct visits to remote Indigenous communities.

The Shell Questacon Science Circus is a national STEM outreach equity programme designed to ensure that Australians who would probably not otherwise be able to visit Questacon- the National Science and Technology Centre - can still access some of the benefits of this national institution. Delivering STEM education across all states and territories, it is considered an activity best performed by the Commonwealth of Australia.

Funding under the Equity of Access element can give effect to Australia's obligations under international agreements that are noted in item 159. For example, the funding can give effect to Australia's obligations under Article 29 of the Convention on the Rights of the Child, which requires parties to conduct activities directed to the development of children, particularly educational activities.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

The Minister for Finance further advised:

Further to Minister Hunt's response [attached], I am also advised that the development of the initiative for the National Science Week and strategic science communication activities and the drafting of item 159 in the Industry Regulation were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the accompanying explanatory statement for this Regulation, the objective of the item references a number of heads of legislative power, namely:

- the trade and commerce power;
- the communications power;
- the astronomical and meteorological observations power;
- the statistics power;
- the power to make special laws for people of any race;
- the external affairs power;
- the power to make grants to the States;
- the Territories power; and
- the Commonwealth executive power and the express incidental power.

Committee's response

The committee thanks the minister for his response.

The committee's request for advice in relation to this regulation arose from concerns about the relevance and operation of each of the constitutional heads of power relied on to support the 'National Science Week and strategic science and communication activities' initiative.

With reference to this request, the committee notes that the minister's response usefully includes detailed information about the different elements of the initiative. To assist with the scrutiny process the committee's preference is that such details about new programs be contained in the ES to a regulation.

While the above information assists the committee to undertake its general scrutiny of the regulation, the response does not provide a clear and explicit statement of how each listed constitutional head of power supports the 'National Science Week and strategic science and communication activities' initiative. In this respect, the committee reiterates its preference that an ES to a regulation that adds items to Part 4 of Schedule 1AB of the FFSP Regulations include a clear and explicit statement of the relevance and operation of each of the constitutional heads of power relied on to support the program.

The committee also notes the minister's advice that '[t]his answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.'

The committee takes this opportunity to note that any claims to withhold information from Senate committees require the minister to 'state recognised public interest grounds for any claim to withhold the information' that can be considered by the committee and the Senate.⁶

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 653.

With respect to claims that legal professional privilege provides grounds for a refusal to provide information in a parliamentary forum, *Odgers' Australian Senate Practice* states:

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for refusal of information in a parliamentary forum.

...the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.⁷

The committee gave a protective notice of motion to disallow this regulation on 21 November 2016. This motion to disallow must be resolved or withdrawn within 15 sitting days after it was given, otherwise the regulation will be deemed to be disallowed. Noting the information provided by the minister to date, the committee has resolved, on this occasion, to withdraw the protective notice of motion.

However, in light of the committee's concerns regarding the absence of a clear and explicit statement of the relevance and operation of each constitutional head of power relied on to support the 'National Science Week and strategic science communication activities', the committee requests the further advice of the minister in relation to the above.

7 *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669.

Advice only

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

Instrument	Industry Research and Development (Portland Aluminium Smelter Assistance Program) Instrument 2017 [F2017L00052]
Purpose	Provides legislative authority to commit Commonwealth funds for the Portland Aluminium Smelter Assistance Program
Last day to disallow	9 May 2017
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)

Delegation of legislative power – authorising spending activities

The committee notes that this instrument is made under subsection 33(1) of the *Industry Research and Development Act 1986* which was inserted by the *Industry Research and Development Amendment (Innovation and Science Australia) Act 2016*. This provision was identified by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) as a delegation to the executive of the parliament's power to authorise and establish new spending initiatives and programs, and referred to this committee's attention.⁸

The Scrutiny of Bills Committee raised concerns about ensuring sufficient parliamentary oversight of the types of arrangements to be authorised under new section 33. Specifically, the Scrutiny of Bills committee noted that the requirement under new subsection 33(3) to specify the legislative power or powers of the parliament in respect of which the instrument is made is an approach consistent with the expectations of this committee in relation to the authorisation of spending initiatives by regulations made pursuant to the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act). In concluding, the Scrutiny of Bills Committee highlighted its previous comments in relation to the need for sufficient parliamentary

⁸ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, pp 571-574.

oversight of the authorisation and establishment of new spending initiatives through the mechanism established by the FF(SP) Act.

The committee notes that this instrument seeks to authorise the Commonwealth to spend money in relation to the 'Portland Aluminium Smelter Assistance Program' (the Program). The ES states:

The Program is a \$30 million one-off grant to assist the Portland Aluminium Smelter (the Smelter) to restore production capacity of the Smelter to the same level as before damage caused by an electricity power outage on 1 December 2016 (which was 300,000 tonnes of aluminium ingots). The funding will be used to support the restarting and continuity of operations at the Smelter until 30 June 2021 through capital improvements, repairs and maintenance to the Smelter.

Funding authorised by this instrument will come from Program 2: Growing Business Investment and Improving Business Capability, Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation, as set out in the Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.2, Industry, Innovation and Science Portfolio at page 33. The funding will be paid to the Portland Aluminium Smelter Project Unincorporated Joint Venture through the operator of the Smelter, Alcoa Portland Aluminium Pty Ltd, in early 2017 to immediately facilitate the capital improvements, repairs and maintenance to the Smelter.

As this is a one-off grant, there are no selection criteria and the Program will not be subject to merits review.

The Program will be administered by the Department of Industry, Innovation and Science. Spending decisions will be made by the s34 delegate, who will be the Deputy Secretary with responsibility for Industry Growth Division. The Program will also be administered in accordance with the Commonwealth Grants Rules and Guidelines (https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines_July_2014.pdf).

The Legislative Instrument specifies that the legislative power in respect of which the Instrument is made is the Commonwealth trade and commerce power (section 51(i)) of the Constitution). In that regard, the Program prescribed by the Instrument is aimed at supporting the Smelter to continue its relevant trade and commerce activities, being the production of aluminium for export.

The committee considers that, prior to the enactment of the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Amendment (Innovation and Science Australia) Act 2016*, this program would properly have been contained in an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate.

The committee draws the above to the minister's attention and to the attention of senators.

Instrument	<p>National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2016 (No. 12) (PB 114 of 2016) [F2016L02032]</p> <p>National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2017 (No. 1) (PB 6 of 2017) [F2017L00074]</p> <p>National Health (Growth Hormone Program) Special Arrangement Amendment Instrument 2016 (No. 2) (PB 116 of 2016) [F2016L02029]</p> <p>National Health (IVF Program) Special Arrangement Amendment Instrument 2016 (No. 5) (PB 115 of 2016) [F2016L02028]</p> <p>National Health (Listed drugs on F1 or F2) Amendment Determination 2016 (No. 12) (PB 112 of 2016) [F2016L02033]</p> <p>National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 1) (PB 9 of 2017) [F2017L00076]</p> <p>National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2017 (No. 1) (PB 1 of 2017) [F2017L00070]</p>
Purpose	These instruments amend principal instruments relating to the administration of the Pharmaceutical Benefits Scheme
Last day to disallow	9 May 2017
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

With reference to these requirements, the committee notes that the ESs for these instruments describe the general process of consultation with the Pharmaceutical Benefits Advisory Committee (PBAC) in relation to matters relevant to the administration of the Pharmaceutical Benefits Scheme (PBS), including special arrangements and the allocation of PBS medicines to formularies. This general process includes consultation with pharmaceutical companies whose products are listed on the PBS.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In these cases, the ESs refer to a general process of consultation and do not provide information about whether consultation was or was not undertaken specifically in relation to each instrument. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ESs to have explicitly stated that further consultation for each of the instruments was considered unnecessary (or inappropriate) due to the nature of the consultation that had already taken place.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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

Instrument	Therapeutic Goods (Permissible Ingredients) Determination No. 1 of 2017 [F2017L00079]
Purpose	Revokes the Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2016 (as amended), and has the effect of permitting the ingredients described in the Determination, subject to the requirements described in the Determination for an ingredient, to be contained in medicines or to be listed on the Australian Register of Therapeutic Goods
Last day to disallow	9 May 2017
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

The committee previously accepted an undertaking by the Minister for Health to specify in the next edition of the permissible ingredients determination where incorporated documents can be freely obtained.⁹ Therapeutic Goods (Permissible Ingredients) Determination No. 1 of 2017 [F2017L00079] (the determination) is the next edition.

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

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

With reference to the above, the committee notes that the determination incorporates:

- *British Pharmacopoeia (BP)*;

⁹ See *Delegated legislation monitor* 10 of 2016, p. 51.

- *European Pharmacopoeia* (EP);
- *United States Pharmacopoeia – National Formulary* (USP-NF); and
- Food Chemicals Codex (FCC) published by the United States Pharmacopoeial Convention.

While the committee notes that the ES is generally helpful in providing information about where documents incorporated in the determination can be obtained, in relation to the above documents, the ES states:

A fee is required for access to these documents. It is anticipated that a sponsor of a medicine included in the Australian Register of Therapeutic Goods and other interested persons in the medicines industry using this instrument would be in possession of these standards in order to manufacture the medicine or use the ingredients. Further, versions of these documents are available through a number of libraries allowing public access.

The committee acknowledges that anticipated users and other interested persons in the medicines industry using this determination would be in possession of the incorporated documents. However, in addition to access for members of the medicines industry, 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. In this respect, the committee notes the advice in the ES that the incorporated documents are available through a number of libraries allowing public access.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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

Instrument	VET Student Loan Rules 2016 [F2016L02030]
Purpose	Provides for the regulation of providers and the administration of the VET student loans program
Last day to disallow	9 May 2017
Authorising legislation	<i>VET Student Loans Act 2016</i>
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(c)

Merits review

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

The committee notes that Part 5 of the rules is made for the purposes of paragraph 32(1)(b) of the *VET Student Loans Act 2016*. Merits review is excluded under section 32 when the Secretary is not required to consider or decide an application for approval as an approved course provider where the application does not comply with the Act and 'in the circumstances set out in the rules'.¹⁰ This provision was drawn to this committee's attention by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) which noted:

...it is not possible to say whether it is appropriate to exclude merits review of a decision not to consider an application in circumstances set out in the rules when no detail has been provided as to what circumstances may be prescribed.¹¹

The committee notes that section 39 of the rules provides that the Secretary is not required to consider or decide an application for approval as an approved course provider where:

- the application is made outside of the period notified on the Department's website; or
- the approval by the Secretary of additional VET student loans during the calendar year would result in the VET student loans cap for the calendar year being exceeded.

¹⁰ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, pp 585-589.

¹¹ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, p. 589.

As described above, pursuant to section 32 of the *VET Student Loans Act 2016*, decisions of this nature would not be subject to merits review. However, the committee understands these decisions to be 'procedural administrative decisions' relating to bodies providing VET courses, rather than students. The committee therefore considers that Part 5 of the rules does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to merits review.

The committee draws the above to the attention of senators.

Multiple instruments that appear to rely on subsection 4(2) of the *Acts Interpretation Act 1901*

Instruments	VET Student Loans (Courses and Loan Caps) Determination 2016 [F2016L02016] VET Student Loan Rules 2016 [F2016L02030]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above were made in reliance on empowering provisions that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ESs to the instruments do not explain the relevance of subsection 4(2) to their operation.

The committee considers that, in the interests of promoting clarity and intelligibility of instruments to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ESs.

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

Multiple instruments that appear to rely on section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*)

Instruments	CASA 132/16 - Helicopter aircrew member - authorisation, exemption and directions [F2016L02037] Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2017 - Reporting Standard SRS 534.0 Derivative Financial Instruments [F2017L00046]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time.

The instruments identified above incorporate Commonwealth disallowable legislative instruments. However, neither the text of the instruments nor their accompanying ESs state the manner in which they are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time) of external documents, including other legislative instruments. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*), and in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated.

The committee draws the above to the attention of ministers.

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

Instruments

Civil Aviation Order 82.6 Amendment Instrument 2016 (No. 1) [F2016L02031]

Health Insurance (Accredited Pathology Laboratories — Approval) Amendment Principles 2017 (No. 1) [F2017L00048]

Health Insurance (ALK Gene Testing) Determination 2017 [F2017L00067]

Health Insurance (BRCA Gene Testing) Determination 2017 [F2017L00069]

National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017 [F2017L00088]

National Disability Insurance Scheme (Plan Management) Amendment Rules 2017 [F2017L00073]

National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016 [F2017L00087]

Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 1) [F2017L00084]

Renewable Energy (Method for Solar Water Heaters) Determination 2016 [F2017L00028]

Social Security (Exempt Lump Sum - Comparable Foreign Payment Arrears) Determination 2017 [F2017L00058]

Social Security (Exempt Lump Sum - Compensation Payments in respect of certain War related Internments) Determination 2017 [F2017L00055]

Social Security (Exempt Lump Sum — Government Superannuation Co-Contribution Payments for Low Income Earners) Determination 2017 [F2017L00056]

Social Security (Exempt Lump Sum - Market-linked Income Stream) Determination 2017 [F2017L00060]

Social Security (Exempt Lump Sum - Pastoral Care and Assistance Scheme) Determination 2017 [F2017L00059]

Therapeutic Goods (Permissible Ingredients) Determination No. 1 of 2017 [F2017L00079]

Scrutiny principle	<p>Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2016 – 2017 Amendment No. 3 [F2016L02019]</p> <p>Woomera Prohibited Area Rule 2014 Determination of an Exclusion Period for the Green Zone for Financial Year 2016-2017 Repeal [F2016L02021]</p> <p>Standing Order 23(3)(a)</p>
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Drafting

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

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.¹²

The committee draws the above to the attention of ministers.

¹² For more extensive comment on this issue, see *Delegated legislation monitor 8 of 2013*, p. 511.

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

Instrument	Army and Air Force (Canteen) Regulation 2016 [F2016L01455]
Purpose	Repeals and replaces the Army and Air Force Canteen Service Regulations 1959 that sunsetted on 1 October 2016
Last day to disallow	1 December 2016
Authorising legislation	<i>Defence Act 1903</i>
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 8 and 10 of 2016</i>

Sub-delegation

The committee commented as follows:

Section 23 of the regulation provides that the Army and Air Force Canteen Service Board of Management (the Board) may delegate any of its powers under the regulation (other than section 23) to the Board's Chair or Deputy Chair, the Managing Director of the Canteen Service or an employee of the Board. An 'employee of the Board' is not defined in the regulation or the *Defence Act 1903*.

By way of comparison, the committee notes that section 24 of the Navy (Canteen) Regulation 2016 [F2016L01454] provides that the Royal Australian Navy Central Canteens Board may only delegate its powers under that regulation (other than section 24) to the Chief Executive Officer of the Canteens Service.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set 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.

In this respect, the ES for the regulation provides no justification for the broad delegation and sub-delegation of the Board's powers under the regulation to an 'employee of the Board'.

The committee requests the advice of the minister in relation to this matter.

Minister's first response

The Minister for Defence advised:

This Regulation and the Navy (Canteen) Regulation 2016 were introduced to replace the Army and Air Force Canteen Service Regulations 1959 and Navy (Canteens) Regulations 1954 respectively, which were to sunset on 1 October 2016. The legal entities established under these regulations, and options for the broader governance arrangements of Australian Defence Force (ADF) canteen services, service trusts and companies established in legislation for the welfare of serving and former ADF members, are currently the subject of an internal Defence review as part of the Government's smaller government initiative. When complete, recommendations from that review could lead to significant change to legislation establishing these entities, including possible repeal of the Army and Air Force (Canteen) Regulation 2016.

In this context, the decision was made to re-make the regulations with substantively the same effect so that existing canteen services could continue uninterrupted, without undertaking a more thorough review of the regulations, pending completion of the review and a decision on the long term governance of these entities. It is acknowledged that this has perpetuated some irregularities and inconsistencies in the regulations. An example is the capacity of the Board to delegate to 'employees of the Board' in the Army and Air Force (Canteen) Regulation 2016, which may be unnecessarily broad and is different from the equivalent provision in the Navy (Canteen) Regulation 2016. The only substantive change made to the previous regulations was to replace references to the Service Chiefs with references to the Chief of the Defence Force (CDF), consistent with the outcome of the First Principles Review.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the regulation has been remade with substantively the same effect so that existing canteen services can continue uninterrupted pending completion of a review and a decision on the long term governance of these entities.

However, the minister's response does not directly address the committee's concern about sub-delegation.

In this regard, the committee reiterates its expectations in relation to legislation that allows delegations to a relatively large class of persons with little or no specificity as to their qualifications or attributes. Generally, a limit should be set 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.

In this respect, the ES for the regulation provides no justification for the broad delegation and sub-delegation of the Board's powers under the regulation to an 'employee of the Board'.

The committee requests the further advice of the minister in relation to this matter.

Minister's second response

The Minister for Defence advised:

I understand that the Committee is concerned about the capacity of the Army and Air Force Canteen Service Management Board, established in the Regulation, to delegate powers to 'employees of the Board', which appears to be a broad discretion to delegate. In my previous response, I advised that the provision relating to delegation of the Board's powers was a continuation of what was previously in the Army and Air Force Canteen Service Regulations 1959, which was the reason it was included in this Regulation. The following provides further justification for why it is appropriate that the Board have relatively broad delegation powers in the Regulation.

The Board controls and conducts the Army and Air Force Canteen Service in accordance with the Regulation, which vests a number of powers in the Board to that end. The Board's functions include selling goods and merchandise, supplying and providing services, entertainment and amenities, and opening and conducting canteens and other facilities. The Board has power to do all things necessary or convenient to be done for and in connection with performing those functions. The Regulation also outlines some specific powers, including powers to establish canteen committees, to enter into contracts and to borrow money.

Under section 23 of the Regulation, the Board can delegate any of its powers under the Regulation to the Chair (of the Board), the Deputy Chair, the Managing Director, or an employee of the Board. An employee of the Board is a person employed by the Board under section 26 of the Regulation, which states that the Board may employ such persons as it considers necessary for the purposes of the instrument. Employees of the Board are not employed under the *Public Service Act 1999*, but are public officials for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

In conducting the Army and Air Force Canteen Service, the Board is essentially responsible for running a business. The business of the Canteen Service is geographically dispersed, with numerous facilities throughout

Australia. The powers vested in the Board by the Regulation are essential to the day-to-day business of the Canteen Service. The broad delegation power in section 26, whereby the Board can delegate its powers to employees of the Board, ensures that the Board has the flexibility to run the business in whatever way it sees fit. This could include, for example, appropriately delegating some of its powers to regional staff.

On its terms section 26 provides broad discretion for the Board to delegate its powers, which are themselves expressed broadly in the Regulation. However, it is important to note that there are a number of limitations on both the exercise of and delegation of its powers.

- The Board is an accountable authority under the *Public Governance, Performance and Accountability Act 2013*, and is subject to a number of statutory duties as a result. This includes the duty to promote the financial sustainability of the entity, and the duty to establish and maintain appropriate systems for risk oversight and management and internal controls. Any delegation of the Board's powers under the Regulation would need to be consistent with these duties.
- The Board's conduct of the Canteen Service must be in accordance with policy guidelines issued by the Minister (paragraph 24(3)(d)) of the Regulation). Any exercise of a delegated power by an employee of the Board would similarly need to meet this threshold.
- Some of the Board's powers include specific limitations. For example, the Board can only borrow money with the written approval of the Finance Minister (subsection 28(1)) of the Regulation). These limitations continue to apply if the power is exercised by a delegate.

Giving the Board a broad discretion to delegate its powers to employees of the Board ensures that the Board can act flexibly in the conduct of the Canteen Service, which is appropriate given that it is a separate legal entity from the Commonwealth. The Board has capacity to decide how the business of the Canteen Service is run, subject to any policy guidelines issued by the Minister and other specific limitations on the Board's powers.

However, the Board can only delegate consistently with the duties of an accountable authority under the *Public Governance, Performance and Accountability Act 2013*, including delegating in a way that promotes the financial sustainability of the entity, and consistently with appropriate risk oversight and management systems.

Committee's second response

The committee thanks the minister for her response and has concluded its examination of the instrument.

In concluding, the committee notes the minister's advice that an employee of the Board is a public official for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act); and that any delegation of the Board's powers

under the regulation would need to be consistent with the Board's statutory duties as an accountable authority under the PGPA Act.

The committee also notes the minister's advice that any exercise of a delegated power by an employee of the Board would need to be in accordance with the policy guidelines issued by the Minister under paragraph 24(3)(d) of the regulation.

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

Instrument	Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulation 2016 [F2016L01583]
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training
Last day to disallow	1 December 2016
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 8 of 2016</i>

Constitutional authority for expenditure

The committee commented as follows:

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

The committee notes that, in *Williams No. 2*,¹ the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

¹ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulation 2016 [F2016L01583] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New table item 169 establishes legislative authority for the Commonwealth government to provide funding of \$5.9 million over two years to make the Early Learning Languages Australia (ELLA) initiative nationally available to early childhood education and care services.

The objective of the ELLA initiative is:

To deliver, through the use of online communication services, language education to children, including by:

- (a) maintaining and developing language learning applications for download onto tablet devices; and
- (b) developing and providing support materials and professional development to educators; and
- (c) funding the purchase of tablet devices.

The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the communications power (section 51(v)) of the Constitution.

The regulation thus appears to rely on the communications power as the relevant head of legislative power to authorise the addition of item 169 to Schedule 1AB (and therefore the spending of public money under it). However, it is unclear to the committee how the funding of the ELLA initiative is sufficiently connected to the power to make laws with respect to postal, telegraphic, telephonic and other like services so as to be authorised by this head of legislative power.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for Finance, on behalf of the Minister for Education and Training, advised:

The development of this initiative and drafting of this Regulation were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the accompanying explanatory statement, the objective of the item references the communications power. As detailed below, the Early Learning Languages Australia (ELLA) initiative utilises online communications technology such as internet, web based applications and mobile devices and technology.

ELLA is a program that promotes the early engagement of language learning for preschool aged children, and further engagement in continued language learning in primary and secondary school. ELLA aims to achieve this by delivering foreign language education to preschool students through the use of online communications technology.

ELLA consists of a suite of play based online applications, which can be downloaded from the internet by participating early childhood education and care services onto tablet devices for use by children. The expansion of ELLA will allow access to the ELLA language learning applications for more preschool aged children nationally. This supports the Australian Government's aim to better prepare students for a globalised world by increasing the number of students studying languages during schooling.

The Department of Education and Training will provide Education Services Australia funding of \$5.9 million for the expansion of ELLA. The expansion of ELLA involves maintaining and developing language learning applications for download from the internet onto tablets, developing and providing support materials and professional development to educators, and funding the purchase of tablet devices.

I note that all aspects of the ELLA program are provided by way of mobile applications and online communications resources. This initiative relies on the use of online communications technology to disseminate information to preschool aged children across Australia and to encourage engagement in language learning.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Committee's response

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

In concluding, the committee notes that the regulation appears to rely on the communications power as the relevant head of legislative power to authorise the funding of the ELLA initiative. While the minister's response usefully includes detailed information about the different elements of the initiative, to assist with the scrutiny process the committee's preference is that such details about new programs be contained in the ES to a regulation.

In concluding, the committee also notes the minister's advice that '[t]his answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.'

The committee takes this opportunity to note that any claims to withhold information from Senate committees require the minister to 'state recognised public

interest grounds for any claim to withhold the information' that can be considered by the committee and the Senate.²

With respect to claims that legal professional privilege provides grounds for a refusal to provide information in a parliamentary forum, *Odgers' Australian Senate Practice* states:

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for refusal of information in a parliamentary forum.

...the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.³

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

2 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 653

3 *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669.

Instrument	Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776]
Purpose	Specifies matters relating to nominations, approvals and variation to approvals for standard business sponsors and temporary activity sponsors
Last day to disallow	21 March 2017
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors</i> 10 of 2016 and 1 of 2017

Unclear basis for determining fees

The committee commented as follows:

Schedule 1 items 10 and 13 of the instrument set two new fees of \$420 and \$170 relating to sponsorship and nomination for temporary activities visas. However, the ES does not explicitly state the basis on which the fees have been calculated.

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

The committee requests the advice of the minister in relation to this matter.

Minister's first response

The Minister for Immigration and Border protection advised:

The instrument IMMI 16/107 sets two new fees of \$420 and \$170 relating to sponsorship and nomination for temporary activity visas. In addition to the above, the Committee has requested that the Explanatory Statement makes clear the specific basis on which the fees have been calculated. The replacement Explanatory Statement for IMMI 16/107, specifying the basis on which the fees have been calculated, is attached.

The replacement ES states:

The fees that are set by the Instrument IMMI [2016/107], specifically the fee applicable to an application to be approved as a Temporary Activity Sponsor (\$420) and a Training Visa Nomination (\$170), remain the same as the fees that were applicable to the products that they replaced. These price points ensure uniformity with similar visa products.

In the case of the Temporary Activity Sponsorship, the price point represents better value than the products it replaces as the validity period for sponsorship has been extended from three to five years, and once approved a sponsor will be eligible to sponsor multiple activities and visa types within the Temporary Activity visa framework. This removes the need for many organisations to become multiple classes of sponsor.

Committee's first response

The committee thanks the minister for his response.

The committee notes that the replacement ES explains that the fees set by the instrument are the same as those that were applicable to the products that they replaced, and that the price point represents better value. However, the replacement ES does not address the question of the specific basis on which the fees have been calculated; for example, whether the fees are calculated on the basis of cost recovery, or on another basis.

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

Minister's second response

The Minister for Immigration and Border protection advised:

The fees applicable to an application to be approved as a Temporary Activity Sponsor and a Training Visa Nomination remain the same as the fees that were applicable to the products that they replaced.

The nomination and sponsorship fees specified in the instrument in writing for a Temporary Activity Sponsor and a Training Visa Nomination have not changed since last varied on 1 July 2012 when the fees were increased in line with the Consumer Price Index at \$420 and \$170 respectively.

These fees and charges applied for cost recovery activities, including those in migration legislation, are set using departmental data for direct and indirect costs incurred in undertaking the activity or function. This includes staffing and relevant oncosts, suppliers, IT, property, contractors/consultants and corporate overhead where appropriate.

The Committee may also be aware that the Australian Government introduced the Australian Government Charging Framework (AGCF) in 2015 to improve consistency of charging activities and help determine when it is appropriate to charge for a government activity. Where existing/proposed charges fall within the regulatory category of the AGCF, then the only pricing model that can be used is full or partial cost recovery. If we charge more than (full) cost recovery for a regulatory activity then it may be considered to be general taxation.

While the AGCF applied to all new charging activities from 1 July 2015, for existing charging activities, transitional arrangements apply whereby the responsible government entities and ministers have until the next scheduled portfolio charging review to determine consistency of charging arrangements with the AGCF.

Committee's second response

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

In concluding, the committee notes the minister's advice that the fees and charges are calculated on the basis of cost recovery.

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

Instrument	Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743]
Purpose	Amends the Migration Regulations 1994 in relation to the temporary activity visas framework and the visa application charge for the Subclass 888 (Business Innovation and Investment (Permanent)) visa
Last day to disallow	20 March 2017
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitors 10 of 2016 and 1 of 2017</i>

Retrospective in effect

The committee commented as follows:

The Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (the regulation) amends the Migration Regulations 1994 to repeal five classes of temporary activity visas,⁴ and create two new visas to replace them.⁵

Part 6 of Schedule 1 of the regulation deals with the application of the amendments made by the regulation. New paragraph 6002(1)(d) provides that the amendments made by Parts 5 and 6 of Schedule 1 to the regulation apply to a nomination made in an application for a visa made, but not yet finally determined, before the commencement of the regulation (19 November 2016).

4 Subclass 401 (Temporary Work (Long Stay Activity)) visa; Subclass 402 (Training and Research) visa; Subclass 416 (Special Program) visa; Subclass 420 (Temporary Work (Entertainment)) visa; and Subclass 488 (Superyacht Crew) visa.

5 Subclass 407 (Training) visa and Subclass 408 (Temporary Activity) visa.

The ES explains that an effect of this paragraph is that:

...no new nominations for applicants for Subclasses 401, 402 (Occupational Trainee stream) and 420 visas can be made, including by legacy sponsors and including for applications made before 19 November 2016, as those provisions have been repealed.

The ES also notes that an application for these visas cannot validly be made without a nomination in place at the time of making the application, and therefore the amendments will not affect the majority of visa applicants. However, notwithstanding this, the ES acknowledges that there may be cases where an applicant's nomination could expire between the visa application being made and a visa decision being made, or where an applicant may change their sponsor and wish to provide a new nomination. The ES makes clear that in those cases, the applicant will not be able to provide a new nomination for the purposes of a visa grant. In this respect, the ES states:

Given the small number impacted, it would have been inefficient to continue to support the operation of the repealed nomination provisions after 19 November 2016 in a context where all paper-based applications are being replaced by online applications and where the new visa scheme for Subclass 408 no longer requires nominations. However, the Department will consider alternative arrangements for applicants who are adversely affected.

The committee is concerned that while the ES acknowledges that some applicants who applied for the repealed visa classes before 19 November 2016 will be adversely affected, it only goes so far as to say that the Department will 'consider alternative arrangements' for these applicants. Without knowing what these alternative arrangements are, it is difficult for the committee to assess whether the regulation will have a retrospective effect that will unduly trespasses on personal rights and liberties (scrutiny principle 23(3)(b)).

The committee requests the advice of the minister in relation to this matter.

Minister's first response

The Minister for Immigration and Border Protection advised:

As outlined in the Explanatory Statement, my Department expects that there may be a small number of visa applicants who will be adversely impacted by the legislative changes. There is a possibility that some applicants will no longer be eligible for the repealed visa e.g. because of the expiry of a nomination which cannot be renewed) and who will also not be eligible to apply for, or be granted, the equivalent new visa. Alternative arrangements for any applicants who are adversely affected will be considered on a case by case basis, depending on the specific circumstances.

I have a range of powers to intervene to remedy situations of unfairness. For example, section 351 of the *Migration Act 1958* (the Act) would allow

me to grant one of the temporary activity visas to a non-citizen in a situation where the Administrative Appeals Tribunal had affirmed a refusal decision in relation to a repealed visa and I think it is in the public interest to do so. My practice is to consider intervention in circumstances not anticipated by relevant legislation; where there are clearly unintended consequences of legislation; or where the application of relevant legislation leads to unfair or unreasonable results.

Committee's first response

The committee thanks the minister for his response.

The committee's request for advice in relation to this instrument arose from concerns that the regulation may have a retrospective effect that will unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)), as the ES provided only that the Department of Immigration and Border Protection would 'consider alternative arrangements' for those applicants who applied for a repealed visa class before 19 November 2016 and were adversely affected by the changes made by the regulation.

The committee notes the minister's advice that where the application of relevant legislation leads to unfair or unreasonable results the minister's practice is to consider intervention to remedy the situation.

The committee also notes the minister's advice that there may be a small number of visa applicants who will be adversely impacted by this regulation and that alternative arrangements for such applicants will be considered on a case by case basis, depending on the specific circumstances.

However, the committee remains concerned that the minister's response does not provide details of what specific 'alternative arrangements' will apply to applicants that are adversely affected by the regulation, nor an assurance that the minister will intervene to remedy such a situation should it arise.

The committee reiterates its previous comments that without knowledge of what the specific 'alternative arrangements' are, it is difficult for the committee to assess whether the regulation will have a retrospective effect that will unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)).

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

Minister's second response

The Minister for Immigration and Border protection advised:

One alternative arrangement is that the applicant may withdraw the visa application, prior to a decision by the Department, and apply for an equivalent visa. I appreciate that this would involve some expense for applicants and sponsors, and that it may lead to requests for compensation. Requests for compensation will be considered under established arrangements...

In relation to applicants who have unsuccessfully sought merits review by the Administrative Appeals Tribunal, the most appropriate solution may be intervention under section 351 of the *Migration Act 1958*. I would like to affirm to the Committee that I have a longstanding Ministerial Intervention guideline for circumstances that are either unfair or unreasonable as a result of legislative change.

The power to intervene in circumstances as described in the Explanatory Statement provides an established alternative arrangement for this potential cohort of visa applicants. This needs to remain on a case by case basis however as I must also be satisfied of other factors particular to the visa applicant, such as their health and character prior to exercising this power it would be inappropriate for me to provide any assurance about future intervention in the absence of all of the facts about the particular case.

The Ministerial Intervention guidelines are available on my Department's website and include, among others, the following longstanding provision:

Types of unique or exceptional circumstances: Circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in your case.

<https://www.border.gov.au/Trav/Refu/Mini/ministerial-tribunal#circumstances>

Committee's second response

The committee thanks the minister for his response.

The committee notes the minister's advice that the power to intervene to provide an alternative arrangement where the regulation leads to unfair or unreasonable results needs to remain on a case by case basis, as the minister must also be satisfied of other factors particular to the visa applicant.

The committee also notes the minister's advice that the Ministerial Intervention guidelines include a provision that specifically provides that unique or exceptional circumstances include 'clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in your case'.

While the above provision of the guidelines forms part of the department's administrative framework for providing 'alternative arrangements' for applicants who may be adversely impacted by the legislative changes made by the regulation, the committee remains concerned that there is currently no legislative requirement to intervene to remedy a situation where an applicant is adversely affected by the retrospective effect of the regulation.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the absence of a legislative requirement for

the minister to intervene to remedy a situation where an applicant is adversely affected by the retrospective effect of the regulation, the committee draws this matter to the attention of senators.

Senator John Williams (Chair)

Appendix 1

Guidelines

Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislation Act 2003* (the Act)¹ regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislation Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument.

1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

It is important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 15J of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation:** An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted:** An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes:** An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Absence of consultation:** Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning supporting this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation:** The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 15J of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Guideline on incorporation

Purpose

This guideline provides information on the committee's expectations in relation to legislative instruments that incorporate, by reference, Acts, legislative instruments or other external documents, without reproducing the relevant text of the incorporated material in the instrument.

Where an instrument incorporates material by reference, the committee expects the instrument and/or its explanatory statement (ES) to:

1. specify the manner in which the Act, legislative instrument, or other document is incorporated;
2. identify the legislative authority for the manner of incorporation specified;
3. contain a description of the incorporated document; and
4. include information as to where the incorporated document can be readily and freely accessed.

These expectations reflect the fact that incorporated material becomes a part of the law.

The guideline includes brief background information, an outline of the legislative requirements and guidance about the committee's expectations in relation to ESs.

Manner of incorporation

Instruments may incorporate, by reference, Acts, legislative instruments and other documents as they exist at different times (for example, as in force from time to time, as in force at a particular date or as in force at the commencement of the instrument). However, the manner in which material is incorporated must be authorised by legislation.

Legislative framework

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Commonwealth Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Authorising or other legislation may also provide that other documents can be incorporated into instruments as in force from time to time. However, in the absence of such legislation, other documents may only be incorporated as at the commencement of the legislative instrument (see subsection 14(2) of the *Legislation Act 2003*).

Committee's expectations

The committee expects instruments (and ideally their accompanying ESs) to clearly specify:

- the manner in which Acts, legislative instruments and other documents are incorporated (that is, either as in force from time to time or as in force at a particular time); and
- the legislative authority for the manner of incorporation.

This enables a person interested in or affected by an instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Below are some examples of reasons provided in ESs for the incorporation of different types of documents that the committee has previously accepted:

- **Commonwealth Acts and disallowable legislative instruments**

Section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

- **State and Territory Acts**

Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory Acts can be taken to be references to versions of those Acts as in force from time to time.

- **Other documents (for example, Commonwealth instruments that are exempt from disallowance, Australian and international Standards)**

A section of the authorising (or other) legislation is identified that operates to allow these documents to be incorporated as in force from time to time.

Description of, and access to, incorporated documents

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely (i.e. without cost) access its terms. This principle is supported by provisions in the *Legislation Act 2003*.

Legislative framework

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

Committee's expectations

The committee expects ESs to:

- contain a description of incorporated documents; and
- include information about where incorporated documents can be readily and freely accessed (for example, at a particular website).

In this regard, the committee's expectations accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to provisions of bills that authorise material to be incorporated by reference, particularly where the material is not likely to be readily and freely available to the public.

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, 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 an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.² This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with the appropriate justification, the committee has previously accepted:

- copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;
- the relevant extracts from the incorporated documents are set out in full in the instrument or ES; or

2 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) <http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3> (accessed 10 January 2017).

- copies of incorporated documents will be made available free of charge to people affected by, or interested in, the instrument on request to the administering agency.

Appendix 2

Correspondence



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS17-000131

Senator John Williams
 Chair
 Senate Standing Committee
 on Regulations and Ordinances
 Parliament House
 CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 10 November 2016 sent to my office seeking further information about items in the *Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulation 2016* (the Education Regulation) and the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016* (the Industry Regulation).

In the *Delegated legislation monitor 8 of 2016*, 9 November 2016, the Committee requested further information about the Early Learning Languages Australia initiative, an item in the Education Regulation, and the National Science Week and strategic science communication activities, an item in the Industry Regulation.

Responses to the Committee's requests from the Minister for Education and Training, Senator the Hon Simon Birmingham, and the then Minister for Industry, Innovation and Science, the Hon Greg Hunt MP, are at Attachment A and Attachment B, respectively. I am advised that the current Minister for Industry, Innovation and Science, Senator the Hon Arthur Sinodinos, supports the response for the Industry Regulation. I have provided the Ministers with a copy of this letter.

Further to Minister Hunt's response, I am also advised that the development of the initiative for the National Science Week and strategic science communication activities and the drafting of item 159 in the Industry Regulation were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the accompanying explanatory statement for this Regulation, the objective of the item references a number of heads of legislative power, namely:

- the trade and commerce power;
- the communications power;

- the astronomical and meteorological observations power;
- the statistics power;
- the power to make special laws for people of any race;
- the external affairs power;
- the power to make grants to the States;
- the Territories power; and
- the Commonwealth executive power and the express incidental power.

I trust this advice will assist the Committee with its consideration of these matters.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance



February 2017

Provided by the Minister for Education and Training***Response to the Committee's question about the 'Early Learning Languages Australia' initiative***

The development of this initiative and drafting of this Regulation were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the accompanying explanatory statement, the objective of the item references the communications power. As detailed below, the Early Learning Languages Australia (ELLA) initiative utilises online communications technology such as internet, web based applications and mobile devices and technology.

ELLA is a program that promotes the early engagement of language learning for preschool aged children, and further engagement in continued language learning in primary and secondary school. ELLA aims to achieve this by delivering foreign language education to preschool students through the use of online communications technology.

ELLA consists of a suite of play based online applications, which can be downloaded from the internet by participating early childhood education and care services onto tablet devices for use by children. The expansion of ELLA will allow access to the ELLA language learning applications for more preschool aged children nationally. This supports the Australian Government's aim to better prepare students for a globalised world by increasing the number of students studying languages during schooling.

The Department of Education and Training will provide Education Services Australia funding of \$5.9 million for the expansion of ELLA. The expansion of ELLA involves maintaining and developing language learning applications for download from the internet onto tablets, developing and providing support materials and professional development to educators, and funding the purchase of tablet devices.

I note that all aspects of the ELLA program are provided by way of mobile applications and online communications resources. This initiative relies on the use of online communications technology to disseminate information to preschool aged children across Australia and to encourage engagement in language learning.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Provided by the then Minister for Industry, Innovation and Science*Response to the Committee's question about the National Science Week and Strategic Science Communication Activities*

New item 159 establishes legislative authority for the Commonwealth government to fund the National Science Week and strategic science communication activities.

National Science Week

National Science Week is Australia's preeminent national celebration of science, held annually in August. It provides high profile science engagement across the nation, in which the whole of the Australian community can participate. It aims to reach as many Australians as possible – and has reached more than 1.5 million people each year – with a positive message about the impact science has on our lives, the Australian economy, our nation's society, and on the rest of the world. It is also an important opportunity for the Australian science community to celebrate and showcase science to the Australian public and the rest of the world.

The Australian Government supports National Science Week in a variety of ways, including through National Science Week Grants supported by this item. The Australian Government has allocated \$2 million over 4 years (\$500,000 each year) from 2016-17 to 2019-20 to National Science Week Grants. National Science Week Grants provide funding to meritorious and high profile science engagement projects across all states and territories, and support projects that stimulate and leverage further contributions to science by organisations across Australia.

Given its truly national focus on advancing the Australian community's engagement and participation in science, technology, engineering and mathematics (STEM) across all state and territory jurisdictions, it is considered that National Science Week is a nationally significant activity which could only be carried out for the benefit of Australia by the Commonwealth.

National Science Week Grants also support projects with a particular focus on engaging Indigenous Australians. In 2016, this included support for the Indigenous Science Experience Family Science Fund Day, which celebrated Indigenous and Western science and Indigenous youth and elder achievements, and demonstrated the value of traditional and customary Indigenous knowledge in science and technology and the relevance of science to our daily lives.

The National Science Week Grants support certain citizen science projects. Citizen science involves amateur or non-professional scientists collecting or analysing data, and formulating research questions and design, usually working with a professional scientist. Funding of \$85,000 per year is allocated to support a national online citizen science project as part of National Science Week. Funding is provided for citizen science projects that are designed to collect and disseminate science data (for example in relation to bird and mammal populations).

Citizen science also has a focus on the use of the internet as a means of engaging and communicating with Australians about science projects. In 2016, funding under this initiative supported the Wildlife Spotter citizen science project, which involved the establishment of an online web portal available to all sectors of the Australian community. Individuals across Australia were encouraged to register online to classify images of wildlife taken by movement-triggered cameras set up by scientists. The project resulted in over 2.8 million images being processed, with more than 3.4 million animals identified, all using the internet.

National Science Week Grants projects (including relevant citizen science projects) may span a vast range of scientific subject matters. These include, amongst other things, projects related to documenting and recording data from astronomy projects.

National Science Week Grants projects can also include a variety of activities which give effect to Australia's obligations under international agreements which are noted in item 159. The international agreements discussed below are relevant.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to enjoy the benefits of scientific progress and its applications, and for government parties to take steps necessary for the conservation, development and diffusion of science and culture.

Articles 7, 12 and 13 of the Convention on Biological Diversity obliges parties to conduct activities which are directed to promoting the community's understanding of the importance of biodiversity, measures that can be undertaken to conserve biodiversity, and projects directed at contributing to the identification, conservation or sustainable use of biodiversity.

Articles 4 and 6 of the United Nations Framework Convention on Climate Change requires parties to undertake activities directed at improving knowledge and understanding of climate change and its effects.

Article 4 of the Ramsar convention requires parties to conduct activities directed towards improving knowledge of wetlands and their flora and fauna.

Articles 5, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, obliges parties to conduct activities which contribute to an increased knowledge of the processes leading to desertification and drought, investigating ways of mitigating the effects of drought, and sustainable use and management of the natural resources of affected areas.

New item 159 is also drafted with reference to funding in relation to places, persons, matters or things external to Australia. Citizen science projects (including nationally significant citizen science projects supported through National Science Week) may include activities outside Australia, for example activities directed at water quality, plants or animals seaward of the low water mark.

Strategic science communication activities

Beyond National Science Week Grants, the strategic science communication activities under this item include three further elements:

1. Science tourism capacity building;
2. Decision-maker engagement; and
3. Equity of access.

1. Science tourism capacity building

The primary purpose of this element is to develop and implement a national framework for science tourism that helps to build Australia's profile as a science and innovation nation. Funding of \$49,500 (incl. GST) has been provided to the Canberra Innovation Network, based in the ACT, to develop this national framework. Once the national framework is complete, roundtables will be hosted in the ACT and Northern Territory to discuss local implementation in other states and territories. A pilot may also be undertaken in the ACT to demonstrate implementation strategies to other states and territories.

Funding under this element will have a strong focus on the use of the internet and development of online resources. The science tourism roundtables mentioned above will be streamed online to enable individuals and organisations in other locations to participate via the internet. Funding may also be provided to support the development of web-based applications and other downloadable resources to enable local state and territory tourism experiences to be made available from other parts of Australia, or otherwise enhanced, via the internet. A further key aim of the science tourism activities is to facilitate international and inter-jurisdictional tourism.

Funding under this element can also give effect to Australia's obligations under international agreements that are noted in item 159. For example, Article 6(2) of ICESCR relates to supporting technical and vocational guidance and training programmes, policies and techniques to support full and productive employment. By way of further example, Articles 1 and 2 of the International Labour Organization's Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources also requires parties to adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training.

Funding under this initiative may also be provided to the states or territories to support specific science tourism activities and to support the implementation of the abovementioned national science tourism framework.

2. Decision-maker Engagement

This element aims to increase the interaction between Australia's scientists and leading decision makers, for the purpose of improving dialogue in relation to science and innovation in public policy and evidence-based decision making.

Funding under this element has been provided to Science Technology Australia to undertake events wholly in the ACT which will bring together scientists and decision makers like Parliamentarians. Funding may also be provided to the states or territories to support other activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

3. Equity of Access

The Equity of Access element comprises three separate funding components. The first supports the Questacon Transport Assistance Programme (QTAP). This programme subsidises the costs associated with transportation to and from Questacon from within the ACT for socially disadvantaged groups including migrants, refugees, people with a disability and people in aged care.

The second component of the Equity of Access programme provides support for the development of a low vision project, also to be undertaken wholly at Questacon in the Australian Capital Territory. Questacon is currently working with the Royal Blind Society to develop a community engagement project to open Questacon exhibitions in the ACT to the low vision community.

The final component of the Equity of Access programme provides funding for a travelling outreach programme focusing on STEM, namely the Shell Questacon Science Circus. Questacon provides funding to the Australian National University to deliver pop-up interactive exhibits and learning experiences for children in preschools, primary schools, and secondary schools in remote and regional communities across Australia. It delivers teacher professional development workshops to support students' STEM outcomes. It also aims to benefit children by contributing to their development, as well as assisting school teachers or parents (or a child's legal guardian) to undertake activities in the classroom or at home to improve a child's understanding of science.

Funding is also provided to support the Shell Questacon Science Circus to conduct visits to remote Indigenous communities.

The Shell Questacon Science Circus is a national STEM outreach equity programme designed to ensure that Australians who would probably not otherwise be able to visit Questacon – the National Science and Technology Centre – can still access some of the benefits of this national institution. Delivering STEM education across all states and territories, it is considered an activity best performed by the Commonwealth of Australia.

Funding under the Equity of Access element can give effect to Australia's obligations under international agreements that are noted in item 159. For example, the funding can give effect to Australia's obligations under Article 29 of the Convention on the Rights of the Child, which requires parties to conduct activities directed to the development of children, particularly educational activities.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.



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MC17-000091

Chair
Senate Standing Committee on Regulations and Ordinances
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Dear Chair

John

Thank you for your letter of 1 December 2016 drawing my attention to the Committee's Delegated Legislation Monitor 10 of 2016, and seeking my response in relation to the issues identified in the Monitor in relation to the Army and Air Force (Canteen) Regulation 2016.

I understand that the Committee is concerned about the capacity of the Army and Air Force Canteen Service Management Board, established in the Regulation, to delegate powers to 'employees of the Board', which appears to be a broad discretion to delegate. In my previous response, I advised that the provision relating to delegation of the Board's powers was a continuation of what was previously in the Army and Air Force Canteen Service Regulations 1959, which was the reason it was included in this Regulation. The following provides further justification for why it is appropriate that the Board have relatively broad delegation powers in the Regulation.

The Board controls and conducts the Army and Air Force Canteen Service in accordance with the Regulation, which vests a number of powers in the Board to that end. The Board's functions include selling goods and merchandise, supplying and providing services, entertainment and amenities, and opening and conducting canteens and other facilities. The Board has power to do all things necessary or convenient to be done for and in connection with performing those functions. The Regulation also outlines some specific powers, including powers to establish canteen committees, to enter into contracts and to borrow money.

Under section 23 of the Regulation, the Board can delegate any of its powers under the Regulation to the Chair (of the Board), the Deputy Chair, the Managing Director, or an employee of the Board. An employee of the Board is a person employed by the Board under section 26 of the Regulation, which states that the Board may employ such persons as it considers necessary for the purposes of the instrument. Employees of the Board are not employed under the *Public Service Act 1999*, but are public officials for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

In conducting the Army and Air Force Canteen Service, the Board is essentially responsible for running a business. The business of the Canteen Service is geographically dispersed, with numerous facilities throughout Australia. The powers vested in the Board by the Regulation are essential to the day-to-day business of the Canteen Service. The broad delegation power in section 26, whereby the Board can delegate its powers to employees of the Board, ensures that the Board has the flexibility to run the business in whatever way it sees fit. This could include, for example, appropriately delegating some of its powers to regional staff.

On its terms section 26 provides broad discretion for the Board to delegate its powers, which are themselves expressed broadly in the Regulation. However, it is important to note that there are a number of limitations on both the exercise of and delegation of its powers.

- The Board is an accountable authority under the *Public Governance, Performance and Accountability Act 2013*, and is subject to a number of statutory duties as a result. This includes the duty to promote the financial sustainability of the entity, and the duty to establish and maintain appropriate systems for risk oversight and management and internal controls. Any delegation of the Board's powers under the Regulation would need to be consistent with these duties.
- The Board's conduct of the Canteen Service must be in accordance with policy guidelines issued by the Minister (paragraph 24(3)(d)) of the Regulation). Any exercise of a delegated power by an employee of the Board would similarly need to meet this threshold.
- Some of the Board's powers include specific limitations. For example, the Board can only borrow money with the written approval of the Finance Minister (subsection 28(1)) of the Regulation). These limitations continue to apply if the power is exercised by a delegate.

Giving the Board a broad discretion to delegate its powers to employees of the Board ensures that the Board can act flexibly in the conduct of the Canteen Service, which is appropriate given that it is a separate legal entity from the Commonwealth. The Board has capacity to decide how the business of the Canteen Service is run, subject to any policy guidelines issued by the Minister and other specific limitations on the Board's powers. However, the Board can only delegate consistently with the duties of an accountable authority under the *Public Governance, Performance and Accountability Act 2013*, including delegating in a way that promotes the financial sustainability of the entity, and consistently with appropriate risk oversight and management systems.

Yours sincerely

MARISE PAYNE
07 FEB 2017



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS17-000497

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 9 February 2017 concerning Delegated Legislation Monitor 1 of 2017, in which the Committee requested further information in relation to the following legislative instruments:

- *Migration Amendment (Temporary Activity Visas) Regulation 2016* (the Regulation); and
- Forms, Fees, Circumstances and Different Ways of Making an Application Amendment Instrument 2016/107 (the Fees Instrument).

In relation to the Regulation, the Committee sought additional information, further to my previous response on 19 January 2017 concerning the 'alternative arrangements' that will apply to applicants that are adversely affected by the Regulation.

One alternative arrangement is that the applicant may withdraw the visa application, prior to a decision by the Department, and apply for an equivalent visa. I appreciate that this would involve some expense for applicants and sponsors, and that it may lead to requests for compensation. Requests for compensation will be considered under established arrangements.

In addition, the Committee also sought additional information about whether I would intervene to remedy situations where the applicant is adversely affected by the Regulation.

In relation to applicants who have unsuccessfully sought merits review by the Administrative Appeals Tribunal, the most appropriate solution may be intervention under section 351 of the *Migration Act 1958*. I would like to affirm to the Committee that I have a longstanding Ministerial Intervention guideline for circumstances that are either unfair or unreasonable as a result of legislative change.

The power to intervene in circumstances as described in the Explanatory Statement provides an established alternative arrangement for this potential cohort of visa applicants. This needs to remain on a case by case basis however as I must also be satisfied of other factors particular to the visa applicant, such as their health and character prior to exercising this power it would be inappropriate for me to provide any assurance about future intervention in the absence of all of the facts about the particular case.

The Ministerial Intervention guidelines are available on my Department's website and include, among others, the following longstanding provision:

Types of unique or exceptional circumstances: Circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in your case.

<https://www.border.gov.au/Trav/Refu/Mini/ministerial-tribunal#circumstances>

In relation to IMMI 16/107, the Committee has requested additional information because it remains concerned that the replacement Explanatory Statement provided does not address the question of the specific basis on which the fees have been calculated.

The fees applicable to an application to be approved as a Temporary Activity Sponsor and a Training Visa Nomination remain the same as the fees that were applicable to the products that they replaced.

The nomination and sponsorship fees specified in the instrument in writing for a Temporary Activity Sponsor and a Training Visa Nomination have not changed since last varied on 1 July 2012 when the fees were increased in line with the Consumer Price Index at \$420 and \$170 respectively.

These fees and charges applied for cost recovery activities, including those in migration legislation, are set using departmental data for direct and indirect costs incurred in undertaking the activity or function. This includes staffing and relevant on-costs, suppliers, IT, property, contractors/consultants and corporate overhead where appropriate.

The Committee may also be aware that the Australian Government introduced the Australian Government Charging Framework (AGCF) in 2015 to improve consistency of charging activities and help determine when it is appropriate to charge for a government activity. Where existing/proposed charges fall within the regulatory category of the AGCF, then the only pricing model that can be used is full or partial cost recovery. If we charge more than (full) cost recovery for a regulatory activity then it may be considered to be general taxation.

While the AGCF applied to all new charging activities from 1 July 2015, for existing charging activities, transitional arrangements apply whereby the responsible government entities and ministers have until the next scheduled portfolio charging review to determine consistency of charging arrangements with the AGCF.

I thank the Committee for bring these matters to my attention.

Yours sincerely

PETER DUTTON

14/02/17