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Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister 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 relevant ministers or 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 24 February 2017 and 16 March 2017 (new matters); seven determinations made under the *Public Governance, Performance and Accountability Act 2013* that are subject to a six day disallowance period, which were received on 20 March 2017;¹ 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	Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171]
Purpose	Amends the Classification Principles 2014 to give effect to measures in the <i>Budget Savings (Omnibus) Act 2016</i> ; and includes restrictions on who can be appointed as an adviser to assist approved providers make appraisals or reappraisals
Last day to disallow	20 June 2017
Authorising legislation	<i>Aged Care Act 1997</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(b)

Unclear basis for determining fees

The Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171] (the amendment principles) amend the Classification Principles 2014 to set the application fee approved providers are required to pay to request that

1 [F2017L00249], [F2017L00250], [F2017L00251], [F2017L00252], [F2017L00253], [F2017L00254] and [F2017L00255].

the Secretary of the Department of Health reconsider a decision to change a care recipient's classification.

New section 27 of the Classification Principles 2014, inserted by item 6 of the amendment principles, sets the application fee for a request at \$375.

The explanatory statement (ES) to the amendment principles states:

The application fee was been [sic] introduced to encourage approved providers to limit any requests for reconsideration to circumstances to [sic] in which there is evidence to show that the classification decision was incorrect. It is intended to encourage approved providers to submit genuine and meritorious applications. This will reduce the current demand on Commonwealth resources arising from such processes.

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 will be concerned where an instrument imposes fees which use an incentive as their basis rather than fees which reasonably reflect the cost of providing a service.

The committee notes that section 85-6 of the *Aged Care Act 1997* provides that the Classification Principles may prescribe the application fee for reconsideration of a decision to change a care recipient's classification under that Act. However, it is unclear to the committee whether the \$385 fee reasonably reflects the cost of reconsidering a decision to change a care recipient's classification.

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

Instrument	Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017 [F2017L00234]
Purpose	Amends the Federal Court (Corporations) Rules 2000 to restore the requirement that certain notices be published in a daily newspaper circulating in the relevant jurisdiction
Last day to disallow	20 June 2017
Authorising legislation	<i>Federal Court of Australia Act 1976</i>
Department	Attorney-General's
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 the Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017 [F2017L00234] (the amendment rules) provides background information about the monitoring of the Federal Court (Corporations) Rules 2000 (the principal rules), but does not provide a description of consultation, if any, that occurred in relation to the making of the amendment rules.

While the committee does not interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* 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 the committee's view, a general background statement providing information on the monitoring of the operation of the principal rules is not sufficient to meet the requirement that the ES describe the nature of any consultation undertaken.

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 Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217]
Purpose	Establishes legislative authority for spending activities administered by the Department of Agriculture and Water Resources
Last day to disallow	20 June 2017
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a) and (c)

Constitutional authority for expenditure

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

The committee notes that, in *Williams No. 2*,² 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.

The Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217] (the regulation) adds new item 197 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative authority for Commonwealth government spending for the Leadership in Agricultural Industries Fund.

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

The committee notes that the objective of this program is:

To provide grants to build the capacity of national agricultural representative organisations to engage with, and represent, their stakeholders in relation to matters of Commonwealth policy responsibility.

This objective also has the effect that it would have if it were limited to providing grants:

- (a) in the exercise of the executive power of the Commonwealth; or
- (b) as a measure that is peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation; or
- (c) incidental to the execution of the legislative powers vested in the Commonwealth; or
- (d) in connection with interstate or overseas trade and commerce; or
- (e) in connection with taxation imposed by a law of the Commonwealth; or
- (f) in connection with quarantine.

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 constitutional powers:

- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix));
- the trade and commerce power (section 51(i));
- the taxation power (section 51(ii)); and
- the quarantine power (section 51(ix)).

The regulation thus appears to rely on the Commonwealth executive power and the express incidental power; the trade and commerce power; the taxation power; and the quarantine power as the relevant heads of legislative power to authorise the addition of item 197 to Part 4 of Schedule 1AB to the FFSP Regulations (and therefore the spending of public money under it).

However, it is unclear to the committee how each of the constitutional heads of power relied on specifically supports the Leadership in Agricultural Industries Fund.

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 and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

The ES to the regulation does not provide a clear and explicit statement to explain the link between each of the constitutional heads of power relied on and the provision of grants to national agricultural representative organisations to engage with, and represent, their stakeholders in relation to matters of Commonwealth policy responsibility.

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

Merits review

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

The regulation adds new item 197 to Part 4 of Schedule 1AB to the FFSP Regulations establishing legislative authority for spending activities in relation to the Leadership in Agricultural Industries Fund. While the ES is generally helpful in providing information about the proposed administration of the Leadership in Agricultural Industries Fund, the committee notes that the program will not be subject to merits review. The ES states:

There will be no independent merits review for grant decisions. The decisions of the Deputy Prime Minister and Minister for Agriculture and Water Resources will be final in all matters, including the approval of grants and grant amounts.

In order to assess whether a program in Part 4 of Schedule 1AB possesses characteristics justifying the exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to Part 4 of Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review. In this instance, the ES does not provide information to justify the exclusion of merits review.

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

Previously unauthorised expenditure

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

New table item 197 to Part 4 of Schedule 1AB to the FFSP Regulations appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund the Leadership in Agricultural Industries Fund. In relation to the source of funding for the program the ES states:

Funding of \$5 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Leadership in Agricultural Industries Fund – establishment' for a period of three years commencing in 2016-17. Details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 132.

...Funding for this item will come from Program 1.12: Rural Programs, which is part of Outcome 1. Details are set out in the *Portfolio Additional Estimates Statements 2016-17, Agriculture and Water Resources Portfolio* at page 132.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, 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 will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017 [F2017L00215]
Purpose	Establishes legislative authority for spending activities administered by the Department of the Environment and Energy
Last day to disallow	20 June 2017
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional authority for expenditure

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

The committee notes that, in *Williams No. 2*,³ 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.

The Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017 [F2017L00215] (the regulation) adds new items 195 and 196 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seek to establish legislative authority for Commonwealth government spending for the Solar Communities Program and the Food Rescue Charity Program.

The committee notes that the objectives of the two programs reference the United Nations Framework Convention on Climate Change and the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

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

The ES for the regulation identifies the constitutional basis for expenditure in relation to each program as follows:

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

The regulation thus appears to rely on the external affairs power as the relevant head of legislative power to authorise the addition of items 195 and 196 to Part 4 of Schedule 1AB to the FFSP Regulations (and therefore the spending of public money under these items).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.⁴ The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the regulation or the ES.

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

Previously unauthorised expenditure

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

New table items 194 to 196 to Part 4 of Schedule 1AB to the FFSP Regulations appear to authorise expenditure not previously authorised by legislation. These items establish legislative authority for the Commonwealth government to fund the Improving your Local Parks and Environment Program; the Solar Communities Program; and the Food Rescue Charity Program. In relation to the source of funding for the programs the ES states:

Improving your Local Parks and Environment Program

Funding for the program will come from Program 1.1: Sustainable Management of Natural Resources and the Environment, which is part of Outcome 1. Details are set out in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Support Your Local Parks and Environment' at page 156 and in the *Portfolio Additional Estimates Statements 2016-17, Environment and Energy Portfolio* at page 16.

4 *Victoria v Commonwealth* (1996) 187 CLR 416.

Solar Communities Program

Funding of \$5 million over three years from 2016-17 will come from Program 2.1: Reducing Australia's Greenhouse Gas Emissions, which is part of Outcome 2. Details are set out in the 2016-17 Mid-Year Economic and Fiscal Outlook in the measure 'Support Your Local Parks and Environment' at page 156 and in the *Portfolio Additional Estimates Statements 2016-17, Environment and Energy Portfolio* at page 33.

Food Rescue Charity Program

Funding of \$1.2 million over two years from 2016-17 will come from Program 2.1: Reducing Australia's Greenhouse Gas Emissions, which is part of Outcome 2. Details are set out in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Support Your Local Parks and Environment' at page 156 and in the *Portfolio Additional Estimates Statements 2016-17, Environment and Energy Portfolio* at page 33.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, these programs 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 will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 [F2017L00211]
Purpose	Establishes legislative authority for spending activities administered by the Department of Health
Last day to disallow	20 June 2017
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional authority for expenditure

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This

principle requires that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 2*,⁵ 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.

The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 [F2017L00211] (the regulation) adds new items 203 and 204 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seek to establish legislative authority for Commonwealth government spending for the Suicide Prevention Research Fund and Suicide Prevention Trials.

The committee notes that the objectives of new items 203 and 204 each include the following reference to measures:

peculiarly adapted to the government of a nation and that cannot otherwise be carried out for the benefit of the nation.

The ES for the regulation identifies the constitutional basis for expenditure in relation to each program 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 communications power (section 51(v));
- the defence power (section 51(vi));
- the races power (section 51(xxvi));
- the external affairs power (section 51(xxix)); and
- the territories power (section 122).

The ES also identifies the social welfare power (section 51(xxiiiA)) as supporting the Suicide Prevention Trials program.

The objectives of these programs appear to reference the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)). However, these powers are not identified as supporting heads of power in relation to these items in the ES. It is therefore unclear to the committee as to whether the regulation is

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

seeking to rely on these heads of legislative power to authorise the addition of items 203 and 204 to Schedule 1AB (and therefore the spending of public money under these items).

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 and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

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

Previously unauthorised expenditure

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

New table items 203, 204, 206 and 207 to Part 4 of Schedule 1AB to the FFSP Regulations appear to authorise expenditure not previously authorised by legislation. These items establish legislative authority for the Commonwealth government to fund the Suicide Prevention Research Fund; Suicide Prevention Trials; the Lifeline text service; and the Digital technologies for mental health program. In relation to the source of funding for each of the programs the ES states:

The...mental health care initiatives are part of the Government's announcement in the 2016-17 Mid-Year Economic and Fiscal Outlook of \$194.5 million for initiatives to strengthen mental health care in Australia.

...Funding for this item will come from Program 2.1: Mental Health, which is part of Outcome 2: Health Access and Support Services, as set out in the *Portfolio Additional Estimates Statements 2016-17, Health Portfolio* at page 38.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, these programs 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 will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 [F2017L00209]
Purpose	Sets rules for funding specialist disability accommodation for participants under the National Disability Insurance Scheme
Last day to disallow	20 June 2017
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Department	Social Services
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 (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 [F2017L00209] (the rules) incorporate the NDIS (National Disability Insurance Scheme) Price Guide and Legacy Stock Price List, as in force from time to time. However, the ES does not provide a description of these documents, or indicate how they may be freely obtained, other than to state that the documents are published by the National Disability Insurance Agency (NDIA).

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*.

With respect to providing a description of the incorporated documents, the committee understands that NDIS prices and associated arrangements included in these documents are designed to assist disability support providers to understand the way pricing and payments work in the NDIS, and that the documents may be

described as administrative in character. However, the committee is interested to understand why it is appropriate for the NDIS Price Guide and Legacy Stock Price List to be issued by the NDIA without Parliamentary oversight given that their application in the rules will determine the amounts that will be funded by the NDIS for specialist disability accommodation.⁶

With respect to indicating how the incorporated documents may be obtained, the committee notes that the NDIS Price Guide is available for free online.⁷ 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 remains concerned about how the Legacy Stock Price List may be obtained.

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	Primary Industries (Excise) Levies Amendment (Bananas) Regulations 2017 [F2017L00156]
Purpose	Increases the rate of the Plant Health Australia levy on bananas to 0.5 cents per kilogram, and minor rounding of the marketing levy to 1.15 cents per kilogram
Last day to disallow	20 June 2017
Authorising legislation	<i>Primary Industries (Excise) Levies Act 1999</i>
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(b)

Unclear basis for determining fees

The Primary Industries (Excise) Levies Amendment (Bananas) Regulations 2017 [F2017L00156] (the amendment regulations) amend the Primary Industries (Excise)

⁶ See paragraph 5.4.

⁷ See National Disability Insurance Agency, <https://www.ndis.gov.au/providers/pricing-and-payment> (accessed 28 March 2017).

Levies Regulations 1999 (the primary regulations) to increase the rate of the Plant Health Australia (PHA) and market levy on bananas.

The amendment regulations increase the existing PHA levy from the current rate of 0.0103 cents per kilogram to 0.5 cents per kilogram (an increase of 0.4897 cents per kilogram) and the marketing levy from 1.1497 cents to 1.15 cents (an increase of 0.003 cents per kilogram).

The ES to the amendment regulations states:

The levy will raise money to repay the Australian Government for a grant of \$3 million (excluding GST) used to purchase a property in Tully, Northern Queensland, infested with Panama disease Tropical Race 4, and the ongoing containment and management of the disease. Any remaining levy funds will be used to improve banana industry biosecurity more generally.

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 notes that Schedule 15 of the *Primary Industries (Excise) Levies Act 1999* provides for the ability to impose levies on bananas; and that Part 27 of Schedule 15 to the primary regulations sets out details for the imposition of levies on bananas. However, the committee is concerned that it appears to be anticipated that the increase to the rate of the levy on bananas may result in 'remaining levy funds', and it is unclear to the committee whether this is authorised under the *Primary Industries (Excise) Levies Act 1999* and the primary regulations.

In this respect, the committee notes that neither the amendment regulations nor the ES provides information about whether it is both permitted and appropriate for the amendment regulations to apply levies which may result in additional funds, rather than levies which reasonably reflect the level of funding required for PHA and marketing activities relating to bananas.

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

Instrument	Privacy Amendment (Energy and Water Utilities) Regulations 2017 [F2017L00170]
Purpose	Amends the Privacy Regulation 2013 to extend permission for energy and water utilities in the Australian Capital Territory and the Northern Territory to disclose credit information
Last day to disallow	20 June 2017
Authorising legislation	<i>Privacy Act 1988</i>
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Background

Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016 [F2016L01913] (the 2016 regulations) intended to amend the Privacy Regulation 2013 (the privacy regulation) to extend permission for energy and water utilities in the Australian Capital Territory (ACT) and the Northern Territory (NT) to disclose credit information until 1 January 2018. This permission would enable those utilities to continue to access the credit reporting system. However, as a result of a drafting error in the commencement provision in the 2016 regulations, the relevant provision in the privacy regulation was repealed on 1 January 2017.

Drafting

Privacy Amendment (Energy and Water Utilities) Regulations 2017 [F2017L00170] (the 2017 regulations) amend the privacy regulation to permit energy and water utilities in the ACT and the NT to disclose credit information until 1 January 2018.

However, the committee notes that as the 2017 regulations commenced on 29 February 2017 it appears that there was no law in operation to support any disclosures of credit information by utilities in the ACT and the NT during the period between the repeal of the 2016 regulations and the commencement of the 2017 regulations.

The committee is concerned about the effect, if any, on the legality of any disclosures that may have occurred during the period between the repeal of the 2016 regulations on 1 January 2017 and the commencement of the 2017 regulations on 29 February 2017. The ES does not provide any information about the effect, if any, of the drafting error in the commencement provision of the 2016 regulations.

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 (Social Services Measures No. 4) Regulation 2016 [F2016L01922]
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Social Services
Last day to disallow	9 May 2017
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 1 of 2017</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*,⁸ 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*

⁸ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

(Supplementary Powers) Act 1997 explicitly states, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016 [F2016L01922] (the regulation) replaces table item 83 in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative authority for spending in relation to the Commonwealth Financial Counselling and Financial Capability – Capability Building program.

The committee notes that the objective of the Commonwealth Financial Counselling and Financial Capability – Capability Building program is:

1. To provide funding for an entity to:
 - (a) develop and provide online information and resources for financial counsellors, financial capability workers and consumers; and
 - (b) provide the national 1800 financial counselling and financial capability Helpline telephone service (the Helpline), including the development of national standards and materials for the Helpline.
2. To provide funding for services to be provided by an entity directed at supporting:
 - (a) attendance at national financial counselling and financial capability conferences by the following:
 - i. financial counsellors and financial capability workers for the Helpline;
 - ii. residents of a Territory; and
 - (b) the presentation of sessions at national financial counselling and financial capability conferences that relate to any of the following:
 - i. bankruptcy or insolvency;
 - ii. invalid or old-age pensions within the meaning of paragraph 51 (xxiii) of the Constitution;
 - iii. allowances, pensions, endowments, benefits or services to which paragraph 51(xxiiiA) of the Constitution applies;
 - iv. immigrants or aliens;
 - v. the Helpline;
 - vi. online information or resources relevant to financial counselling or financial capability;
 - vii. particular issues confronting the residents of Territories.
3. To provide funding for services to be provided by an entity directed at supporting the presentation of sessions at national financial counselling and financial capability conferences, to the extent that the

presentation amounts to a measure designed to meet Australia's obligations under:

- i. the Convention on the Rights of the Child; or
 - ii. the Convention on the Rights of Persons with Disabilities; or
 - iii. the Convention on the Elimination of All Forms of Discrimination Against Women; or
 - iv. the International Covenant on Economic, Social and Cultural Rights.
4. To provide funding for services to be provided by an entity directed at supporting the following:
- (a) attendance at national financial counselling and financial capability conferences by the following:
 - i. Indigenous persons;
 - ii. persons who provide financial counselling and financial capability services predominantly to Indigenous persons;
 - iii. the presentation of sessions at national financial counselling and financial capability conferences that relate to particular issues confronting Indigenous persons.

The ES for the regulation identifies the constitutional basis for expenditure in relation to this program 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 communications power (section 51(v));
- the bankruptcy and insolvency power (section 51(xvii));
- the social welfare power (section 51(xxiiiA));
- the territories power (section 122);
- the invalid and old age pensions power (section 51(xxiii));
- the aliens power (section 51(xix));
- the immigration power (section 51(xxvii));
- the external affairs power (section 51(xxix)); and
- the race power (section 51(xxvi)).

The committee notes that the objective of the Commonwealth Financial Counselling and Financial Capability – Capability Building program, 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.⁹

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 No. 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 not exhaust the purported operation of the operative provision in question.¹⁰

9 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 2 February 2016), p. 9.

10 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 2 February 2016), p. 9.

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 includes 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 Commonwealth Financial Counselling and Financial Capability – Capability Building program, 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 the above.

Minister's response

The Minister for Finance, on behalf of the Minister for Social Services, advised:

The Financial Wellbeing and Capability (FWC) funding supports a range of services and programs to assist people in time of immediate financial crisis, as well as help them build longer-term financial capability to manage serious debt, move out of financial difficulty and/or provide basic budgeting and financial literacy support. This includes the provision of free access to professional financial counselling and financial capability services to those most at risk of financial and social exclusion and disadvantage. The Commonwealth Financial Counselling and Financial Capability – Capability Building program within the FWC activity aims to build and maintain the capability of financial counsellors and financial capability workers to provide consistent and quality services to individuals and families experiencing financial difficulties.

Communications power

Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

The Commonwealth Financial Counselling and Financial Capability – Capability Building program provides funding for the management of the National Debt Helpline 1800 007 007, in addition to developing and making available national standards and materials for the Helpline.

The Financial Counselling Australia annual national conference brings together financial counsellors and capability workers, consumer lawyers and community sector workers along with government agencies, universities, regulators and other organisations interested in financial counselling. The conference program includes a range of current topics and issues focusing on bankruptcy and insolvency, social welfare, the National Debt Helpline and information and resources for workers and

consumers. The 2017 program includes sessions dealing with consumer credit law, mortgage stress, banks, the National Disability Insurance Scheme and consumer centred care, refugee financial counselling, and problem gambling.

The program also provides funding for a range of online information tools and materials for consumers, financial counsellors and capability workers, which are available on the www.ndh.org.au and www.financialcounsellingaustralia.org.au websites. Additional information and resources for financial capability workers and consumers are available online during the operation of the Financial Counselling Australia annual national conference.

Bankruptcy and insolvency power

Section 51(xvii) of the Constitution supports legislation with respect to 'bankruptcy and insolvency'. The program supports financially vulnerable people by funding specific sessions of the Financial Counselling Australia annual national conference that relate to bankruptcy and insolvency.

Social welfare power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to social welfare payments within the meaning of section 51(xxiiiA) of the Constitution.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by section 122 of the Constitution. The program supports people living in the Territories to attend sessions of the Financial Counselling Australia annual national conference.

The program also funds sessions of the Financial Counselling Australia annual national conference that relate to particular issues confronting residents of the Territories.

Invalid and old age pensions power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to invalid and old age pensions within the meaning of section 51(xxiii) of the Constitution.

Aliens and immigration powers

The program funds sessions of the Financial Counselling Australia annual national conference that relate to relevant social welfare issues faced by financially vulnerable migrants and refugees. In doing so, the program assists persons within the reach of the aliens and immigration powers in sections 51(xix) and (xxvii) of the Constitution.

External affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia's obligations in relation to children under the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, or in relation to women under the Convention on the Elimination of All Forms of Discrimination Against Women. Funding can also be provided for the presentation of sessions to the extent that they are measures that are designed to meet Australia's obligations under the International Covenant on Economic, Social and Cultural Rights.

Race power

The race power in section 51(xxvi) of the Constitution supports laws with respect to Indigenous Australians. The program provides funding for Indigenous persons and persons who provide financial counselling and financial capability services predominantly to Indigenous persons, particularly those living in remote communities, to attend the Financial Counselling Australia annual national conference. The program also funds the presentation of sessions at the Financial Counselling Australia annual national conference that relate to particular social welfare issues confronting Indigenous persons.

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 ministers for their detailed response.

While the minister's response is generally helpful in providing a clear and explicit statement of the relevance and operation of the majority of the constitutional heads of power that the regulation seeks to rely on to support the Commonwealth Financial Counselling and Financial Capability – Capability Building program, the committee notes that, in relation to the external affairs power, the minister's response does not specify the articles of the international treaties on which the program seeks to rely.

The committee understands that, in order to rely on the external affairs power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that

treaty.¹¹ The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the regulation or the ES.

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

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.

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.¹²

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

11 *Victoria v Commonwealth* (1996) 187 CLR 416.

12 *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	Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulations 2017 [F2017L00216]
Purpose	Establishes legislative authority for a spending activity administered by the Department of Education and Training
Last day to disallow	20 June 2017
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Previously unauthorised expenditure

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

The Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulations 2017 [F2017L00216] inserts new table item 209 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 and appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund the Commonwealth Scholarships Program for South Australia. In relation to the source of funding for the program the ES states:

Funding of \$24 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Jobs and Growth in South Australia' for a period of four years commencing in 2016-17. Details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 146.

...Funding for this item will come from Sub-program 2.8.2: Skills Development, which is part of Program 2.8: Building Skills and Capability under Outcome 2. Details are set out in the *Portfolio Additional Estimates Statements 2016-17, Education and Training Portfolio* at page 41. Funding for the OCESC will come from the ACMA's Program 1.3: Office of the Children's eSafety Commissioner, which is part of Outcome 1. Details are set out for the ACMA in Table 1.2 at page 76, Table 1.3 at page 77 and Table 2.2.1 at page 81 of the *Portfolio Additional Estimates Statements 2016-17, Communications and the Arts Portfolio*.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, 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 will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220]
Purpose	Establishes legislative authority for certain spending activities administered by the Department of Social Services and the Office of the Children's eSafety Commissioner
Last day to disallow	20 June 2017
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional authority for expenditure

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

The committee notes that, in *Williams No. 2*,¹³ 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.

The Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220] (the regulation) adds new items 199 and 200 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seek to establish legislative authority for Commonwealth government spending for the Prevention of Domestic Violence program and Domestic Violence Frontline Services.

The committee noted that the objects of new items 199 and 200 each include the following reference to activities:

to meet Australia's obligations under:

- (i) the Convention on the Elimination of All Forms of Discrimination Against Women (particularly Articles 2, 3, 5(a) and 16); and
- (ii) the Convention on the Rights of the Child (particularly Articles 4 and 19); and
- (iii) the Convention on the Rights of Persons with Disabilities (particularly Article 6(2)); and
- (iv) the International Covenant on Civil and Political Rights (particularly Article 7).

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 199 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 communications power (section 51(v));
- the aliens power (section 51(xix));
- the races power (section 51(xxvi));
- the immigration power (section 51(xxvii)); and
- the external affairs power (section 51(xxix)).

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

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 200 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 aliens power (section 51(xix));
- the immigration power (section 51(xxvii)); and
- the external affairs power (section 51(xxix)).

With respect to items 199 and 200, the committee understands that spending in relation to domestic violence programs may be authorised by the external affairs power insofar as the spending is directed to meeting Australia's obligations under international human rights treaties. However, the links between the objectives of the Prevention of Domestic Violence program and Domestic Violence Frontline Services and the external affairs power are not stated clearly and explicitly in the ES.

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 and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

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

Previously unauthorised expenditure

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

New table item 198 to Part 4 of Schedule 1AB to the FFSP Regulations appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund the Digital Literacy for Older Australians program. In relation to the source of funding for the program the ES states:

Total funding of \$47.2 million for this four-year program was included in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Digital Literacy for Older Australians' at page 191.

...Funding for the Department of Social Services' responsibilities under the program will come from Program 2.1: Families and Communities, which is part of Outcome 2. Details are set out in Table 1.2 at page 20, Table 1.3 at

page 23 and Table 2.2.1 at page 62 of the *Portfolio Additional Estimates Statements 2016-17, Social Services Portfolio*.

Funding for the OCESC will come from the ACMA's Program 1.3: Office of the Children's eSafety Commissioner, which is part of Outcome 1. Details are set out for the ACMA in Table 1.2 at page 76, Table 1.3 at page 77 and Table 2.2.1 at page 81 of the *Portfolio Additional Estimates Statements 2016-17, Communications and the Arts Portfolio*.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, 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 will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

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	Private Health Insurance (Prostheses) Rules 2017 (No. 1) [F2017L00183] Social Security (Partially Asset-test Exempt Income Stream - Exemption) Principles 2017 [F2017L00218] Social Security (Primary Production Concession) Principles 2017 [F2017L00219] Torres Strait Fisheries Management Instrument No. 12 [F2017L00169]
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	
	Australian National Audit Office (ANAO) Auditing Standards (09/03/2017) [F2017L00230]
	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 1) [F2017L00200]
	Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171]
	National Health (Claims and under co-payment data) Amendment (Extension of exceptional circumstances dates) Rule 2017 (PB 24 of 2017) [F2017L00225]
	Private Health Insurance (Prostheses) Rules 2017 (No. 1) [F2017L00183]
	Remuneration Tribunal Determination 2017/01 – Remuneration and Allowances for Holders of Public Office [F2017L00151]
	Social Security (Personal Care Support – Direct Consumer Funding) Determination 2017 [F2017L00149]

<p>Scrutiny principle</p>	<p>Social Security (Personal Care Support Scheme – Disability Services Queensland) Determination 2017 [F2017L00150]</p> <p>Social Security (Personal Care Support Scheme – Pflegegeld) Determination 2017 [F2017L00152]</p> <p>Torres Strait Fisheries Management Instrument No. 12 [F2017L00169]</p> <p>Trade Support Loan Amendment (Overseas Debtors Repayment) Rules 2017 [F2017L00158]</p> <p>Water and Wastewater Services Fees Determination 2017–18 (Jervis Bay Territory) [F2017L00182]</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.¹⁴

The committee draws the above to the attention of ministers.

¹⁴ 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	Code for the Tendering and Performance of Building Work 2016 [F2016L01859]
Purpose	Sets the Australian Government's standards of conduct for all building contractors or building industry participants that seek to be, or are, involved in Commonwealth funded building work
Last day to disallow	9 May 2017
Authorising legislation	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>
Department	Employment
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	<i>Delegated legislation monitors 1 and 3 of 2017</i>

Availability of merits review

The committee commented as follows:

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

With reference to the above, the committee notes that section 18 of the Code for the Tendering and Performance of Building Work 2016 [F2016L01859] (the code) provides for the imposition of exclusion sanctions on an entity that is covered by the code. Exclusion sanction is defined in subsection 3(3) as a period during which a building entity covered by the code is not permitted to tender for, or be awarded, Commonwealth funded building work.

If the ABC Commissioner (the commissioner) is satisfied that a code covered entity has failed to comply with the code, the commissioner may refer the matter to the minister with recommendations that a sanction should be imposed. If such a matter

has been referred to the minister, the minister may impose an exclusion sanction on the entity, or issue a formal warning to the entity that a further failure may result in the imposition of an exclusion sanction.

While section 19 of the code requires the minister to provide written notification of their intention to impose an exclusion sanction, and provides for the entity to make a submission in relation to the proposed sanction, it does not appear that the minister's decision to impose an exclusion sanction is subject to merits review. The ES to the code does not provide information as to whether the decision to impose an exclusion sanction possesses characteristics that would justify the exclusion of such decisions from merits review.

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

Minister's first response

The Minister for Employment advised:

Section 19 of the Code protects the integrity of the decision-making process in relation to exclusion sanctions by outlining a number of steps that must be taken before a decision to issue an exclusion sanction is made. It provides that written notice must be given to the code covered entity detailing the alleged breach of the Code and inviting the entity to make a submission in relation to the matter within 21 days. If a submission is made, that submission must be considered before a decision to impose an exclusion sanction is made.

I note that a decision to impose an exclusion sanction would be amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, which is an appropriate review mechanism for these decisions.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that written notice must be given to the code covered entity detailing the alleged breach of the code and inviting the entity to make a submission in relation to the matter within 21 days, and that any submission made must then be considered before a decision to impose an exclusion sanction is made.

The committee also notes the minister's advice that a decision to impose an exclusion sanction would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

However, the minister's response does not provide a justification for excluding merits review of decisions to impose exclusion sanctions on entities that are covered by the code.

The committee draws the minister's attention to the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to*

merit review? as providing useful guidance for justifying the exclusion of merits review.¹

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

Minister's second response

The Minister for Employment advised:

The Code is an opt-in procurement scheme for Commonwealth funded work in the building industry.

That is to say, only the builders who choose to tender for Commonwealth funded building work, subject themselves to the Code. Exclusion sanctions can only be imposed under section 18 of the Code if the Minister for Employment is satisfied, upon the recommendation of the Australian Building and Construction Commissioner, that a code covered entity has breached the Code. The effect of an exclusion sanction is that the code covered entity is excluded from submitting expressions of interest, tendering for, or being awarded Commonwealth funded building work during a period of up to one year. An exclusion sanction does not prevent the code covered entity from performing Commonwealth funded building work that was awarded prior to the commencement of the exclusion period.

The Government considers that the rigorous two-step process to impose an exclusion sanction, involving decisions by an independent statutory office holder and a Minister, is sufficient to ensure the integrity of the decision-making process. However, as noted in my previous response to the Committee, decisions to impose exclusion sanctions are also amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. By contrast, decisions under the predecessor legislation to the *Building and Construction Industry (Improving Productivity) Act 2016* were exempt from judicial review, as are decisions under the *Fair Work Act 2009*.

A decision to impose an exclusion sanction is fundamentally a decision about who the Australian Government contracts with in relation to building work. The Government should be responsible for, and accountable to the Parliament in relation to its own procurement decisions. Merits review by a third party would inappropriately diminish the capacity of the Government to determine with whom it contracts, increase uncertainty, and potentially delay (and therefore significantly increase the cost) of building projects.

1 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (accessed 2 March 2017).

On this basis the Government considers that there are factors justifying the exclusion of merits review of a decision taken by a Commonwealth Minister to impose an exclusion sanction in accordance with the broad discretion in section 18 of the Code.

Committee's second response

The committee thanks the minister for her response.

The committee notes the minister's advice that decisions to impose exclusion sanctions are amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*; and that merits review of decisions to impose exclusion sanctions was not previously available under the predecessor legislation to the *Building and Construction Industry (Improving Productivity) Act 2016*.

The committee also notes the minister's advice that the Government should be responsible for, and accountable to, the Parliament in relation to its own procurement decisions and that merits review by a third party would:

- inappropriately diminish the capacity of the Government to determine with whom it contracts, increase uncertainty; and
- potentially delay (and therefore significantly increase the cost) of building projects.

However, noting that the effect of an exclusion sanction is that an entity covered by the code would be excluded from submitting expressions of interest, tendering for, or being awarded Commonwealth funded building work during a period of up to one year, the committee remains concerned that decisions to impose exclusion sanctions on entities that are covered by the code are excluded from merits review.

The committee has concluded its examination of this issue. However, in light of the committee's concerns regarding the exclusion of merits review of decisions to impose exclusion sanctions on entities that are covered by the code, the committee draws this matter to the attention of senators.

Instrument	Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924]
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Attorney-General's Department
Last day to disallow	9 May 2017
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 1 of 2017</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*,² 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.

The Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924] (the regulation) adds new item 186 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative authority for Commonwealth government spending for the Safer Communities Fund Program.

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

The committee notes that the objective of this program is:

To address crime and antisocial behaviour, and to protect community centres, pre-schools, schools and places of worship that are at high risk of attack, harassment or violence as a result of racial or religious intolerance.

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 communications power (section 51(v)); and
- the external affairs power (section 51(xxix)).

The regulation thus appears to rely on the communications power and the external affairs powers as the relevant heads of legislative power to authorise the addition of item 186 to Schedule 1AB (and therefore the spending of public money under it).

In relation to the communications power, it is unclear to the committee how the funding of the Safer Communities Fund Program 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 the communications power.

In relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.³ The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the instrument or the ES. However, while the regulation states that it is giving effect to Australia's obligations under International Covenant on Civil and Political Rights, particularly Article 18, and the International Convention on the Elimination of All Forms of Racial Discrimination, it does not explain how the regulation is appropriately adapted to implement specific obligations under these articles.

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

Minister's response

The Minister for Finance, on behalf of the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, advised:

Communications power

The program principally provides funding to identified local council and community organisations for the installation of security enhancements and infrastructure that utilise communications technology, such as closed-

3 *Victoria v Commonwealth* (1996) 187 CLR 416.

circuit television (CCTV) facilities and software, in and for the benefit of at risk communities. The installation of this communications infrastructure, involving forms of communications services or facilities covered by s 51(v) of the Constitution, will improve security, which will enhance community safety and reduce street crime and violence, leading to a reduction in the fear of crime in the Australian community and greater community resilience and wellbeing.

External affairs power

Under the program, funding is available to protect particular religious or racial groups in the Australian community, including pre-schools, schools and community organisations, which are facing security risks associated with religious or racial intolerance.

Australia has international obligations relating to the freedom and security of religious practice under the International Covenant on Civil and Political Rights [1980] ATS 23 (ICCPR). Article 18(1) of the ICCPR provides that '[e]veryone shall have the right to freedom of thought, conscience and religion', and that this right includes 'freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

Australia has international obligations relating to racial intolerance under the International Convention on the Elimination of all Forms of Racial Discrimination [1975] ATS 40. Article 2(1)(d) of this Convention provides that State Parties 'shall prohibit and bring to an end' 'racial discrimination by any persons, group or organization'. Article 2(2) provides that State Parties shall take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.'

As set out in Article 5(b), States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone' 'to equality before the law', 'in the enjoyment of' the 'right to security of person and protection by the State against violence or bodily harm'.

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 ministers for their response and has concluded its examination of the instrument.

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

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.

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.⁴

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

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

Instrument	Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751]
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Health
Last day to disallow	15 sitting days after notice of motion to disallow (20 June 2017) ⁵
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</i> 10 of 2016

Addition of matters to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (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*,⁶ the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the 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 (Health Measures No. 4) Regulation 2016 [F2016L01751] (the regulation) adds eight new items to

5 A notice of motion to disallow this instrument was given by the Chair of the Regulations and Ordinances Committee on 20 March 2017. If the notice of motion is not resolved or withdrawn by 20 June 2017 the instrument will be deemed to be disallowed. See 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 (accessed 28 March 2017).

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

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 items 180–182 establish legislative authority for the:

- Primary Health Care Development Program;
- Health Policy Research and Data Program; and
- Health Protection Program.

These programs each cover a wide range of objectives, and the ES for the regulation identifies the constitutional basis for expenditure in relation to each of these initiatives 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 telecommunications power (section 51(v));
- the census and statistics power (section 51(xi));
- the social welfare power (section 51(xxiiiA));
- the races power (section 51(xxvi));
- the external affairs power (section 51(xxix));
- the Territories power (section 122);
- the power to grant financial assistance to the States (section 96);
and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

The ES also identifies the naturalization and aliens power (section 51(xix)) to authorise the Health Policy Research and Data Program and the Health Protection Program; in addition to the defence power (section 51(vi)), the quarantine power (section 51(ix)) and the immigration power (section 51(xxvii)) to authorise the Health Protection Program.

The regulation thus appears to rely on numerous constitutional heads of legislative power to authorise the addition of the items to Schedule 1AB (and therefore the spending of public money under them).

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.

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 Health, advised:

Item 180 Primary Health Care Development Program

The Primary Care Program provides funding for a number of activities that will strengthen health outcomes through facilitating access to and improving the quality, efficiency and availability of health and medical services in the community. Examples of activities that will be funded include:

- Primary Health Networks (PHNs);
- Health Information, Advice and Counselling Network;
- Primary Health Collaboration and Complex Conditions activities that aim to help people living with chronic and complex conditions to maintain good health and quality of life through improved care and collaboration of health providers; and
- Health Care Homes.

Telecommunications power

Under s51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Primary Care Program, the Department gives grants to organisations through the Health, Information, Advice and Counselling Network to:

- provide healthcare information including through telehealth and through emerging online interactive communication technologies such as social media; and
- improve access to health services for marginalised and special needs groups, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds, through the delivery of health advice, information, counselling and support services via national health communication infrastructure. Communication is undertaken through the use of various digital platforms.

Census and Statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Primary Care Program, the Department gives grants to Primary Health Networks to collect, analyse and report on the health care needs of individual communities and then to provide data and information to the Department. The Department uses this data to direct funding to activities

that improve the coordination of care to ensure patients receive the right care in the right place at the right time.

Social Welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of various social welfare benefits and services.

Under the Primary Care Program the Department gives grants:

- to Primary Health Networks to increase the efficiency and effectiveness of medical services to patients;
- through the Primary Health Collaboration and Complex Conditions activities, to improve patient outcomes, by better management of chronic and complex conditions using integrated, multidisciplinary team based care; and
- to medical practices to facilitate eligible patients with chronic and complex health problems to enrol in the medical practice known as a Health Care Home that will provide ongoing team-based coordination, management and support of patients' medical conditions.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. The race power supports laws with respect to Indigenous Australians.

Under the Primary Care Program, grants given under the Health Information, Advice and Counselling Network activity assist to support Aboriginal and Torres Strait Islander people to access relevant health information and services through responsive technology solutions.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Primary Care Program gives effect to Australia's obligations under various treaties. For example, funding of particular activities gives effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. These Articles require States Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Under the Primary Care Program the Department provides grants to Primary Health Care Networks to undertake health promotion and health

prevention activities to prevent epidemic, endemic, occupational and other diseases.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by the territories power in s 122 of the Constitution.

Under the Primary Care Program the Department may make payments to one or more Territory entities to support activities that improve access to quality primary health and medical services in the community.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Primary Care Program the Department may make payments to one or more State entities to support activities that improve access to quality primary health and medical services in the community.

Executive power and incidental power

The Primary Care Program involves funding activities that are taken in the exercise of the executive power of the Commonwealth. This funding is supported by the executive power in section 61 of the Constitution and the express incidental power in s 51(xxxix).

Item 181 Health Policy Research and Data Program

The objectives of the Research Program are to:

- provide a mechanism for driving improvements in the way the Department uses and manages its research and analytical agenda including enabling prioritisation of funding according to changing needs;
- fund entities such as universities, research organisations and public companies to undertake research, evaluation or data activities and report the results of that research to the Commonwealth to support policy development for safe, high quality health care systems and services; and
- help build a strong evidence base and enable access to data to inform the development, implementation, monitoring and evaluation of health policy and improve clinical practice in Australia.

Funding may be for research:

- on particular diseases;
- that is sector-specific (for example, improving the delivery of primary care); and

- that is directed to improving the health of particular demographic groups (for example Aboriginal and Torres Strait Islanders and migrant communities).

Relevant research may also be funded by giving grants to one or more States and Territories, or grants may relate to research that is undertaken in a Territory.

Social Welfare Power

Section 51(xxiiiA) of the Constitution empowers the Parliament to fund measures that are incidental to the provision of various social welfare services and benefits.

Under the Research Program, the Department may fund activities that are incidental to the provision of medical services and pharmaceutical benefits.

External Affairs Power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Research Program gives effect to Australia's obligations under various treaties. For example, funding of particular activities gives effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. The activities funded under the Research Program include activities that relate to, for example, the provision of health services.

Census and Statistics Power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Research Program the Department funds numerous research projects that provide for the development of existing national datasets (for example, the national maternal and perinatal data collection) and the development of new datasets.

Telecommunications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Research Program data may be collected and disseminated through, for example, the internet.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. The race power supports laws with respect to Indigenous Australians.

Under the Research Program the Department will fund research that is directed to improving the health of Aboriginal and Torres Strait Islanders.

Naturalization and aliens power

Section 51(xix) of the Constitution supports laws with respect to 'naturalization and aliens'.

Under the Research Program the Department will fund research that is directed to improving the health of migrant communities.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by the territories power in s 122 of the Constitution.

Under the Research Program relevant research may be funded by giving grants to one or more Territories, or grants may relate to research that is undertaken in a Territory.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Research Program relevant research may be funded by giving grants to one or more States.

Commonwealth executive power and the express incidental power

The Research Program involves funding activities that are taken in the exercise of the executive power of the Commonwealth. This funding is supported by the executive power in section 61 of the Constitution and the express incidental power in s 51(xxxix).

Item 182 Health Protection Program

The Health Protection Program provides funding for a number of activities. The objective of the funding is to provide for prevention, preparedness and response activities that protect the health of all Australians from threats posed by communicable disease outbreaks, natural disasters, environmental hazards, acts of terrorism and other incidents that may lead to mass casualties.

Telecommunications power

Under s51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Health Protection Program the Department provides funding for activities that involve the dissemination of relevant materials over the internet and via radio or television. This may include information campaigns about the prevention and treatment of communicable diseases.

The item also authorises expenditure on the delivery of information for health practitioners online on the most effective way to care for patients with particular communicable diseases.

Defence power

Section 51(vi) of the Constitution supports laws for the purpose of defence.

Under the Health Protection Program the Department provides funding for the National Medical Stockpile, which is intended for use as part of a national response to terrorism. Further, funding for the maintenance of a register of biological agents of security concern, and the purchase of certain medicines and equipment for distribution in health emergencies, also assists the Commonwealth to prepare for and defend the country against certain terrorist attacks.

Quarantine power

Section 51(ix) of the Constitution empowers the Parliament to make laws with respect to 'quarantine'.

Under the Health Protection Program the Department provides funding for a variety of activities that involve developing and undertaking quarantine measures that seek to reduce the spread of communicable diseases. These activities include, for example, funding laboratories to maintain the capacity and capability to provide diagnostic services in the event of a national health emergency that relates to a communicable disease.

Census and statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Health Protection Program the Department provides funding for expenditure on research such as data collection to ensure that the Commonwealth is fully informed of emerging or changing risks and threats to public health in Australia, including risks to health arising from environmental factors. Such research may also inform the further development of Commonwealth policy, including plans for responding to a national public health emergency.

Naturalization and aliens power; immigration power

Section 51(xix) of the Constitution supports laws with respect to 'naturalization and aliens', and 51(xxvii) supports laws with respect to 'immigration and emigration'.

Under the Health Protection Program the Department provides funding for delivering culturally appropriate community education to target priority populations, such as newly arrived migrants, to improve their understanding of exposure and transmission risks of blood borne viruses and sexually transmitted infections, to increase testing and treatment uptake, encourage safer sex behaviour and safer injecting practices. This

education would benefit and assist persons within the reach of these powers.

Social welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to fund measures that are incidental to the provision of various social welfare services and benefits.

Under the Health Protection Program, the Department may fund activities that are incidental to the provision of medical services and pharmaceutical benefits that are available for testing, treatment and management of communicable diseases.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. The race power supports laws with respect to Indigenous Australians.

Under the Health Protection Program the Department provides funding on activities directed at reducing the incidence of certain communicable diseases in Aboriginal and/or Torres Strait Islander communities. For example, the Department funds the delivery of community prevention and education programs to prevent transmission of blood borne viruses and sexually transmitted infections.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Health Protection Program gives effect to Australia's obligations under various treaties. For example, funding of activities that are directed to reducing the spread of communicable diseases, gives effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. These Articles require States Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

The Department also funds activities that relate to matters affecting Australia's relations with foreign countries and international organisations. For example, under the Health Protection Program, the Department provides payments to organisations such as the World Health Organization for the purpose of increasing the capacity of developing countries to respond to outbreaks of infectious diseases, which in turn assists in reducing the risk of infectious diseases spreading to Australia.

Territories power

Provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Under the Health Protection Program the Department pays grants to, for example, the Government of the Northern Territory for exotic mosquito control activities.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Health Protection Program the Department pays grants to, for example, a State in accordance with longstanding arrangements to meet the costs of maintaining the Security Sensitive Biological Agents National Register and the National Positions Register.

By way of further example, the Department also pays grants to State (and Territory) Health departments for the cost of purchasing rabies immunoglobulin for bat handlers or private citizens who have been exposed to Australian bats and may be at risk of infection.

Commonwealth executive power and the express incidental power

The executive power in section 61 of the Constitution, together with s 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

Under the Health Protection Program, the Department funds a variety of activities that strengthen the Commonwealth's capacity to respond, or to actually respond, to a national health emergency. These activities include, for example, maintaining laboratory capacity and capability for providing services in the event of a health emergency that affects the nation.

These answers are 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 ministers for their response and has concluded its examination of the instrument.

The committee notes that the ministers have provided a clear and explicit statement of the relevance and operation of each constitutional head of power that the regulation seeks to rely on to support Commonwealth funding for the Primary Health Care Development Program, Health Policy Research and Data Program, and Health Protection Program.

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

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.

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 draws the above to the minister's attention.

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (merits review)

The committee commented as follows:

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

The regulation adds eight new table items to Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 establishing legislative authority for spending activities administered by the Department of Health. New table items 179, 181 and 183 establish authority for the:

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

- Drug and Alcohol Program;
- Health Policy Research and Data Program; and
- Public Health and Chronic Disease Program.

While the ES is generally helpful in providing information about the proposed administration of these programs, in relation to merits review, the ES states that details on merits review will be provided in guidelines for each program. The committee notes that, currently, these guidelines do not appear to be publicly available.

In order to assess whether a program in Schedule 1AB possesses characteristics justifying exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review. In this instance, the ES has not sufficiently addressed whether the Drug and Alcohol Program, Health Policy Research and Data Program and the Public Health and Chronic Disease Program, will or will not be subject to merits review, and if not, what characteristics of each of the programs justify the exclusion.

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 Health, advised:

Guidelines for all three programs are now publicly available at:

<http://www.health.gov.au/internet/main/publishing.nsf/Content/drug-and-alcohol-program>

[http://www.health.gov.au/internet/main/publishing.nsf/Content/HealthPolicy Research and Data Program](http://www.health.gov.au/internet/main/publishing.nsf/Content/HealthPolicyResearchandDataProgram)

<http://www.health.gov.au/internet/main/publishing.nsf/Content/public-health-chronic-disease-grant-program>

In each case reference is made to the Department's Grant and Procurement Complaints Procedures at the following web address:

<http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-complaintsprocedures>

The Procedures provide a merits review mechanism for each of the three programs. The mechanism is outlined below.

If a person wishes to lodge a dispute or complaint about a procurement or grant/funding process, they are asked to write to the Departmental Contact Officer for that process. The Department will request details of the basis upon which the dispute or complaint is being lodged, including:

- a clear statement of what the person considers was defective in the procurement or grant process;
- copies of, or references to, information to support the complaint; and
- a statement regarding the outcome the person wishes to achieve.

The Contact Officer will acknowledge receipt of the complaint in writing within 10 working days of receiving it. If further correspondence or information is required, the person will be given no less than 15 working days to respond to any communication from the Department unless the matter is urgent.

The Contact Officer will then attempt to resolve the matter.

The Department will advise the person of the decision in writing within a reasonable timeframe, which will usually be within 15 working days of receiving all written correspondence relating to a complaint.

If the person is not satisfied with the Department's response then they may seek an independent internal review of the complaint.

The internal review officer will promptly notify the person in writing to advise of their appointment and the expected time frame for making the internal review decision. The notice will also include a request for any further information that may be required to conduct the review. The person will be given no less than 15 working days to provide any further information unless the matter is urgent.

The internal review officer will notify the person in writing of the decision within the timeframe specified in the original notice.

If the person is not satisfied with the Department's internal review decision, they may lodge a complaint with the Commonwealth Ombudsman.

Committee's response

The committee thanks the ministers for their response and has concluded its examination of the instrument.

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

Instrument	<p>Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921]</p> <p>Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925]</p>
Purpose	These regulations amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Infrastructure and Regional Development
Last day to disallow	9 May 2017
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 1 of 2017</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*,⁸ 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 states, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921] (the No. 1 regulation) and Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925] (the No. 2 regulation) add new items to Part 4 of Schedule 1AB to the

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

Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seek to establish legislative authority for spending in relation to these items. New table items 190 and 191 establish legislative authority for the Commonwealth government to fund the Regional Jobs and Investment Package and the Building Better Regions Fund.

The committee notes that the objective of the Regional Jobs and Investment Package is:

To encourage investment, employment, productivity and innovation in regions affected by structural economic change and foster the capacity of such regions to participate in international and domestic trade, by providing grants for projects which support economic diversification, growth and employment in regions.

The committee also notes that the objective of the Building Better Regions Fund is:

To support regional and remote communities by providing grants for infrastructure and community investment projects which create jobs and encourage economic growth in such communities.

The regulations provide that the objectives of the programs 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 No. 1 regulation identifies the constitutional basis for expenditure in relation to the Regional Jobs and Investment Package 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 interstate and international trade and commerce power (section 51(i));
- the communications power (section 51(v));
- the aliens power (section 51(xix));
- the social welfare power (section 51(xxiiiA));
- the immigration power (section 51(xxvii));
- the race power (section 51(xxvi));
- the power to grant financial assistance to States (section 96);
- the external affairs power (section 51(xxix));
- the railway construction and extension power (section 51(xxxiv)); and
- the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)).

The ES for the No. 2 regulation identifies the constitutional basis for expenditure in relation to the Building Better Regions Fund in substantially the same manner, with the addition of the territories power (section 122).

The committee notes that the objectives of the programs, when read in conjunction with the constitutional authority set out in the regulations, appear 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.⁹

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 No. 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

9 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 2 February 2016), p. 9.

not exhaust the purported operation of the operative provision in question.¹⁰

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 includes 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 regulations supports the funding for the Regional Jobs and Investment Package and the Building Better Regions Fund, and the ESs to the regulations do not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the programs.

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

Minister's response

The Minister for Finance, on behalf of the Minister for Regional Development, advised:

Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921]

The external affairs power

Australia has ratified the International Covenant on Economic, Social and Cultural Rights which broadly described commits the signatories to achieving full realisation of the right to work. Under Article 6, 'the right of everyone to the opportunity to gain his living by work' is recognised, and each party has agreed to 'take appropriate steps to safeguard this right' including the implementation of 'programmes...to achieve...full and productive employment'. Australia is also a party to various International Labour Organisation (ILO) Conventions, including ILO Convention 122, which requires each Member 'to declare and pursue, as a major goal, an active policy designed to promote full and freely chosen employment (Art 1). It further provides that the policy shall, amongst other objectives, aim at ensuring there is work for all who are available for and seeking work'.

An overarching criterion for eligibility for funding under RJIP is that projects must create and sustain employment in regions. For example, projects which assist workers affected by structural change to retrain and

10 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 2 February 2016), p. 9.

obtain new employment, or projects which will develop export markets and hence increase employment, may be funded. Such projects will contribute to ensuring full and productive employment by providing new and sustainable employment opportunities, and therefore will contribute to Australia meeting these international obligations.

Trade and commerce power and railway construction and extension power

Projects which enhance the ability of a region to participate in interstate or international trade may receive funding. An example could be support for the investment by a regional business in new technology to enable it to diversify its operations or increase production to develop or meet interstate or overseas demand. Projects which involve enhancing, upgrading or constructing infrastructure that serves interstate transportation and therefore facilitate interstate trade and commerce may receive funding under RJIP. An example might be the upgrade of regional airport infrastructure. Similarly, projects which enhance or develop tourism and therefore trade and commerce to the relevant region may receive funding under RJIP. An example might be the construction of camping facilities, bushwalking tracks, and museum or art gallery enhancements. Such projects will encourage visits from interstate and overseas tourists, and thus facilitate and enhance interstate and overseas trade and commerce.

The communications power

Projects which provide or enhance communications infrastructure or services in regions may be funded under RJIP. An example might be a community internet hub supporting enhanced online communications.

The aliens power and the immigration power

Projects which assist or benefit migrant groups may be funded under RJIP - for example, drop in centres which offer English language training or other skills acquisition opportunities for migrant groups. Such projects would benefit and assist persons within the reach of the aliens and immigration powers.

The races power

Projects which benefit Aboriginal or Torres Strait Islander people may be funded under RJIP. The races power supports laws for the benefit of Indigenous people.

The social welfare power

Projects which provide medical services may be funded under RJIP. An example may be upgrades to hospital or other medical services infrastructure. Such projects would entail the provision of medical benefits within the social welfare power.

Financial assistance to States

Under RJIP, funding may be provided to bodies that are within the term 'State' in s96 of the Constitution for projects which further the purposes of RJIP. Such funding would constitute the grant of financial assistance to a State.

The executive power and the express incidental power

Under RJIP funding may be available to support activities or projects of a nature which address a matter affecting Australia as a whole which warrants significant coordination and integration. In addition, support will be provided for local planning committees to identify each region's key investment sectors and strategic priorities which are evidence-based to support sustainable economic growth.

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.

Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925]

Trade and commerce power and railway construction and extension power

Projects which enhance the ability of a region to participate in interstate or international trade may receive funding. An example could be support for the investment by a regional business in new technology to enable it to diversify its operations or increase production to develop or meet interstate or overseas demand. Projects which involve enhancing, upgrading or constructing infrastructure that serves interstate transportation and therefore facilitate interstate trade and commerce may receive funding under the BBRF. An example might be the upgrade of regional airport infrastructure. Similarly, projects which enhance or develop tourism and therefore trade and commerce to the relevant region may receive funding under BBRF. An example might be the construction of camping facilities, bushwalking tracks, and museum or art gallery enhancements. Such projects will encourage visits from interstate and overseas tourists, and thus facilitate and enhance interstate and overseas trade and commerce.

The communications power

Projects which provide or enhance communications infrastructure or services in regions may be funded under BBRF. An example might be a community internet hub supporting enhanced online communications.

The aliens power and the immigration power

Projects which assist or benefit migrant groups may be funded under BBRF – for example, drop in centres which offer English language training or other skills acquisition opportunities for migrant groups. Such projects

would benefit and assist persons within the reach of the aliens and immigration powers.

The races power

Projects which benefit Aboriginal or Torres Strait Islander people may be funded under BBRF. The races power supports laws for the benefit of Indigenous people.

The social welfare power

Projects which provide medical services may be funded under the BBRF. An example may be upgrades to hospital or other medical services infrastructure. Such projects would entail the provision of medical benefits within the social welfare power.

Financial assistance to States

Under the BBRF, funding may be provided to bodies that are within the term 'State' in s 96 of the Constitution for projects which further the purposes of BBRF. Such funding would constitute the grant of financial assistance to a State.

The territories power

Projects in a territory may receive funding under the BBRF. The provision of funding in or in relation to a territory is supported by s122 of the Constitution.

The external affairs power

Australia has ratified the International Covenant on Economic, Social and Cultural Rights which broadly described commits the signatories to achieving full realisation of the right to work. Under Article 6, 'the right of everyone to the opportunity to gain his living by work' is recognised, and each party has agreed to 'take appropriate steps to safeguard this right' including the implementation of 'programmes ... to achieve ... full and productive employment'. Australia is also a party to various International Labour Organisation (ILO) Conventions, including ILO Convention 122, which requires each Member 'to declare and pursue, as a major goal, an active policy designed to promote full and freely chosen employment (Art 1). It further provides that the policy shall, amongst other objectives, aim at ensuring there is work for all who are available for and seeking work'.

Projects that drive growth and thus create employment opportunities are likely to receive funding under the BBRF – for example a project that will develop export markets and hence increase employment. Such projects will contribute to ensuring full and productive employment by providing new and sustainable employment opportunities, and therefore contribute to Australia meeting these international obligations.

The executive power and the express incidental power

Under the BBRF, funding may be available to support activities or projects of a nature which address a matter affecting Australia as a whole which warrants significant coordination and integration.

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 ministers for their response and has concluded its examination of the instruments.

The committee notes that the ministers have provided a clear and explicit statement of the relevance and operation of each constitutional head of power that the regulations seek to rely on to support the Regional Jobs and Investment Package and the Building Better Regions Fund.

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

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.

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.¹¹

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

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)
Previously reported in	<i>Delegated legislation monitors 2 and 3 of 2017</i>

The committee commented on two matters as follows:

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.

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

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,¹² 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.

Minister's first response

The Minister for Education and Training advised:

Section 19-5 of The *Higher Education Support Act 2003* (the Act) requires that an organisation (applicant or approved provider allowed to offer loans under the FEE-HELP scheme) is financially viable and likely to remain financially viable. The FVI informs organisations of the financial information that is required to be submitted, the form in which it must be prepared, and how financial viability will be assessed, thereby assisting them to prepare those parts of their application or annual financial submissions that relate to financial viability.

The instrument incorporates the FVI as part of the standard conditions with which providers are required to comply once approval to offer loans under the FEE-HELP scheme is granted.

I remain committed to ensuring that non-statutory material incorporated by reference is easily ascertainable and that persons interested in, or likely be affected by, the terms of the referenced material can readily identify and access such material. Providing a clear description of the document referred to and specifying where such a document is located supports this important objective. The matters raised by the Committee will be addressed in all future higher education provider approvals.

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

Committee's first response

The committee thanks the minister for his response.

The committee notes the minister's advice that the issues raised will be addressed in future instruments.

However, the minister's response does not address the manner of incorporation of the FVI. In addition, the committee's expectation is for the instrument or its accompanying ES to specify where the FVI can be obtained, in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*.

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

Minister's second response

The Minister for Education and Training advised:

I accept the Committee's feedback that legislative instruments and their accompanying explanatory statements should clearly state the manner in which documents are incorporated by reference. My department will ensure future instruments and explanatory statements describe documents incorporated by reference, where they can be accessed and address the relevant method of incorporation.

I now give an undertaking that officers within my department will take the following corrective action in response to the further concerns raised by the Committee:

A replacement explanatory statement to the instrument will be prepared which will include a description of the FVI and provide details of where this document can be publically and freely accessed in accordance with paragraph 15J(2)(c) of the Legislation Act. The replacement explanatory statement will also address the manner of incorporation of the FVI having regard to s 14(2) of the Legislation Act and the Committee's Guideline on incorporation contained at Appendix 1 to Monitor 3/17. A preliminary draft of the proposed replacement explanatory statement is attached for the Committee's reference.

I commit to fulfilling this undertaking promptly. Officers of my department have been instructed to take action to implement this commitment by ensuring that the draft replacement explanatory statement is approved by the rule maker in accordance with paragraph 15J(2)(a) of the Legislation Act and registered on the Federal Register of Legislation as soon as is achievable following the rule maker's approval.

Committee's second response

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

The committee notes the minister's undertaking to register a revised ES that will include information on the manner of incorporation and access to FVI.

Instrument	Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089]
Purpose	Amends the Private Health Insurance (Prostheses) Rules 2016 (No. 4) by correcting errors payable for prostheses in Part A
Last day to disallow	9 May 2017 ¹³
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 3 of 2017</i>

Retrospective commencement

The committee commented as follows:

Subsection 12(2) of the *Legislation Act 2003* provides that a provision that commences retrospectively does not apply retrospectively in relation to a person (other than the Commonwealth) if it would disadvantage their rights or impose a liability on the person 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 commencement provision for the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] (the amendment rules) provides that they commenced 'immediately after the commencement of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4)'. The committee therefore understands the amendment rules to have commenced retrospectively on 8 September 2016.¹⁴ However, the ES to the amendment 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.

13 The committee notes that the last day to disallow was incorrectly referenced in *Delegated legislation monitor 3 of 2017* as 20 June 2017.

14 The Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01386] commenced immediately after the commencement of the Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318], which commenced on 8 September 2016.

Departmental response

The Department of Health advised:

The Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] do not apply retrospectively.

The Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) were registered on 30 January 2017 and commenced 'immediately after the commencement of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4)'.

The Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627] commenced on 20 February 2017.

The commencement date and footnote 1 on page 4 of the committee's *Delegated legislation monitor* 3 of 2017 incorrectly refers to the commencement of the Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386], rather than the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627].

Committee's response

The committee thanks the Assistant Secretary of the Private Health Insurance Branch of the Department of Health for her response and has concluded its examination of this issue.

The committee apologises for having incorrectly referred to the commencement of the Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386], rather than the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627].

Drafting

The committee commented as follows:

The amendment rules replace the schedule of listed prostheses currently set out in the Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386] (the principal rules). The *Private Health Insurance Act 2007* and the principal rules provide that there must be a benefit for the provision of prostheses listed in the principal rules.

The committee notes that the entry for '13.5.2.5 - Laminoplasty plate' on page 937 of the schedule does not appear to list any prostheses or benefits. The committee understands this omission to be an error in the document, and notes that the amendment rules have since been superseded by the Private Health Insurance (Prostheses) Rules 2017 (No. 1) [F2017L00183], which includes prostheses and benefits under this entry.

However, noting the retrospective commencement of the instrument, the committee is unable to determine whether the omission will have any effect on individuals or bodies involved in the provision of prostheses.

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

Departmental response

The Department of Health advised:

On 7 March 2017, the Office of Parliamentary Counsel (OPC) advised the Department that there appeared to be missing details on page 937 of the schedule to the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089].

The omission appears to be an error in the document supplied to the Federal Register of Legislation, caused by the conversion process to create a web accessible version.

On 10 March 2017, the Department supplied OPC with the information missing from page 937 (see Attachment A).

To date, it does not appear that the corrections have been made to the instrument.

Committee's response

The committee thanks the Assistant Secretary of the Private Health Insurance Branch of the Department of Health for her response and has concluded its examination of the instrument.

The committee also thanks the Assistant Secretary for her advice that the corrections to the document have been supplied to the Office of Parliamentary Counsel.

Instrument	Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016 [F2016L01970]
Purpose	Sets out the procedures to be applied in allocating spectrum licences in the residual 700 MHz band and fixes the access charges payable by persons who are allocated such licences
Last day to disallow	9 May 2017
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitors 1 and 3 of 2017</i>

Sub-delegation

The committee commented as follows:

Section 23 of the determination requires the Australian Communications and Media Authority (ACMA) to appoint an ‘auction manager’ to manage the auction of spectrum licences in the residual 700 MHz Band. Section 91 of the determination enables the auction manager to delegate any of their functions and powers under the determination.

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 committee notes that there is no apparent limit on the category of people to whom the auction manager's functions and powers can be delegated; and the ES does not provide a justification for the broad delegation of the auction manager's functions and powers under the determination.

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

Minister's first response

The Minister for Communications advised:

The ACMA has provided me with advice in relation to the Committee's concerns. It is the ACMA's practice to appoint an ACMA employee as the auction manager, and it is the practice of the auction manager to delegate

their powers only to ACMA employees or members, who are subject to the *Public Service Act 1999*. The auction manager is appointed as a principal point of contact for applicants and bidders in the auction process, and as a principal person responsible for the conduct of the auction.

The auction manager performs several functions and powers under the Determination which are procedural or mechanistic, and are necessary for the timely, orderly and efficient conduct of the auction. The Determination sets out the processes that the auction manager must adhere to in conducting the auction, including setting the start date and time for the first and second rounds of the auction or cancelling the auction in exceptional circumstances. If the auction manager were taken ill during the auction, subsequent rounds or processes could not take place in the absence of delegated functions and powers. As it is not possible to predict when a substitute auction manager will be required, the ACMA has not limited the powers which may be delegated to a substitute auction manager.

Committee's first response

The committee thanks the minister for his response.

The committee notes the minister's advice that it is the practice of the auction manager to delegate their powers only to ACMA employees or members, who are subject to the *Public Service Act 1999*, and that, if the auction manager were taken ill during the auction, subsequent rounds or processes could not take place in the absence of delegated functions and powers.

However, it remains unclear to the committee why it is necessary for there to be such a broad delegation of the auction manager's powers under the determination. While the committee also notes the minister's advice that the powers which may be delegated have not been limited as it is not possible to predict when a substitute auction manager will be required, the committee reiterates its expectations that, 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.

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

Minister's second response

The Minister for Communications advised:

To further address the Committee's concerns in this instance, the Australian Communications and Media Authority (ACMA) will lodge a supplementary Explanatory Statement to the Determination to clarify the auction manager's delegation powers. It is expected that the ACMA will lodge the supplementary Explanatory Statement prior to the commencement of the auction on 4 April 2017.

The supplementary Explanatory Statement is currently being drafted but it will:

- explain ACMA's intention that the Manager of the Spectrum Licensing Policy Section, an ACMA employee engaged at the Executive Level 2 under the *Public Service Act 1999*, be the 'auction manager' for this auction;
- identify the range of powers and functions that the auction manager may delegate under section 91 of the Determination; and
- state ACMA's intention that the power in section 91 only be exercised by the auction manager to delegate functions and powers to 'Members of the ACMA' or to members of the ACMA staff at Executive Level 1, Executive Level 2 or Senior Executive Service officer level employed under the *Public Service Act 1999*.

In this instance 'Members of the ACMA' include the Chair, Deputy Chair and all full time and part-time Members but not including Associate Members.

There are a total of 15 powers and functions that may be delegated by the auction manager. Only those of a procedural or administrative nature (such as approving another method of communication should there be IT issues) are delegated to Executive Level staff.

The supplementary Explanatory Statement will be consistent with the ACMA's actual internal instrument of delegation of the auction manager's powers. This instrument was signed by the auction manager on 12 January 2017. It includes a table of powers and functions and stipulates the staff levels those powers may be delegated to. I have enclosed a copy of the instrument for the Committee's information.

Committee's second response

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

The committee notes the minister's undertaking that the ACMA will lodge a supplementary ES to clarify the auction manager's delegation powers.

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).

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- 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 Michaelia Cash

Minister for Employment

Minister for Women

Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003323

Senator John Williams
 Chair
 Senate Regulations and Ordinances Committee
 Suite S1.111
 Parliament House
 CANBERRA ACT 2600

Dear Senator

Standing Committee on Regulations and Ordinances - Code for the Tendering and Performance of Building Work 2016 [F2016L01859]

I refer to your letter of 23 March 2017 on behalf of the Standing Committee on Regulations and Ordinances (the Committee) concerning section 18 of the *Code for the Tendering and Performance of Building Work 2016* (the Code).

The Committee has sought further advice as to the justification for excluding merits review of decisions to impose exclusion sanctions under section 18 of the Code.

The Code is an opt-in procurement scheme for Commonwealth funded work in the building industry. That is to say, only the builders who choose to tender for Commonwealth funded building work, subject themselves to the Code. Exclusion sanctions can only be imposed under section 18 of the Code if the Minister for Employment is satisfied, upon the recommendation of the Australian Building and Construction Commissioner, that a code covered entity has breached the Code. The effect of an exclusion sanction is that the code covered entity is excluded from submitting expressions of interest, tendering for, or being awarded Commonwealth funded building work during a period of up to one year. An exclusion sanction does not prevent the code covered entity from performing Commonwealth funded building work that was awarded prior to the commencement of the exclusion period.

The Government considers that the rigorous two-step process to impose an exclusion sanction, involving decisions by an independent statutory office holder and a Minister, is sufficient to ensure the integrity of the decision-making process. However, as noted in my previous response to the Committee, decisions to impose exclusion sanctions are also amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. By contrast, decisions under the predecessor legislation to the *Building and Construction Industry (Improving Productivity) Act 2016* were exempt from judicial review, as are decisions under the *Fair Work Act 2009*.

A decision to impose an exclusion sanction is fundamentally a decision about who the Australian Government contracts with in relation to building work. The Government should be responsible for, and accountable to the Parliament in relation to its own procurement decisions. Merits review by a third party would inappropriately diminish the capacity of the Government to determine with whom it contracts, increase uncertainty, and potentially delay (and therefore significantly increase the cost) of building projects.

On this basis the Government considers that there are factors justifying the exclusion of merits review of a decision taken by a Commonwealth Minister to impose an exclusion sanction in accordance with the broad discretion in section 18 of the Code.

Yours sincerely

Senator the Hon Michaelia Cash

 / 2017



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

REF: MS17-000448

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 letters dated 1 December 2016 and 9 February 2017 sent to my office seeking further information about items in the following instruments:

- the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016*;
- the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016*;
- the *Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016*;
- the *Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016*; and
- the *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016*.

The Ministers who are responsible for the items in these instruments have provided responses to the Committee's requests. The response at [Attachment A](#) includes responses from the Minister for Justice, the Hon Michael Keenan MP; the Minister for Health, the Hon Greg Hunt MP; the Minister for Regional Development, Senator the Hon Fiona Nash; and the Minister for Social Services, the Hon Christian Porter MP. I trust this advice will assist the Committee with its consideration of the instruments.

I have copied this letter to the relevant Ministers. Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

March 2017

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016

Provided by the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism

Response to the Committee's questions about the 'Safer Communities Fund' program

I thank the Committee for its question in relation to the Safer Communities Fund program.

The development of the Safer Communities Fund program and the drafting of table item 186 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references two heads of legislative power in the Constitution, namely the:

- communications power (section 51(v)); and
- external affairs power (section 51(xxix)).

Communications power

The program principally provides funding to identified local council and community organisations for the installation of security enhancements and infrastructure that utilise communications technology, such as closed-circuit television (CCTV) facilities and software, in and for the benefit of at risk communities. The installation of this communications infrastructure, involving forms of communications services or facilities covered by s 51(v) of the Constitution, will improve security, which will enhance community safety and reduce street crime and violence, leading to a reduction in the fear of crime in the Australian community and greater community resilience and wellbeing.

External affairs power

Under the program, funding is available to protect particular religious or racial groups in the Australian community, including pre-schools, schools and community organisations, which are facing security risks associated with religious or racial intolerance.

Australia has international obligations relating to the freedom and security of religious practice under the *International Covenant on Civil and Political Rights* [1980] ATS 23 (ICCPR). Article 18(1) of the ICCPR provides that '[e]veryone shall have the right to freedom of thought, conscience and religion', and that this right includes 'freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

Australia has international obligations relating to racial intolerance under the *International Convention on the Elimination of all Forms of Racial Discrimination* [1975] ATS 40. Article 2(1)(d) of this Convention provides that State Parties 'shall prohibit and bring to an end' 'racial discrimination by any persons, group or organization'. Article 2(2) provides that State Parties shall take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.' As set out in Article 5(b), States Parties undertake to prohibit and to eliminate racial

discrimination in all its forms and to guarantee the right of everyone' 'to equality before the law', 'in the enjoyment of' the 'right to security of person and protection by the State against violence or bodily harm'.

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.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016

Provided by the Minister for Health

Response to the Committee's Questions about certain items inserted into Schedule 1AB of the *Financial Framework (Supplementary Powers) Regulations 1997* by way of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016*

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (merits review)

The Senate Standing Committee on Regulations and Ordinances notes that details on merits review that were to be set out in guidelines for programs reflected in the following items were not available at the time of the making of the items:

Item 179	Drug and Alcohol Program
Item 181	Health Policy Research and Data Program
Item 183	Public Health and Chronic Disease Program

Guidelines for all three programs are now publicly available at:

www.health.gov.au/internet/main/publishing.nsf/Content/drug-and-alcohol-program

[www.health.gov.au/internet/main/publishing.nsf/Content/Health Policy Research and Data Program](http://www.health.gov.au/internet/main/publishing.nsf/Content/Health_Policy_Research_and_Data_Program)

www.health.gov.au/internet/main/publishing.nsf/Content/public-health-chronic-disease-grant-program

In each case reference is made to the Department's Grant and Procurement Complaints Procedures at the following web address:

www.health.gov.au/internet/main/publishing.nsf/Content/pfps-complaintsprocedures.

The Procedures provide a merits review mechanism for each of the three programs. The mechanism is outlined below.

If a person wishes to lodge a dispute or complaint about a procurement or grant/funding process, they are asked to write to the Departmental Contact Officer for that process. The Department will request details of the basis upon which the dispute or complaint is being lodged, including:

- a clear statement of what the person considers was defective in the procurement or grant process;
- copies of, or references to, information to support the complaint; and
- a statement regarding the outcome the person wishes to achieve.

The Contact Officer will acknowledge receipt of the complaint in writing within 10 working days of receiving it. If further correspondence or information is required, the person will be given no less than 15 working days to respond to any communication from the Department unless the matter is urgent.

The Contact Officer will then attempt to resolve the matter.

The Department will advise the person of the decision in writing within a reasonable timeframe, which will usually be within 15 working days of receiving all written correspondence relating to a complaint.

If the person is not satisfied with the Department's response then they may seek an independent internal review of the complaint.

The internal review officer will promptly notify the person in writing to advise of their appointment and the expected time frame for making the internal review decision. The notice will also include a request for any further information that may be required to conduct the review. The person will be given no less than 15 working days to provide any further information unless the matter is urgent.

The internal review officer will notify the person in writing of the decision within the timeframe specified in the original notice.

If the person is not satisfied with the Department's internal review decision, they may lodge a complaint with the Commonwealth Ombudsman.

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (constitutional authority for expenditure)

Set out below is the response to the Committee's request for further information on the heads of legislative power referred to in the explanatory statement for the following items:

Item 180	Primary Health Care Development Program
Item 181	Health Policy Research and Data Program
Item 182	Health Protection Program

Item 180 Primary Health Care Development Program

The development of the Primary Health Care Development Program (the Primary Care Program) and the drafting of item 180 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references the following heads of legislative power, namely:

- the telecommunications power (section 51(v));
- the census and statistics power (section 51(xi));
- the social welfare power (section 51(xxiiiA));
- the races power (section 51(xxvi));

- the external affairs power (section 51(xxix));
- the Territories power (section 122);
- the power to grant financial assistance to the States (section 96); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

The Primary Care Program provides funding for a number of activities that will strengthen health outcomes through facilitating access to and improving the quality, efficiency and availability of health and medical services in the community. Examples of activities that will be funded include:

- Primary Health Networks (PHNs);
- Health Information, Advice and Counselling Network;
- Primary Health Collaboration and Complex Conditions activities that aim to help people living with chronic and complex conditions to maintain good health and quality of life through improved care and collaboration of health providers; and
- Health Care Homes.

Telecommunications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Primary Care Program, the Department gives grants to organisations through the Health, Information, Advice and Counselling Network to:

- provide healthcare information including through telehealth and through emerging online interactive communication technologies such as social media; and
- improve access to health services for marginalised and special needs groups, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds, through the delivery of health advice, information, counselling and support services via national health communication infrastructure. Communication is undertaken through the use of various digital platforms.

Census and Statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Primary Care Program, the Department gives grants to Primary Health Networks to collect, analyse and report on the health care needs of individual communities and then to provide data and information to the Department. The Department uses this data to direct funding to activities that improve the coordination of care to ensure patients receive the right care in the right place at the right time.

Social Welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of various social welfare benefits and services.

Under the Primary Care Program the Department gives grants:

- to Primary Health Networks to increase the efficiency and effectiveness of medical services to patients;
- through the Primary Health Collaboration and Complex Conditions activities, to improve patient outcomes, by better management of chronic and complex conditions using integrated, multidisciplinary team based care; and
- to medical practices to facilitate eligible patients with chronic and complex health problems to enrol in the medical practice known as a Health Care Home that will provide ongoing team-based coordination, management and support of patients' medical conditions.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. The race power supports laws with respect to Indigenous Australians.

Under the Primary Care Program, grants given under the Health Information, Advice and Counselling Network activity assist to support Aboriginal and Torres Strait Islander people to access relevant health information and services through responsive technology solutions.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Primary Care Program gives effect to Australia's obligations under various treaties. For example, funding of particular activities gives effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. These Articles require States Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Under the Primary Care Program the Department provides grants to Primary Health Care Networks to undertake health promotion and health prevention activities to prevent epidemic, endemic, occupational and other diseases.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by the territories power in s 122 of the Constitution.

Under the Primary Care Program the Department may make payments to one or more Territory entities to support activities that improve access to quality primary health and medical services in the community.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Primary Care Program the Department may make payments to one or more State entities to support activities that improve access to quality primary health and medical services in the community.

Executive power and incidental power

The Primary Care Program involves funding activities that are taken in the exercise of the executive power of the Commonwealth. This funding is supported by the executive power in section 61 of the Constitution and the express incidental power in s 51(xxxix).

Item 181 Health Policy Research and Data Program

The development of the Health Policy Research and Data Program (the Research Program) and the drafting of item 181 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* 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 following heads of legislative power, namely:

- the social welfare power (section 51(xxiiiA));
- the external affairs power (section 51(xxix));
- the census and statistics power (section 51(xi));
- the telecommunications power (section 51(v));
- the races power (section 51(xxvi));
- the naturalization and aliens power (section 51(xix));
- the Territories power (section 122);
- the power to grant financial assistance to the States (section 96); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

The objectives of the Research Program are to:

- provide a mechanism for driving improvements in the way the Department uses and manages its research and analytical agenda including enabling prioritisation of funding according to changing needs;
- fund entities such as universities, research organisations and public companies to undertake research, evaluation or data activities and report the results of that research to the Commonwealth to support policy development for safe, high quality health care systems and services; and
- help build a strong evidence base and enable access to data to inform the development, implementation, monitoring and evaluation of health policy and improve clinical practice in Australia.

Funding may be for research:

- on particular diseases;
- that is sector-specific (for example, improving the delivery of primary care); and
- that is directed to improving the health of particular demographic groups (for example Aboriginal and Torres Strait Islanders and migrant communities).

Relevant research may also be funded by giving grants to one or more States and Territories, or grants may relate to research that is undertaken in a Territory.

Social Welfare Power

Section 51(xxiiiA) of the Constitution empowers the Parliament to fund measures that are incidental to the provision of various social welfare services and benefits.

Under the Research Program, the Department may fund activities that are incidental to the provision of medical services and pharmaceutical benefits.

External Affairs Power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Research Program gives effect to Australia's obligations under various treaties. For example, funding of particular activities gives effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. The activities funded under the Research Program include activities that relate to, for example, the provision of health services.

Census and Statistics Power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Research Program the Department funds numerous research projects that provide for the development of existing national datasets (for example, the national maternal and perinatal data collection) and the development of new datasets.

Telecommunications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Research Program data may be collected and disseminated through, for example, the internet.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. The race power supports laws with respect to Indigenous Australians.

Under the Research Program the Department will fund research that is directed to improving the health of Aboriginal and Torres Strait Islanders.

Naturalization and aliens power

Section 51(xix) of the Constitution supports laws with respect to 'naturalization and aliens'.

Under the Research Program the Department will fund research that is directed to improving the health of migrant communities.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by the territories power in s 122 of the Constitution.

Under the Research Program relevant research may be funded by giving grants to one or more Territories, or grants may relate to research that is undertaken in a Territory.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Research Program relevant research may be funded by giving grants to one or more States.

Commonwealth executive power and the express incidental power

The Research Program involves funding activities that are taken in the exercise of the executive power of the Commonwealth. This funding is supported by the executive power in section 61 of the Constitution and the express incidental power in s 51(xxxix).

Item 182 Health Protection Program

The development of the Health Protection Program and the drafting of item 182 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* 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 following heads of legislative power, namely:

- the telecommunications power (section 51(v));
- the defence power (section 51(vi));
- the quarantine power (section 51(ix));
- the census and statistics power (section 51(xi));
- the naturalization and aliens power (section 51(xix));
- the social welfare power (section 51(xxiiiA));
- the races power (section 51(xxvi));
- the immigration power (section 51(xxvii));
- the external affairs power (section 51(xxix));

- the Territories power (section 122);
- the power to grant financial assistance to the States (section 96); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

The Health Protection Program provides funding for a number of activities. The objective of the funding is to provide for prevention, preparedness and response activities that protect the health of all Australians from threats posed by communicable disease outbreaks, natural disasters, environmental hazards, acts of terrorism and other incidents that may lead to mass casualties.

Telecommunications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Health Protection Program the Department provides funding for activities that involve the dissemination of relevant materials over the internet and via radio or television. This may include information campaigns about the prevention and treatment of communicable diseases.

The item also authorises expenditure on the delivery of information for health practitioners online on the most effective way to care for patients with particular communicable diseases.

Defence power

Section 51(vi) of the Constitution supports laws for the purpose of defence.

Under the Health Protection Program the Department provides funding for the National Medical Stockpile, which is intended for use as part of a national response to terrorism. Further, funding for the maintenance of a register of biological agents of security concern, and the purchase of certain medicines and equipment for distribution in health emergencies, also assists the Commonwealth to prepare for and defend the country against certain terrorist attacks.

Quarantine power

Section 51(ix) of the Constitution empowers the Parliament to make laws with respect to 'quarantine'.

Under the Health Protection Program the Department provides funding for a variety of activities that involve developing and undertaking quarantine measures that seek to reduce the spread of communicable diseases. These activities include, for example, funding laboratories to maintain the capacity and capability to provide diagnostic services in the event of a national health emergency that relates to a communicable disease.

Census and statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the Health Protection Program the Department provides funding for expenditure on research such as data collection to ensure that the Commonwealth is fully informed of emerging or changing risks and threats to public health in Australia, including risks to health

arising from environmental factors. Such research may also inform the further development of Commonwealth policy, including plans for responding to a national public health emergency.

Naturalization and aliens power; immigration power

Section 51(xix) of the Constitution supports laws with respect to ‘naturalization and aliens’, and s 51(xxvii) supports laws with respect to ‘immigration and emigration’.

Under the Health Protection Program the Department provides funding for delivering culturally appropriate community education to target priority populations, such as newly arrived migrants, to improve their understanding of exposure and transmission risks of blood borne viruses and sexually transmitted infections, to increase testing and treatment uptake, encourage safer sex behaviour and safer injecting practices. This education would benefit and assist persons within the reach of these powers.

Social welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to fund measures that are incidental to the provision of various social welfare services and benefits.

Under the Health Protection Program, the Department may fund activities that are incidental to the provision of medical services and pharmaceutical benefits that are available for testing, treatment and management of communicable diseases.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. The race power supports laws with respect to Indigenous Australians.

Under the Health Protection Program the Department provides funding on activities directed at reducing the incidence of certain communicable diseases in Aboriginal and/or Torres Strait Islander communities. For example, the Department funds the delivery of community prevention and education programs to prevent transmission of blood borne viruses and sexually transmitted infections.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’. The external affairs power supports legislation implementing treaties to which Australia is a party.

Funding under the Health Protection Program gives effect to Australia’s obligations under various treaties. For example, funding of activities that are directed to reducing the spread of communicable diseases, gives effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights, particularly under Articles 2 and 12. These Articles require States Parties to take steps necessary for ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases’ and to take steps necessary

for ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness’.

The Department also funds activities that relate to matters affecting Australia’s relations with foreign countries and international organisations. For example, under the Health Protection Program, the Department provides payments to organisations such as the World Health Organization for the purpose of increasing the capacity of developing countries to respond to outbreaks of infectious diseases, which in turn assists in reducing the risk of infectious diseases spreading to Australia.

Territories power

Provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Under the Health Protection Program the Department pays grants to, for example, the Government of the Northern Territory for exotic mosquito control activities.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to States.

Under the Health Protection Program the Department pays grants to, for example, a State in accordance with longstanding arrangements to meet the costs of maintaining the Security Sensitive Biological Agents National Register and the National Positions Register.

By way of further example, the Department also pays grants to State (and Territory) Health departments for the cost of purchasing rabies immunoglobulin for bat handlers or private citizens who have been exposed to Australian bats and may be at risk of infection.

Commonwealth executive power and the express incidental power

The executive power in section 61 of the Constitution, together with s 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

Under the Health Protection Program, the Department funds a variety of activities that strengthen the Commonwealth’s capacity to respond, or to actually respond, to a national health emergency. These activities include, for example, maintaining laboratory capacity and capability for providing services in the event of a health emergency that affects the nation.

These answers are 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.

Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016

Provided by the Minister for Regional Development

Regional Jobs and Investment Packages (RJIP) provides grants to assist regions to diversify their economies, stimulate economic growth and deliver sustainable jobs. Ten pilot regions have been selected. It is intended that funds will be awarded through a competitive grants process across three streams: business innovation; local infrastructure; and skills and training.

The development of the RJIP program and the drafting of item 190 of Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references the following heads of legislative power:

- the interstate and international trade and commerce power ;
- the communications power;
- the aliens power;
- the social welfare power;
- the immigration power;
- the race power;
- the power to grant financial assistance to States;
- the external affairs power;
- the railway construction and extension power; and
- the Commonwealth executive power and the express incidental power.

The external affairs power

Australia has ratified the International Covenant on Economic, Social and Cultural Rights which broadly described commits the signatories to achieving full realisation of the right to work. Under Article 6, 'the right of everyone to the opportunity to gain his living by work' is recognised, and each party has agreed to 'take appropriate steps to safeguard this right' including the implementation of 'programmes ... to achieve ... full and productive employment'. Australia is also a party to various International Labour Organisation (ILO) Conventions, including ILO Convention 122, which requires each Member 'to declare and pursue, as a major goal, an active policy designed to promote full and freely chosen employment (Art 1). It further provides that the policy shall, amongst other objectives, aim at ensuring there is work for all who are available for and seeking work'.

An overarching criterion for eligibility for funding under RJIP is that projects must create and sustain employment in regions. For example, projects which assist workers affected by structural change to retrain and obtain new employment, or projects which will develop export markets and hence increase employment, may be funded. Such projects will contribute to ensuring full and productive employment by providing new and sustainable employment opportunities, and therefore will contribute to Australia meeting these international obligations.

Trade and commerce power and railway construction and extension power

Projects which enhance the ability of a region to participate in interstate or international trade may receive funding. An example could be support for the investment by a regional business in new technology to enable it to diversify its operations or increase production to develop or meet interstate or overseas demand. Projects which involve enhancing, upgrading or constructing infrastructure that serves interstate transportation and therefore facilitate interstate trade and commerce may receive funding under RJIP. An example might be the upgrade of regional airport infrastructure. Similarly, projects which enhance or develop tourism and therefore trade and commerce to the relevant region may receive funding under RJIP. An example might be the construction of camping facilities, bushwalking tracks, and museum or art gallery enhancements. Such projects will encourage visits from interstate and overseas tourists, and thus facilitate and enhance interstate and overseas trade and commerce.

The communications power

Projects which provide or enhance communications infrastructure or services in regions may be funded under RJIP. An example might be a community internet hub supporting enhanced online communications.

The aliens power and the immigration power

Projects which assist or benefit migrant groups may be funded under RJIP – for example, drop in centres which offer English language training or other skills acquisition opportunities for migrant groups. Such projects would benefit and assist persons within the reach of the aliens and immigration powers.

The races power

Projects which benefit Aboriginal or Torres Strait Islander people may be funded under RJIP. The races power supports laws for the benefit of Indigenous people.

The social welfare power

Projects which provide medical services may be funded under RJIP. An example may be upgrades to hospital or other medical services infrastructure. Such projects would entail the provision of medical benefits within the social welfare power.

Financial assistance to States

Under RJIP, funding may be provided to bodies that are within the term ‘State’ in s 96 of the Constitution for projects which further the purposes of RJIP. Such funding would constitute the grant of financial assistance to a State.

The executive power and the express incidental power

Under RJIP funding may be available to support activities or projects of a nature which address a matter affecting Australia as a whole which warrants significant coordination and integration. In addition, support will be provided for local planning committees to identify each region's key investment sectors and strategic priorities which are evidence-based to support sustainable economic growth.

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.

Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016

Provided by the Minister for Regional Development

The Building Better Regions Fund (BBRF) is a grant program designed to invest in projects to create jobs, drive economic growth and build strong, sustainable regional communities. Grants will be awarded through a competitive grants process under two streams: infrastructure projects and community investments.

The development of the BBRF program and the drafting of item 191 of Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references the following heads of legislative power:

- the interstate and international trade and commerce power;
- the communications power;
- the aliens power;
- the social welfare power;
- the immigration power;
- the race power;
- the power to grant financial assistance to States
- the territories power;
- the external affairs power;
- the railway construction and extension power; and
- the Commonwealth executive power and the express incidental power.

Trade and commerce power and railway construction and extension power

Projects which enhance the ability of a region to participate in interstate or international trade may receive funding. An example could be support for the investment by a regional entity in new technology to enable it to diversify its operations or increase production to develop or meet interstate or overseas demand. Projects which involve enhancing, upgrading or constructing infrastructure that serves interstate transportation and therefore facilitate interstate trade and commerce may receive funding under the BBRF. An example might be the upgrade of regional airport infrastructure. Similarly, projects which enhance or develop tourism to the relevant region may receive funding under the BBRF. An example might be the construction of camping facilities, bushwalking tracks, and museum or art gallery enhancements. Such projects will encourage visits from interstate and overseas tourists, and thus facilitate and enhance interstate and overseas trade and commerce.

The communications power

Projects which provide or enhance communications infrastructure or services in regions may be funded under BBRF. An example might be a community internet hub supporting enhanced online communications.

The aliens power and the immigration power

Projects which assist or benefit migrant groups may be funded under the BBRF – for example, drop in centres which offer English language training or other skills acquisition opportunities for migrant groups. Such projects would benefit and assist persons within the reach of the aliens and immigration powers.

The races power

Projects which benefit Aboriginal or Torres Strait Islander people may be funded under the BBRF. The races power supports laws for the benefit of Indigenous people.

The social welfare power

Projects which provide medical services may be funded under the BBRF. An example may be upgrades to hospital or other medical services infrastructure. Such projects would entail the provision of medical benefits within the social welfare power.

Financial assistance to States

Under the BBRF, funding may be provided to bodies that are within the term ‘State’ in s 96 of the Constitution for projects which further the purposes of BBRF. Such funding would constitute the grant of financial assistance to a State.

The territories power

Projects in a territory may receive funding under the BBRF. The provision of funding in or in relation to a territory is supported by s 122 of the Constitution.

The external affairs power

Australia has ratified the International Covenant on Economic, Social and Cultural Rights which broadly described commits the signatories to achieving full realisation of the right to work. Under Article 6, ‘the right of everyone to the opportunity to gain his living by work’ is recognised, and each party has agreed to ‘take appropriate steps to safeguard this right’ including the implementation of ‘programmes ... to achieve ... full and productive employment’. Australia is also a party to various International Labour Organisation (ILO) Conventions, including ILO Convention 122 which requires each Member ‘to declare and pursue, as a major goal, an active policy designed to promote full and freely chosen employment (Art 1). It further provides that the policy shall, amongst other objectives, aim at ensuring there is work for all who are available for and seeking work’.

Projects that drive growth and thus create employment opportunities are likely to receive funding under the BBRF – for example a project that will develop export markets and hence increase employment. Such projects will contribute to ensuring full and productive employment by providing new and sustainable employment opportunities, and therefore contribute to Australia meeting these international obligations.

The executive power and the express incidental power

Under the BBRF, funding may be available to support activities or projects of a nature which address a matter affecting Australia as a whole which warrants significant coordination and integration.

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.

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016

Provided by the Minister for Social Services

Response to the request by the Senate Standing Committee on Regulations and Ordinances for information about the Commonwealth Financial Counselling and Financial Capability – Capability Building program

The development of the Commonwealth Financial Counselling and Financial Capability – Capability Building program and the amendment of table item 83 of Schedule 1AB to the Financial Framework (Supplementary Powers) Act 1997 were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objectives of the item references the following heads of legislative power:

- the communications power (section 51(v));
- the bankruptcy and insolvency power (section 51(xvii));
- the social welfare power (section 51(xxiiiA));
- the territories power (section 122);
- the invalid and old age pensions power (section 51(xxiii));
- the aliens power (section 51(xix));
- the immigration power (section 51(xxvii));
- the external affairs power (section 51(xxix)); and
- the race power (section 51(xxvi)).

The Financial Wellbeing and Capability (FWC) funding supports a range of services and programs to assist people in time of immediate financial crisis, as well as help them build longer-term financial capability to manage serious debt, move out of financial difficulty and/or provide basic budgeting and financial literacy support. This includes the provision of free access to professional financial counselling and financial capability services to those most at risk of financial and social exclusion and disadvantage. The Commonwealth Financial Counselling and Financial Capability – Capability Building program within the FWC activity aims to build and maintain the capability of financial counsellors and financial capability workers to provide consistent and quality services to individuals and families experiencing financial difficulties.

Communications power

Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to ‘postal, telegraphic, telephonic and other like services’.

The Commonwealth Financial Counselling and Financial Capability – Capability Building program provides funding for the management of the National Debt Helpline 1800 007 007, in addition to developing and making available national standards and materials for the Helpline.

The Financial Counselling Australia annual national conference brings together financial counsellors and capability workers, consumer lawyers and community sector workers along with government agencies, universities, regulators and other organisations interested in financial counselling. The conference program includes a range of current topics and issues

focusing on bankruptcy and insolvency, social welfare, the National Debt Helpline and information and resources for workers and consumers. The 2017 program includes sessions dealing with consumer credit law, mortgage stress, banks, the National Disability Insurance Scheme and consumer centred care, refugee financial counselling, and problem gambling.

The program also provides funding for a range of online information tools and materials for consumers, financial counsellors and capability workers, which are available on the www.ndh.org.au and www.financialcounsellingaustralia.org.au websites. Additional information and resources for financial capability workers and consumers are available online during the operation of the Financial Counselling Australia annual national conference.

Bankruptcy and insolvency power

Section 51(xvii) of the Constitution supports legislation with respect to ‘bankruptcy and insolvency’. The program supports financially vulnerable people by funding specific sessions of the Financial Counselling Australia annual national conference that relate to bankruptcy and insolvency.

Social welfare power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to social welfare payments within the meaning of section 51(xxiiiA) of the Constitution.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by section 122 of the Constitution. The program supports people living in the Territories to attend sessions of the Financial Counselling Australia annual national conference. The program also funds sessions of the Financial Counselling Australia annual national conference that relate to particular issues confronting residents of the Territories.

Invalid and old age pensions power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to invalid and old age pensions within the meaning of section 51(xxiii) of the Constitution.

Aliens and immigration powers

The program funds sessions of the Financial Counselling Australia annual national conference that relate to relevant social welfare issues faced by financially vulnerable migrants and refugees. In doing so, the program assists persons within the reach of the aliens and immigration powers in sections 51(xix) and (xxvii) of the Constitution.

External affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia's obligations in relation to children under the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, or in relation to women under the Convention on the Elimination of All Forms of Discrimination Against Women. Funding can also be provided for the presentation of sessions to the extent that they are measures that are designed to meet Australia's obligations under the International Covenant on Economic, Social and Cultural Rights.

Race power

The race power in section 51(xxvi) of the Constitution supports laws with respect to Indigenous Australians. The program provides funding for Indigenous persons and persons who provide financial counselling and financial capability services predominantly to Indigenous persons, particularly those living in remote communities, to attend the Financial Counselling Australia annual national conference. The program also funds the presentation of sessions at the Financial Counselling Australia annual national conference that relate to particular social welfare issues confronting Indigenous persons.

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.



Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-001350

27 MAR 2017

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I note that the Committee's Delegated Legislation Monitor No. 3 of 2017 released on 22 March 2017 sought my further response in relation to issues identified with respect to the legislative instrument, *Higher Education Provider Approval No 5 of 2016* (F2016L02008) (the instrument).

The Committee notes that while the Financial Viability Instructions (FVI), which are incorporated by reference in clause 5 of the instrument are available at no cost on my department's website, the Committee remains concerned that neither the instrument, nor its accompanying explanatory statement, provides a description of the FVI or details of the website where it can be accessed in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003* (the Legislation Act). The Committee further notes that my earlier response did not address the manner of incorporation by reference of the FVI in accordance with section 14 of the Legislation Act.

I accept the Committee's feedback that legislative instruments and their accompanying explanatory statements should clearly state the manner in which documents are incorporated by reference. My department will ensure future instruments and explanatory statements describe documents incorporated by reference, where they can be accessed and address the relevant method of incorporation.

I now give an undertaking that officers within my department will take the following corrective action in response to the further concerns raised by the Committee:

A replacement explanatory statement to the instrument will be prepared which will include a description of the FVI and provide details of where this document can be publically and freely accessed in accordance with paragraph 15J(2)(c) of the Legislation Act. The replacement explanatory statement will also address the manner of incorporation of the FVI having regard to s 14(2) of the Legislation Act and the Committee's Guideline on incorporation contained at Appendix 1 to Monitor 3/17. A preliminary draft of the proposed replacement explanatory statement is attached for the Committee's reference.

Adelaide

107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra

Parliament House Canberra ACT 2600
Ph 02 6277 7350

I commit to fulfilling this undertaking promptly. Officers of my department have been instructed to take action to implement this commitment by ensuring that the draft replacement explanatory statement is approved by the rule maker in accordance with paragraph 15J(2)(a) of the Legislation Act and registered on the Federal Register of Legislation as soon as is achievable following the rule maker's approval.

Thank you for bringing the Committee's further concerns to my attention.

Yours sincerely

Simon Birmingham

EXPLANATORY STATEMENT

Approval and Notice of Approval under Sections 16-25 and 16-50 of the Higher Education Support Act 2003

Higher Education Provider Approval No. 5 of 2016

Issued by the authority of the Minister for Education and Training

This Explanatory Statement replaces the Explanatory Statement registered on the Federal Register of Legislation on 21 December 2016 for the Higher Education Provider Approval No. 5 of 2016 [F2016L02008]

Authority

Section 16-25 of *Higher Education Support Act 2003* (the Act) provides for the approval of bodies as higher education providers by the Minister. Section 16-50 of the Act provides that the Minister must decide an application for approval as a Higher Education Provider and under paragraph 16-50(1)(b) cause the applicant to be notified in writing whether or not the applicant is approved as a higher education provider.

Under section 238-5 of the Act the Minister has delegated his powers under section 16-25 and subsection 16-50(1) of the Act to an APS employee responsible for administering the Act.

Subsection 16-55(1) of the Act stipulates that a notice of approval under paragraph 16-50(1)(b) of the Act is a legislative instrument.

Purpose

This instrument:

- a. approves Proteus Technologies Pty Ltd (ACN: 112 989 581, ABN: 95 112 989 581) as a higher education provider under section 16-25 of the Act;
- b. imposes conditions on the approval of Proteus Technologies Pty Ltd as a higher education provider under section 16-60 of the Act;
- c. decides the application of Proteus Technologies Pty Ltd for the purposes of paragraph 16-50(1)(a) of the Act; and
- d. gives Proteus Technologies Pty Ltd notice of that approval for the purposes of paragraph 16-50(1)(b) of the Act.

Conditions

The Minister has the power under section 16-60 of the Act, to impose or vary conditions on a body's approval as a higher education provider. Conditions imposed under that provision are set out in the notice of approval for Proteus Technologies Pty Ltd's approval as a higher education provider.

Clause 5 of the conditions of approval states that Proteus Technologies Pty Ltd must provide the department responsible for administering the Act (the responsible department) with all required financial information as specified in an external document entitled Financial Viability Instructions for Applicants and Providers of FEE-HELP (the FVI). The FVI are incorporated by reference without reproduction of the full text of that document in the instrument. According to the terms of its approval, Proteus Technologies Pty Ltd must provide the responsible department with all required financial information as specified in the FVI, on an annual basis by no later than 31 December each year for the period of its approval. The FVI are freely and publically available on the Department of Education and Training's website accessible at:

<<https://docs.education.gov.au/documents/financial-viability-instructions>>

Subdivision 19-B (the financial viability requirements), section 19.5 of the Act requires that an organisation (applicant or approved provider permitted to offer loans under the FEE-HELP scheme) is financially viable and likely to remain financially viable. As part of this process, approved providers must provide the Minister with a financial statement in a form approved by the Minister. Applicants applying to be approved higher education providers that fail to satisfy the financial viability requirements will face non-approval of their application. Approved higher education providers failing to satisfy ongoing financial viability requirements may face additional monitoring and reporting activities, suspension or revocation of approved provider status. The purpose of the FVI is to inform organisations of the financial information that is required to be submitted, the form in which it must be prepared, and how financial viability will be assessed for the purposes of the Act, thereby assisting them to prepare those parts of their application or annual financial submissions that relate to financial viability.

The manner of incorporation of the FVI, as an external document incorporated into the approval instrument as in force from time to time, is authorised virtue of the operation of paragraph 19.10(2)(a) (financial statements must be in a form as approved by the Minister) of the Act. The FVI specify the, financial information that must be submitted by prospective and approved higher education providers in order to comply with statutory financial viability obligations under Subdivision 19-B of the Act. The FVI are intended for use by organisations that are applying to become approved providers and organisations that are approved providers to offer loans under the FEE-HELP scheme. The FVI are designed to assist organisations to prepare the parts of their application or annual financial submission that relate to financial viability obligations under the Act. It may be discerned from the power under the Act to determine the financial viability of an approved higher education provider and the allied requirement that existing and prospective providers submit a financial statement in an approved form, that the requirements under the FVI be incorporated as in force or existing from time to time in that this document gives effect to the intended operation of financial viability provisions as authorised under the Act.

In accordance with subsections 22-15(1) and 22-30(1) of the Act, the Minister may suspend or revoke Proteus Technologies Pty Ltd's approval as a higher education provider if Proteus Technologies Pty Ltd breaches any of the conditions imposed on Proteus Technologies Pty Ltd's approval as a higher education provider.

Commencement

In accordance with subsection 16-55(2) of the Act and paragraph 12(1)(a) of the *Legislative Instruments Act 2003*, the notice and the decision to approve Proteus Technologies Pty Ltd as a higher education provider take effect on the day after the notice is registered on the Federal Register of Legislation.

Consultation

Consultation was not undertaken and was not considered necessary in this case because the notice confers a benefit on Proteus Technologies Pty Ltd and this body is the only body affected by the notice. This notice will not have a direct or substantial indirect effect on business, nor will it restrict competition.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Notice of Approval

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Instrument is made by the Minister or the Minister's delegate under subsection 16-55 of the *Higher Education Support Act 2003* (the Act). The purpose of the Instrument is to approve Proteus Technologies Pty Ltd (ACN: 112 989 581, ABN: 95 112 989 581) as a higher education provider. For approval as a higher education provider the Minister must be satisfied that the body meets the requirements of section 16-25 of the Act.

Human rights implication

Right to education

The Instrument engages the right to education, contained in Article 13 of the International Covenant on Economic, Social, and Cultural Rights. In particular, this Instrument has an effect on the provision of education by Proteus Technologies Pty Ltd by approving it as a higher education provider, enabling it to offer FEE-HELP assistance to its eligible students.

The objective of the Instrument is to approve Proteus Technologies Pty Ltd as a higher education provider under the Act and thereby enable eligible students of Proteus Technologies Pty Ltd to continue to access FEE-HELP assistance for courses of study.

To the extent that the right to education is engaged, this right is promoted by the Instrument as the Instrument approves Proteus Technologies Pty Ltd as a higher education provider, thereby extending FEE-HELP assistance and the availability of education to its eligible students.

Conclusion

This Instrument is compatible with human rights because it advances the protection of human rights.



Australian Government
Department of Health

Ref No: MC17-005528

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA NSW 2600

Dear Sir/Madam

Thank you for your correspondence of 23 March 2017 on behalf of the Senate Regulations and Ordinance Committee (the committee) in relation to the following instrument for which the Minister for Health has portfolio responsibility.

Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089]

Retrospective commencement

The Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] do not apply retrospectively.

The Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) were registered on 30 January 2017 and commenced 'immediately after the commencement of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4)'.

The Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627] commenced on 20 February 2017.

The commencement date and footnote 1 on page 4 of the committee's *Delegated legislation monitor 3 of 2017* incorrectly refers to the commencement of the Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386], rather than the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627].

Drafting

On 7 March 2017, the Office of Parliamentary Counsel (OPC) advised the Department that there appeared to be missing details on page 937 of the schedule to the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089].

The omission appears to be an error in the document supplied to the Federal Register of Legislation, caused by the conversion process to create a web accessible version.

On 10 March 2017, the Department supplied OPC with the information missing from page 937 (see Attachment A).

To date, it does not appear that the corrections have been made to the instrument.

The Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] will be superseded by the Private Health Insurance (Prostheses) Rules 2017 (No. 1) [F2017L0183] when it commences on 28 March 2017. Therefore, it is important that this error be corrected so no patients, hospitals, device sponsors or private health insurers are disadvantaged by this omission during the period 20 February 2017 to 28 March 2017.

Yours sincerely

~~Tracy Duffy~~
Assistant Secretary
Private Health Insurance Branch
27 March 2017

Encl:
Attachment A - Missing details

Attachment A

Information missing from page 937:

13.05.02.05 - Laminoplasty Plate

Globus Medical Australia

LB092	CANOPY Laminoplasty System Plate	Laminoplasty Plate	5 - 13mm	750
LB149	Canopy Radiolucent Spacer	Slide-on PEEK spacer with graft packing chamber	5-13mm in 2mm increments	750

Lifehealthcare Pty Ltd

LH544	Ultio Laminoplasty Plate	Plate	27-35mm length	750
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Medtronic Australasia Pty Ltd

M1174	Centerpiece	TiMesh LP	Various	750
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Nuvasive Australia and NZ Pty Ltd

NV054	Leverage LFS (Traditional Plate)	Laminoplasty plate	8/9.5/11/12.5mm	750
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Australian Pacific Medical Pty Ltd

PB046	Laminoplasty Mini Plate	Laminoplasty Plate	10/12/14mm	750
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Johnson & Johnson Medical Pty Ltd t/a DePuy Synthes

SY335	Arch Fixation System	Pre contoured mini titanium plates	4 to 16mm	750
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SENATOR THE HON MITCH FIFIELD
 MINISTER FOR COMMUNICATIONS
 MINISTER FOR THE ARTS
 MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Senator John Williams
 Chair
 Senate Regulations and Ordinances Committee
 Suite S1.111
 Parliament House
 CANBERRA ACT 2600

Delegated Legislation Monitor 3 of 2017

Dear Chair

John

Thank you for your letter of 23 March 2017 on behalf of the Senate Standing Committee on Regulations and Ordinances about the Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016 (the Determination) as set out in the Delegated Legislation Monitor 3 of 2017.

I acknowledge the Committee's comments in relation to delegation of powers and will ensure my Department and portfolio agencies take the Committee's advice into account in drafting instruments in the future.

To further address the Committee's concerns in this instance, the Australian Communications and Media Authority (ACMA) will lodge a supplementary Explanatory Statement to the Determination to clarify the auction manager's delegation powers. It is expected that the ACMA will lodge the supplementary Explanatory Statement prior to the commencement of the auction on 4 April 2017. The supplementary Explanatory Statement is currently being drafted but it will:

- explain ACMA's intention that the Manager of the Spectrum Licensing Policy Section, an ACMA employee engaged at the Executive Level 2 under the *Public Service Act 1999*, be the 'auction manager' for this auction;
- identify the range of powers and functions that the auction manager may delegate under section 91 of the Determination; and
- state ACMA's intention that the power in section 91 only be exercised by the auction manager to delegate functions and powers to 'Members of the ACMA', or to members of the ACMA staff at Executive Level 1, Executive Level 2 or Senior Executive Service officer level employed under the *Public Service Act 1999*.

In this instance 'Members of the ACMA' include the Chair, Deputy Chair and all full time and part-time Members but not including Associate Members.

There are a total of 15 powers and functions that may be delegated by the auction manager. Only those of a procedural or administrative nature (such as approving another method of communication should there be IT issues) are delegated to Executive Level staff.

The supplementary Explanatory Statement will be consistent with the ACMA's actual internal instrument of delegation of the auction manager's powers. This instrument was signed by the auction manager on 12 January 2017. It includes a table of powers and functions and stipulates the staff levels those powers may be delegated to. I have enclosed a copy of the instrument for the Committee's information.

If the Committee requires further information I ask that you urgently contact my office. The Determination is necessary for the upcoming auction of the 700 MHz spectrum. Processes for the auction are underway and it is expected to formally commence on 4 April 2017.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

Encl.

27/3/17



COMMONWEALTH OF AUSTRALIA

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

*Radlocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination
2016*

APPOINTMENT OF AUCTION MANAGER

THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY appoints the person holding, or for the time being performing the duties of, the position of Manager of the Spectrum Licensing Policy Section with responsibility for the management of allocation of the residual 700 MHz band (as defined in the *Radlocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*), as the Auction Manager under section 23 of the *Radlocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*.

Dated 2016
21st December

Member

Member/~~General Manager~~

Australian Communications and Media Authority

Delegation

Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016

1. Commencement

This instrument commences when it is made.

2. Definitions

In this instrument, unless the contrary intention appears:

- (a) "ACMA" means the Australian Communications and Media Authority;
- (b) "Auction Manager" means the person appointed under section 23 of the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*;
- (c) a reference to a delegation to exercise a power or perform a function includes a delegation to refuse to exercise that power or to refuse to perform that function;
- (d) a reference to a "Member" is a reference to a Member of ACMA including the Chair, Deputy Chair and all full and part-time Members but not including Associate Members;
- (e) "officer of the ACMA" includes a Member or a member of staff of the ACMA;
- (f) "SES1" and "SES2" mean, respectively, positions in the ACMA with the classification Senior Executive Service Band 1 and Senior Executive Service Band 2; and
- (g) "EL2", "EL1", "APS6", "APS5", "APS4" and "APS3" means positions with those classifications specified in the Australian Communications and Media Authority Enterprise Agreement 2011-2014, or any later instrument that determines the terms and conditions of ACMA staff.

3. Delegation

On *12 January* 2017, acting under section 91 of the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*, the Auction Manager:

- (a) DELEGATES the powers and functions described in columns 1 and 2 of each item of Schedule A to the persons performing the duties from time to time of:
 - (i) positions with the classification specified in column 3 of Schedule A; or
 - (ii) officers with the work level standard or position title specified in column 3 of Schedule A;
- (b) limits the delegation in (a) of each power and function itemised in columns 1 and 2 of Schedule A:

- (i) in the manner specified in column 4 of the same item; and
- (ii) to the exercise and performance of those powers and functions while the person is an officer of the ACMA but not while absent on leave, or suspended, from the ACMA.

Signature of Auction Manager

Name of Auction Manager

12 JANUARY 2017

Date

SCHEDULE A

Delegation of powers and functions under the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*

Item	Column 1 Provisions	Column 2 Description of powers and functions	Column 3 Delegates	Column 4 Limitations
1	6(2)(b)(i) and (ii)	Approve another format for a document that is emailed as an attachment.	EL2 EL1	
2	58(1)	Set the start date and time of the first and second rounds of the auction.	SES2 SES1 EL2	
3	59(1)	Being satisfied that a bidder is not able to make a bid for the round using the auction system, permit the bidder to make a bid during a round by a method other than the auction system.	Member SES2 SES1 EL2 EL1	
4	59(2)	Being satisfied that a bidder could not make a bid during the round because of technical or communication problems, permit a bidder to make a bid for a round after the end time of the round.	Member SES2 SES1	
5	60(1)(a)	Being satisfied that the auction is affected by exceptional circumstances, make corrections to the results of the round of the auction that last ended and information received by a bidder after that round.	Member SES2 SES1 EL2 EL1	
6	60(1)(b)	Being satisfied that the auction is affected by exceptional circumstances, stop the current round of the auction and restart the round.	Member SES2 SES1	
7	60(1)(c)	Being satisfied that the auction is affected by exceptional circumstances, cancel the results of one or more auction rounds and restart the auction from the point before those rounds.	Member SES2 SES1	

8	60(1)(d)	Being satisfied that the auction is affected by exceptional circumstances, cancel the results of all the auction rounds and restart the auction from the first round.	Member SES2 SES1	
9	60(1)(e)	Being satisfied that the auction is affected by exceptional circumstances, stop the auction.	Member SES2 SES1	
10	Schedule 1, subclause 1(2)	Schedule rounds of the auction.	Member SES2 SES1	
11	Schedule 1, subclause 1(5)	Modify the schedule of rounds.	Member SES2 SES1	
12	Schedule 1, subclause 2(5)	For each round, set the: (a) start time of the round; (b) end time of the round.	Member SES2 SES1	
13	Schedule 1, subclause 2(7)	For each round, set the: (a) start time of the round; (b) end time of the round.	Member SES2 SES1	
14	Schedule 1, subclause 3(1)	Declare a day to be a recess day.	Member SES2 SES1	
15	Schedule 1, subclause 6(1)	Change the bid increment percentage to vary the specified price for a lot in a round.	Member SES2 SES1 EL2	