The Senate

Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 5 of 2017

 10 May 2017

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ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

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# Introduction

### Terms of reference

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

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

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

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

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

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

### Nature of the committee's scrutiny

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

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

1. seeking an explanation/information; or
2. seeking further explanation/information subsequent to a response; or
3. 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]](#footnote-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]](#footnote-4)

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[[5]](#footnote-5)

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[[6]](#footnote-6)

# 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.[[7]](#footnote-7)

## 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** | *Aboriginal Land Rights (Northern Territory) Act 1976* |
| **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 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** | *Environment Protection and Biodiversity Conservation Act 1999* |
| **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 undertsands 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** | *Competition and Consumer Act 2010* |
| **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 unforseen events arose requiring a decision before a RIS could be prepared.'[[8]](#footnote-8) 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 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.[[9]](#footnote-9) 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.**

|  |  |
| --- | --- |
| **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** | *Competition and Consumer Act 2010* |
| **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 hotriculture 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 satsified that a person appointed to the role of mediaton 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 Secifications are available for free online,[[10]](#footnote-10) 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 *Regulatory Powers (Standard Provisions) Act 2014* |
| **Authorising legislation** | *Fisheries Management Act 1991* |
| **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:

1. a person appointed under section 83 to be an officer for the purposes of this Act;[[11]](#footnote-11) or
2. a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; or
3. a member of the Defence Force; or
4. an officer of Customs (as defined in the *Customs Act 1901*).[[12]](#footnote-12)

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.**

|  |  |
| --- | --- |
| **Instrument** | Legal Services Directions 2017 [F2017L00369] |
| **Purpose** | Repeals and remakes Legal Services Directions 2005 [F2006L00320] which sunsetted on 1 April 2017 |
| **Authorising legislation** | *Judiciary Act 1903* |
| **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 sunsetting 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.[[13]](#footnote-13)
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 insufficent 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 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 arranagements 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 sufficent, 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 sunsetting 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](http://www.ag.gov.au/lsmul)'. While the committee notes that the LSMUL is available for free online,[[14]](#footnote-14) 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:

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** | *National Health Act 1953* |
| **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** | *Private Health Insurance Act 2007* |
| **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** | *Occupational Health and Safety (Maritime Industry) Act 1993* |
| **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 sunsetting 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 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.[[15]](#footnote-15)

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 sufficent, 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 sunsetting 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 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** | *Torres Strait Fisheries Act 1984*  |
| **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 reagrding 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.[[16]](#footnote-16) 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.**

|  |  |
| --- | --- |
| **Instrument** | Legislation (Recovery Plans) Sunset-altering Declaration 2017 [F2017L00282] |
| **Purpose** | Aligns the sunsetting dates of 39 instruments making or adopting recovery plans to enable their inclusion in a thematic review |
| **Authorising legislation** | *Legislation Act 2003* |
| **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 sunsetting 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 'sunsetting', and the relevant date of repeal is known as the 'sunsetting date'.

Section 51A of the *Legislation Act 2003* allows the Attorney-General to align the sunsetting 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 sunsetting 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 sunsetting dates of 39 instruments making or adopting recovery plans, which would otherwise sunset between 1 April 2017 and
1 April 2021. The new sunsetting 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 sunsetting 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** | *National Health Act 1953* |
| **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** | *Therapeutic Goods Act 1989* |
| **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.[[17]](#footnote-17) 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 [F2017L00304] National Health (Commonwealth Price—Pharmaceutical Benefits Supplied By Public Hospitals) Determination 2017(PB 25 of 2017) [F2017L00372]Primary Industries (Customs) Charges Amendment (Seed Cotton) Regulations 2017 [F2017L00297]Primary Industries Levies and Charges Collection Amendment (Seed Cotton) Regulations 2017 [F2017L00296]Therapeutic Goods Order No. 93 (Standard for Medicinal Cannabis) [F2017L00286]Torres Strait Fisheries Management Instrument No. 15 [F2017L00370]Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]Torres Strait Fisheries Management Instrument No. 17 [F2017L00373]Veterans' Children Education Scheme Amendment Instrument 2017 [F2017L00273] |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**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*

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| --- | --- |
| **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]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] |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**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.[[18]](#footnote-18)

**The committee draws the above to the attention of ministers.**

# 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.[[19]](#footnote-19)

|  |  |
| --- | --- |
| **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** | *Delegated legislation monitor* 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.

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.

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| --- | --- |
| **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** | *Delegated legislation monitor* 3 of 2017 |

**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.

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| **Instrument** | Classification Amendment (2016 Budget Savings Measures) Principles 2017 [F2017L00171] |
| **Purpose** | Amends the Classification Principles 2014 to give effect to measures in the *Budget Savings (Omnibus) Act 2016*; and includes restrictions on who can be appointed as an adviserto assist approved providers make appraisals or reappraisals |
| **Authorising legislation** | *Aged Care Act 1997* |
| **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** | *Delegated legislation monitor* 4 of 2017 |

**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.

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| **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[[20]](#footnote-20)Notice must currently be resolved by 8 August 2017 |
| **Scrutiny principle** | Standing Order 23(3)(b) and (a) |
| **Previously reported in** | *Delegated legislation monitors* 1 and 3 of 2017 |

**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*,[[21]](#footnote-21) as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

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.

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| **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** | *Federal Court of Australia Act 1976* |
| **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** | *Delegated legislation monitor* 4 of 2017 |

**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.

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| **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** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* 4 of 2017 |

**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*,[[22]](#footnote-22) 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.

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.[[23]](#footnote-23) 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 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.

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| **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** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* 4 of 2017 |

**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*,[[24]](#footnote-24) the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

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

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

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

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

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

* the communications power (section 51(v));
* the defence power (section 51(vi));
* the races power (section 51(xxvi));
* the external affairs power (section 51(xxix)); and
* the territories power (section 122).

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

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

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| **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** | *Insurance Act 1973* |
| **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** | *Delegated legislation monitor* 3 of 2017 |

**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.

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| **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** | *Primary Industries (Excise) Levies Act 1999* |
| **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** | *Delegated legislation monitor* 4 of 2017 |

**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 maket 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.

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| **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** | *Privacy Act 1988* |
| **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** | *Delegated legislation monitor* 4 of 2017 |

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 lnformation 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*.

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| **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 inthe total shares in the fishery due to surrendered entitlements and the implementation of vessel monitoring systems |
| **Authorising legislation** | *Torres Strait Fisheries Act 1984* |
| **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** | *Delegated legislation monitor* 3 of 2017 |

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*](http://www.comlaw.gov.au/Details/C2012C00041) (the Act)[[25]](#footnote-25) 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm).

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.

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.[[26]](#footnote-26) 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

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

(Please refer to the PDF copy of the report to view ministerial correspondence)

1. For further information on the disallowance process and the work of the committee see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15. [↑](#footnote-ref-1)
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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index). [↑](#footnote-ref-2)
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.*  [↑](#footnote-ref-3)
4. See Australian Government, Federal Register of Legislation, [www.legislation.gov.au](http://www.legislation.gov.au). [↑](#footnote-ref-4)
5. Parliament of Australia, *Senate Disallowable Instruments List*, [http://www.aph.gov.au/Parli
amentary\_Business/Bills\_Legislation/leginstruments/Senate\_Disallowable\_Instruments\_List](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List). [↑](#footnote-ref-5)
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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts). [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. 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). [↑](#footnote-ref-8)
9. Resolution Institute, *Current Arbitration Rules*, <https://www.resolution.institute/dispute-resolution/arbitration-rules> (accessed 4 May 2017). [↑](#footnote-ref-9)
10. The Australian Chamber of Fruit & Vegetable Industries Limited, Fresh Markets Australia, *FreshSpecs Produce Specifications*, <http://freshmarkets.com.au/fresh-specs/> (accessed 5 May 2017). [↑](#footnote-ref-10)
11. See *Fisheries Management Act 1991, s*ection 83. This section provides a very broad definition of who can be appointed as 'an officer' for the purposes of the FMA Act. [↑](#footnote-ref-11)
12. See *Customs Act 1901*, section 4. This sectionprovides a very broad definition of the term an 'officer of Customs'. [↑](#footnote-ref-12)
13. 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.' [↑](#footnote-ref-13)
14. 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). [↑](#footnote-ref-14)
15. 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). [↑](#footnote-ref-15)
16. 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](http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3) (accessed 2 March 2017). [↑](#footnote-ref-16)
17. 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](http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3) (accessed 2 March 2017). [↑](#footnote-ref-17)
18. For more extensive comment on this issue, see *Delegated legislation monitor* 8 of 2013, p. 511. [↑](#footnote-ref-18)
19. 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. [↑](#footnote-ref-19)
20. 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). [↑](#footnote-ref-20)
21. 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](https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx) (accessed 31 January 2017). [↑](#footnote-ref-21)
22. *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416. [↑](#footnote-ref-22)
23. *Victoria v Commonwealth* (1996) 187 CLR 416. [↑](#footnote-ref-23)
24. *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416. [↑](#footnote-ref-24)
25. 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*. [↑](#footnote-ref-25)
26. 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](http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3) (accessed 10 January 2017). [↑](#footnote-ref-26)