

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Contents

Membership of the committee	<i>iii</i>
--	------------

Introduction	<i>vii</i>
---------------------------	------------

Chapter 1 – New and continuing matters

Response required

Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 [F2017L00333]	1
Amendment of List of Exempt Native Specimens – Multiple fisheries, March 2017 [F2017L00256]	3
Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387]	5
Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 [F2017L00302]	8
Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017 [F2017L00295]	10
Legal Services Directions 2017 [F2017L00369]	12
National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 2) (PB 22 OF 2017) [F2017L00361]	16
Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) [F2017L00242]	17
Seacare Authority Code of Practice Approval 2017 [F2017L00326]	18
Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]	21

Advice only

AEB 17/1583 - Approval – Means of Compliance with Transport Canada Airworthiness Directive (AD) CF-2011-24 - Wing to Fuselage Attachment Joints - Barrel Nut Cracking [F2017L00368]	22
Legislation (Recovery Plans) Sunset-altering Declaration 2017 [F2017L00282]	24
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2017 (No. 2) (PB 15 of 2017) [F2017L00362]	25
Therapeutic Goods Order No. 93 (Standard for Medicinal Cannabis) [F2017L00286]	26
Multiple instruments that appear to rely on section 10 of the <i>Acts Interpretation Act 1901</i> (as applied by paragraph 13(1)(a) of the <i>Legislation Act 2003</i>)	27

Multiple instruments that appear to rely on subsection 33(3) of the <i>Acts Interpretation Act 1901</i>	29
Chapter 2 – Concluded matters	
AD/PHS/10 Amdt 2 - Hydromatic Propeller - Aluminium Blades [F2017L00127]	31
CASA 11/17 - Direction — conduct of parachute training operations [F2017L00093]	33
Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171]	35
Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796]	37
Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017 [F2017L00234]	40
Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017 [F2017L00215]	42
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 [F2017L00211]	45
Insurance (prudential standard) determination No. 1 of 2017 - Prudential Standard GPS 114 Capital Adequacy: Asset Risk Charge [F2017L00101]	48
Primary Industries (Excise) Levies Amendment (Bananas) Regulations 2017 [F2017L00156]	49
Privacy Amendment (Energy and Water Utilities) Regulations 2017 [F2017L00170]	52
Torres Strait Prawn Fishery Management Plan Amendment 2017 [F2017L00120]	54
Appendix 1 – Guidelines	57
Guideline on consultation	59
Guideline on incorporation	62
Appendix 2 – Correspondence	67

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 17 March 2017 and 6 April 2017 (new matters).

With respect to the dates for disallowance recorded in this chapter, the committee notes that for the purposes of disallowance the sitting of the Senate on 31 March 2017 has been counted as a sitting day.¹

Response required

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

Instrument	Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 [F2017L00333]
Purpose	Prescribes the township of Gunyangara in the Northern Territory in relation to the Arnhem Land Aboriginal Land Trust and prescribes a further function to the Executive Director of Township Leasing
Authorising legislation	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative

1 For guidance regarding the interpretation of the expression 'sitting day' in section 42 of the *Legislation Act 2003*, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15, pp 446-447.

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

The Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 [F2017L00333] (the regulations) insert new regulation 6AA to the Aboriginal Land Rights (Northern Territory) Regulations 2007, which provides for a parcel of land to be prescribed as a single township in relation to the Arnhem Land Aboriginal Land Trust. With reference to the above, the committee notes that the definition of the parcel of land in new regulation 6AA incorporates Survey Plan S2016/039. However, neither the text of the regulations nor the explanatory statement (ES) expressly states the manner in which Survey Plan S2016/039 is incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the regulations incorporate Survey Plan S2016/039. However, the ES does not contain a description of this document, or indicate how the document 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	Amendment of List of Exempt Native Specimens – Multiple fisheries, March 2017 [F2017L00256]
Purpose	Amends the List of Exempt Native Specimens Instrument 2001 by deleting and including products sourced in multiple Australian fisheries
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2017) Notice of motion to disallow must be given by 20 June 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 Schedule 2 of the Amendment of List of Exempt Native Specimens – Multiple fisheries, March 2017 [F2017L00256] (the instrument), which defines specimens that are derived from certain fisheries, incorporates various State regulations. However, neither the instrument nor the ES states the manner in which the State regulations are incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the instrument incorporates various State regulations. While the committee understands the State regulations to be freely available, the ES does not indicate where each of the State regulations 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	Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387]
Purpose	Prescribes a new mandatory Sugar Code of Conduct which regulates the conduct of growers, mill owners and marketers in relation to the supply of cane or the on-supply of sugar
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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 Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387] (the sugar code) provides no information regarding consultation.

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

The committee further notes that the Prime Minister granted an exemption from the regulation impact statement (RIS) requirements for the sugar code 'because urgent and unforeseen events arose requiring a decision before a RIS could be prepared.'² The ES to the sugar code states:

The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created

2 Australian Government, Department of Prime Minister and Cabinet, *Prime Minister's exemption – Sugar Industry Code*, 5th April 2017, <http://ris.pmc.gov.au/2017/04/05/prime-minister%E2%80%99s-exemption-%E2%80%93-sugar-industry-code> (accessed 5 May 2017).

significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.

To ensure the Sugar Code of Conduct (the Code) operates efficiently and effectively as intended, the Regulations also require a review of the Code to take place within 18 months after its commencement.

The committee's guideline on consultation states:

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.

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

Manner of incorporation

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 subsection 16(2) of the sugar code incorporates the Resolution Institute Arbitration Rules 2016 (RIA Rules). However, neither the text of the sugar code nor the ES states the manner in which the RIA Rules are incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the sugar code incorporates the RIA Rules. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

In this instance, the committee notes that the RIA Rules are available for free online.³ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

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

3 Resolution Institute, *Current Arbitration Rules*, <https://www.resolution.institute/dispute-resolution/arbitration-rules> (accessed 4 May 2017).

Instrument	Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 [F2017L00302]
Purpose	Prescribes a mandatory Horticulture Code of Conduct which regulates trade in horticulture produce between growers and traders and provides a dispute resolution procedure for disputes arising under the code or a horticulture produce agreement
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2017) Notice of motion to disallow must be given by 9 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation/authorisation

Clause 39 of the Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 [F2017L00302] (the horticulture code) provides for the Minister for Agriculture and Water Resources (the minister) to appoint a mediation adviser who must compile and maintain a list of persons who are to be mediators for the purposes of resolving disputes arising under the horticulture code or horticulture produce agreements.

Clause 40 of the horticulture code provides for the mediation adviser to appoint a mediator to a dispute who then decides how the mediation is to be carried out.

Neither the horticulture code nor the ES appears to limit in any way who the minister may appoint as a mediation adviser, or who the mediation adviser may appoint as a mediator.

The committee is concerned that the horticulture code contains no requirement that the minister be satisfied that a person appointed to the role of mediation adviser is appropriately trained or qualified for the role, nor that a mediation adviser be satisfied that a person appointed to the role of mediator be appropriately trained or qualified for the role.

The ES provides no justification as to why it is appropriate for there to be no apparent limit on the category of people who can be appointed as a mediation adviser or mediator under the horticulture code.

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

Manner of incorporation

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 subclause 16(i) of the horticulture code incorporates the FreshSpecs Produce Specifications which are defined in clause 5 as 'product specifications published by Fresh Markets Australia'. However, neither the text of the horticulture code nor the ES states the manner in which the FreshSpecs Produce Specifications are incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the horticulture code incorporates the FreshSpecs Produce Specifications. However, the ES does not contain a description of this document, or indicate how it can be obtained.

The committee notes that clause 5 of the horticulture code states that the FreshSpecs Produce Specifications are published by Fresh Markets Australia. However, while the committee notes that the FreshSpecs Produce Specifications are available for free online,⁴ neither the horticulture code 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's expectations in this regard are set out in the guideline on incorporation in Appendix 1.

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

Instrument	Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017 [F2017L00295]
Purpose	Increases penalties for offences, strengthens the Australian Fisheries Management Authority's infringement notice scheme and adopts the infringement notice scheme of the <i>Regulatory Powers (Standard Provisions) Act 2014</i>
Authorising legislation	<i>Fisheries Management Act 1991</i>
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2017) Notice of motion to disallow must be given by 9 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

Section 44 of the Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017 [F2017L00295] (the regulations) allows the Chief Executive Officer (CEO) of the Australian Fisheries Management Authority (AFMA) to delegate to 'an officer' the power to extend the period in which an infringement notice must be paid and the power to withdraw an infringement notice.

Section 4 of the *Fisheries Management Act 1991* (FMA Act) broadly defines an 'officer' as:

4 The Australian Chamber of Fruit & Vegetable Industries Limited, Fresh Markets Australia, *FreshSpecs Produce Specifications*, <http://freshmarkets.com.au/fresh-specs/> (accessed 5 May 2017).

- (a) a person appointed under section 83 to be an officer for the purposes of this Act;⁵ or
- (b) a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; or
- (c) a member of the Defence Force; or
- (d) an officer of Customs (as defined in the *Customs Act 1901*).⁶

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 the ES to the regulations does not provide any justification for the need to sub-delegate the abovementioned powers of the CEO of AFMA to 'an officer'.

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

5 See *Fisheries Management Act 1991*, section 83. This section provides a very broad definition of who can be appointed as 'an officer' for the purposes of the FMA Act.

6 See *Customs Act 1901*, section 4. This section provides a very broad definition of the term an 'officer of Customs'.

Instrument	Legal Services Directions 2017 [F2017L00369]
Purpose	Repeals and remakes Legal Services Directions 2005 [F2006L00320] which sunsetted on 1 April 2017
Authorising legislation	<i>Judiciary Act 1903</i>
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a) and (d)

Description of purpose and operation of the instrument

Paragraph 15J(2)(b) of the *Legislation Act 2003* requires the ES for a legislative instrument to explain the purpose and operation of the instrument.

The Legal Services Directions 2017 [F2017L00369] (the directions) repeal and remake Legal Services Directions 2005 [F2006L00320] (the 2005 directions). The ES to the directions explains that the remaking of the 2005 directions is required due to the sunset provisions of the *Legislation Act 2003*.

In relation to the purpose and operation of the directions, the ES explains that the directions contain minimal changes from the 2005 directions and provides notes only on those sections that appear in these directions and not in the 2005 directions.⁷ The ES to the directions states:

These Directions preserve all existing arrangements for the management of Commonwealth legal services by the Attorney-General.

...the 2005 Directions are well understood and no substantive alterations to the arrangements under the 2005 Directions have been proposed at this time.

In the absence of an item-by-item description of the provisions of an instrument, a statement that an instrument has been made with 'minimal changes' may be insufficient for the committee to effectively scrutinise the instrument with reference to its scrutiny principles. Further, such an ES may fail to meet the requirements in

⁷ The ES states: 'No explanations have been provided for provisions in these Directions where the only difference from the 2005 Directions is to provide for the following: updated references to entities, jurisdictions, and other organisations; updated references to documents and guidelines; updated references to websites, and removing typographical and stylistic inconsistencies.'

section 15J of the *Legislation Act 2003* (as discussed below in relation to access to incorporated documents). In this case, as the ES provides notes on sections that appear in these directions and not in the 2005 directions and states that the directions make no substantive alterations to the arrangements under the 2005 directions, the committee considers that the definitive description of the changes to the 2005 directions may provide sufficient basis for scrutiny of the instrument, notwithstanding the absence of an item-by-item description of all the provisions of the directions.

The committee draws to the attention of ministers, and instrument-makers more generally, that while in some cases a comprehensive description of the changes to a remade instrument may be sufficient, the committee's preference is that ESs also include an item-by-item description of all the provisions of the instrument, even in cases where the instrument is being remade due to the sunset provisions of the *Legislation Act 2003*.

Manner of incorporation

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 sections 1 and 3 of Appendix F to the directions incorporate the Legal Services Multi-use List (LSMUL). However, neither the text of the directions nor the ES expressly states the manner in which the LSMUL is incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the directions incorporate the LSMUL. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

The committee notes that section 3 of Appendix F to the directions provides a note that '[g]uidance material on the operation of the LSMUL is available at www.ag.gov.au/lsmul'. While the committee notes that the LSMUL is available for free online,⁸ neither the directions nor the ES states exactly where it 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's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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

Matter more appropriate for parliamentary enactment

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to seek to ensure that an instrument does not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in scrutinising whether matters are being appropriately dealt with as primary or delegated legislation. In this regard, the committee notes the following guidance from the Legislation Handbook:

8 Attorney-General's Department, *Legal services multi-use list and service providers*, <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Purchasingservicesfromthelegalservicesmultiuselist.aspx> (accessed 5 May 2017).

While it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation, the following are examples of matters generally implemented only through Acts of Parliament...provisions imposing obligations on individuals or organisations to...desist from activities (e.g. to prohibit an activity and impose sanctions for engaging in an activity).

With reference to the above, the committee notes that paragraph 14 in Part 3 of Schedule 1 and section 5 of Appendix G of the directions enables the Attorney-General to impose sanctions for non-compliance with the directions. A note to paragraph 14 in Part 3 of Schedule 1 of the directions provides:

Examples demonstrating the range of sanctions and the manner in which OLSC [The Office of Legal Services Commissioner] approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that this guidance material does not appear to be available on the OLSC website and the ES provides no further information in relation to the range of sanctions that may be imposed by the Attorney-General for non-compliance with the directions.

With respect to section 5 of Appendix G, the ES to the directions states:

This provision ensures that the Attorney-General may continue to impose sanctions for non-compliance with the 2005 Directions after those Directions are repealed.

However, neither the directions nor the ES appear to:

- set any limitations or provide any guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; nor
- justify the need for the Attorney-General to be granted such broadly defined sanction powers; nor
- explain the reasons for enabling the Attorney-General to impose sanctions for non-compliance with the directions in delegated as opposed to primary legislation.

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

Instrument	National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 2) (PB 22 OF 2017) [F2017L00361]
Purpose	Amends the National Health (Listed drugs on F1 or F2) Determination 2010 (PB 93 of 2010)
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The *National Health Act 1953* (the Act) provides that drugs listed on the pharmaceutical benefits scheme may be assigned to formularies identified as F1 and F2.

F1 is intended for single brand drugs and F2 for drugs that have multiple brands, or are in a therapeutic group with other drugs with multiple brands. Drugs identified as F2 are subject to the provisions of the Act relating to first new brand statutory price reductions, price disclosure and guarantee of supply.

The ES for National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 2) (PB 22 OF 2017) [F2017L00361] (the determination) states that, in addition to adding 5 new drugs to the F1 list, the determination is also moving 5 currently listed drugs from the F1 list to the F2 list.

However, the committee notes that one of the drugs listed as being moved from the F1 list to the F2 list (etanercept) has been inserted into Schedule 2 of the determination (relating to the F2 list) but not omitted from Schedule 1 (relating to the F1 list). This drug is therefore now included in both lists. It is unclear to the committee whether this was the intention of the determination, or whether the listing of the drug etanercept on both the F1 list and F2 list is the result of a drafting error in the determination.

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

Instrument	Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) [F2017L00242]
Purpose	Updates references and changes the minimum benefits payable by private health insurers for nursing-home type patients at public hospitals in some states and at private hospitals nationally
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2017) Notice of motion to disallow must be given by 20 June 2017
Scrutiny principle	Standing Order 23(3)(a)

Indexation method

Item 2 of Schedule A to the Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) (the amendment rules) decreases the minimum benefit payable per night for nursing-home type patients (NHTPs) in private hospitals in clause 6, Table 2 of Schedule 4 to the Private Health Insurance (Benefit Requirements) Rules 2011 (the principal rules) from \$53.05 to \$52.30.

The committee acknowledges that section 72-1, table item 5 of the *Private Health Insurance Act 2007* appears to provide legislative authority for the principal rules to set out the minimum benefit, or method for working out the minimum benefit, that a private health insurance policy that covers hospital treatment must provide to policy holders (including the minimum benefit payable for treatment for NHTPs in private hospitals). However, the committee notes that the principal rules do not appear to set out a method by which the minimum benefit payable for treatment for NHTPs is calculated.

The ES to the amendment rules explains:

The minimum benefits payable per night for hospital treatment provided to NHTPs in Schedule 4 of the Principal Rules is subject to review and change twice annually, to reflect the indexation applied to the Adult Pension Basic Rate and Maximum Daily Rate of Rental Assistance (Pension and Rental Assistance Rates). The latest indexation of these rates takes effect on 20 March 2017.

However, the committee is concerned that this current indexation method, which is used to calculate the minimum benefit payable per night for NHTPs, does not appear to be codified in the principal rules. The committee is interested in exploring why it

is appropriate for this method not to be specified in the principal rules; and whether consideration has been given to providing more detail in relation to this method in the principal rules.

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

Instrument	Seacare Authority Code of Practice Approval 2017 [F2017L00326]
Purpose	Provides guidance on ways to meet occupational health and safety standards and manage commonly understood hazards and control measures for managing health and safety risks at work on vessels
Authorising legislation	<i>Occupational Health and Safety (Maritime Industry) Act 1993</i>
Department	Employment
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of purpose and operation of the instrument

Paragraph 15J(2)(b) of the *Legislation Act 2003* requires the ES for a legislative instrument to explain the purpose and operation of the instrument.

The Seacare Authority Code of Practice Approval 2017 [F2017L00326] (the code) remakes the Seacare Authority Code of Practice 1/2000 (the 2000 code). The ES to the code explains that the remaking of the 2000 code is required due to the sunset provisions of the *Legislation Act 2003*.

In relation to the purpose and operation of the code, the ES explains that:

The Code provides guidance on ways to meet occupational health and safety standards on vessels and to manage commonly understood hazards and control measures for managing health and safety risks at work on vessel.

However, the ES does not provide an item-by-item description of the provisions of the code. In the absence of an item-by-item description of the provisions of an instrument the committee may not be able to effectively scrutinise an instrument with reference to its scrutiny principles. Further, an ES that does not include an item-by-item description may fail to meet the requirements in section 15J of the

Legislation Act 2003 (as discussed below in relation to access to incorporated documents). However, the ES states:

The Code was first approved by the Minister for Employment, Workplace Relations and Small Business on 10 May 2000. The Code is due to sunset on 1 April 2017 under section 51 of the *Legislation Act 2003*. The Code has been under review by a working group formed by the Seacare Authority. The Chairperson of the Seacare Authority consulted and received the unanimous support of the working group members to request that the Code be remade to allow for that review to be completed...The content of the Code is unchanged and the approval is limited to a two year period while updated guidance for industry participants is prepared, reflecting developments in work health and safety.⁹

The above statement appears to provide that the code makes no changes, additions or deletions to the 2000 code and that it will be in existence for a maximum of 2 years. Therefore, the committee considers that in this case this definitive description that no changes have been made to the 2000 code, may provide a sufficient basis for scrutiny of the code, notwithstanding the absence of an item-by-item description of the provisions of the code.

The committee draws to the attention of ministers and instrument-makers more generally, that while in some cases a comprehensive description of the changes to a remade instrument may be sufficient, the committee's preference is that ESs also include an item-by-item description of all the provisions of the instrument, even in cases where the instrument is being remade due to the sunset provisions of the *Legislation Act 2003*.

Manner of incorporation

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

The code incorporates the Australian OffShore Support Vessel Code of Safe Working Practice (the AOSC code) and the Code of Safe Working Practice for Australian Seafarers (the COSW code). With reference to the above, the committee notes that

9 The ES explains that the working group is made up of representatives from the Australian Maritime Safety Authority and employee and employer representatives (Maritime Industry Australia Ltd, the Australian Maritime Officers Union, the Australian Institute of Marine and Power Engineers and the Maritime Union of Australia).

the code sets out the full text of both the AOSC and COSW codes which in turn incorporate various Australian and international standards. However, neither the text of the code nor the ES expressly states the manner in which the Australian and international standards are incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the code incorporates various Australian and international standards. However, the ES does not contain a description of these documents, nor indicate how the documents 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	Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]
Purpose	Prohibits the taking of Sea Turtles or Dugong in the Torres Strait region
Authorising legislation	<i>Torres Strait Fisheries Act 1984</i>
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

With reference to these requirements, the committee notes that the ES for the instrument provides the following information:

Consultation

Native title notification was undertaken in relation to the Instrument.

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 this case, noting that the ES appears to address only the native title notification requirements in relation to the instrument, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003*.

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 this matter; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Advice only

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

Instrument	AEB 17/1583 - Approval – Means of Compliance with Transport Canada Airworthiness Directive (AD) CF-2011-24 - Wing to Fuselage Attachment Joints - Barrel Nut Cracking [F2017L00368]
Purpose	Provides an alternate means of compliance with Transport Canada Airworthiness Directive CF-2011-24
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

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

With reference to the above, the committee notes that AEB 17/1583 - Approval – Means of Compliance with Transport Canada Airworthiness Directive (AD) CF-2011-24 - Wing to Fuselage Attachment Joints - Barrel Nut Cracking [F2017L00368] (the instrument) incorporates Bombardier Service bulletin 84-57-26 and Bombardier modification summary packages 4-123841, 4-113769 and 4-113768, as in force at the date of the instrument. However, the ES to the instrument states:

The service bulletins and ModSum [modification summary packages] are available from Bombardier for a fee. The operators of the relevant aircraft in Australia have a subscription with Bombardier to access these documents.

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

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been 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.¹⁰ 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.

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

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

10 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 2 March 2017).

Instrument	Legislation (Recovery Plans) Sunset-altering Declaration 2017 [F2017L00282]
Purpose	Aligns the sunseting dates of 39 instruments making or adopting recovery plans to enable their inclusion in a thematic review
Authorising legislation	<i>Legislation Act 2003</i>
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 27 March 2017) Notice of motion to disallow must be given by 8 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Extending the sunseting date of instruments

Unless otherwise provided by an enabling Act, all legislative instruments made on or after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration (section 50 of the *Legislation Act 2003*). This process is called 'sunseting', and the relevant date of repeal is known as the 'sunseting date'.

Section 51A of the *Legislation Act 2003* allows the Attorney-General to align the sunseting of instruments where two or more instruments are to be reviewed together. The Attorney-General must be satisfied that all the instruments to be reviewed would, apart from section 51A, be repealed by section 50 or 51 of the *Legislation Act 2003*; are the subject of a single review; and the making of the declaration to align sunseting dates will facilitate the undertaking of the review and the implementation of its findings.

The Legislation (Recovery Plans) Sunset-altering Declaration 2017 [F2017L00282] (the declaration) aligns the sunseting dates of 39 instruments making or adopting recovery plans, which would otherwise sunset between 1 April 2017 and 1 April 2021. The new sunseting date for each of these instruments will be 1 April 2022.

The ES to the declaration explains that the 39 instruments 'are or will be the subject of a single review' and that the declaration facilitates that review and the implementation of its findings, as otherwise the instruments would be repealed by section 50 of the *Legislation Act 2003*.

The committee draws the extension of the sunseting dates for 39 instruments to 1 April 2022 to the attention of the Senate.

Instrument	National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2017 (No. 2) (PB 15 of 2017) [F2017L00362]
Purpose	Amends the National Health (Listing of Pharmaceutical Benefits) Instrument 2012 (PB 71 of 2012) to make changes to the pharmaceutical benefits listed on the Pharmaceutical Benefits Scheme
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of purpose and operation of the instrument

Paragraph 15J(2)(b) of the *Legislation Act 2003* requires the ES for a legislative instrument to explain the purpose and operation of the instrument.

The National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2017 (No. 2) (PB 15 of 2017) [F2017L00362] (the amendment instrument) amends the National Health (Listing of Pharmaceutical Benefits) Instrument 2012 (PB 71 of 2012) (the principal instrument).

With respect to Schedule 1 of the instrument, the item-by-item description of the provisions in the ES states:

The amendments in Schedule 1 involve additions, deletions and changes to forms, brands, responsible person codes, maximum quantities, the circumstances for prescribing various pharmaceutical benefits (including authority requirements), determined quantities, pack quantities and section 100 only status. These changes are summarised below.

However, the committee notes that the ‘summary of changes’ included in the ES does not appear to address certain items in the instrument, namely items 7, 36, 62 and 74. As the summary is effectively replacing an item-by-item description in the ES, the committee is concerned that the ES may not explain all the changes being made to the Pharmaceutical Benefits Scheme by the amendment instrument.

In the absence of an item-by-item description of the provisions of an instrument, the committee may not be able to effectively scrutinise the instrument with reference to its scrutiny principles. Further, such an ES may fail to meet the requirements in

section 15J of the *Legislation Act 2003*. However, the committee considers that the summary of changes being made by the amendment instrument provided in the ES in this instance provides a sufficient basis for scrutiny of the instrument.

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

Instrument	Therapeutic Goods Order No. 93 (Standard for Medicinal Cannabis) [F2017L00286]
Purpose	Establishes a standard for medicinal cannabis products, in the absence of any current international quality standard applying to medicinal cannabis products
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2017) Notice of motion to disallow must be given by 9 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated document

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

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

With reference to the above, the committee notes that Therapeutic Goods Order No. 93 (Standard for Medicinal Cannabis) [F2017L00286] (the instrument) incorporates the European Pharmacopoeia as in force from time to time. However, the ES states:

The European Pharmacopoeia is available online at: <http://online.phEur.org>. At the time of making this Order, it is understood that a subscription fee is required to access the current edition of this publication. It is expected that manufacturers of medicinal cannabis

products acquire access to the European Pharmacopoeia as part of an overall understanding of, and compliance with the regulatory regime for medicinal cannabis products. Further, versions of this publication may be available through libraries.

The committee acknowledges that anticipated users of the instrument would have access to the incorporated document. However, in addition to access for manufacturers of medicinal cannabis products 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.¹¹ 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.

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

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

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	
	ASIC Corporations (Amendment and Repeal) Instrument 2017/65 [F2017L00284]
	ASIC Corporations (Capital Reductions and Reconstructions—
	Technical Disclosure Relief) Instrument 2017/242
	[F2017L00280]
	ASIC Corporations (Foreign-Controlled Company Reports)
	Instrument 2017/204 [F2017L00307]
	Law Enforcement Integrity Commissioner Regulations 2017

11 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 2 March 2017).

<p>Scrutiny principle</p>	<p>[F2017L00304]</p> <p>National Health (Commonwealth Price—Pharmaceutical Benefits Supplied By Public Hospitals) Determination 2017 (PB 25 of 2017) [F2017L00372]</p> <p>Primary Industries (Customs) Charges Amendment (Seed Cotton) Regulations 2017 [F2017L00297]</p> <p>Primary Industries Levies and Charges Collection Amendment (Seed Cotton) Regulations 2017 [F2017L00296]</p> <p>Therapeutic Goods Order No. 93 (Standard for Medicinal Cannabis) [F2017L00286]</p> <p>Torres Strait Fisheries Management Instrument No. 15 [F2017L00370]</p> <p>Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]</p> <p>Torres Strait Fisheries Management Instrument No. 17 [F2017L00373]</p> <p>Veterans' Children Education Scheme Amendment Instrument 2017 [F2017L00273]</p> <p>Standing Order 23(3)(a)</p>
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Incorporation of Commonwealth disallowable legislative instruments

The instruments identified above incorporate by reference Commonwealth disallowable legislative instruments. This means that they incorporate the content of other disallowable legislative instruments without reproducing the relevant text.

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

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, neither the text of the instruments identified above, nor their accompanying ESs explain the relevance of these provisions to their operation.

The committee considers that, in the interests of promoting the clarity and intelligibility of delegated legislation, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative

instruments are incorporated; and/or clearly identify the relevance of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) to their operation. 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's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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	
	ASIC Corporations (Repeal and Transitional) Instrument 2017/186 [F2017L00283]
	Biosecurity (Methods of Ballast Water Management) Amendment (2017 Measures No. 1) Approval 2017 [F2017L00334]
	Consumer Goods (Elastic luggage straps) Safety Standard 2017[F2017L00382]
	GST-free Supply (Health Services) Determination 2017 [F2017L00377]
	Health Insurance (Professional Services Review – Sampling Methodology) Determination 2017 [F2017L00274]
	Legal Services Directions 2017 [F2017L00369]
	National Health (Commonwealth Price—Pharmaceutical Benefits Supplied By Public Hospitals) Determination 2017 (PB 25 of 2017) [F2017L00372]
	Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) [F2017L00242]
	Private Health Insurance (Complying Product) Amendment Rules 2017 (No. 1) [F2017L00243]
	Private Health Insurance (Lifetime Health Cover) Rules 2017 [F2017L00354]
	Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 2) [F2017L00271]

Scrutiny principle	Private Health Insurance (Registration) Rules 2017 [F2017L00316]
	Public Governance, Performance and Accountability (Relevant Company) Amendment (2017 Measures No. 1) Rules 2017 [F2017L00294]
	Torres Strait Fisheries Management Instrument No. 15 [F2017L00370]
	Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]
	Torres Strait Fisheries Management Instrument No. 17 [F2017L00373]
	Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2017 - 2018 Amendment No.1 [F2017L00342]

Drafting

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

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

The committee draws the above to the attention of ministers.

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

Chapter 2

Concluded matters

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

Correspondence relating to these matters is included at Appendix 2.

The dates for disallowance recorded in this chapter have changed since the committee previously reported. For the purposes of disallowance the sitting of the Senate on 31 March 2017 has been counted as a sitting day.¹

Instrument	AD/PHS/10 Amdt 2 - Hydromatic Propeller - Aluminium Blades [F2017L00127]
Purpose	Repeals and replaces AD/PHS/10 Amdt 1 to allow for Limited Category aircraft administered by the Australian Warbirds Association Ltd (AWAL) to have an extended inspection period to comply with AWAL Maintenance Direction 16-001
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> 3 of 2017

Access to documents

The committee previously commented as follows:

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

¹ For guidance regarding the interpretation of the expression 'sitting day' in section 42 of the *Legislation Act 2003*, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15, pp 446-447.

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

With reference to the above, the committee notes that the instrument incorporates AWAL Maintenance Direction No: 16-001, as in force from time to time. The ES to the instrument states:

AWAL Maintenance Direction 16-001 is available by contacting the Australian Warbirds Association Ltd [AWAL] via their website (<http://australianwarbirds.com.au/>).

However, it is unclear from the ES and the AWAL website whether AWAL Direction 16-001 may be accessed for free.

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

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

Minister's response

The Minister for Infrastructure and Transport advised:

With respect to the Committee's concerns regarding access to Australian Warbirds Association Limited (AWAL) Maintenance Direction 16-001, I am advised by CASA that this document is freely available to the public via the AWAL website and that there are no restrictions placed on accessing this document by AWAL.

Committee's response

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

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

Instrument	CASA 11/17 - Direction — conduct of parachute training operations [F2017L00093]
Purpose	Contains directions relating to aircraft engaged in parachute training operations by organisations that are members of the Australian Skydiving Association Inc.
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 7 February 2017) The time to give a notice of motion to disallow expired on 31 March 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 3 of 2017</i>

Access to documents

The committee previously commented as follows:

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

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

With reference to the above, the committee notes that the instrument incorporates the Australian Skydiving Association (ASA) Operational Regulations approved in writing by CASA from time to time; the ASA Jump Pilot Handbook approved in writing by CASA from time to time and the ASA Training Operations Manual as existing from time to time.

The ES states that these documents are available from ASA; that the instrument only applies to organisations that are members of ASA; and that those organisations have access to those documents. However, the ES does not provide information as to where these documents may be accessed for free by persons other than organisations that are members of ASA.

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.

Minister's response

The Minister for Infrastructure and Transport advised:

I have sought advice from CASA on this issue and I am advised that ASA will provide copies of the ASA Jump Pilot Handbook and the ASA Training Operations Manual to any person, regardless of whether they are an ASA member, on request. CASA has also advised that ASA is preparing to make the documents freely available on its website, and that ASA anticipates that it will do so by the end of April 2017.

I note the Committee's expectations regarding information on the availability of referenced material in Explanatory Statements. CASA has indicated that it will look at updating the Explanatory Statement for CASA 11/17 when it is satisfied the documents have been made available by the ASA.

Committee's response

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

The committee welcomes the minister's advice that ASA is in the process of making the incorporated documents freely available on its website and that CASA will update the ES to the instrument following the publication of these documents.

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
Authorising legislation	<i>Aged Care Act 1997</i>
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor 4 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

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 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 \$375 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.

Minister's response

The Minister for Aged Care advised:

I am writing to clarify that the application fee for reconsideration of decisions to change classification of care recipients (the fee) reasonably reflects the cost of the Department of Health undertaking this work.

In 2015-16, there were 234 requests for Aged Care Funding Instrument (ACFI) reconsideration processed by the Department involving 421 questions. This work was estimated to have incurred \$210,500 in administrative costs (i.e. approximately \$500 per question). It included staffing costs for corresponding and liaising with each approved provider to gather relevant evidence, electronic filing of documentation and extensive time for staff with relevant expertise to review the evidence from a clinical perspective. It also involved legal costs, quality assurance, preparation of the delegate's written statement of reasons to underpin their decision, and distribution costs.

In addition to the above, the introduction of the \$375 fee per question now involves additional administrative costs for the Department. These include establishment of new administrative procedures, processing applications and implementing accounts payable processes for invoicing, receipt of payments, refunds and waivers as appropriate.

The intent of the \$375 fee per question is that it reasonably reflects only part of the overall administrative cost of undertaking these reconsiderations. In setting this amount, careful consideration was given to limiting the financial impact on approved providers so the fee is not cost prohibitive, thereby not impeding their right to merits review.

It is noted that the fee will be refunded when a reconsideration request has overturned an ACFI review decision and the provider's initial ACFI classification has been reinstated, except where new information was presented that should have been available at the time of the original review.

Committee's response

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

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

Instrument	Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796]
Purpose	Extends export control legislation relevant to plant and plant products to Norfolk Island
Authorising legislation	Export Control (Orders) Regulations 1982
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 28 November 2016) The time to give a notice of motion to disallow expired on 27 March 2017 Notice given on 27 March 2017 ² Notice must currently be resolved by 8 August 2017
Scrutiny principle	Standing Order 23(3)(b) and (a)
Previously reported in	<i>Delegated legislation monitors 1 and 3 of 2017</i>

Insufficient justification of strict liability offences

The committee previously commented as follows:

Sections 9 and 13 of Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796] (the order) create strict liability offences of issuing a false certificate and altering a certificate without authorisation. The offences are subject to 50 and 20 penalty units, respectively (currently \$9000 and \$3600).

Given the potential consequences of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. The committee notes that in this case the ES provides no explanation of or justification for the framing of the offence.

The committee draws the minister's attention to the discussion of strict liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,³ as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

2 See Parliament of Australia, *Disallowance Alert 2017*, [http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Regulations_and_Ordinances/Alerts](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts) (accessed 21 April 2017).

3 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (accessed 31 January 2017).

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

Minister's first response

The Minister for Agriculture and Water Resources advised:

On 1 July 2016 a number of legislative changes came into effect which extended some Commonwealth legislation to Norfolk Island. One of the Acts extended to Norfolk Island was the *Export Control Act 1982*. To support Norfolk Island's \$1 million dollar export industry the Export Control (Plants and Plant Products - Norfolk Island) Order 2016 (Norfolk Order) was made under the *Export Control Act 1982* to enable the Department of Agriculture and Water Resources to provide certification for exports of plants and plant exports from Norfolk Island.

In order to provide a consistent export regulatory regime between Australia and Norfolk Island and not give undue advantage, it was considered important to maintain consistency between the Export Control (Plants and Plant Products) Order 2011 (Plant Order) and the Norfolk Order. This includes the strict liability offences in sections 9 and 13, which reflect the strict liability offences outlined in sections 44 and 48 of the Plant Order.

The government considers these provisions are consistent with principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers 2011* (Guide) as the provisions underpin the Australian export regulatory regime, and to a lesser extent, protect general revenue through the export of plants and plant products. The penalties for the offences have been set at 20 penalty units for the offence of altering a certificate in section 13 and 50 penalty units for the offence of issuing a false certificate in section 9. The offences therefore meet the requirement in the Guide that strict liability offences should not exceed 60 penalty units for an individual.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments... I have requested that, where possible, the department include additional information in explanatory statements providing justification for the use of strict liability offences.

Committee's first response

The committee thanks the minister for his response.

The committee also thanks the minister for the advice that in the future where instruments impose strict liability offences, the Department of Agriculture and Water Resources will include a justification for the use of such offences in the ESs.

The committee also acknowledges that the penalties for the strict liability offences in the order are consistent with the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

However, while the committee understands the desire to provide a consistent export regulatory regime between Australia and Norfolk Island and to not give undue advantage, the minister's response does not explain the reasons for applying strict liability to the offences of issuing a false certificate and altering a certificate without authorisation.

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

Minister's second response

The Minister for Agriculture and Water Resources advised:

As the committee would be aware, when strict liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, they are not required to prove fault elements, in order for the defendant to be found guilty. Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations.

Sections 9 and 13 provide strict liability offences for the issuing of a false certificate and altering a certificate. They have been drafted to ensure the ongoing integrity and consistency of the department's export certification framework. There is a strong public interest in maintaining the integrity of export certification provided by the Department of Agriculture and Water Resources which is absolutely critical to Australia's reputation as a trusted phytosanitary regulator and international trading partner.

Use of false or altered certificates has the potential for negative financial, political and trade impacts on the Norfolk Island and the broader Australian economy. The application of strict liability offences for sections 9 and 13 provides a deterrent to issuing a false or altered certificate, which will result in the continuing maintenance of Australia's international biosecurity and trading status. It can reasonably be expected that an exporter of plants and plant products is aware that only authorised officers may issue or alter certificates.

This approach to applying strict liability offences reflects the policy intent of the *Export Control Act 1982* in relation to false trade descriptions and the penalties applied to the use of false trade descriptions applied in documentation, and for the unlawful interference with, or forgery of, official marks. Penalties were established and consistent with Commonwealth legislation for offences of this kind. The application of strict liability offences for sections 9 and 13 continues to apply to the original policy intent of the legislation and is necessary to ensure the integrity of the regulatory regime.

The department considers that the provisions for strict liability offences are consistent with principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers 2011*. In particular, the department considers the principles that the strict

liability offences are consistent with are that the fines are less than 60 penalty units; are appropriate to ensure the integrity of the regulatory regime; and allow the protection of general revenue.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments. I have requested that, where possible, the department include additional information in explanatory statements providing justification for the use of strict liability offences.

Committee's second response

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

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

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
Authorising legislation	<i>Federal Court of Australia Act 1976</i>
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 4 of 2017</i>

Consultation

The committee previously commented as follows:

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

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*.

Minister's response

The Attorney-General advised:

I am advised that the Federal Court of Australia undertook consultation in relation to these amendments, in accordance with its harmonised rules process. Accordingly, the Federal Court is proposing to issue a supplementary Explanatory Statement pursuant to paragraph 15J(3) of the *Legislation Act 2003*, which will reflect the consultation process undertaken.

Committee's response

The committee thanks the Attorney-General for his response and has concluded its examination of the instrument.

The committee notes that a supplementary ES which addresses the committee's concerns regarding consultation has been registered on the Federal Register of Legislation.

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	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 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 4 of 2017</i>

Constitutional authority for expenditure

The committee previously commented as follows:

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

The committee notes that, in *Williams No. 2*,⁴ 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.

4 *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.⁵ 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.

Minister's response

The Minister for Finance, on behalf of the Acting Minister for the Environment and Energy, advised:

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party.

The *United Nations Framework Convention on Climate Change* [1994] ATS 2 (the UNFCCC) includes a range of obligations on Australia to take domestic actions that reduce Australia's emissions of greenhouse gases. The UNFCCC relevantly provides that Australia shall:

- formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change (article 4.1(b));
- promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors (article 4.1(c)); and
- adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions

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

of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs (article 4.2(a)).

The *Kyoto Protocol to the United Nations Framework Convention on Climate Change* [2008] ATS 2 also includes obligations on Australia to take action to reduce emissions, such as articles 3 and 10(b). Article 3 imposes obligations to ensure that Australia's greenhouse gas emissions during the commitment period do not exceed its assigned amount. Article 10(b) imposes obligations to formulate, implement and report upon climate change mitigation and adaptation programmes.

The *Paris Agreement* [2016] ATS 24 was entered into by the parties to the UNFCCC to enhance its implementation. Under the Paris Agreement Australia has a 'nationally determined contribution' of a 2030 emissions reduction target of 26 to 28 per cent below 2005 levels. Relevantly, article 4.2 of the Paris Agreement provides as follows:

- Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

The Solar Communities Program provides support for community groups to install solar photovoltaic equipment, solar hot water equipment and solar-connected batteries at facilities that they own, lease or use to reduce greenhouse gas emissions. The Food Rescue Charity Program provides support for food rescue charities to reduce greenhouse gas emissions, in particular by installing solar photovoltaic equipment, solar-connected batteries and energy efficient refrigeration equipment at facilities that they own, lease or use and purchasing energy efficient refrigeration vehicles.

It is well established in Australia that the increased use of renewable energy and increased energy efficiency, as supported by these programs, reduces the use of fossil fuels in our electricity grid or transport systems. This reduces the emissions of greenhouse gases for which Australia is responsible for under international climate change agreements. Food rescue charities, by diverting waste from landfills, also reduce methane emissions that would result if that waste was sent to a landfill, further reducing Australia's greenhouse gas emissions.

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	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	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 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 4 of 2017</i>

Constitutional authority for expenditure

The committee previously commented as follows:

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

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

6 *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 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 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.

Minister's response

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

Commonwealth executive power and the express incidental power

Both items 203 and 204 reference the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with s 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Suicide Prevention Research Fund (the Fund) listed in **item 203** will support a national approach to targeted research that will increase knowledge about the prevention of suicide, including a best practice hub of evidence-based resources to support community-based suicide prevention.

The Fund will provide a clear national mechanism for setting suicide prevention research priorities and ensure research is aligned with national and state-based suicide prevention policies. It takes into account the challenges faced by service providers, frontline practitioners and communities.

The Fund will ensure there is a single large-scale national effort dedicated to suicide prevention research. As issues to be addressed by the research will be of national significance, the funded organisation will be required to engage with key government-funded research entities to ensure there are complementary research priorities, research grant assessment processes and disbursement arrangements.

The Suicide Prevention Trials listed in **item 204** will be conducted through the national Primary Health Network (PHN) program and will provide evidence of how a more systems based approach to suicide prevention and treatment might be best undertaken on a national scale. The trials will seek to improve the Australian Government's understanding of the challenges faced nationally in the delivery of suicide prevention services, and inform the Australian Government's development of national mental health and suicide prevention responses.

The Explanatory Statement for the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 will be replaced to correct the omission of the reference to sections 61 and 51(xxxix) for items 203 and 204.

Committee's response

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

The committee notes that a replacement ES has been registered on the Federal Register of Legislation which identifies the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution) as supporting heads of power in relation to the Suicide Prevention Research Fund and Suicide Prevention Trials.

The committee also notes that the additional information provided by the minister in relation to the relevance and operation of each head of power that the regulation seeks to rely on to support Commonwealth funding for the Suicide Prevention Trials would also have been useful in the ES.

Instrument	Insurance (prudential standard) determination No. 1 of 2017 - Prudential Standard GPS 114 Capital Adequacy: Asset Risk Charge [F2017L00101]
Purpose	Determines Prudential Standard GPS 114 Capital Adequacy: Asset Risk Charge
Authorising legislation	<i>Insurance Act 1973</i>
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 February 2017) Notice of motion to disallow must be given by 10 May 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 3 of 2017</i>

Drafting

The committee previously commented as follows:

Paragraph 81 of the determination contains a transitional provision that refers to relief granted by the Australian Prudential Regulation Authority (APRA) under the paragraph having effect until no later than December 2014. The committee notes that paragraph 81 appears in the same form in the determination as in the version of the determination being replaced (Insurance (prudential standard) determination No. 4 of 2012 - Prudential Standard GPS 114 - Capital Adequacy: Asset Risk Charge [F2012L02360]). The committee is therefore unable to determine whether paragraph 81 is still operative, or whether the inclusion of paragraph 81 in the current version of the determination is unnecessary.

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 Revenue and Financial Services advised:

APRA has re-examined paragraph 81 of the Instrument and is of the view that the paragraph is no longer operative and is unnecessary. As APRA considers the risk of an authorised general insurer seeking retrospective relief under paragraph 81 to be extremely low, it proposes to remove the paragraph when amendments are next made to the prudential standard.

Committee's 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 when the determination is next amended APRA will remove paragraph 81.

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
Authorising legislation	<i>Primary Industries (Excise) Levies Act 1999</i>
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor 4 of 2017</i>

Unclear basis for determining fees

The committee previously commented as follows:

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

Minister's response

The Minister for Agriculture and Water Resources advised:

The Australian Banana Growers' Council (ABGC) requested an overall increase to its existing statutory Plant Health Australia (PHA) levy on bananas from 2.45 cents per kilogram to 2.94 cents. This comprised of an increase to the PHA levy component from 0.0103 cents per kilo to 0.5 cents per kilogram and the marketing levy component from 1.1497 cents to 1.15 cents. The research and development and emergency plant pest response levies remain at their current rates of 0.54 of a cent per kilogram and 0.75 of a cent per kilogram respectively.

The calculation of the levy increase was based on biosecurity requirements for the banana industry over the next five years. At estimated production levels, the ABGC calculates that the PHA levy increase will raise \$8.77 million in five years (assuming no adverse weather events, such as a tropical cyclone in the North Queensland growing area). ABGC stated in its business case that funds raised through the increase to the PHA levy will be used to repay a \$3 million Australian Government grant and fund the ongoing containment and management of Panama disease TR4. The existing expenses of levy collection costs, annual PHA subscription and annual share of the Torres Strait Exotic Fruit Fly Response will continue to be paid through the PHA levy. ABGC stated that any remaining funds will be used to improve banana industry biosecurity more generally.

The increase in the marketing levy is a rounding adjustment of 0.0003 cents per kilogram, to avoid the overall levy rate having four decimal places. This will assist levy payers with accuracy of levy return calculations, avoiding unnecessary compliance costs to levy payers, as most levy collection points use software that rounds to three decimal places.

Consistent with Principle 4 of the Australian Government Levy Principles and Guidelines, the ABGC undertook widespread consultation and

received majority support from actual and potential levy payers for the levy changes.

The *Primary Industries (Excise) Levies Act 1999* authorises the imposition of levies at an operative rate on a specific person(s). Schedule 15 of the Act provides the ability to impose levies on bananas. All funds raised using a PHA levy must then be used for a purpose consistent with the *Plant Health Australia (Plant Industries) Funding Act 2002* (PHA Funding Act).

After levy collection costs are paid, the PHA Funding Act provides for PHA levies to be used for a Plant Industry Member's yearly contribution, which includes the total annual subscription for that member, plus any other amounts that are determined in accordance with PHA's constitution. The PHA constitution specifies that these other amounts are 'for projects relating to improving biosecurity for the industry (or industries) and the commodity (or commodities) it represents.'

The concept of 'remaining funds' should be understood in the context that levy rate calculations are based on estimates of future production. Production rates vary each year and estimates should be conservative so that the required amount will still be raised in the event of a lean production year. This provides a secure funding base for biosecurity programs. However, it can result in additional levy funding being raised in other years. All primary industry levies raise varying amounts year by year, due to varying annual production.

Once PHA levy funds have been utilised for a specified purpose, they can be used for other purposes such as improving an industry's biosecurity. This ensures that industry can flexibly use their levy funds in the future, as long as the use is consistent with the purposes permitted under the PHA Funding Act and PHA's constitution. ABGC indicated in its business case that banana growers will be consulted before any proposed non-Panama TR4 activities are undertaken using remaining funds.

Committee's response

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

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

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
Authorising legislation	<i>Privacy Act 1988</i>
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 4 of 2017</i>

The committee previously commented as follows:

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.

Minister's response

The Attorney-General advised:

Consultation with the ACT and Northern Territory governments indicates that credit information was disclosed by a small number of utilities that were not members of a recognised EDR scheme or prescribed in regulations between 1 January and 1 March 2017. It appears likely that these disclosures would not have been in compliance with subparagraph 21D(2)(a)(i) of the *Privacy Act 1988* (the Privacy Act), which prohibits the disclosure of credit information by credit providers unless they are a member of an EDR scheme recognised by the Australian Information Commissioner or prescribed in regulations.

Notwithstanding the fact that these utilities are not members of a recognised EDR scheme, I am advised that customers of the utilities have dispute resolution options. The utilities have internal complaints processes in place that customers can access. In addition, customers are able to complain to the Australian Information Commissioner if they have any concerns over the collection, use, disclosure and storage of their credit information.

Given that our consultation suggests some disclosures of credit information by energy and water utilities may not have complied with subparagraph 21D(2)(a)(i) of the Privacy Act between 1 January and 1 March 2017, my Department will prepare an amendment to the Privacy Regulation 2013 with appropriate retrospective application to ensure that disclosures of credit information between 1 January 2017 and 1 March 2017 by energy and water utilities in the ACT and the Northern Territory are permitted for the purposes of the Privacy Act.

It is my hope that this intention to amend the Privacy Regulation 2013 in this way will resolve the Committee's scrutiny issues and that the 2017 Regulation will not be subject to a motion of disallowance. Should such a motion be given and be passed, or be taken to be passed, there would be a significant impact on the progress towards simpler complaints processes in the ACT and the Northern Territory as disallowance would mean that, amongst other things, the EDR exemption for ACT and Northern Territory utilities could not be made for six months after the day of disallowance. Such an impact on progress towards simpler complaints processes would be a poor outcome for the utilities and their customers.

Committee's response

The committee thanks the Attorney-General for his response and has concluded its examination of the instrument.

The committee notes the Attorney-General's undertaking to register an amendment to the Privacy Regulation 2013 with appropriate retrospective application to ensure that disclosures of credit information between 1 January 2017 and 1 March 2017 by

energy and water utilities in the ACT and the NT are permitted for the purposes of the *Privacy Act 1988*.

Instrument	Torres Strait Prawn Fishery Management Plan Amendment 2017 [F2017L00120]
Purpose	Amends the Torres Strait Prawn Fishery Management Plan 2009 to clarify anomalies that have arisen since the original plan was made including allowing for reduction in the total shares in the fishery due to surrendered entitlements and the implementation of vessel monitoring systems
Authorising legislation	<i>Torres Strait Fisheries Act 1984</i>
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor 3 of 2017</i>

The committee previously 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 item 13 of Schedule 1 to the instrument substitutes a new paragraph 5.1(1)(c) into the Torres Strait Prawn Fishery Management Plan 2009 which requires a licensee to 'keep a logbook of the type specified in the current logbook instrument'. However, neither the instrument nor the ES states the manner in which the 'current logbook instrument' is incorporated.

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the instrument incorporates the 'current logbook instrument'. However, the ES does not contain a description of this document, or indicate how the document 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.

Minister's response

The Assistant Minister for Agriculture and Water Resources advised:

To address the matter of incorporation by reference in a manner consistent with the Committee's Guidelines on consultation and incorporation of documents, the Australian Fisheries Management Authority (AFMA) has revised the Explanatory Statement, which I have approved and is enclosed for the Committee's consideration. Further, persons directly impacted by the legislation, being the fishers, are provided information about the logbook through a number of means, including the logbook itself.

With respect to the issues raised by the Committee, I have asked AFMA to take steps to ensure that correct references to legislation, including incorporation and any other requirement of law, are taken to ensure efficient and effective rule-making in future.

The revised ES states:

Section 14 of the *Legislation Act 2003* has the effect that references to Commonwealth disallowable instruments can be taken to be references to versions of those instruments as in force from time to time. The current logbook instrument is the Fisheries Logbook Instrument 2015, which can be found on the Federal Register of Legislative Instruments. The instrument will be remade from time to time.

Committee's response

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

The committee understands the Fisheries Logbook Instrument 2015 to be incorporated as in force from time to time.

Senator John Williams (Chair)

Appendix 1

Guidelines

Guideline on consultation

Purpose

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

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

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

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

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

Requirements of the *Legislation Act 2003*

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

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

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

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

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

Describing the nature of consultation

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

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

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

Explaining why consultation has not been undertaken

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

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

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

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

Guideline on incorporation

Purpose

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

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

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

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

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

Manner of incorporation

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

Legislative framework

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

Committee's expectations

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

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

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

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

- **Commonwealth Acts and disallowable legislative instruments**

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

- **State and Territory Acts**

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

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

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

Description of, and access to, incorporated documents

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

Legislative framework

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

Committee's expectations

The committee expects ESs to:

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

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

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.² This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

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

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

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

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

Appendix 2

Correspondence




The Hon Darren Chester MP
 Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

PDR ID: MC17-001357

29 MAR 2017

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

Dear Senator 

Thank you for your letters of 23 March 2017 regarding various instruments included in the Senate Standing Committee on Regulations and Ordinances Delegated Legislation Monitor No 3 of 2017. I trust the following information will assist the Committee.

CASA 11/17 – Direction – Conduct of Parachute Training Operations [F2017L00093]

I note the Committee's concerns regarding the availability of various Australian Skydiving Association (ASA) documents referred to under Civil Aviation Safety Authority (CASA) Direction 11/17.

I have sought advice from CASA on this issue and I am advised that ASA will provide copies of the ASA Jump Pilot Handbook and the ASA Training Operations Manual to any person, regardless of whether they are an ASA member, on request. CASA has also advised that ASA is preparing to make the documents freely available on its website, and that ASA anticipates that it will do so by the end of April 2017.

I note the Committee's expectations regarding information on the availability of referenced material in Explanatory Statements. CASA has indicated that it will look at updating the Explanatory Statement for CASA 11/17 when it is satisfied the documents have been made available by the ASA.

AD/PHS/10 Amdt 2 – Hydromatic Propeller – Aluminium Blades [F2017L00127]

With respect to the Committee's concerns regarding access to Australian Warbirds Association Limited (AWAL) Maintenance Direction 16-001, I am advised by CASA that this document is freely available to the public via the AWAL website and that there are no restrictions placed on accessing this document by AWAL.

Thank you again for taking the time to write and inform me of the Committee's concerns on these matters.

Yours sincerely

DARREN CHESTER



The Hon Ken Wyatt AM, MP

**Minister for Aged Care
Minister for Indigenous Health
Member for Hasluck**

Ref No: MC17-006236

Chair
Senate Regulation and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 30 March 2017 regarding *Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171]* for which I have portfolio responsibility.

As requested in your letter, I am writing to clarify that the application fee for reconsideration of decisions to change classification of care recipients (the fee) reasonably reflects the cost of the Department of Health undertaking this work.

In 2015-16, there were 234 requests for Aged Care Funding Instrument (ACFI) reconsideration processed by the Department involving 421 questions. This work was estimated to have incurred \$210,500 in administrative costs (i.e. approximately \$500 per question). It included staffing costs for corresponding and liaising with each approved provider to gather relevant evidence, electronic filing of documentation and extensive time for staff with relevant expertise to review the evidence from a clinical perspective. It also involved legal costs, quality assurance, preparation of the delegate's written statement of reasons to underpin their decision, and distribution costs.

In addition to the above, the introduction of the \$375 fee per question now involves additional administrative costs for the Department. These include establishment of new administrative procedures, processing applications and implementing accounts payable processes for invoicing, receipt of payments, refunds and waivers as appropriate.

The intent of the \$375 fee per question is that it reasonably reflects only part of the overall administrative cost of undertaking these reconsiderations. In setting this amount, careful consideration was given to limiting the financial impact on approved providers so the fee is not cost prohibitive, thereby not impeding their right to merits review.

It is noted that the fee will be refunded when a reconsideration request has overturned an ACFI review decision and the provider's initial ACFI classification has been reinstated, except where new information was presented that should have been available at the time of the original review.

Thank you for raising this matter.

Yours sincerely

The Hon ~~KEN~~ WYATT AM, MP
Minister for Aged Care
Minister for Indigenous Health

18 APR 2017




The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-002339

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

Dear Chair


Thank you for your correspondence of 23 March 2017 requesting advice on instruments within my portfolio responsibility that have been identified in the *Delegated legislation monitor* No. 3 of 2017.

For ease of reference, response to the committee's issues are addressed in the enclosed document.

Thank you again for your letter.

Yours sincerely

Barnaby Joyce MP

Enc.

Export Control (Plants and Plant Products – Norfolk Island) Order 2016 [F2016L01796]

Insufficient information regarding strict liability offences

I note that the committee has requested additional information to justify the inclusion of strict liability offences in delegated legislation, specifically sections 9 and 13 of the *Export Control (Plants and Plant Products - Norfolk Island) Order 2016 [F2016L01796]*.

As the committee would be aware, when strict liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, they are not required to prove fault elements, in order for the defendant to be found guilty. Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations.

Sections 9 and 13 provide strict liability offences for the issuing of a false certificate and altering a certificate. They have been drafted to ensure the ongoing integrity and consistency of the department's export certification framework. There is a strong public interest in maintaining the integrity of export certification provided by the Department of Agriculture and Water Resources which is absolutely critical to Australia's reputation as a trusted phytosanitary regulator and international trading partner.

Use of false or altered certificates has the potential for negative financial, political and trade impacts on the Norfolk Island and the broader Australian economy. The application of strict liability offences for sections 9 and 13 provides a deterrent to issuing a false or altered certificate, which will result in the continuing maintenance of Australia's international biosecurity and trading status. It can reasonably be expected that an exporter of plants and plant products is aware that only authorised officers may issue or alter certificates.

This approach to applying strict liability offences reflects the policy intent of the *Export Control Act 1982* in relation to false trade descriptions and the penalties applied to the use of false trade descriptions applied in documentation, and for the unlawful interference with, or forgery of, official marks. Penalties were established and consistent with commonwealth legislation for offences of this kind. The application of strict liability offences for sections 9 and 13 continues to apply to the original policy intent of the legislation and is necessary to ensure the integrity of the regulatory regime.

The department considers that the provisions for strict liability offences are consistent with principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers 2011*. In particular, the department considers the principles that the strict liability offences are consistent with are that the fines are less than 60 penalty units; are appropriate to ensure the integrity of the regulatory regime; and allow the protection of general revenue.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments. I have requested that, where possible, the department include additional information in explanatory statements providing justification for the use of strict liability offences.



ATTORNEY-GENERAL

CANBERRA

19 APR 2017

MC17-003271

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600
regords.sen@aph.gov.au

Dear Senator

Wacka

I write in response to the letter from Ms Toni Dawes, Committee Secretary of the Standing Committee on Regulations and Ordinances, dated 30 March 2017, about instruments that fall within my portfolio responsibility. This response relates solely to the Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017 (the Rules). I will provide a separate response in relation to the Privacy Amendment (Energy and Water Utilities) Regulations 2017.

The Committee has indicated that the Explanatory Statement to the Rules does not provide a description of the consultation undertaken during the development of the amendments. The Committee refers to Delegated Legislation Monitor No. 4 of 2017, and notes that the *Legislation Act 2003* provides that the Explanatory Statement to an instrument is required to describe the nature of any consultation that has been undertaken throughout the process of developing that instrument. Alternatively, if consultation is not undertaken, the Explanatory Statement must detail why it did not occur.

I am advised that the Federal Court of Australia undertook consultation in relation to these amendments, in accordance with its harmonised rules process. Accordingly, the Federal Court is proposing to issue a supplementary Explanatory Statement pursuant to paragraph 15J(3) of the *Legislation Act 2003*, which will reflect the consultation process undertaken.

I trust that this information will assist the Committee.

Thank you for writing on this matter

Yours faithfully

(Georg& Brandis)



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

REF: MS17-000740

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 30 March 2017 sent to my office seeking further information about items in the following instruments:

- the *Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017*; and
- the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017*.

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 Acting Minister for the Environment and Energy, Senator the Simon Birmingham; and the Minister for Health, the Hon Greg Hunt MP. I trust this advice will assist the Committee with its consideration of the instruments.

An advance copy of the replacement explanatory statement referenced in the Minister for Health's response is also attached for the Committee's information at Attachment B.

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

2 May 2017

Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017

Provided by the Acting Minister for the Environment and Energy

Solar Communities Program and the Food Rescue Charity Program

In its *Delegated Legislation Monitor No. 4 of 2017*, the Senate Standing Committee on Regulations and Ordinances seeks advice how the Solar Communities Program and the Food Rescue Charity Program included in the *Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017* relate to the external affairs power of the Constitution.

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party.

The *United Nations Framework Convention on Climate Change* [1994] ATS 2 (the UNFCCC) includes a range of obligations on Australia to take domestic actions that reduce Australia's emissions of greenhouse gases. The UNFCCC relevantly provides that Australia shall:

- formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change (article 4.1(b));
- promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors (article 4.1(c)); and
- adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs (article 4.2(a)).

The *Kyoto Protocol to the United Nations Framework Convention on Climate Change* [2008] ATS 2 also includes obligations on Australia to take action to reduce emissions, such as articles 3 and 10(b). Article 3 imposes obligations to ensure that Australia's greenhouse gas emissions during the commitment period do not exceed its assigned amount. Article 10(b) imposes obligations to formulate, implement and report upon climate change mitigation and adaptation programmes.

The *Paris Agreement* [2016] ATS 24 was entered into by the parties to the UNFCCC to enhance its implementation. Under the Paris Agreement Australia has a 'nationally determined contribution' of a 2030 emissions reduction target of 26 to 28% below 2005 levels. Relevantly, article 4.2 of the Paris Agreement provides as follows:

- Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

The Solar Communities Program provides support for community groups to install solar photovoltaic equipment, solar hot water equipment and solar-connected batteries at facilities that they own, lease or use to reduce greenhouse gas emissions. The Food Rescue Charity Program provides support for food rescue charities to reduce greenhouse gas emissions, in particular by installing solar photovoltaic equipment, solar-connected batteries and energy efficient refrigeration equipment at facilities that they own, lease or use and purchasing energy efficient refrigeration vehicles.

It is well established in Australia that the increased use of renewable energy and increased energy efficiency, as supported by these programs, reduces the use of fossil fuels in our electricity grid or transport systems. This reduces the emissions of greenhouse gases for which Australia is responsible for under international climate change agreements. Food rescue charities, by diverting waste from landfills, also reduce methane emissions that would result if that waste was sent to a landfill, further reducing Australia's greenhouse gas emissions.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017

Provided by the Minister for Health

Response to the Committee's questions about items 203 and 204 inserted into Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulation 1997* by way of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017*.

Commonwealth executive power and the express incidental power

Both items 203 and 204 reference the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with s 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Suicide Prevention Research Fund (the Fund) listed in **item 203** will support a national approach to targeted research that will increase knowledge about the prevention of suicide, including a best practice hub of evidence-based resources to support community-based suicide prevention.

The Fund will provide a clear national mechanism for setting suicide prevention research priorities and ensure research is aligned with national and state-based suicide prevention policies. It takes into account the challenges faced by service providers, frontline practitioners and communities.

The Fund will ensure there is a single large-scale national effort dedicated to suicide prevention research. As issues to be addressed by the research will be of national significance, the funded organisation will be required to engage with key government-funded research entities to ensure there are complementary research priorities, research grant assessment processes and disbursement arrangements.

The Suicide Prevention Trials listed in **item 204** will be conducted through the national Primary Health Network (PHN) program and will provide evidence of how a more systems based approach to suicide prevention and treatment might be best undertaken on a national scale. The trials will seek to improve the Australian Government's understanding of the challenges faced nationally in the delivery of suicide prevention services, and inform the Australian Government's development of national mental health and suicide prevention responses.

The Explanatory Statement for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017* will be replaced to correct the omission of the reference to sections 61 and 51(xxxix) for items 203 and 204.

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 14 March 2017 for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017* [F2017L00211] to correct the constitutional powers referenced in table items 203 and 204.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Health Measures No. 1) Regulations 2017*

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Schedule 1 to the Regulations amends Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on a number of initiatives in the Health portfolio that arise from 2016 election commitments and decisions in the 2016-17 Mid-Year Economic and Fiscal Outlook which was released on 19 December 2016. The initiatives will be administered by the Department of Health.

Funding will be provided for:

- the Royal Flying Doctor Service to deliver rural outreach dental services;
- the Suicide Prevention Research Fund to support a national approach to targeted research that will increase knowledge about the prevention of suicide, including a best practice hub of evidence-based resources to support community-based suicide prevention;

- twelve regional suicide prevention trials to bring together the best evidence-based strategies and models to better target people at risk of suicide and to ensure a more integrated, regional-based approach to suicide prevention;
- the delivery of headspace services, including the establishment of additional headspace centres and regional trials, to improve mental health outcomes for young people aged 12 to 25 years with, or at risk of, mild to moderate mental illness;
- Lifeline Australia to contribute to the design and trial of a text service for crisis support and suicide prevention;
- the Synergy project for the design and trial of new digital technologies for providing services to people with mental health issues; and
- the Digital Mental Health Gateway and the certification framework to maximise use of digital technologies in providing public access to evidence-based information, advice and digital mental health treatment options.

The five 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.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Health.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Details of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedules to the Regulations.

Schedule 1 – Amendments

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds seven new table items to Part 4 of Schedule 1AB to establish legislative authority for government spending on certain activities administered by the Department of Health.

New **table item 202** establishes legislative authority for government spending on rural outreach dental services delivered by the Royal Flying Doctor Service (RFDS).

The objective of the activity is to reduce the ‘gap’ in access to dental services in rural and remote communities, which would otherwise have no access to dental services. The RFDS will provide mobile outreach dental services in areas where there are no private or state/territory government funded public dental services.

The RFDS, a not-for-profit organisation, is a core provider of outreach primary health care services nationally. The Government provides funding to the RFDS under the RFDS Program, which aims to ensure access to essential emergency aeromedical and other primary health care services in rural and remote areas of Australia beyond the normal medical infrastructure in locations of market failure.

The RFDS commenced delivery of mobile outreach dental services in 2012-13 under its own separate arrangements. The Government has not previously funded dental services provided by the RFDS. Funding will expand the delivery of outreach dental services to rural and remote Australians from 1 April 2017 to 31 March 2019.

Funding of \$11 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Royal Flying Doctor Dental Services – continued delivery' for a period of two years commencing in 2016-17. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 173.

On 28 June 2016, the then Minister for Rural Health, Senator the Hon Fiona Nash, announced funding of the RFDS dental services as part of the Coalition's election commitment 'Funding Commitment to Royal Flying Doctor Service until 2020'.

Spending decisions for dental services under the RFDS Program will be based on relevant criteria in the Additional Dental Services Grant Guidelines to be approved by the Minister for Health. A departmental official with appropriate financial delegations, as the delegate of the Minister for Health, will approve making payments to the RFDS.

The guidelines for the provision of mobile outreach dental services may be made available on the Department of Health's website at www.health.gov.au/internet/main/publishing.nsf/Content/royal-flying-doctor-service-programme.

The decision to award funding to the RFDS will be published on the Department of Health's website at <http://www.health.gov.au/internet/main/publishing.nsf/Content/GSD-healthgrants-senateorder14-MinchinMotion>.

Further information about the RFDS Program can be found on the Department of Health's website at www.health.gov.au/internet/main/publishing.nsf/Content/royal-flying-doctor-service-program.

The provision of funds to the RFDS to continue and expand its current mobile dental outreach services is not considered suitable for independent merits review because it is of a short-term, time-limited and one-off nature of a small scale.

The RFDS is highly experienced in delivering essential fly-in and fly-out primary health care services in rural and remote Australia. The RFDS also has the capital infrastructure required to continue to deliver its current dental services and expand its dental service footprint to meet the Government's objective.

The RFDS, as the single grant recipient, is required to have in place service planning arrangements approved by the Government to ensure that current services continue and new services are prioritised in areas of most need within agreed timeframes. The RFDS, funded under direct funding arrangements, is the only provider of mobile outreach dental services nationally which has the capacity to meet this need.

To reconsider this decision under merits review would substantially delay implementation of the activity in a market environment where there are no alternative providers with similar capacity to increase access to dental services in rural and remote areas nationally.

Funding for this item will come from Program 2.3: Health Workforce, 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 17.

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 social welfare power (section 51(xxiiiA));
- the external affairs power (section 51(xxix)); and
- the territories power (section 122).

New **table item 203** establishes legislative authority for government spending on the Suicide Prevention Research Fund.

The Fund will support a national approach to targeted research that will increase knowledge about the prevention of suicide, including a best practice hub of evidence-based resources to support community-based suicide prevention.

The Fund will provide a clear national mechanism for setting suicide prevention research priorities and ensure research is aligned with national and state-based suicide prevention policies. It takes into account the challenges faced by service providers, frontline practitioners and communities.

The Fund will ensure there is a single large-scale effort dedicated to suicide prevention research. Research into potential prevention programs, the efficacy of clinical interventions (including treatment for mental illness) as well as investigation of potential and existing models of system design and service delivery will lead to more effective evidence-based service delivery.

A single organisation will be funded to administer the Fund and establish a best practice hub of resources. A key role of the funded organisation will be to establish a governance framework and principles to oversee the disbursement of research grants including financial and risk management and structures to manage probity, conflicts of interest and ethics protocols. It is envisaged that the government funding will be used to leverage further investment in the Fund from the corporate sector, philanthropic and community organisations and individual donations.

As issues to be addressed by the research will be of national significance, the funded organisation will be required to engage with key government-funded research entities to ensure there are complementary research priorities, research grant assessment processes and disbursement arrangements. The organisation will also be required to consult with Primary Health Networks in regard to the design and functionality of the best practice hub and to set aside funds for an independent evaluation of the hub.

Funding of \$12 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Strengthening Mental Health Care in Australia' for a period of four years commencing in 2016-17. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

The Fund is part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at <https://www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia>.

Funding will be provided to a single organisation that is independent of the conduct of research and has demonstrated experience working with the suicide prevention sector in Australia to administer the Fund and establish a best practice hub of resources.

A direct sourcing or limited tender grant process will be used to select a Fund Administrator to perform this role, given the specific expertise required. The organisation will be precluded from participating in any of the funded research.

The selected organisation is expected to establish a governance framework and principles to oversee the selection and disbursement of grants and to appoint a clinical and expert advisory committee comprising researchers, health and other service providers, people with lived experience of suicide and policy experts to conduct consultation, develop suicide prevention research priorities and criteria and review grant applications. This organisation will be the decision-maker for the disbursement of research grants based on recommendations for funding from the advisory committee. The organisation will also be responsible for the development of a communication strategy for the dissemination of research findings.

The program guidelines will outline the objectives and outcomes of the Commonwealth investment in the Fund, deliverables and the approach to market selection process. The ongoing assessment of the success of the Fund will be undertaken through performance monitoring and measures that will form part of the funding agreement with the successful organisation. The guidelines will be published on the Department of Health's website at <http://www.health.gov.au/>.

Decisions both in relation to the choice of the Fund Administrator and the disbursement of funding for research grants by the selected organisation will be made in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines*.

It is anticipated that the grants selection process will be finalised prior to June 2017, with funding commencing in 2016-17.

Selection of the Fund Administrator will be approved by the First Assistant Secretary of the Health Services Division, as the delegate of the Secretary of the Department of Health. Further details of the Fund will be made available on the Department of Health's website at <http://www.health.gov.au/>.

All spending decisions will adhere to the *Commonwealth Grants Rules and Guidelines* available at <https://www.finance.gov.au/resource-management/grants/>. Relevant details of the Department of Health's funding agreements and contracts for services are published in the Annual Report available at <http://www.health.gov.au/>.

Information on individual grants will be reported no later than 14 working days after the grant takes effect at <http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-grantsreporting>.

The selection of a single organisation to manage and administer the Fund will be targeted, non-competitive, and for a specific purpose. Therefore, merits review is not applicable.

The decisions both in relation to the choice of the Fund Administrator and disbursement of grant funds are not considered suitable for independent merits review because they are of a short-term, time-limited and one-off nature of a small scale. To reconsider decisions under merits review would substantially delay the research which will support the work of Primary Health Networks and others involved in community-based suicide prevention.

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.

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));
- the territories power (section 122); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

New **table item 204** establishes legislative authority for government spending on twelve regional suicide prevention trials of system-based approaches to suicide prevention for populations at risk of suicide.

The suicide prevention trials will consist of six stages: selection of trial sites; local planning and community engagement; implementation of trial activities including commissioning of suicide prevention services; information collection; evaluation; and dissemination of learnings and findings.

The twelve trial sites are: Brisbane North; North Coast NSW; North Western Melbourne; Perth South; Townsville; the Kimberley; Tasmania; country SA; Darwin, NT; Western NSW; Central Queensland, Wide Bay, Sunshine Coast; and Mid-West region in country WA.

The suicide prevention trials will be led by Primary Health Networks (PHNs). The trials will test models of system-based suicide prevention and regional development; build partnerships with Local Hospital Networks, Indigenous organisations and other local service providers; model approaches to follow-up care for individuals who have attempted suicide; and adopt new digital technologies to assist in crisis support, clinical intervention and ongoing support for individuals.

Implementation of the trials will improve understanding of the challenges and enable development of evidence-based strategies and models which can be applied nationwide across all PHNs to better target people at risk of suicide and to ensure a more integrated, regional-based approach to suicide prevention.

Funding of \$34 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Strengthening Mental Health Care in Australia' for a period of three years commencing in 2016-17. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

The suicide prevention trials are part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at <https://www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia>.

Funding for the suicide prevention trials will be provided to PHNs through a variation to the existing mental health funding schedules with the Department of Health, approved by the First Assistant Secretary of the Health Services Division, as the delegate of the Secretary of the Department of Health.

Grant guidelines are in place for funding to PHNs and are available at http://www.health.gov.au/internet/main/publishing.nsf/Content/PHN-Program_Guidelines. No changes are required to these guidelines.

Relevant details of the Department of Health's funding agreements and contracts for services are published in the Annual Report, available at <http://www.health.gov.au/>. Information on individual grants will be reported no later than 14 working days after the grant takes effect at <http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-grantsreporting>.

As funding is targeted, non-competitive, and for a specific purpose, merits review is not applicable.

The Australian Government has funded PHNs to plan, commission and integrate mental health and suicide prevention services at a regional level to improve outcomes for people with, or at risk of, mental illness and to ensure appropriate follow-up and support arrangements are in place at a regional level for individuals after a suicide attempt and for other people at high risk of suicide.

The decisions regarding the PHN regions for the suicide prevention trial sites are not considered suitable for independent merits review because the trials are of a short-term, time-limited and one-off nature of a small scale. The decisions have also been based on a number of factors including:

- the PHN regions and/or sub-regions that have very high suicide death rates and have continued to have these over a significant period;
- the areas that have sufficient population and urban centres with infrastructure to support the trial activity, specifically a system-based approach to suicide prevention; and
- the areas that complement and do not duplicate other regions involved in other trial activity.

To reconsider this decision under merits review would substantially delay undertaking suicide prevention trial site activities which will support the work of PHNs and others involved in community-based suicide prevention.

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.

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 social welfare power (section 51(xxiiiA));
- the races power (section 51(xxvi));
- the external affairs power (section 51(xxix));
- the territories power (section 122); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

New **table item 205** establishes legislative authority for government spending on the delivery of headspace services.

The headspace network has been established since 2006 with 100 headspace centres announced to date. The headspace centres aim to improve mental health outcomes for young people aged 12 to 25 years with, or at risk of, mild to moderate mental illness by reducing help-seeking barriers and facilitating early access to services that meet the holistic needs of young people. The establishment of ten additional headspace services will increase access to mental health services for young people in Australia.

Funding will be provided to support the delivery of headspace services via the existing network of headspace centres and the establishment of additional headspace centres and regional trials. Trial approaches may include the establishment of satellite centres that have an existing centre as their base; outreach services from existing centres that may involve staff travelling to another community location to treat patients or run group sessions; and other activities such as mobile units and the use of digital technology.

The headspace centres are funded to be highly accessible, youth-friendly, integrated service hubs that respond to mental health, general health, alcohol and other drug and vocational concerns of young people. The service is based on a local consortium/partnership model which seeks to draw together existing local service capacity as well as create additional capacity through use of the headspace centre funding.

PHNs commission lead agencies to deliver services through headspace centres. Funding for the additional headspace services and regional trials will be provided via PHNs to lead agencies through a variation to existing funding agreements.

The ongoing funding for the new headspace centres will be used by PHNs for site selection, negotiating contracts, securing leases and building fitouts. Following establishment of the services, ongoing funding will be used for operational costs and service delivery.

The non-ongoing trial funding may be used in a similar way to establish satellite centres but may also be used for workforce, transport and information technology.

Where appropriate, regional trials will commence in 2017-18 for two years to expand existing headspace services, particularly in regional and remote areas, using regional approaches such as satellite centres, outreach services and other activities.

Location of the new headspace centres and regional trials will be decided by the Minister for Health, in consultation with the Minister for Regional Development. These decisions will be

informed by national modelling data and consultation with PHNs and other stakeholders regarding the need, benefit to regional and rural communities, and supporting infrastructure. The selection of additional sites will give priority to rural and regional areas experiencing social disadvantage or where factors indicate a high need for improved youth mental health services.

Consultations will be undertaken with states and territories, PHNs and headspace National Office to incorporate specific information about community needs, existing supporting infrastructure and other state and territory planned investments that might impact on new headspace sites and timing of their establishment. The location of the headspace centres will be determined in early 2017, with the aim for the headspace centres to be established and providing services by mid-2019.

Funding of \$28.9 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Strengthening Mental Health Care in Australia' for a period of three years commencing in 2017-18. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

Funding for new headspace centres and an expansion of existing headspace services using innovative approaches is part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at <https://www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia>.

Spending decisions for headspace services will be made by PHNs and lead agencies operating headspace centres.

The PHNs are funded by the Government under an existing grant process to commission services including headspace services. The relevant PHN funding agreements will be varied to include the additional headspace services in accordance with the *Commonwealth Grants Rules and Guidelines*. Funding will be approved by the First Assistant Secretary of the Health Services Division, as the delegate of the Secretary of the Department of Health.

The PHN Grant Program guidelines are available at http://www.health.gov.au/internet/main/publishing.nsf/Content/PHN-Program_Guidelines. No changes are required to these guidelines.

As funding is targeted, non-competitive, and for a specific purpose, merits review is not applicable.

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.

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 census and statistics power (section 51 (xi));
- the social welfare power (section 51 (xxiiiA));
- the external affairs power (section 51(xxix)); and
- the territories power (section 122).

New **table item 206** establishes legislative authority for government spending on the Lifeline Australia text service.

Funding will be provided to Lifeline Australia to contribute to the design and trial of a text service for crisis support and suicide prevention which will leverage Lifeline Australia's experience in telephone crisis support. This text service would be the first of its kind delivered in Australia and would draw on international experiences where such services have previously been developed.

Funding of \$2.5 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Strengthening Mental Health Care in Australia' for a period of two years commencing in 2016-17. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

Funding to Lifeline Australia to design and trial a new crisis support service is part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at <https://www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia>.

Grant funding is proposed to be provided to Lifeline Australia through a direct approach. The Department of Health will manage the grant funding arrangements and oversight of the activity.

Grant funding will be approved by the delegate of the Secretary of the Department of Health. The decision to award a grant will be published at www.health.gov.au. Existing program guidelines for the Council of Australian Governments' *Telephone Counselling, Self Help and Web-Based Support Programs* are currently being updated to reflect the inclusion of funding to Lifeline Australia.

The activity will be subject to regular performance reporting to the Department of Health. It will also be subject to independent evaluation of outcomes prior to completion.

As funding is targeted, non-competitive, and for a specific purpose, merits review is not applicable. Grant funding will be offered to Lifeline Australia once a detailed proposal is submitted and overall merits of the trial are assessed, including value for money. Lifeline Australia is an existing recipient of Commonwealth funding, meeting its funding requirements and delivering value for money outcomes. Lifeline Australia is considered a suitable entity with which to enter into a new agreement.

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.

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

New **table item 207** establishes legislative authority for government spending on the design and trial of new digital technologies for providing services to people with mental health issues.

Funding will be provided for the Synergy project (Synergy) which is administered by the University of Sydney. Synergy is an online system of care that embeds technology in Australia's youth mental health services. The combination of online support and underpinning technology enables technologies to interact and be used by young people to manage their own wellbeing and mental health. The current Synergy trials have provided a proof of concept for an information technology system that addresses young people's mental health needs.

Under a new grant funding agreement, Synergy will continue to develop trials to support its integration with the new Digital Mental Health Gateway (the Gateway) and support and test capability at a national level, including its capacity to integrate a range of digital mental health services. Synergy will partner with a broad range of mental health service providers and their users to co-design technology-based solutions for service specific issues, and to increase access to and quality of service provision.

Implementing Synergy in a broader range of settings with a broader range of target groups and aligning it with the Gateway, while building on the existing Synergy project, would bring the best new digital mental health services to the most vulnerable communities, including youth, veterans and people at risk of suicide. This will be achieved by: co-investing with non-government organisations, private, technical, telecommunication and academic partners; co-designing technical and operating standards with digital mental health services to allow delivery of integrated services within a digital ecosystem; establishing an evidence base for new digital technologies through regional trials; and publishing source code (including interface specifications and data schemas) to be re-used by other digital mental health services.

As veterans are a key target population for this project, it will be developed in consultation with the Department of Veterans' Affairs.

Funding of \$30 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Strengthening Mental Health Care in Australia' for a period of three years commencing in 2016-17. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

Funding to continue and expand Synergy trials is part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at <https://www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia>.

Grant funding is proposed to be provided for the Synergy project through a direct approach. The funding announced as part of the 2016-17 Mid-Year Economic and Fiscal Outlook is reliant on continuing the project with the same project administrator. A detailed proposal will be sought to assess overall merits of the project and its value for money before grant funding is offered. The Department of Health will manage the grant funding arrangements and oversight of the activity, in consultation with the Department of Veterans' Affairs.

Grant funding will be approved by the delegate of the Secretary of the Department of Health. The decision to award a grant will be published at www.health.gov.au. Existing program guidelines for the Council of Australian Governments' *Telephone Counselling, Self Help and Web-Based Support Programs* are currently being updated to reflect the inclusion of funding for the Synergy project.

The activity will be subject to regular performance reporting to the Department of Health. It will also be subject to independent evaluation of outcomes prior to completion.

As funding is targeted, non-competitive, and for a specific purpose, merits review is not applicable.

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.

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

New **table item 208** establishes legislative authority for government spending on the ongoing operation of the Digital Mental Health Gateway (the Gateway) and development of a certification framework for digital mental health services.

The Gateway will maximise use of digital technologies, providing a multichannel platform (web, social media, and telephone) enabling the general community, people with lived experience of mental illness, people who support those with lived experience of mental illness including carers, digital mental health services, and health professionals to access evidence-based information, advice and digital mental health treatment options that meet a minimum quality standard. The Gateway is expected to be released in 2017.

The initial release of the Gateway is expected to include:

- a new website of professionally-curated, evidence-based information and advice;
- a decision support tool designed to assist users in finding tailored information and/or services that will meet their needs; and
- an aggregated view of digital mental health (and other) services presented in an interactive service finder.

Future enhancements of the Gateway are expected to introduce real-time support through the establishment of a contact centre to provide assistance to end users via telephone.

The certification framework will enable the certification of digital mental health services primarily to inform which digital mental health services should be listed on the Gateway and to assist in ensuring there is community confidence in selecting from the range of digital mental health services available within Australia.

By ensuring digital mental health services adhere to standards related to evidence, usability, quality, safety and outcomes evaluation/measurement, the certification framework will help build trust in digital mental health services as an effective alternative (or complement) to face-to-face services and treatments. The certification framework is fundamental to

establishing the Gateway as a trusted authority on digital mental health services. In the future, the Gateway service catalogue will be expanded to include all digital mental health services certified under the framework.

The development of the certification framework will involve engaging an organisation to develop standards that digital mental health services will need to meet to be able to be listed on the Gateway, establish governance and processes, as well as develop a website to support the certification process for rollout in late 2017.

Funding of \$2.5 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook as part of the measure 'Digital Mental Health Gateway – development of a second pass business case'. Measure details are set out in Appendix A: Policy decisions taken since the 2016 PEFO at page 165.

The Gateway is part of the Government's response to *Contributing Lives, Thriving Communities – Review of Mental Health Programs and Services* which was released by the Prime Minister, the Hon Malcolm Turnbull MP, and the then Minister for Health, the Hon Sussan Ley MP, on 26 November 2015 (available at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2015-ley151126.htm>).

Departmental officials, as delegates of the Secretary of the Department of Health, will make spending decisions relating to the development and implementation of the Gateway.

In September 2016, the Department of Health approached the market via the newly established Digital Transformation Agency's Digital Services Panel for a digital provider to develop and operate the Gateway's online channels (website and social media). Speedwell Pty Ltd, in partnership with Liquid Interactive, has been selected as the successful provider. The early focus of this engagement has been on stakeholder engagement activities to inform the development of the Gateway.

An approach to the market to secure the services of a contact centre operator to manage the Gateway's telephone channel is expected to be conducted by Healthdirect Australia in 2017. Gateway users will be able to interact in real time with trained contact centre agents who can provide guidance on using the Gateway's features. Agents will be contactable by web chat and telephone.

The procurement process for development of the certification framework will be undertaken in early 2017. A procurement funding plan will be developed for the approach to market. The plan will provide details on how to apply and how to address conflicts of interest, and will include a probity plan and processes for informing unsuccessful applicants, including feedback on an application where required. Details of the resultant contract will be published on the AusTender website at <https://www.tenders.gov.au>. Following the assessment of applications in accordance with the funding plan, a recommendation will be made to the Assistant Secretary of the Mental Health Services Branch, as a delegate of the Secretary of the Department of Health, seeking agreement to engage the preferred applicant through a contract.

All spending decisions adhere to the *Commonwealth Procurement Rules* (CPRs) and applicable legislative requirements of the *Public Governance, Performance and Accountability Act 2013*.

In accordance with the CPRs, the Department of Health will report the contract and, where necessary, any amendments to the contract on AusTender at <https://www.tenders.gov.au> within 42 days of entering into (or amending) a contract with a value at or above the reporting threshold (currently \$10,000).

Relevant details of the Department of Health's funding agreements and contracts for services are published in the Annual Report, available at <http://www.health.gov.au/>.

The engagement of contractors or consultants to deliver any aspect of the Gateway will be undertaken in accordance with the CPRs and will be subject to relevant merit review procedures, which include an assessment of the value of the proposal as well as its value for money. Tender specifications released to the market in relation to the Gateway activities (for example, development of the certification framework) will outline the assessment and complaints handling processes. A departmental tender evaluation committee will review and assess all tenders in accordance with a tender evaluation plan which will be developed in line with the CPRs.

Persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

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.

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

Statement of Compatibility with Human Rights

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

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017

These Regulations are 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

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Schedule 1 to the Regulations amends Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on a number of initiatives in the Health portfolio that arise from 2016 election commitments and decisions in the 2016-17 Mid-Year Economic and Fiscal Outlook which was released on 19 December 2016. The initiatives will be administered by the Department of Health.

Funding will be provided for:

- the Royal Flying Doctor Service to deliver rural outreach dental services;
- the Suicide Prevention Research Fund to support a national approach to targeted research that will increase knowledge about the prevention of suicide, including a best practice hub of evidence-based resources to support community-based suicide prevention;
- twelve regional suicide prevention trials to bring together the best evidence-based strategies and models to better target people at risk of suicide and to ensure a more integrated, regional-based approach to suicide prevention;
- the delivery of headspace services, including the establishment of additional headspace centres and regional trials, to improve mental health outcomes for young people aged 12 to 25 years with, or at risk of, mild to moderate mental illness;
- Lifeline Australia to contribute to the design and trial of a text service for crisis support and suicide prevention;
- the Synergy project for the design and trial of new digital technologies for providing services to people with mental health issues; and
- the Digital Mental Health Gateway and the certification framework to maximise use of digital technologies in providing public access to evidence-based information, advice and digital mental health treatment options.

The Minister for Health has portfolio responsibility for these matters.

Human rights implications

The Regulations do not engage any of the applicable rights or freedoms.

Conclusion

These Regulations are compatible with human rights as they do not raise any human rights issues.

**Senator the Hon Mathias Cormann
Minister for Finance**



SENATOR THE HON MATHIAS CORMANN

Minister for Finance

Deputy Leader of the Government in the Senate

Acting Minister for Revenue and Financial Services

- 4 MAY 2017

Senator John Williams
 Chair
 Senate Standing Committee on Regulations and Ordinances
 Room S1.111
 Parliament House, Canberra

Dear Chair

Thank you for your letter of 23 March 2017 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice on the *Insurance (prudential standard) Determination No. 1 of 2017 – GPS 114 – Capital Adequacy: Asset Risk Charge* (the Instrument).

The Committee's concerns have been raised with the Australian Prudential Regulation Authority (APRA) which is responsible for making the Instrument.

APRA has re-examined paragraph 81 of the Instrument and is of the view that the paragraph is no longer operative and is unnecessary. As APRA considers the risk of an authorised general insurer seeking retrospective relief under paragraph 81 to be extremely low, it proposes to remove the paragraph when amendments are next made to the prudential standard.

Kind regards

Mathias Cormann

5 May 2017



The Hon. Barnaby Joyce MP

Deputy Prime Minister
 Minister for Agriculture and Water Resources
 Leader of The Nationals
 Federal Member for New England

Ref: MC17-002501

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

Dear Senator Williams

I refer to your correspondence of 30 March 2017 requesting advice on an instrument within my portfolio responsibility identified in the Senate Standing Committee on Regulations and Ordinances' *Delegated Legislation Monitor No. 4 of 2017*.

The Committee raised a concern that the basis for determining fees in the *Primary Industries (Excise) Levies Amendment (Bananas) Regulations 2017* is unclear. In particular, it referred to the explanatory statement which states 'any remaining levy funds will be used to improve banana industry biosecurity more generally' and questioned whether this is authorised in the *Primary Industries (Excise) Levies Act 1999* and the primary regulations.

The Australian Banana Growers' Council (ABGC) requested an overall increase to its existing statutory Plant Health Australia (PHA) levy on bananas from 2.45 cents per kilogram to 2.94 cents. This comprised of an increase to the PHA levy component from 0.0103 cents per kilo to 0.5 cents per kilogram and the marketing levy component from 1.1497 cents to 1.15 cents. The research and development and emergency plant pest response levies remain at their current rates of 0.54 of a cent per kilogram and 0.75 of a cent per kilogram respectively.

The calculation of the levy increase was based on biosecurity requirements for the banana industry over the next five years. At estimated production levels, the ABGC calculates that the PHA levy increase will raise \$8.77 million in five years (assuming no adverse weather events, such as a tropical cyclone in the North Queensland growing area). ABGC stated in its business case that funds raised through the increase to the PHA levy will be used to repay a \$3 million Australian Government grant and fund the ongoing containment and management of Panama disease TR4. The existing expenses of levy collection costs, annual PHA subscription and annual share of the Torres Strait Exotic Fruit Fly Response will continue to be paid through the PHA levy. ABGC stated that any remaining funds will be used to improve banana industry biosecurity more generally.

The increase in the marketing levy is a rounding adjustment of 0.0003 cents per kilogram, to avoid the overall levy rate having four decimal places. This will assist levy payers with accuracy of levy return calculations, avoiding unnecessary compliance costs to levy payers, as most levy collection points use software that rounds to three decimal places.

Consistent with Principle 4 of the Australian Government *Levy Principles and Guidelines*, the ABGC undertook widespread consultation and received majority support from actual and potential levy payers for the levy changes.

The *Primary Industries (Excise) Levies Act 1999* authorises the imposition of levies at an operative rate on a specific person(s). Schedule 15 of the Act provides the ability to impose levies on bananas. All funds raised using a PHA levy must then be used for a purpose consistent with the *Plant Health Australia (Plant Industries) Funding Act 2002* (PHA Funding Act).

After levy collection costs are paid, the PHA Funding Act provides for PHA levies to be used for a Plant Industry Member's yearly contribution, which includes the total annual subscription for that member, plus any other amounts that are determined in accordance with PHA's constitution. The PHA constitution specifies that these other amounts are 'for projects relating to improving biosecurity for the industry (or industries) and the commodity (or commodities) it represents.'

The concept of 'remaining funds' should be understood in the context that levy rate calculations are based on estimates of future production. Production rates vary each year and estimates should be conservative so that the required amount will still be raised in the event of a lean production year. This provides a secure funding base for biosecurity programs. However, it can result in additional levy funding being raised in other years. All primary industry levies raise varying amounts year by year, due to varying annual production.

Once PHA levy funds have been utilised for a specified purpose, they can be used for other purposes such as improving an industry's biosecurity. This ensures that industry can flexibly use their levy funds in the future, as long as the use is consistent with the purposes permitted under the PHA Funding Act and PHA's constitution. ABGC indicated in its business case that banana growers will be consulted before any proposed non-Panama TR4 activities are undertaken using remaining funds.

Thank you again for your letter. I trust that this information will be of assistance to the Committee.

Yours sincerely

Barnaby Joyce MP



ATTORNEY-GENERAL

CANBERRA

19 APR 2017

MS17-001067

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600
regords.sen@aph.gov.au

Dear Chair

I refer to the letter of 30 March 2017 from the Committee Secretary, Ms Toni Dawes, on behalf of the Senate Regulations and Ordinances Committee (the Committee) seeking information about scrutiny issues identified with the Privacy Amendment (Energy and Water Utilities) Regulations 2017 (the 2017 Regulations).

Specifically, the Committee seeks information to address its concern about the effect, if any, on the legality of any disclosures that may have occurred between the repeal of the Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016 on 1 January 2017 and the commencement of the 2017 Regulations on 1 March 2017.

The 2017 Regulations provide a temporary external dispute resolution (EDR) exemption that allows energy and water utilities in the Australian Capital Territory (the ACT) and the Northern Territory to disclose credit information without needing to be a member of an EDR scheme recognised by the Australian Information Commissioner. Currently, the ACT and the Northern Territory are in the process of enabling consumer credit reporting disputes to be handled by the same territory EDR schemes that handle other disputes about energy and water utilities, as occurs in other jurisdictions. This simpler approach will ensure utilities do not need to be a member of different EDR schemes for different types of disputes with the additional complexity and costs that this brings. It also ensures customers have a simplified dispute resolution mechanism which removes the possibility that they would have to navigate multiple dispute resolution processes for an energy or water utility. The EDR exemption in the 2017 Regulations supports this by permitting utilities to disclose credit reporting information without being a member of a recognised EDR scheme whilst progress towards the simpler dispute resolution processes takes place. The EDR exemption is intended to cease once progress is complete.

Consultation with the ACT and Northern Territory governments indicates that credit information was disclosed by a small number of utilities that were not members of a recognised EDR scheme or prescribed in regulations between 1 January and 1 March 2017. It appears likely that these disclosures would not have been in compliance with subparagraph 21D(2)(a)(i) of the *Privacy Act 1988* (the Privacy Act), which prohibits the disclosure of credit information by credit providers unless they are a member of an EDR scheme recognised by the Australian Information Commissioner or prescribed in regulations.

Notwithstanding the fact that these utilities are not members of a recognised EDR scheme, I am advised that customers of the utilities have dispute resolution options. The utilities have internal complaints processes in place that customers can access. In addition, customers are able to complain to the Australian Information Commissioner if they have any concerns over the collection, use, disclosure and storage of their credit information.

Given that our consultation suggests some disclosures of credit information by energy and water utilities may not have complied with subparagraph 21D(2)(a)(i) of the Privacy Act between 1 January and 1 March 2017, my Department will prepare an amendment to the Privacy Regulation 2013 with appropriate retrospective application to ensure that disclosures of credit information between 1 January 2017 and 1 March 2017 by energy and water utilities in the ACT and the Northern Territory are permitted for the purposes of the Privacy Act.

It is my hope that this intention to amend the Privacy Regulation 2013 in this way will resolve the Committee's scrutiny issues and that the 2017 Regulation will not be subject to a motion of disallowance. Should such a motion be given and be passed, or be taken to be passed, there would be a significant impact on the progress towards simpler complaints processes in the ACT and the Northern Territory as disallowance would mean that, amongst other things, the EDR exemption for ACT and Northern Territory utilities could not be made for six months after the day of disallowance. Such an impact on progress towards simpler complaints processes would be a poor outcome for the utilities and their customers.

I trust this information satisfies the concerns of the Committee and am willing to provide further information should it be required.

Thank you again for writing on this matter

Yours faithfully

(George Brandis)



Senator the Hon. Anne Ruston

Assistant Minister for Agriculture and Water Resources
Senator for South Australia

Ref: MC17-000528

10 APR 2017

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

Dear Chair

I am writing in response to your letter of 23 March 2017 on behalf of the Senate Committee on Regulations and Ordinances (the Committee), regarding the *Torres Strait Prawn Fishery Management Plan Amendment 2017* [F2017L00120].

The Committee raised concerns about an amendment to the logbook provisions within the *Torres Strait Prawn Fishery Management Plan 2009*. The Amendment removed specific detail about logbook requirements and replaced that part with a reference to the *current logbook instrument* without stating the manner in which the current logbook instrument is incorporated. The Committee noted its expectation that the Explanatory Statement contain a description of that document and indicate how it may be obtained.

The committee also noted that the text on the front page of the instrument refers to subsection 33(3A) of the *Acts Interpretation Act 1901* (AIA). However, as the instrument is amending the *Torres Strait Prawn Fishery Management Plan 2009*, the committee understands the instrument to be relying on subsection 33(3) of the AIA which provides that the power to make an instrument includes the power to vary or revoke the instrument. The correct reference to subsection 33(3) of the AIA is made in the Explanatory Statement.

To address the matter of incorporation by reference in a manner consistent with the Committee's *Guidelines on consultation and incorporation of documents*, the Australian Fisheries Management Authority (AFMA) has revised the Explanatory Statement, which I have approved and is enclosed for the Committee's consideration. Further, persons directly impacted by the legislation, being the fishers, are provided information about the logbook through a number of means, including the logbook itself.

With respect to the issues raised by the Committee, I have asked AFMA to take steps to ensure that correct references to legislation, including incorporation and any other requirement of law, are taken to ensure efficient and effective rule-making in future.

Thank you for bringing these matters to my attention. If you have any further questions or require further action regarding this amendment, please don't hesitate to contact me. I look forward to hearing back from you on behalf of the Committee.

Yours sincerely

Anne Ruston

Enc.

EXPLANATORY STATEMENT

Torres Strait Prawn Fishery Management Plan Amendment 2017

Section 15A of the *Torres Strait Fisheries Act 1984* (the Act) provides that the Protected Zone Joint Authority (PZJA) may determine written plans of management for each fishery that it manages.

The PZJA has determined the *Torres Strait Prawn Fishery Management Plan Amendment 2017* (the Plan Amendment) to amend the *Torres Strait Prawn Fishery Management Plan 2008* (the Plan).

The Plan Amendment is made pursuant to subsection 33(3) of the *Acts Interpretation Act 1901*.

The Plan Amendment is a legislative instrument for the purposes of the *Legislation Act 2003*.

Need for Amendment

The purpose of the Management Plan is to pursue the PZJA's legislative objectives whilst providing a comprehensive framework for the regulation of fishing for prawns in the fishery.

Amendments include simplifying the wording of some provisions, correcting previous drafting errors (including the date of the Plan) and removing provisions which are no longer applicable or have been replaced by other legislative instruments.

The most significant amendment provides for the cancellation of units of fishing capacity in the fishery where a fishing licence is surrendered or if a levy is not paid.

The Plan currently provides for the expiry of fishing boat licences, pursuant to the Act, but is silent in relation to cancellation of units of fishing capacity once a licence expires.

Licences must be renewed annually and can only be renewed with payment of the annual management levy. Under the Plan, the renewal of a fishing boat licence is linked with the allocation of units of fishing capacity for the upcoming season. This process also takes account of any transfers of units of fishing capacity. If a fishing boat licence is not renewed (it is either surrendered or the levy is not paid), the units of fishing capacity cannot be dealt with by the holder (used or transferred) – they are rendered unusable. In this scenario, the Plan makes no provision for dealing with the units of fishing capacity, including their cancellation. The units of fishing capacity simply cease to be held.

S15A(6)(g) of the Act provides that a management plan may make provisions for the suspension and cancellation of units of fishing capacity. The Plan provides that the licence can only be renewed if levy is paid but this does not extend to units of fishing capacity. The Plan Amendment provides for the same provision to extend to units of fishing capacity if they are not renewed by the payment of levy - the units of fishing capacity will then be cancelled. Similarly, if the units are surrendered, they would also be cancelled.

The main disadvantage of not cancelling units which "cease to be held" from the fishery is that remaining licence holders pay an unrecovered levy debt from the expired licence and associated units, but do not benefit from a redistribution of the fishing capacity associated with the units.

While units of fishing capacity are intended to provide ongoing access to the fishery, it is equally intended that certain costs of managing the fishery are recovered against

those units.

The absence of a mechanism in the Plan to cancel units of fishing capacity if a license holder fails to pay a levy, or chooses to “surrender” is an apparent oversight in the initial development of the Plan. This oversight places an unfair financial burden on remaining licence holders who gain no increase in access from units in limbo, and leaves units of fishing capacity unable to be dealt with by anyone, including the regulator.

There is always sensitivity around the concept of cancelling access rights to a fishery. However, the consequences under which proposed cancellation would take place will be limited and defined in the Plan (in accordance with the Act). This has been communicated to all licence holders along with the licence renewal procedure. Cancellation is the only practical means of dealing with an unpaid levy, allowing for the redistribution of units of fishing capacity and administration of the units which “cease to be held”.

Consultation

While there is no statutory requirement under the Act to conduct consultation in relation to PZJA managed fisheries, the PZJA’s management philosophy is to be highly consultative in the management of marine resources under its jurisdiction. The Torres Strait Prawn Management Advisory Committee (TSPFMAC) has considered the Plan Amendment and has endorsed the changes therein.

A public consultation process requesting comments on the proposed amendments was undertaken from 26 May to 30 June 2016, following the TSPMAC consideration. There were no substantial comments made.

Native Title notification of the proposed amendments has also been undertaken. One submission was received from Malu Lamar (Torres Strait Islander) Corporation RNTBC. No comments specific to the Plan Amendment were made in the submission.

Regulation Impact Statement

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required for this legislative instrument (ID: 20906).

Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

AFMA assesses under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* that this legislative instrument is compatible with human rights. AFMA’s Statement of Compatibility is attached as a supporting document.

Details of the Plan Amendment are set out below:

Part 1 provides for the Plan Amendment to be called the *Torres Strait Prawn Fishery Management Plan Amendment 2017*.

Part 2 provides that the Plan Amendment commences on the day after it is registered on the Federal Register of Legislative Instruments.

Part 3 provides that the Management Plan is to be amended in accordance with Schedule 1.

Schedule 1 Item 1 amends section 1.1 of the Management Plan to amend the name of the Management Plan.

Schedule 1 Item 2 Omits subsection 2.3(1).

Schedule 1 Item 3 amends subsection 2.3(2) of the Management Plan to remove a specific season date, allowing the PZJA to determine the fishing season in a particular year.

Schedule 1 Item 4 Omits subsection 3.2(2).

Schedule 1 Item 5 Omits subsection 3.5(4).

Schedule 1 Item 6 Omits subsection 3.7(5).

Schedule 1 Item 7 amends section 4.2(2) of the Management Plan allowing the number of units of fishing capacity in the fishery to decrease if people leave the fishery and surrender or cancel units. A decrease in the number of units of fishing capacity will increase the value of remaining units for any given total allowable effort set by the PZJA.

Schedule 1 Item 8 amends section 4.3(1) of the Management Plan by changing the formula used to calculate the annual use entitlement for licence holders. The formula contains the number of units of fishing capacity in the fishery and if that number changes as a result of cancellation, the formula will now reflect the new number of units.

Schedule 1 Item 9 omits subsection 4.3(2).

Schedule 1 Item 10 amends subsection 4.9(3) by omitting the word 'will' and inserting the word 'may'.

Schedule 1 Item 11 inserts a new section 4.10 to allow Australian units of fishing capacity to be surrendered by licence holders who no longer wish to operate in the fishery.

Schedule 1 Item 12 inserts a new section 4.11 to allow Australian units of fishing capacity to be cancelled if surrendered or ceased to be held. This ensures surrendered units also reduce the number of units in the fishery in the same way that cancellation reduces the number of units in the fishery.

Schedule 1 Item 13 amends section 5.1(1)(c) to simplify the licence conditions pertaining to the use of logbooks, by making reference to the current fisheries logbook instrument, as determined from time to time. Section 14 of the *Legislation Act 2003* has the effect that references to Commonwealth disallowable instruments can be taken to be references to versions of those instruments as in force from time to time. The current logbook instrument is the *Fisheries Logbook Instrument 2015*, which can be found on the Federal Register of Legislative Instruments. The instrument will be remade from time to time.

The purpose of the logbook is for licensed fishers to furnish information about their fishing activity, including, among other things, the species and weight of fish taken, to assist the PZJA in the pursuit of its objectives for the good management of the fishery.

Schedule 1 Item 14 amends section 5.1(1)(e) to require a vessel monitoring system to be fitted to the fishing vessel. This changes the emphasis from ‘operate’ the vessel monitoring system to ‘fit’ the vessel monitoring system, in accordance with section 5.6.

Schedule 1 Item 15 omits subsection 5.1(2). **Schedule 1 Item 16** omits subsection 5.1(3).

Schedule 1 Item 17 omits subsection 5.2.

Schedule 1 Item 18 amends section 5.6 by removing excessive detail and clarifying the operators responsibility about the operation of a vessel monitoring system.

Schedule 1 Item 19 amends subsection 6.3(4) to change the requirements for notifying the PZJA licensing delegate regarding matters relating to licences.

Statement of Compatibility with Human Rights

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

Torres Strait Prawn Fishery Management Plan Amendment 2017

This Legislative 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 Legislative Instrument amends the *Torres Strait Prawn Fishery Management Plan 2009* to provide for fishing access rights (units of fishing capacity) to be removed from the fishery if a license holder surrenders the rights or fails to pay the associated management levy. The amendments also simplify wording of the management plan, correct previous drafting errors, and remove redundant provisions now covered by other legislative instruments.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Senator the Hon. Anne Ruston
Parliamentary Secretary to the Deputy Prime Minister and
Minister for Agriculture and Water Resources