The Senate

Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Introduction

### Terms of reference

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

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

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

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

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

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

### Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister 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 ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.

**Appendix 1 Guidelines on consultation and incorporation of documents**: includes the committee's guidelines on addressing the consultation requirements of the *Legislation Act 2003*[[3]](#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 7 April 2017 and 11 May 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

## Response required

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

|  |  |
| --- | --- |
| **Instrument** | Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1) [F2017L00451] |
| **Purpose** | Clarifies the basis on which the AUSTRAC CEO can suspend a remittance dealer's registration and exempts licensed trustees from complying with specified provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* when they provide certain designated services |
| **Authorising legislation** | *Anti-Money Laundering and Counter-Terrorism FinancingAct 2006* |
| **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) |

**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 the definition of people smuggling in subparagraph 59.11(5)(c)(ii) of Schedule 1 incorporates the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol). However, neither the instrument nor the explanatory statement (ES) expressly states the manner in which the Protocol 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 a particular time). 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 the Protocol. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

While the committee notes that the Protocol is available for free online from some international organisations' websites[[7]](#footnote-7), neither the instrument nor the ES states where it can be accessed.

Where an incorporated document is available for free online, the committee considers 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** | Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] |
| **Purpose** | Exempts operators of low-momentum ultralight aeroplanes from particular requirements of the Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998 |
| **Authorising legislation** | Civil Aviation Regulations 1988; 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) |

**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 6.1(c) of the Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] (the order) provides that an aeroplane to which the order applies must be flown in specified classes of airspace; and that the definition of those classes of airspace in the note to subsection 6.1(c) incorporates the Australian Airspace Policy Statement.[[8]](#footnote-8) However, neither the order nor the ES expressly states the manner in which the Australian Airspace Policy Statement 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 a particular time). 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.**

|  |  |
| --- | --- |
| **Instrument** | Consumer Goods (Babies’ Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516]Consumer Goods (Children’s Nightwear and Limited Daywear and Paper Patterns for Children’s Nightwear) Safety Standard 2017 [F2017L00452]Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518] |
| **Purpose** | Specifies construction, design, performance and labelling requirements for babies' dummies;Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear; and Extends the interim ban on certain decorative alcohol fuelled devices by a period of 30 days from 16 May 2017 |
| **Authorising legislation** | *Competition and Consumer Act 2010* |
| **Department** | Treasury |
| **Disallowance** | 15 sitting days after tabling [F2017L00452] (tabled Senate 9 May 2017)Notice of motion to disallow must be given by 16 August 2017[F2017L00516]; [F2017L00518] (tabled Senate 13 June 2017)Notice of motion to disallow must be given by 5 September 2017 |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**Background**

Subsection 44(1) of the *Legislation Act 2003* (LA) provides:

Section 42 [disallowance of legislative instruments] does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

(a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and

(b) authorises the instrument to be made by the body or for the purposes of the body or scheme;

unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

The explanatory memorandum to the *Legislative Instruments Act 2003*[[9]](#footnote-9)explains:

Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.

In 2010 the *Trade Practices Act 1974* was amended to be named the *Competition and Consumer Act 2010* (CCA) and to establish the Australian Consumer Law (ACL).
The amendments were made pursuant to the agreements of the Council of Australian Governments (COAG) made on July and October 2008, to create a single national consumer law for Australia, including a national product safety law, and the *Intergovernmental Agreement for the Australian Consumer Law*, signed by COAG
in July 2009.

The ACL therefore appears to facilitate the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States.

Sections 104 and 105 of the ACL authorise safety standards to be made; and section 109 authorises interim bans to be made for the purposes of the ACL scheme. Section 131E of the CCA provides that instruments made under these sections of the ACL are to be made by legislative instrument. Neither the ACL, CCA or another Act appear to otherwise have the effect that legislative instruments made under these sections are disallowable. Therefore, it appears that by virtue of paragraph 44(1)(a) of the LA such legislative instruments would be exempt from disallowance.

 **Classification of legislative instruments as subject to disallowance**

The Consumer Goods (Babies’ Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516] (the dummy standard) is made under section 104 of the ACL.
The purpose of the dummy standard is to ensure babies’ dummies and dummy chains have safety features that reduce the risk of injury.

The Consumer Goods (Children’s Nightwear and Limited Daywear and Paper Patterns for Children’s Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) is made under section 105 of the ACL. The purpose of the nightwear standard is to reduce the risk of child death and injury associated with nightwear catching fire.

The Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518] (the interim devices ban) is made under section 109 of the ACL. The purpose of the interim devices ban is to minimise the risk of injury to persons due to uncontrolled fire while refuelling, lighting or being in close proximity to an alcohol fuelled device.

As set out above, the dummy standard and the nightwear standard are made under sections 104 and 105 of the ACL; and the interim device ban is made under section 109. Therefore, as these standards appear to facilitate the operation of an intergovernmental scheme, are not regulations and do not appear to be disallowable under the CCA, ACL or another Act, the committee understands that these instruments may be exempt from disallowance in accordance with subsection 44(1) of the LA.

However, the ESs to the dummy standard, the nightwear standard and the interim devices ban state the following in relation to each instrument:

This legislative instrument is subject to disallowance under Chapter 3, Part 2 of the *Legislation Act 2003*.

It is therefore unclear to the committee whether these standards have been properly described as subject to disallowance.

The committee is also interested to understand more about the apparent inconsistent approach to the classification of instruments made under the ACL.
For example, the committee notes that the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474] (the egg standard) also seems to be covered by the operation of section 44(1) of the LA, but it is classified as exempt from disallowance (and thereby removed from the effective oversight of the Parliament).[[10]](#footnote-10)

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

|  |  |
| --- | --- |
| **Instrument** | Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471] |
| **Purpose** | Adjusts entitlements of divorced or separated spouses, or of separated de facto couples (except in Western Australia), under certain orders or agreements splitting particular kinds of future superannuation benefits made in property settlements under the *Family Law Act 1975* |
| **Authorising legislation** | Family Law (Superannuation) Regulations 2001 |
| **Department** | Attorney-General's |
| **Disallowance** | Exempt (tabled Senate 9 May 2017) |
| **Scrutiny principle** | Standing Order 23(3)(a) |

 **Background**

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)[[11]](#footnote-11) exempts particular instruments from disallowance, including, by virtue of table item 3 in section 9, instruments (other than regulations) relating to superannuation.

The ES to the exemption regulation provides the following justification for the exemption:

This exemption exists because exposure of superannuation instruments to disallowance would cause commercial uncertainty, as well as uncertainty for superannuation fund members and providers. These instruments are intended to have enduring operation and are not suitable for the disallowance process.

 **Classification of legislative instrument as exempt from disallowance**

The Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471] (the determination) adjusts entitlements of divorced or separated spouses, or of separated de facto couples (except in Western Australia), under certain orders or agreements splitting particular kinds of future superannuation benefits made in property settlements under the *Family Law Act 1975*.

As set out above, by virtue of table item 3 in section 9 of the exemption regulation, the committee understands the determination to be exempt from disallowance,
as it is an instrument (other than a regulation) which relates to superannuation.

However, the committee notes that the statement of compatibility to the determination refers to the determination as a 'Disallowable Legislative Instrument'.

The committee seeks to confirm whether the determination has been properly classified as exempt from disallowance (and thereby removed from the effective oversight of the Parliament).

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

|  |  |
| --- | --- |
| **Instrument** | Fish Receiver Permits Declaration 2017 [F2017L00400] |
| **Purpose** | Identifies Commonwealth managed fisheries that must utilise a licenced 'Fish Receiver' to acquit and verify the amount of each relevant species of fish caught and landed by operators holding fishing concessions in particular fisheries |
| **Authorising legislation** | *Fisheries Management Act 1991* |
| **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) |

**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 this declaration provides no information regarding consultation.

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

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

|  |  |
| --- | --- |
| **Instrument** | Inspector of Transport Security Regulations 2017 [F2017L00510] |
| **Purpose** | Identifies the international obligations that the Inspector of Transport Security must comply with; sets the form of the identity card that must be issued to persons exercising the Inspector's delegated search powers; prescribes the criteria that a person must satisfy to be delegated powers under the *Inspector Transport Security Act 2006*; and details the fee for attendance at a coronial inquiry and the due date for payment |
| **Authorising legislation** | *Inspector of Transport Security Act 2006* |
| **Department** | Infrastructure and Regional Development |
| **Disallowance** | 15 sitting days after tabling (tabled Senate 11 May 2017)Notice of motion to disallow must be given by 4 September 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 section 7 of the Inspector of Transport Security Regulations 2017 [F2017L00510] (the regulation) appears to incorporate paragraphs 5.12 and 6.2 of Annex 13 to the Convention on International Civil Aviation(Annex 13). However neither the regulation nor the ES state the manner in which Annex 13 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 at a particular time). 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 note to section 7 of the regulation states:

The Convention is in Australian Treaty Series 1957 No. 5 ([1957] ATS 5) and could in 2017 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au).

However, the committee notes that the text of Annex 13 does not appear to be available at this location and the ES does not contain any further information about where Annex 13 can be freely accessed.

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.**

 **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 to the regulation states:

The *Legislation Act 2003* states that consultation on legislative instruments is not required when the instrument is minor or machinery in nature or does not substantially alter existing arrangements. Remaking the 2007 Regulations in this case will not require consultation as they provide for the continuation of the current practice (which affect the Inspector of Transport Security and not external bodies).

Whilst the committee accepts that this description explains why no consultation was undertaken in relation to the regulation, the committee notes that the provisions concerning consultation requirements in the *Legislation Act 2003* were amended with the passage of the *Acts and Instruments (Framework Reform) Act 2015* and
no longer reflect the statement included in the ES for this instrument.

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

|  |  |
| --- | --- |
| **Instrument** | Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00437] |
| **Purpose** | Amends the Migration Regulations 1994 in relation to fomer holders of Norfolk Island entry permits, protection visas and registered migration agents |
| **Authorising legislation** | *Migration Act 1958* |
| **Department** | Immigration and Border Protection |
| **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) |

**Classification of 'instrument in writing'**

Schedule 4 of the Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 (the regulation) inserts new regulation 9M into the Migration Agents Regulations 1998 providing:

Application for approval as CPD [continuing professional development] provider

1. A person may apply to the Minister for approval as a CPD provider.
2. The application must be:
	1. in the form approved in writing by the Minister; and
	2. accompanied by the fee specified by the Minister in an instrument in writing for the purposes of this paragraph.
3. A fee specified in an instrument made under paragraph (2)(b) may be nil.

The ES to the regulation states:

New regulation 9M provides that a person (which includes an incorporated body) may apply to the Minister for approval as a CPD provider. The application must be made in the form approved by the Minister, and must be accompanied by the fee specified by the Minister in a legislative instrument.

The committee understands that legislative instruments made under the Migration Agents Regulations 1998 are subject to disallowance. However, the committee requests the minister's general advice as to whether there are any exceptions to this; and in relation to this specific matter, the committee seeks confirmation that an 'instrument in writing' made under new regulation 9M which specifies the relevant fee will be a disallowable legislative instrument.

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

**Merits review**

Scrutiny principle 23(3)(c) of the committee’s terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. In this respect, the committee also seeks to ensure that affected individuals are given adequate notice of administrative decisions and are provided with reasons for a decision.

With reference to the above, the committee notes that Schedule 4 of the regulation inserts new regulation 9T into the Migration Agents Regulations 1998, which allows the minister to cancel a person’s approval as a CPD provider by written notice.

However, the committee notes that neither the regulation nor the ES:

sets any requirements for the content of the written notice of cancellation, for example, that the notice set out the reasons for making the decision to cancel a person's approval as a CPD provider; or

provides information as to whether a person who receives a notice of cancellation can request a reconsideration of the intitial decision on its merits (i.e. that the decision is subject to merits review), or how such a person may be notified of avenues for complaint or review.

With reference to the committee's scrutiny principle 23(3)(c), if the decision to cancel an approval as a CPD provider is not subject to merits review, the committee would expect the ES to the regulation to provide a justification for the exclusion of the decision from merits review.

The committee draws the minister's attention to the Attorney-General's Department,

Administrative Review Council's publication, *What decisions should be subject to merit review?* as providing useful guidance for justifying the exclusion of merits review.[[12]](#footnote-12)

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

**Sub-delegation**

Schedule 4 of the regulation inserts new regulation 9U into the Migration Agents Regulations 1998, which provides that the Minister for Immigration and Border Protection (the minister) may delegate to an Australian Public Service (APS) employee in the Department of Immigration and Border Protection any or all of the minister’s functions under new Part 3C (Approval of CPD providers), other than the power to make, vary or revoke a legislative instrument. This includes the power to cancel a person's approval as a CPD provider under new regulation 9T.

The ES provides the following description of the sub-delegation of the minister's powers under new regulation 9U:

Powers of the Migration Agents Registration Authority are currently delegated by the Minister, acting under section 320 of the Migration Act, to employees in the Office of the Migration Agents Registration Authority within the Department of Immigration and Border Protection. The power under new regulation 9U for the Minister to delegate the Minister’s powers under new Part 3C to any APS employee will allow delegation of these powers to the same employees and will provide flexibility if administrative arrangements in the future require powers relating to migration agents to be exercised by employees in other areas of the Department.

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.

However, the committee notes that neither the regulation nor the ES provides information about whether a delegate who exercises the powers of the minister under new Part 3C is required to be at a certain APS level, such as a member of the senior executive service.

In addition, the committee is concerned that new regulation 9U contains no requirement that the minister be satisfied that an APS employee to whom the minister's powers under Part 3C are delegated is appropriately trained or qualified for the role.

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

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| **Instrument** | Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] |
| **Purpose** | Revokes and remakes the Private Health Insurance (Health Insurance Business) Rules 2016 to update the kinds of statistical information to be provided by hospitals to insurers and by private hospitals to the Department of Health |
| **Authorising legislation** | *Private Health Insurance Act 2007* |
| **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**

Section 17 of the Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] (the rules) provides that certain insurance is not health insurance business if it covers prescribed matters or persons. Subsection 17(2) provides:

Despite subrule (1), during the period from the commencement of these Rules until 1 July 2008, the business referred to in that subrule is health insurance business if it is conducted by a private health insurer.

However, as the rules commence on 1 July 2017, it is unclear to the committee whether subsection 17(2) contains a drafting error, or whether the inclusion of the subsection in the rules is unnecessary, as it is no longer operational.

The committee notes that this provision has remained in the Private Health Insurance (Health Insurance Business) Rules since 2007.

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

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| **Instrument** | Small Pelagic Fishery (Closures) Direction Revocation 2017 [F2017L00514] |
| **Purpose** | Revokes the Small Pelagic Fishery (Closures) Direction No. 1 2015 |
| **Authorising legislation** | *Fisheries Management Act 1991* |
| **Department** | Agriculture and Water Resources |
| **Disallowance** | 15 sitting days after tabling (tabled Senate 13 June 2017)Notice of motion to disallow must be given by 5 September 2017 |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**Statement of compatibility**

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights, and must be included in the ES for the instrument.

With reference to this requirement, the committee notes that the ES for the Small Pelagic Fishery (Closures) Direction Revocation 2017 [F2017L00514] (the instrument) states:

AFMA assesses under section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011 that this legislative instrument is compatible with human rights. AFMA’s Statement of Compatibility is attached to this explanatory statement.

However, the statement of compatibility has not been attached to the ES for the instrument.

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

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| **Instrument** | Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] |
| **Purpose** | Specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to applications for skilled migration under the Migration Regulations 1994 |
| **Authorising legislation** | Migration Regulations 1994 |
| **Department** | Immigration and Border Protection |
| **Disallowance** | Exempt (tabled Senate 9 May 2017) |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**Background**

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)[[13]](#footnote-13) exempts particular instruments from disallowance, including by virtue of table item 20 in section 10, instruments made under Schedules 1 and 2 of the Migration Regulations 1994 (Migration Regulations).

In its previous comments on the exemption regulation, the committee noted that the descriptions in the ES of table items in section 10 generally provided justifications for the exemption of particular instruments from disallowance, explaining why their particular nature or character required the exemption.[[14]](#footnote-14)

However, no such justification was provided for table item 20. Accordingly, the committee sought a response from the Attorney-General in relation to this question.

In response, the Attorney-General advised:

It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.

Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act...[[15]](#footnote-15)

The Attorney-General also provided the following examples of the nature and purpose of instruments commonly made under Schedules 1 and 2 of the Migration Regulations:

• Form required to make a valid visa application;

• The manner and place for lodging applications;[[16]](#footnote-16) and

• Specify members of industry associations in relation to certain streams.[[17]](#footnote-17)

In concluding this matter, the committee noted the Attorney-General's advice that exempting such instruments from disallowance ensures certainty in operational matters and provides for administrative matters to support the machinery of the migration program.

**Classification of legislative instrument as exempt from disallowance**

The Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] (the instrument) is made under Schedules 1 and 2 of the Migration Regulations. It specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration.

As set out above, the committee generally understands instruments made under Schedules 1 and 2 of the Migration Regulations to be exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation.

However, paragraph 16 of the ES to this instrument states:

Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance…

The committee requests the minister's general advice as to whether all instruments made under Schedules 1 and 2 of the Migration Regulations are exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation, or whether there are any exceptions to this. In particular, with reference to the Attorney-General's previous advice about the nature of instruments made under Schedules 1 and 2 of the Migration Regulations, and the examples provided of the nature and purpose of such instruments, it is unclear to the committee that the current instrument (which specifes skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration) is properly characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify its exemption from disallowance (and thereby removal from the effective oversight of the Parliament).

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

## Further response required

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

Correspondence relating to these matters is included at Appendix 2.

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 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 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.'[[18]](#footnote-18) 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*.

**Minister's response**

The Treasurer advised:

With regards to consultation, unfortunately due to the events that warranted the Government's intervention in the raw sugar export industry, it was not reasonably practical for the Government to consult on the regulation. The Government started developing the regulations in February as a contingency should commercial negotiations fail; however consulting at that time was not appropriate as it would have undermined those negotiations. When it became clear that a commercial outcome was no longer a reasonable possibility, the Government considered the benefits of acting quickly to provide certainty for the industry outweighed the benefits of taking further time to consult before making the regulation.

**Committee's response**

**The committee thanks the Treasurer for his response.**

The committee notes the Treasurer's advice that consultation was not undertaken for the sugar code.

However, the committee's concern with consultation is to ensure that an ES is technically compliant with the requirements of the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The committee considers that an ES that does not contain a description of consultation (including in appropriate instances a description stating that consultation was not considered necessary) falls short of these requirements.

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

The committee previously commented in relation to two matters as follows:

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

**Minister's response**

The Treasurer advised:

In compliance with section 14 of the *Legislation Act 2003*, the Resolution Institute Arbitration Rules 2016 (RIA Rules) are incorporated as in force
at the time of commencement. The rules are not a disallowable instrument and the *Competition and Consumer Act 2010* does not alter the operation of section 14. As the Committee has noted, the RIA Rules are freely available online at [https://www.resolution.institute/documents/item/
1844](https://www.resolution.institute/documents/item/1844).

**Committee's response**

**The committee thanks the Treasurer for his response and has concluded its examination of the above.**

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Manner of incorporation**

The committee previously commented as follows:

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.

**Minister's response**

The Attorney-General advised:

Paragraphs 1 and 3 of Appendix F to the 2017 Directions incorporate LSMUL. The Committee has commented that neither the text of the 2017 Directions nor the Explanatory Statement expressly state the manner in which the LSMUL is incorporated into the 2017 Directions.

The 2017 Directions incorporate the LSMUL as in force from time to time.

**Committee's response**

**The committee thanks the Attorney-General for his response.**

The committee notes the Attorney-General's advice that the LMSUL is incorporated as in force from time. However, pursuant to section 14 of the *Legislation Act 2003* the committee understands that, as the LMSUL is not a Commonwealth disallowable legislative instrument, it may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*.

**The committee requests the further advice of the Attorney-General in relation to the above.**

**Matter more appropriate for parliamentary enactment**

The committee previously commented as follows:

Scrutiny principle 23(3)(d) of the committee’s terms of reference requires the committee to 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.

 **Minister's response**

The Attorney-General advised:

Paragraph 14 of Part 3 of Schedule 1 of the 2017 Directions states, '[t]he Attorney-General may impose sanctions for non-compliance with the Directions.' The note to this paragraph states, '[e]xamples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.'

The Committee has commented that neither the 2017 Directions nor the Explanatory Statement set any limitations or provide any guidance as to what sanctions could be imposed, justification of the need for such a broadly defined power, and the reasons for this power to be in the 2017 Directions rather than in primary legislation.

Section 55ZG of the *Judiciary Act 1903* states, '[c]ompliance with a Legal Services Direction is not enforceable except by, or on the application of, the Attorney-General.' Compliance with the 2017 Directions (per paragraph 14) derives its legislative basis from section 55ZG of the *Judiciary Act 1903*.

The OLSC website contains guidance material regarding its approach
to compliance with the 2017 Directions in a document entitled the 'Compliance Framework'. It is available at [https://www.ag.gov.au/
LegalSystem/LegalServicesCoordination/Documents/OLSC%20-20
Compliance%20Framework.pdf](https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-20Compliance%20Framework.pdf)

**Committee's response**

**The committee thanks the Attorney-General for his response.**

The committee acknowledges the Attorney-General's advice that compliance with the directions derives its legislative basis from section 55ZG of *Judiciary Act 1903*.

The committee also acknowledges that the note to paragraph 14 of Part 3 of Schedule 1 of the directions, which provides that the Attorney-General may impose sanctions for non-compliance with the Directions, states:

Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that the guidance material referred to by the Attorney-General does not provide information about the range of sanctions that may be imposed.

The committee therefore remains concerned that neither the Compliance Framework nor the Attorney-General's response:

provides guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; or

justifies the need for the Attorney-General to be granted such broadly defined sanction powers.

**The committee requests the further advice of the Attorney-General in relation to the above.**

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

The committee previously commented in relation to two matters as follows:

**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.

**Minister's response**

The Minister for Employment advised:

The Instrument reapproves the Seacare Authority Code of Practice 1/2000, as made by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority). The Code was reapproved in its current form for an interim period to enable the Seacare Authority to complete its review of the Code.

The Code itself incorporates two codes developed by the private sector and adopted by the Seacare Authority in 2000. These are set out in full in the instrument I approved. The Department of Employment was aware that there were references to standards and other guidance material in the Code. However, as made clear in the explanatory statement, no amendment was made to the Code when I reapproved it for an interim period pending completion of the Seacare Authority's review.

Your committee considers that the text of the Code should state the manner in which documents are incorporated. To now include in the text a new description of how matters referred to are incorporated would have been an amendment of the Code.

Access to referenced documents is expressly dealt with in the *Occupational Health and Safety (Maritime Industry) Act 1993*. Subsection 109(7) of the OHS(MI) Act provides that the Australian Maritime Safety Authority (as the Inspectorate under the OHS(MI) Act) will ensure that all incorporated material is available for inspection at its offices, which are located in 19 major ports around Australia (see [www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp](http://www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp)).

Industry participants have had 17 years to locate and become familiar with the relevant referenced material but, if required, the maritime industry is able to obtain referenced material directly from the AMSA.

Failure to comply with any provision of a code approved by me cannot make a person liable for any civil or criminal proceedings (see subsection 109(8) of the OHS(MI) Act). The Code merely provides practical guidance to operators on how to meet their duties under the OHS(MI)Act (see subsection 109(1) of the OHS(MI) Act). The Code provides a benchmark against which maritime industry participants and the Inspectorate can assess compliance and operates alongside other guidance material.

I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawing his attention to the need for the replacement code to meet modern drafting standards.

Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.

 **Committee's response**

**The committee thanks the minister for her response.**

The committee also thanks the minister for her advice that all incorporated material is available for inspection at AMSA offices, which are located in 19 major ports around Australia.

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

The committee acknowledges the minister's advice that the code provides practical guidance to operators on how to meet their duties under the *Occupational Health and Safety (Maritime Industry) Act 1993*, and notes the advice that:

no changes will be made to the code itself before it is replaced; and

a request has been made for a replacement code of practice that meets modern drafting standards to be made as soon as reasonably practicable.

However, the committee remains concerned that in this interim period, maritime industry participants, particularly any new participants and other persons interested in the code, will not know the manner in which the Australian and international standards are incorporated.

While the committee notes that no changes will be made to the code before it is replaced, the committee requests that the minister provide information about the manner in which the Australian and international standards are incorporated into the code, so that during the interim period before the replacement code is made, maritime industry participants and other persons interested in the code will know the manner in which these documents are incorporated.

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

The committee also notes the minister's advice that the code was reapproved for an interim period pending completion of the Seacare Authority's review. In the committee's view this may undermine the effectiveness of the sunsetting mechanism.

The committee notes that the process to review instruments, and to act in response to review recommendations, can be lengthy, and the committee expects agencies to plan for sunsetting well in advance of an instrument’s sunset date.[[20]](#footnote-20)

**The committee draws this matter to the attention of ministers, instrument‑makers and senators.**

## Advice only

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

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| **Instrument** | AD/A320/36 Amdt 3 - Passenger Door Lower Connection Link Bushes [F2017L00410]AD/IAI-W/15 Amdt 1 - Structural Inspection Program [F2017L00395] |
| **Purpose** | Clarifies the applicability of the airworthiness directive 93-207-048(B)R1 affecting Airbus A320 series aeroplanes issued by French Direction Générale de l'Aviation Civile in 1994; Repeals and replaces AD/IAI-W/15 to allow compliance with the Civil Aviation Authority of Israel issued AD 91-01 affecting Israeli Aircarft Industries Westwind series aeroplanes in 1991 |
| **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:

AD/A320/36 Amdt 3 - Passenger Door Lower Connection Link Bushes [F2017L00410] (AD/A320/36) incorporates Airbus Service Bulletins SB A320-52-1027 and A320-52-1047 as in force from time to time, and Airbus All Operators Telex 52-04 Revision 1 dated 12 October 1993 as in force at the commencement of AD/A320/36; and

AD/IAI-W/15 Amdt 1 - Structural Inspection Program [F2017L00395] (AD/IAI‑W/15) incorporates the Inspection Requirements of Israel Aircraft Industries (IAI) Structural Inspection Program, as in force from time to time.

The ES to AD/A320/36 states:

The Airbus Service Bulletins and the Airbus All operators telex referred to in the AD can be obtained from Airbus, however, any Australian airline or operator which operates the A320 aircraft are provided with these documents by Airbus by subscription.

The ES to AD/IAI-W/15 states:

The IAI Structural Inspection Program can be obtained from IAI for a fee. Operators of the aircraft would have a subscription with IAI for maintenance documents such as the program.

The committee acknowledges that anticipated users of AD/A320/36 and
AD/IAI-W/15 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.[[21]](#footnote-21) 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 remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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** | Consumer Goods (Children’s Nightwear and Limited Daywear and Paper Patterns for Children’s Nightwear) Safety Standard 2017 [F2017L00452] |
| **Purpose** | Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear  |
| **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) |

**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 Consumer Goods (Children’s Nightwear and Limited Daywear and Paper Patterns for Children’s Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) incorporates Australian/New Zealand Standard AS/NZS 1249:2014 *Children’s nightwear and limited daywear having reduced fire hazard*, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force immediately before the commencement of the nightwear standard.

The note to the definition of 'Australian Standard' in the nightwear standard, as well as the ES, state:

The Australian Standard could in 2017 be purchased from SAI Global’s website (https://www.saiglobal.com). The Australian Competition and Consumer Commission [ACCC] can make a copy of the standard available for viewing at one of its offices, subject to licensing conditions.

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.[[22]](#footnote-22) 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 remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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** | Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 2) Regulations 2017 [F2017L00442]Financial Framework (Supplementary Powers) Amendment (Veterans’ Affairs Measures No. 1) Regulations 2017 [F2017L00439] |
| **Purpose** | Amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Agriculture and Water Resources and the Department of Veterans’ Affairs |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **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)(d) |

**Parliamentary scrutiny – ordinary annual services of the government**

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

Under the provisions of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), executive spending may be authorised by specifying schemes in regulations made under that Act. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters *not* involving the ordinary annual services of the government.[[23]](#footnote-23) In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[[24]](#footnote-24)

The agriculture regulation referred to above seeks to establish legislative authority for Commonwealth government spending on grants to support Casino Beef Week (for $1 million over four years from 2016-17).[[25]](#footnote-25)

The veterans’ affairs regulation referred to above seeks to establish legislative authority for Commonwealth government funding to assist in the establishment of the Centenary of ANZAC Centre and to support the centre to provide a mental health practitioner support service; and a mental health treatment research centre (for $6 million over four years from 2016-17).[[26]](#footnote-26)

It appears to the committee that Casino Beef Week and the Centenary of ANZAC Centre are new policies not previously authorised by special legislation; and that the initial appropriation in relation to these new policies may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2016-2017 (which is not subject to amendment by the Senate).

**The committee draws the above to the attention of the minister, the Senate and the relevant Senate committees.**

|  |  |
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| **Instrument** | Remuneration Tribunal Determination 2017/03: Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2017L00416] |
| **Purpose** | Sets remuneration and allowances for various full-time, part-time and judicial office holders |
| **Authorising legislation** | *Remuneration Tribunal Act 1973* |
| **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) |

**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)).

The committee notes that the ES is generally helpful in providing information about the manner in which the Remuneration Tribunal may consult in relation to its decisions, and the submissions which informed particular decisions set out in this determination. However, the ES does not explicitly address consultation in relation to clauses concerning the following bodies:

Aboriginal Hostels Limited;

Professional Standards Board for Patent and Trade Marks Attorneys and Patent and Trade Marks Attorney Disciplinary Tribunal;

Australian Organ and Tissue Donation and Transplantation Authority Advisory Council; and

Companies Auditors Disciplinary Board.

The committee understands the explanations given in the ES at paragraphs 10–12 and 17 to mean that no consultation was undertaken in relation to the amendments concerning the above bodies. However, in terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that consultation on the relevant amendments was considered unnecessary or inappropriate, if this is the case, and the reason(s) why.

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

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

|  |  |
| --- | --- |
| **Instrument** | Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407] |
| **Purpose** | Specifies the kinds of therapeutic goods information, relating to laboratory testing, that may be released to the public under subsection 61(5C) of the *Therapeutic Goods Act 1989* |
| **Authorising legislation** | *Therapeutic Goods Act 1989* |
| **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 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 Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407] (the specification) states:

 **Consultation**

A regulation impact statement was not required in relation to the development of this Specification, as the matter of specifying kinds of therapeutic goods information under subsection 61(5D) of the Act is the subject of a standing exemption (OBPR ID 15070).

However, the [Therapeutic Goods Administration] TGA has undertaken communication and education activities to inform the public and relevant stakeholders regarding its intention to publish information about its laboratory testing activities, and the outcomes of those activities, on the TGA website. This includes correspondence with members of the TGA-Industry Consultative Committee, a statement released on the TGA website, and presentations at the Regulatory and Technical Consultative Forum and the TGA Consultative Committee meeting.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the ES explains that communication and education activities have been undertaken to inform the public and relevant stakeholders. However, it does not provide information about whether consultation was or was not undertaken in relation to the specification. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that consultation for the specification was considered unnecessary or inappropriate, if this is the case, and the reason(s) why.

The committee further notes that the requirements regarding the preparation of a regulation impact statement (RIS) are separate to the requirements of the *Legislation Act 2003* in relation to consultation. As set out in the committee's guideline on 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's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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

|  |  |
| --- | --- |
| **Instrument** | Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457] |
| **Purpose** | Permits the ingredients described in the determination, subject to the requirements described in the determination for an ingredient, to be contained in medicines or to be listed on the Australian Register of Therapeutic Goods |
| **Authorising legislation** | *Therapeutic Goods Act 1989* |
| **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) |

**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 Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457] (the determination) incorporates:

British Pharmacopoeia (BP);

European Pharmacopoeia (EP);

United States Pharmacopeia – National Formulary (USP-NF); and

Food Chemicals Codex (FCC) published by the United States Pharmacopeial Convention.

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

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

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

The 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.[[27]](#footnote-27) 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 remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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** | Fair Work (Registered Organisations) Amendment Regulations 2017 [F2017L00470]Fish Receiver Permits Declaration 2017 [F2017L00400]Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination 2017 for Defined Commission and/or Fee Based Services in the Financial Industry [F2017L00419]Parliamentary Entitlements (Supplement of Capped Entitlements) Determination 2017 (No. 1) [F2017L00496]Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407] |
| **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*

|  |  |
| --- | --- |
| **Instruments** | ASIC Class Rule Waiver [CW 17/0370] [F2017L00494]Consumer Goods (Babies’ Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516]Consumer Goods (Children’s Nightwear and Limited Daywear and Paper Patterns for Children’s Nightwear) Safety Standard 2017 [F2017L00452]Declaration of Quality Assurance Activity under section 124Xof the Health Insurance Act 1973 – QAA 1/2017 [F2017L00491]Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Estonia and Pakistan) Determination 2017 [F2017L00507]Employer Reimbursement Rules 2017 [F2017L00415]Fish Receiver Permits Declaration 2017 [F2017L00400]Health Insurance (Epicutaneous patch testing) Revocation Determination 2017 [F2017L00433]Logbooks for Fisheries Determination 2017 [F2017L00446]Parliamentary Entitlements (Supplement of Capped Entitlements) Determination 2017 (No.1) [F2017L00496]Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 3) [F2017L00461]Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504]Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 3) [F2017L00484]Remuneration Tribunal Determination 2017/03: Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2017L00416]Therapeutic Goods (Manufacturing Principles) Amendment Determination 2017 (No. 1) [F2017L00509]Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457] |
| **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.[[28]](#footnote-28)

**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.

For the purposes of disallowance the sitting of the Senate on 31 March 2017 has been counted as a sitting day.[[29]](#footnote-29)

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Manner of incorporation**

The committee previously commented as follows:

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.

**Minister's response**

The Minister for Indigenous Affairs advised:

Section 14(1)(b) of the *Legislation Act 2003* (Cth) (Legislation Act) provides (relevantly) that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.

The Regulations and the Explanatory Statement incorporate the extrinsic writing of the Survey Plan. Section 14(2) of the Legislation Act provides that, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by incorporating any matter contained in other writing as in force or existing from time to time.

Accordingly, the Regulations can only incorporate the Survey Plan as it exists at the time the Regulations commence. Section 14(2) of the Legislation Act precludes the Regulations incorporating the Survey Plan as in force or existing from time to time.

In addition, the Survey Plan as incorporated into the Regulations cannot,
in effect, change. Under s 50(2) of the *Licenced Surveyors Act* (NT) (Surveyors Act), once a survey plan has been lodged with and approved by the Surveyor-General, that survey plan is to be accepted as correct in
all questions relating to the boundaries delineated in the plan. The Survey Plan was approved by the Surveyor-General on 25 August 2016.

Given the Survey Plan has been lodged and approved, it cannot be changed (although there is limited scope for errors or omissions made
in the Survey Plan to be corrected under s 51(1) of the Surveyors Act).
Any change to the boundaries delineated in the Survey Plan would require the preparation of a new plan, and that new plan could only be incorporated into the Regulations through an amendment to the Regulations.

**Committee's response**

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

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

**Access to incorporated 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 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.

**Minister's response**

The Minister for Indigenous Affairs advised:

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

The Regulations and the Explanatory Statement provide that the Survey Plan is lodged with the Northern Territory Surveyor-General in Darwin. Once a survey plan has been lodged with the Surveyor-General it becomes freely available to the public and can be obtained from the Northern Territory Land Information System website via the NT Atlas.

To further address the concerns of the Committee, I have approved a replacement Explanatory Statement with the Survey Plan attached, which will be lodged on the Federal Register of Legislation in accordance with the process set out in section 15G(4)(b) of the *Legislation Act 2003*. I have attached the replacement Explanatory Statement for your reference.

The replacement ES states:

A copy of Survey Plan S2016/039, which prescribes the township of Gunyangara, is provided in Attachment 2. Survey Plan S2016/039 can also be obtained from the Northern Territory Land Information System website via the NT Atlas.

**Committee's response**

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

The committee also notes the minister's undertaking to register the replacement ES provided to the committee, which addresses the committee's concerns regarding access to incorporated documents.

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| --- | --- |
| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

The committee previously commented in relation to two matters as follows:

**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.

**Minister's response**

The Minister for the Environment and Energy advised:

The amendments relate to the take of specimens of fish or invertebrates in fifteen commercial fisheries as defined in the management regimes for Commonwealth, Western Australian, New South Wales, Northern Territory, and South Australian managed fisheries.

The Committee has advised that where an instrument incorporates non Commonwealth Acts and disallowable instruments by reference, there is an expectation that the manner of incorporation, and where this information can be found, is clearly specified in the explanatory statement. A revised explanatory statement is enclosed and will be registered on the Federal Register of Legislation.

I can confirm that the intention in the instrument Amendment of List of Exempt Native Specimens - Multiple fisheries March 2017 is to reference definitions in force from time to time under the respective management regimes.

The updated ES states:

Non Commonwealth Acts and disallowable instruments that are incorporated by reference in this instrument are to be incorporated as in force from time to time. All State and Territory legislation incorporated by reference in this instrument can be freely accessed on the relevant State legislation websites:

• New South Wales legislation at www.legislation.nsw.gov.au (as of May 2017)

• Northern Territory legislation at www.legislation.nt.gov.au (as of May 2017)

• South Australian legislation at www.legislation.sa.gov.au (as of May 2017)

• Western Australian legislation at www.slp.wa.gov.au (as of May 2017)

**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 to register the updated ES provided to the committee, which addresses the committee's concerns regarding the manner in which the State regulations are incorporated and where they can be freely accessed.

|  |  |
| --- | --- |
| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Sub-delegation/authorisation**

The committee previously commented as follows:

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.

**Minister's response**

The Minister for Agriculture and Water Resources advised:

Regarding clause 39, I note the committee's concern that the code contains no requirement that I be satisfied that a person appointed to the role of mediation adviser is appropriately trained or qualified for the role. The mediation advisor appointed under the code is also contracted by the Commonwealth to serve as the mediation advisor under both the Competition and Consumer (Industry Codes-Franchising) Regulation 2014 and the Competition and Consumer (Industry Codes-Oil) Regulations 2017.

A request for tender (RFT) to procure the mediation advisor service was developed by the Treasury, in consultation with my Department and the Department of the Environment and Energy. The RFT outlined the requirements for the role, including the required experience and qualifications. Applicants were evaluated in line with the RFT giving specific consideration to each code, including the Horticulture Code. Once a preferred bidder was identified through the tender process each department provided a recommendation to myself, the Minister for Small Business and the Minister for the Environment and Energy. My colleagues and I have accepted our departments' recommendation.

Regarding clause 40, in appointing the current mediation adviser specific expectations were included in the contract for the separate codes of conduct. These included the requirements for the appointment of mediators by the mediation adviser. The requirements included having appropriate industry knowledge and qualifications. These requirements are monitored by my department to ensure compliance with the contractual requirements.

**Committee's response**

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

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

The committee notes the minister's advice about the Department of Agriculture and Water Resource's (the department) processes for procuring the mediation adviser service; and that the requirements for the appointment of a mediation adviser and mediator included a need for appropriate experience and qualifications. While these processes form part of the department's administrative framework for the relevant appointments, the committee's preference is that a requirement for relevant experience and qualifications for the appointments be contained in legislation.

The committee previously commented in relation to two matters as follows:

**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,[[30]](#footnote-30) 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.

**Minister's response**

The Minister for Agriculture and Water Resources advised:

Regarding the manner in which the FreshSpecs Produce Specifications
are incorporated, the intent of subclause 16(i) of the code is to ensure that a product specification is agreed, not that the FreshSpecs Produce Specifications are used in all circumstances. The parties to a horticulture produce agreement are free to choose whichever produce specifications they wish. As the committee's letter notes, because no contrary intention appears in the code, section 14(2) of the *Legislation Act 2003* applies and the specifications are incorporated as existing at the time when the code commenced.

I note the committee's expectations regarding access to the incorporated document. The FreshSpecs Produce Specifications are widely known within the industry and are publically available for free on the Fresh Markets Australia website. The explanatory statement refers to the Fresh Markets Australia website, but does not provide the specific web address. This was done intentionally as Fresh Markets Australia may amend the exact web address in the future.

**Committee's response**

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

The committee also appreciates the minister's advice regarding the provision of a specific web address that is liable to change, and suggests that where appropriate a generic website address be provided, from which a user could navigate to the webpage on which the document is located.

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| **Instrument** | Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217] |
| **Purpose** | Establishes legislative authority for spending activities administered by the Department of Agriculture and Water Resources |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **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) and (c) |
| **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*,[[31]](#footnote-31) the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

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

The committee notes that the objective of this program is:

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

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

(a) in the exercise of the executive power of the Commonwealth; or

(b) as a measure that is peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation; or

(c) incidental to the execution of the legislative powers vested in the Commonwealth; or

(d) in connection with interstate or overseas trade and commerce; or

(e) in connection with taxation imposed by a law of the Commonwealth; or

(f) in connection with quarantine.

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

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

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

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

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

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

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

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

**Minister's response**

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

Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix))

Section 61 of the Constitution, together with section 51(xxxix), supports grants with respect to matters incidental to the executive power of the Commonwealth, including measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation.

This program is designed to ensure that national agricultural industry representative bodies are better able to provide policy advice to their members, the Australian community, the government and their stakeholders. This includes making representations to the Commonwealth about matters of Commonwealth legislative interest affecting their industry and being better able to communicate to their membership and the Australian community who are affected by Commonwealth laws and programs, particularly but not exclusively relating to biosecurity, trade and market access. Ensuring engagement of national agricultural organisations, through fostering their leadership, will enhance the capacity of the Commonwealth to ensure the understanding of and fostering of compliance with its laws and regulations by the organisations’ members and stakeholders. Further, the funding of these organisations, at a national level, will engage these organisations and their leaders in the legislative initiatives and other policy developments of importance to the national agricultural sector for the benefit of the nation.

Trade and commerce power (section 51(i))

Section 51(i) of the Constitution empowers the Parliament to make laws with respect to 'trade and commerce with other countries, and among the States'.

Generally speaking, grants can also be given to support activities that are incidental to the execution of Commonwealth laws made in reliance on the trade and commerce power. Developing the leadership capacity of national agricultural organisations will also build the capacity of those organisations’ leaders to engage with, understand and be involved in the development of Commonwealth laws and policies relating to the export and interstate trade of agricultural outputs.

Taxation power (section 51(ii))

Section 51(ii) of the Constitution empowers the Commonwealth to make laws with respect to 'taxation; but not so as to discriminate between States or parts of States.'

Grants can be provided in connection with taxation imposed by a Commonwealth law. Grants made under this program are intended to build the capacity of national agricultural organisations, including those who have statutorily mandated consultative roles in the setting of taxes and levies under primary industries legislation.

Quarantine power (section 51(ix))

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

Grants can be provided in connection with quarantine. Funding under this program will assist national agricultural organisations to develop the capability of their current and future leaders so they are better able to contribute to key policy issues facing the agricultural sector, including the management of biosecurity risks and the measures needed to prevent the introduction and spread of pests that cause disease or that infest animals or plants and the impact that those pests can have on the agricultural sector, its stakeholders and the wider community.

**Committee's response**

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

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

**Merits review**

The committee previously commented as follows:

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

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

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

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

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

**Minister's response**

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

Merits review

The program has a two-tiered merits assessment process: individual merit assessment by assessment panel members and then a merit discussion at the assessment panel moderation meeting. The program involves the allocation of finite resources (up to $500,000 grants funded from a
$5 million fund). There is no secondary merits review for decisions to approve or not approve a grant in this program.

The process for determining funding recipients is set out in the program guidelines available on the Department of Agriculture and Water Resources’ website ([www.agriculture.gov.au/ag-farm-food/leadership-ag-fund](http://www.agriculture.gov.au/ag-farm-food/leadership-ag-fund)) and on GrantConnect ([www.grants.gov.au](http://www.grants.gov.au)).

Applicants must meet specified eligibility criteria and each eligible application will be assessed on its merit against five program criteria with the relative weighting of each criteria defined in the guidelines.
An assessment panel will assess applications on their merit and then assess against other applications at a moderation meeting to determine
a final ranking. The ranking will be based on the total score that an applicant receives. Each application will be assessed in consideration of the size of the project and amount of funding requested. There is diversity in the size, maturity and leadership needs across national agricultural industry representative bodies and the program will be responsive to
the requirements specified by each applicant organisation. More comprehensive applications with supporting information should be expected from organisations requesting larger amounts. The total funding per grantee is limited to a maximum of $500,000 in this competitive round.

The assessment panel will make recommendations to the Minister for Agriculture and Water Resources as the final decision-maker on whether to approve a grant. Funding decisions for the program will be made in accordance with the assessment process set out in the program guidelines and in accordance with the applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2014*.

Following the decision by the Minister, applicants will be advised of the outcomes of their applications in writing. Unsuccessful applicants can request feedback about their applications from the department after the funding decisions have been made and notified. Applicants may ask for feedback on their applications within 30 days of being advised of the outcome and the department may contact a nominated person for a discussion and/or give written feedback within 30 days of feedback being requested.

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

**Committee's response**

**The committee thanks the ministers for their detailed 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 (Social Services Measures No. 1) Regulations 2017 [F2017L00220] |
| **Purpose** | Establishes legislative authority for certain spending activities administered by the Department of Social Services and the Office of the Children’s eSafety Commissioner |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **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 |

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

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

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

to meet Australia’s obligations under:

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

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 199 as follows:

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

* the communications power (section 51(v));
* the aliens power (section 51(xix));
* the races power (section 51(xxvi));
* the immigration power (section 51(xxvii)); and
* the external affairs power (section 51(xxix)).

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 200 as follows:

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

* the aliens power (section 51(xix));
* the immigration power (section 51(xxvii)); and
* the external affairs power (section 51(xxix)).

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

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

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

**Minister's response**

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

Prevention of Domestic Violence – Table Item 199

Table item 199 establishes legislative authority for government spending on measures to address deep-seated attitudes and practices that excuse, justify and promote violence against women and their children.

The development of this initiative and drafting of table item 199 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 199, the objective of the item references the external affairs power (section 51(xxix) of the Constitution. Specific reference is also made in table item 199 to the following articles of these international treaties:

* Article 6(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
* Article 7 of the International Covenant on Civil and Political Rights (ICCPR);
* Articles 2, 3, 5(a) and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
* Articles 4, 18 and 19 of the Convention on the Rights of the Child (CROC).

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

Articles 2, 5(a) and 16 of CEDAW require Australia to:

* pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
* take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
* take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Funding will be provided for a range of measures intended to reduce the incidence of domestic violence against women and children. For example, funding will be provided in relation to developing a framework for shared understanding and collaborative action in relation to preventing violence against Indigenous women and children.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided for the development of educational resources to enable witnesses of violence against women and children to take safe and appropriate action.

Articles 18(1) and 18(2) of the CROC deal with the responsibilities of parents for their children and require Australia to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.

Funding will be provided for activities that provide information and advice to men who have become fathers for the first time about the importance of their involvement in the development and care of their child, including by positive role-modelling.

Article 6(2) of the ICESCR requires Australia to take steps to achieve the full realization of the right to work by providing technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Funding will be provided for domestic violence prevention strategies focussing on education, employment and empowerment, particularly for women from culturally and linguistically diverse backgrounds.

Domestic Violence Frontline Services – Table Item 200

Table item 200 establishes legislative authority for the Government to fund domestic violence frontline services to provide pathways of support for women and children leaving, or trying to leave, family and domestic violence that prioritise their safety, minimise disruption to their lives and provide choice.

The development of this initiative and drafting of table item 200 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 200, the objective of the item references the external affairs power (section 51(xxix) of the Constitution. Specific reference is also made in table item 200 to the following articles of these international treaties:

* Articles 2, 3, 5(a) and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
* Articles 4 and 19 of the Convention on the Rights of the Child (CROC);
* Article 6(2) of the Convention on the Rights of Persons with Disabilities (CRPD); and
* Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

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

Articles 2, 3, 5(a) and 16 of CEDAW require Australia to:

* pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
* take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men;
* take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
* take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Funding will be provided for domestic violence frontline services that provide pathways of support for women and children leaving, or trying to leave, family and domestic violence with a focus on funding:

* for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
* for workers in the financial counselling and financial capability sector to equip them to better recognise, and respond to the needs of, women who have experienced domestic violence; and
* to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Under the initiative, funding will be provided:

* for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
* to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

As noted above, funding will be provided in relation to alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons.

Article 6(2) of the CRPD is intended to ensure the full development, advancement and empowerment of women with disabilities.

Funding will be provided:

* to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence; and
* to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

**Committee's response**

**The committee thanks the ministers for their response.**

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

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| **Instrument** | Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016 [F2016L01922] |
| **Purpose** | Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Social Services |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **Disallowance** | 15 sitting days after tabling (tabled Senate 7 February 2017)The time to give a notice of motion to disallow expired on31 March 2017Notice given on 31 March 2017[[33]](#footnote-33)Notice must currently be resolved by 15 August 2017 |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitors* 1 and 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*,[[34]](#footnote-34) the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly states, for each new program, the constitutional authority for the expenditure.

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

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

1. To provide funding for an entity to:
	1. develop and provide online information and resources for financial counsellors, financial capability workers and consumers; and
	2. provide the national 1800 financial counselling and financial capability Helpline telephone service (the Helpline), including the development of national standards and materials for the Helpline.
2. To provide funding for services to be provided by an entity directed at supporting:
	1. attendance at national financial counselling and financial capability conferences by the following:
		1. financial counsellors and financial capability workers for the Helpline;
		2. residents of a Territory; and
	2. the presentation of sessions at national financial counselling and financial capability conferences that relate to any of the following:
		1. bankruptcy or insolvency;
		2. invalid or old-age pensions within the meaning of paragraph 51 (xxiii) of the Constitution;
		3. allowances, pensions, endowments, benefits or services to which paragraph 51(xxiiiA) of the Constitution applies;
		4. immigrants or aliens;
		5. the Helpline;
		6. online information or resources relevant to financial counselling or financial capability;
		7. particular issues confronting the residents of Territories.
3. To provide funding for services to be provided by an entity directed at supporting the presentation of sessions at national financial counselling and financial capability conferences, to the extent that the presentation amounts to a measure designed to meet Australia’s obligations under:
	* 1. the Convention on the Rights of the Child; or
		2. the Convention on the Rights of Persons with Disabilities; or
		3. the Convention on the Elimination of All Forms of Discrimination Against Women; or
		4. the International Covenant on Economic, Social and Cultural Rights.
4. To provide funding for services to be provided by an entity directed at supporting the following:
	1. attendance at national financial counselling and financial capability conferences by the following:
		1. Indigenous persons;
		2. persons who provide financial counselling and financial capability services predominantly to Indigenous persons;
		3. the presentation of sessions at national financial counselling and financial capability conferences that relate to particular issues confronting Indigenous persons.

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

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

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

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

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

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

Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.[[35]](#footnote-35)

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

Drafting Direction No. 3.1 also provides the following example of one of the limitations of section 15A:

…if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108‑110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did not exhaust the purported operation of the operative provision in question.[[36]](#footnote-36)

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

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulation supports the funding for the Commonwealth Financial Counselling and Financial Capability – Capability Building program, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

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

**Minister's first response**

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

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

Communications power

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

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

The Financial Counselling Australia annual national conference brings together financial counsellors and capability workers, consumer lawyers and community sector workers along with government agencies, universities, regulators and other organisations interested in financial counselling. The conference program includes a range of current topics and issues focusing on bankruptcy and insolvency, social welfare,
the National Debt Helpline and information and resources for workers and consumers. The 2017 program includes sessions dealing with consumer credit law, mortgage stress, banks, the National Disability Insurance Scheme and consumer centred care, refugee financial counselling, and problem gambling.

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

Bankruptcy and insolvency power

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

Social welfare power

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

Territories power

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

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

Invalid and old age pensions power

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

Aliens and immigration powers

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

External affairs power

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

Race power

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

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

**Committee's first response**

The committee thanks the ministers for their detailed response.

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

The committee understands that, in order to rely on the external affairs power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.[[37]](#footnote-37) The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the regulation or
the ES.

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

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

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

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

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

…the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.[[38]](#footnote-38)

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

**Minister's second response**

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

The external affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia’s international obligations under the Convention of the Rights of the Child [1991] ATS 4, the Convention on the Rights of Persons with Disabilities [2008] ATS 12, the Convention on the Elimination of All Forms of Discrimination Against Women [1983] ATS 9, as well as the International Covenant on Economic, Social and Cultural Rights [1976] ATS 5.

*Convention on the Rights of the Child*

The presentation of conference sessions may be designed to meet Australia’s international obligations under Articles 18(2) and 27(1), as well as Article 19, of the Convention of the Rights of the Child.

Article 19 provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 27(1) provides:

States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

Article 18(2) provides:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

*Convention on the Rights of Persons with Disabilities*

The presentation of conference sessions may also be designed to meet Australia’s international obligations under Articles 12(5), 27(1)(f) and 28(2)(c) of the Convention on the Rights of Persons with Disabilities.

Article 12(5) provides:

Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 27(1)(f) provides:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business.

Article 28(2)(c) provides:

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.

*Convention on the Elimination of All Forms of Discrimination Against Women*

Australia has international obligations under Articles 3, 4(1) and 13(b) of the Convention on the Elimination of All Forms of Discrimination Against Women, and the presentation of conference session may be designed to meet these obligations.

Article 3 provides:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4(1) provides:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 13(b) provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(b) The right to bank loans, mortgages and other forms of financial credit

*International Covenant on Economic, Social and Cultural Rights*

The presentation of conference sessions may also be designed to meet Australia’s international obligations under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. This Article provides as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

**Committee's second 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** | 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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Sub-delegation**

The committee previously commented as follows:

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;[[39]](#footnote-39) 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*).[[40]](#footnote-40)

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.

**Minister's response**

The Assistant Minister for Agriculture and Water Resources advised:

On the basic intent of s44 of the Regulation, the inclusion of a power to withdraw an infringement notice is consistent with the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The guide provides that infringement notice provisions should state that an authorised officer may withdraw an infringement notice and that the infringement notice should indicate that the person issued with the notice may make representations as to why
a notice should be withdrawn. The delegation by the AFMA CEO of the decision to withdraw a notice to the same level of officer authorised to issue a notice ensures that any representations can be taken into account by the issuing officer.

The committee notes that an officer (as defined under s4 of the FMA) appears to encompass a relatively large class of persons. However, the committee may not be aware of AFMA's strategic alliances and extensive collaboration with the Department of Defence, State and Federal Police and Border Force, in a broad range of practical operations to pursue fisheries compliance. While an AFMA officer is most likely to issue an infringement notice, operational requirements may involve an officer from another of those agencies (as specified under s4 of the FMA) undertaking this task.

In regard to the committee's point about the qualifications or attributes of those exercising that power, any officer who becomes directly involved in Commonwealth fisheries compliance operations is appropriately trained by AFMA. This ranges from briefing sessions on the powers of officers
and operational arrangements to specific training on the application of infringement notices. As a result, in terms of operational practices, only
a limited number of officers are directly involved, and each person is appropriately qualified.

Finally, in response to the committee's concerns around limiting the sorts of powers that might be delegated, I note that the proposed delegated powers under s44 are strictly limited to the powers of extending the payment period of a fisheries infringement notice or withdrawing an infringement notice.

**Committee's response**

**The committee thanks the assistant minister for her 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** | Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] |
| **Purpose** | Provides safety protections and navigation requirements for the Jervis Bay Territory similar to those applicable in NSW waters under the marine safety legislative regime established by the New South Wales *Marine Safety* *Act 1998* |
| **Last day to disallow** | 15 sitting days after tabling (tabled Senate 21 November 2016)The time to give a notice of motion to disallow expired on 20 March 2017Notice given on 20 March 2017[[41]](#footnote-41)Notice must currently be resolved by 19 June 2017 |
| **Authorising legislation** | *Jervis Bay Territory Acceptance Act 1915* |
| **Department** | Infrastructure and Regional Development |
| **Scrutiny principle** | Standing Order 23(3)(a), (b) and (d) |
| **Previously reported in** | *Delegated legislation monitors* 1 and 3 of 2017 |

**Matter more appropriate for parliamentary enactment**

The committee previously commented as follows:

The Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the ordinance) creates a number of offences that carry terms of up to 20 months imprisonment or impose penalties of up to 100 penalty units (currently $18 000).[[42]](#footnote-42)

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

Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised.[[43]](#footnote-43)

The ES to the ordinance, while acknowledging these statements in the Guide, states:

The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT [Jervis Bay Territory] waters, to that already enjoyed by people in the adjoining NSW waters. It is desirable for a person to be subject to a comparable penalty for an offence committed in JBT waters as for the same offence committed a few kilometres away in NSW waters. Consequently, in some instances in the Ordinance, consistent with NSW legislation, penalties of greater than 50 penalty units or penalties involving terms of imprisonment are imposed.

The scope of the Ordinance-making power in section 4F of the Acceptance Act is very broad (Ordinances may be made for the peace, order and good government of the Territory) and it may have been a Parliamentary intention that Ordinances be the primary vehicle of legislating for the JBT. Finally, other JBT Ordinances contain offence provisions, some with penalties including terms of imprisonment (see, for example, the Jervis Bay Territory Emergency Management Ordinance 2015, section 24).

In each instance in the Ordinance, where a penalty involves a term of imprisonment or a penalty of greater than 50 penalty units, the description of the section in the Explanatory Statement notes the comparable provision in NSW legislation that the penalty is based.
The Attorney-General’s Department was consulted in relation to penalties during the development of the Ordinance.

The committee acknowledges that the ordinance-making power in the *Jervis Bay Territory Acceptance Act 1915* (Acceptance Act) is broad in scope. However, it does not consider that the information provided in the ES adequately justifies the imposition of terms of imprisonment in the absence of an express power to do so.
In this regard, the committee notes advice received from the Office of Parliamentary Counsel in 2014 that:

[t]he types of provisions…that should be included in regulations include provisions dealing with offences and powers of arrest, detention, entry, search or seizure. Such provisions are not authorised by a general rule-making power (*or a general regulation-making power*). If such provisions are required for an Act that includes only a general rule-making power,
*it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[[44]](#footnote-44) (emphasis added)

The committee further notes that, while other JBT ordinances contain offence provisions, the primary source of offence provisions for the JBT (and of laws for the JBT generally) appears to be laws of the Australian Capital Territory, by virtue of section 4A of the Acceptance Act. Noting that the Acceptance Act was enacted in 1915, the committee is interested in whether there is now a need for offences carrying terms of imprisonment to be created specifically for the JBT; and whether consideration should be given to amending the Acceptance Act to do so directly or
to provide an express power to authorise the inclusion of such provisions in JBT ordinances.

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

**Minister's first response**

The Minister for Local Government and Territories advised:

As a general comment, I note that Ordinances made for the external territories and the Jervis Bay Territory (JBT) are quite unlike other types of delegated legislation at the Commonwealth level. Such Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation. Consequently, deviation from strict compliance with Commonwealth guidance framed in the context of general Commonwealth-level delegated legislation is in some cases justifiable.

Having considered this matter in some detail, at this time I do not think
it is necessary to amend the *Jervis Bay Territory Acceptance Act 1915*
(the Acceptance Act). I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide more robust justifications in relation to the matters mentioned by the Committee.
My response is enclosed.

Reference Sections: 19, 24, 32, 36, 59, 60, 113

The Jervis Bay Territory (JBT) is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) in force in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Act, in force in the JBT as if the JBT formed part of the ACT. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

Section 4F of the Acceptance Act empowers the Governor-General to 'make Ordinances for the peace, order and good government of the Territory'.

In contrast, the Delegated Legislation Monitor (which in turn refers to advice received from the Office of Parliamentary Counsel (OPC) in 2014) refers to a 'general regulation-making power'. As noted in the OPC advice, a 'general regulation-making power' is one that authorises the making of regulations 'required or permitted' or 'necessary or convenient' (see paras 9 to 18 of *Drafting Direction No.3.8-Subordinate Legislation* (DD3.8), which is referred to in the 2014 advice from OPC). Such a law-making power is different in scope from the power to make laws 'for the peace, order and good government' of a territory. The latter is not aptly described as a 'general regulation-making power' as that term is used in the Delegated Legislation Monitor, the 2014 OPC advice or DD3.8. Instead, a power granted in these terms is a plenary power. Although some limits apply to such a power, a grant of power in these terms includes the power to prescribe offences that are punishable by imprisonment.

Ordinances are made by the Governor-General under section 4F of the Acceptance Act to complement the ACT laws that are applied in the JBT (which mainly pertain to state or local government-type issues). Such Ordinances are generally made to account for the JBT's unique legal and administrative arrangements or to address matters, which may not be dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the proximity of the JBT to NSW.

In practice, the Ordinance-making power under the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three are modelled on NSW legislation (which include offence provisions).

In relation to the Marine Ordinance, the ACT does not have a coastal marine environment to regulate so there is no ACT coastal marine law that applies in the JBT. The policy goal behind the making of the Marine Ordinance is to put in place a legal regime covering use of the JBT marine environment similar to that applying across the JBT-NSW maritime border. The Marine Ordinance offence provisions and penalties mirror those in the *Marine Safety Act 1998* (NSW). The *Marine Safety Act 1998*, including its penalty provisions, were scrutinised by the elected NSW legislature.

Other recent JBT Ordinances have been made which mirror NSW legislation, namely the Jervis Bay Territory Rural Fires Ordinance 2013 and the Jervis Bay Territory Emergency Management Ordinance 2015. These Ordinances also replicate the offence provisions in the mirrored NSW legislation, and carry penalties of imprisonment.

In summary, JBT Ordinances generally apply state-type law and are a rarely used tool. Offence provisions and penalties mirror NSW requirements to provide similar protections on both sides of a contiguous border. Penalties of imprisonment are exceptional, and engaged only for the most serious offences including endangering life. The *Marine Safety Act 1998* (NSW) was scrutinised by the elected NSW legislature.

For the reasons set out above, I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more rigorous justification for the provisions of the Ordinance that provide for penalties in excess of 50 penalty units and or terms of imprisonment.

**Committee's first response**

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions of the ordinance mirror NSW legislation. While the committee understands the desire to provide similar protection on both sides of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide
a justification for the provisions of the ordinance that provide for penalties in excess of 50 penalty units and/or terms of imprisonment. However, as the minister's response does not provide information about the content of this justification,
the committee is unable to conclude that the inclusion of such penalties is not a matter that is more appropriate for parliamentary enactment.

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

**Minister's second response**

The Minister for Local Government and Territories advised:

The Department of Infrastructure and Regional Development has prepared a replacement explanatory statement for the Ordinance addressing the Senate Standing Committee on Regulations and Ordinances' (the Committee) scrutiny concerns detailed in *Delegation legislation monitor* 3 of 2017.

As soon as practical, the Department will register the approved explanatory statement on the Federal Register of Legislation, which will cause its tabling by the Office of Parliamentary Counsel.

I have enclosed an advance copy of the approved explanatory statement for consideration by the Committee.

The replacement ES states:

Legislative Framework

The JBT is a Commonwealth administered territory and has no state legislature. Section 4A of the Acceptance Act applies to the JBT the laws (including the principles and rules of common law and equity) in force from time to time in the ACT are [sic], so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Acceptance Act. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, and are subject to the scrutiny of the ACT legislature. They apply to the JBT without Commonwealth parliamentary scrutiny.

Although the laws in force in the JBT are generally those of the ACT, the Acceptance Act provides a framework within which the Governor-General may make Ordinances to adjust and complement the applied ACT laws. Specifically, section 4C of the Acceptance Act permits an applied ACT law to be amended or repealed by an Ordinance made under the Acceptance Act, or a law made under such an Ordinance, and subsection 4F(1) confers on the Governor-General a plenary power to make Ordinances for the peace, order and good government of the JBT.

It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making powers commonly found in Commonwealth legislation, which permit the making of regulations as 'required or permitted' or 'necessary or convenient'. They are used by Parliament to indicate that, within the relevant subject matter, there is to be very little limitation on what can be provided for. They are generally only used for the external territories and the JBT, where the relevant Ordinances deal with state-level matters not normally dealt with in other types of Commonwealth legislation. The Commonwealth Parliament recently enacted a provision similar to s 4F of the Acceptance Act for the governance of Norfolk Island: section 19A of the *Norfolk Island Act 1979* (Cth) (which was enacted in 2015).

Ordinances made by the Governor-General under subsection 4F(1) of the Acceptance Act are generally made to account for the JBT's unique legal and administrative arrangements or to address matters not dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the close proximity of the JBT to NSW land and water. In practice, the Ordinance-making power in subsection 4F(1) of the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three of which are modelled on NSW legislation.

Because the ACT does not have a coastal marine environment, there is no ACT coastal marine law that can be applied in the JBT. This Ordinance establishes a marine safety regime for the JBT marine environment that is similar to the regime applying across the JBT-NSW maritime border, and which draws on both NSW marine safety legislation and the Cth National Law…

Offences and Penalties

The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT waters to that already enjoyed by people in the adjoining NSW waters. As such, it is desirable for a person to be subject to similar offences and penalties
on each side of the adjoining JBT / NSW border. In order to achieve this policy objective, the Ordinance contains offences and impose[s] penalties exceeding 50 penalty units and terms of imprisonment. The Acceptance Act does not contain any offence provisions.

While it is generally more appropriate to create offence provisions imposing penalties greater than 50 penalty units or terms of imprisonment in Acts of Parliament rather than in subordinate legislation, it is not appropriate to create these offence provisions in the Acceptance Act or other territory governance Acts. The reason for this is that imposing penalties in the Acceptance Act may change the basic framework of JBT's legislative scheme and unintentionally limit the scope of the Ordinance making power.

The plenary power provided in the Acceptance Act authorises Ordinances to create offences and does not limit the size or nature of the penalties that can be imposed. This power is inconsistent with the general Commonwealth policy that delegated legislation should not be authorised to impose penalties of imprisonment or fines exceeding 50 penalty units (see paragraph 3.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) (the Guide)).

The Acceptance Act does not place any limitation on the types of penalties that may be imposed by Ordinances made under that Act because Ordinances made for the JBT (together with Ordinances made for other territories) are quite unlike other types of delegated legislation at the Commonwealth level. Ordinances operate within the framework of ACT law applied by the Acceptance Act and are used to adjust and (when necessary) make State-type laws within the JBT. In some circumstances, such legislation will be required to prohibit conduct that is so serious that the imposition of penalties of imprisonment, or above 50 penalty units, will be appropriate. A similarly broad Ordinance-making power was enacted by the Commonwealth Parliament recently (see section 19A of the *Norfolk Island Act 1979* (Cth), enacted in 2015).

In this context, it is relevant to note that, under section 4L of the Acceptance Act and section 118(2) of the Ordinance, offence provisions cannot be created in regulations, rules or by-laws made under the Ordinance.

Certain offences created by the Ordinance are of a sufficiently serious nature that they warrant the imposition of penalties of greater than 50 penalty units and/or penalties involving terms of imprisonment. Specifically, sections 19, 24, 31, 32, 36, 59, 60 and 113 of the Ordinance provide maximum penalties in excess of 50 penalty units and/or a term of imprisonment, to reflect the seriousness of the conduct to be deterred. These penalties are engaged only for the most serious offences giving rise to a danger of harm or death to another person, or damage to property of another person or the environment.

Penalties similar to those imposed by this Ordinance have been imposed by the provisions of other Ordinances made under the Acceptance Act. These provisions include sections 14, 15 and 16 of the Jervis Bay Territory Marine Safety Ordinance 2007 (2007 Ordinance), and section 24 of the Jervis Bay Territory Emergency Management Ordinance 2015.

During the development of the Ordinance, the Attorney-General's Department and the Australian Federal Police were consulted specifically in relation to penalty and imprisonment provisions. Affected persons including JBT business operators and the Wreck Bay community were also consulted and were given adequate notice that these offence provisions would be introduced.

**Committee's second response**

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

The committee also thanks the minister for the informative replacement ES which the committee notes has been registered on the Federal Register of Legislation.

The committee acknowledges JBT's unique legal and administrative arrangements and notes that the replacement ES provides detailed justifications for the provisions of the ordinance that provide for penalties in excess of 50 penalty units and/or terms of imprisonment.

**Insufficient information regarding strict liability offences**

The committee previously commented as follows:

The ordinance creates three strict liability offences:

Subsection 87(6) creates a strict liability offence for failing: to show, or demonstrate to a police officer the operation of, machinery or equipment on a vessel; to give a police officer your name, residential address, date of birth or evidence of your identity; or, where a police officer boards a vessel,
to stop or manoeuvre the vessel as required by the police officer;

Subsection 105(4) creates a strict liability offence for failing to take reasonable steps to facilitate a police officer to board a vessel; and

Section 113 creates a strict liability offence for breaching a condition of an exemption under sections 111 or 112 of the Ordinance.

The first two offences carry penalties of 50 penalty units (currently $9000), and the offence under section 113 carries a penalty of 60 penalty units (currently $10 800). Each of the offences allows a defence of honest and reasonable mistake of fact
to be raised.

With respect to these offences, the ES to the ordinance states:

Failing to assist the police by not demonstrating the operation of equipment, identifying oneself, or manoeuvring a vessel as directed, may hinder the police in their ability to enforce the Ordinance, and may compromise the safety of the person, the police officer or the public. For this reason, this offence has been prescribed as a strict liability offence…

The offence applies if a person does not provide a safe and practicable way for police to board the vessel. If boarding of the vessel is not facilitated, police will be unable to carry out their duty to enforce compliance with the Ordinance, which is why the offence has been prescribed as a strict liability offence…

Breaching a condition could compromise public safety, or the safety of individuals on a vessel, which is why this offence has been designated as a strict liability offence. People operating a vessel under a conditional exemption are placed on notice to avoid breaching any condition of that exemption.

Given the potential consequences of strict liability offence provisions for the defendant, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. While the ES establishes why offences are needed to protect public and individual safety and to enable police to enforce compliance with the ordinance, the ES does not provide sufficient detail to justify
the framing of the offences as strict liability offences. In this respect, the committee notes the following guidance in relation to framing strict liability offences contained in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers* (the Guide):

Application of strict or absolute liability to *all* physical elements of an offence is generally only considered appropriate where all of the following apply.

* The offence is not punishable by imprisonment.
* The offence is punishable by a fine of up to:
	+ 60 penalty units for an individual (300 for a body corporate) in the case of strict liability, or
	+ 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability.
* The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.
* There are legitimate grounds for penalising persons lacking fault; for example, because he or she will be placed on notice to guard against the possibility of any contravention. If imposing absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact.[[45]](#footnote-45)

The committee considers that the ES has not justified how the framing of these offences as strict liability offences is likely to enhance the effectiveness of the enforcement regime under the ordinance in deterring certain conduct or is otherwise appropriate. Further, in respect of the offences under subsections 87(6) and 105(4), the ES has not demonstrated that there are legitimate grounds for penalising persons lacking fault.

The committee draws the minister's attention to the discussion of strict liability offences in theGuideas 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 Local Government and Territories advised:

Subsections: 87(6) and 105(4) and section 113

I have instructed my Department to amend the explanatory statement
for the Marine Ordinance to provide a more comprehensive justification for the three strict liability offence created by these sections, addressing the matters set out in, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide). As noted above, these justifications are that:

* the Marine Ordinance is a state-type law;
* JBT has a contiguous border with NSW;
* strict liability provisions mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of a contiguous marine border between the JBT and NSW;
* the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
* the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

**Committee's first response**

The committee thanks the minister for her response.

The committee notes the minister's advice that the strict liability provisions of the ordinance mirror NSW legislation. While the committee understands the desire
to ensure the same legal regime applies on either side of a contiguous border,
the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of strict liability offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the strict liability offence provisions of the ordinance. However,
as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny
principle 23(3)(b).

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

**Minister's second response**

The replacement ES provided by the Minister for Local Government and Territories states:

Strict liability offences

Subsections 87(6), 105(4) and section 113 of the Ordinance create strict liability offences. Strict liability removes the requirement that the prosecution prove the fault element of an offence, which would otherwise attach to a physical element of that offence. The application of strict liability in relation to these particular offences is appropriate, noting that:

* the penalties for the relevant offences do not include imprisonment or exceed 60 penalty units;
* for these offences, strict liability is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct;
* it is necessary to ensure the integrity of the regulatory regime in question;
* there are legitimate grounds for penalising persons lacking fault, eg, because he or she will be placed on notice to guard against the possibility of any contravention;
* there is general public support and acceptance for both the measure and the penalty.

Strict liability is imposed in respect of limited offences for specific reasons. These reasons include public safety and the public interest and ensuring that the regulatory scheme is observed where the sanction of criminal penalties is justified. They also arise in a context where a defendant can reasonably be expected, because of his or her involvement in marine activities, to know what the requirements of the law are, and the mental, or fault, element can justifiably be excluded.

The general rationale for making these offences strict liability offences is that there is a community expectation that people will be aware of and comply with their marine safety obligations. For example, a person who drives a powered vessel for recreational purposes at a speed of 10 knots or more must be aged 12 years or over and have a current general boat licence. To be granted a general boat licence a person is required to undertake a mandatory knowledge test, including marine safety requirements, and provide evidence of practical boating experience. Accordingly, when in charge of a powered vessel, vessel operators are expected to be aware of their marine safety responsibilities and the obligations they owe to their passengers and the wider community in the JBT marine environment.

For strict liability offences in this Ordinance, the prosecution will have to prove only the conduct of the accused. However, where the accused produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made that conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

Subsections 87(7) and 105(5) of the Ordinance also provide the strict liability offence 'specific defence' of 'reasonable excuse'…

**Committee's second response**

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

**Evidential burdens of proof on the defendant**

The committee previously commented as follows:

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

Subsections 15(2); 28(2); 30(8); 41(2); 47(4); 71(1) and (2); 87(7); and 105(5) of the ordinance provide for a number of defences against liability to offences relating to operating a vessel without a current boat driving licence; contravening a safe loading requirement; keeping all parts of the body within a vessel while underway; unauthorised use of an emergency patrol signal; lifejacket requirements; failure to comply with a direction relating to the conduct of person; failure to comply with monitoring powers relating to vessels and premises; and non-compliance with the requirement to facilitate boarding.

Sections 108 and 110 also provide exemptions from liability to various offences in the ordinance for certain activities and for persons assisting Australian Defence Force or the naval, military or air forces of another country.

In relation to the above provisions the defendant will bear the evidential burden in relation to the matters to make out the defences and exemptions.[[46]](#footnote-46)

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. The ES to the ordinance does not explicitly address the reversal of the evidential burden of proof.

The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the ES explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide* *to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[[47]](#footnote-47)

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

**Minister's first response**

The Minister for Local Government and Territories advised:

Sections: 108 and 110 and subsections 15(2); 28(2); 41(2); 47(4); 71(1) and (2); and 105(5)

I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the reversal of the burden of proof contained in each of the provisions above, addressing the matters set out in the Guide each of the detailed sections. As noted above the justifications are that:

* the Marine Ordinance is a state-type law;
* JBT has a contiguous border with NSW;
* Offence provisions reversing the evidentiary burden of proof mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side the contiguous marine border between the JBT and NSW;
* the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
* the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

**Committee's first response**

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions reversing the evidentiary burden of proof in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the offence provisions in the ordinance that reverse the evidentiary burden of proof. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

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

**Minister's second response**

The replacement ES provided by the Minister for Local Government and Territories states:

An evidential burden of proof requires a person to provide evidence of an asserted fact in order to prove that fact to a court. Subsections 87(7) and 105(5) of the Ordinance place an evidential burden on an individual to demonstrate that they had a reasonable excuse for failing to meet a duty or obligation.

Sections 108 and 110 and subsections 15(2), 28(2), 30(8), 31(2), 32(2), 41(2), 47(4) and 71(1) and (2) of the Ordinance also place an evidential burden on the defendant by requiring the defendant to raise evidence about the relevant matter that suggests a reasonable possibility that the matter exists or does not exist, after which the prosecution must disprove those matters beyond reasonable doubt.

An evidential burden has been placed on defendants in these provisions as the conduct proscribed by each of the offences may pose a grave danger to public safety. In addition, in each case, a defendant will be the only person in the circumstances with the relevant knowledge able to provide evidence of any reason for refusing or failing to comply with the relevant duty or obligation and it would be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

**Committee's second response**

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

**Legal burden of proof on the defendant**

The committee previously commented as follows:

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

Section 56 of the ordinance makes it an offence for a person under the age of 18 to either operate a vessel in Territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant’s breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This reverses the legal burden of proof applying to the section 56 offence.[[48]](#footnote-48)

The ES to the ordinance provides that:

[t]he religious or medicinal consumption of alcohol is likely to be exclusively within the knowledge of the defendant, and thus it would be unworkable if the prosecution bore the legal burden in relation to this.

It is appropriate that the defendant bears the legal burden in relation to this defence because of the potentially significant risks to public safety posed by a person affected by alcohol who is in charge of a vessel.

The committee considers that the ES provides a justification for reversing the evidential burden of proof (i.e. that the matters are peculiarly in the knowledge of the defendant). The committee also understands the justification for creating an offence to reduce the risks to public safety posed by people affected by alcohol in charge of vessels.

However, while the committee considers that it may be appropriate to require a defendant to *raise evidence* about matters relevant to the defence set out in section 63 (the evidential burden), the committee considers that the ES does not provide a justification for requiring the defendant to *positively prove* matters relevant to this defence (the legal burden).

The committee's consideration of the appropriateness of a provision which reverses the legal burden of proof is assisted if the ES explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide* *to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[[49]](#footnote-49)

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

**Minister's first response**

The Minister for Local Government and Territories advised:

Sections 56 and 63

I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the section 63 requirement for defendants to positively prove the matters set out in that section. As noted above, these justifications are that:

* the Marine Ordinance is a state-type law;
* JBT has a contiguous border with NSW;
* offence provisions and penalties mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of the contiguous marine border between the JBT and NSW;
* the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
* the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

**Committee's first response**

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions and penalties in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the reversal of the legal burden of proof that applies to a section 56 offence under the ordinance. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that this offence does not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

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

**Minister's second response**

The replacement ES provided by the Minister for Local Government and Territories states:

..section 63 of the Ordinance provides a defence to the offence created by section 56 of the Ordinance relating to underage alcohol consumption while operating a vessel, or supervising a person under 16 years of age who is operating a vessel. Section 63 of the Ordinance provides for a defence, which applies if the defendant proves that the relevant breath or blood alcohol was not caused by certain things, including the consumption of an alcoholic beverage. This defence requires the defendant to discharge the legal burden of proof for an element of the offence.

It is appropriate in this particular circumstance that the defendant bears the legal burden in relation to this defence rather than the evidential burden because of the potentially significant risks to public safety posed by a person under 18 years of age who is affected by alcohol while in charge of a vessel.

In addition, each specific matter capable of being raised as a defence by the defendant is peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

**Committee's second response**

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

**Unclear definition**

The committee previously commented as follows:

Section 92 of the ordinance provides that persons may assist police officers in exercising powers or functions or duties under Part 9. These include boarding a vessel, requiring a master of a vessel to answer questions, sampling, and securing or seizing things found using monitoring powers in relation to a vessel. ‘Persons assisting police officers’ is not defined outside of section 92. In this regard, the ES states:

This section provides that persons may assist police officers in the execution of their duties, if it is necessary and reasonable. Someone who helps a police officer in the exercise of their functions and duties is called a ‘person assisting’ the police officer. Powers exercised, or functions or duties performed by persons assisting, in accordance with the directions of a police officer, are taken to have been exercised or performed by the police officer.

However, it appears unclear to the committee:

1. whether the class of persons who may assist police officers is limited in any way;
2. whether the exemptions for police officers that are provided for in sections 109 and 110 would also apply to ‘persons assisting police officers’;
3. whether the conduct of 'persons assisting police officers' can be questioned in the same manner as the conduct of police officers; and
4. how these provisions would operate if ‘persons assisting police officers’ acted not in accordance with the directions of the police officer.

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

**Minister's first response**

The Minister for Local Government and Territories advised:

Section 92

I note the matters raised by the Committee and I have asked my Department to amend the explanatory statement for the Marine Ordinance to clarify:

* whether the class of person who may assist police officers is limited in any way;
* if the exemptions for police officers that are provided for in sections 109 and 110 apply to persons assisting police officers;
* whether the conduct of persons assisting police officers can be questioned in the same manner as the conduct of police officers; and
* how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officers.

**Committee's first response**

The committee thanks the minister for her response.

However, while the committee notes the minister's undertaking to amend the ES to the ordinance to clarify the committee's initial queries, the minister's response does not provide any information to clarify the matters raised by the committee.

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

**Minister's second response**

The replacement ES provided by the Minister for Local Government and Territories states:

Section 92 - Persons assisting police officers

Subsection 92(1) provides that a police officer may be assisted by other persons in the execution of their marine investigation and enforcement powers, functions and duties (provided for under Part 9 of the Ordinance) if that assistance is necessary and reasonable. Someone who assists a police officer in the exercise of their powers, functions and duties is called a 'person assisting' the police officer. The Ordinance does not limit the class of persons who may be a 'person assisting'…

Paragraphs (a) and (b) of subsection 92(2) provide for specific things that a person may do in assisting a police officer, namely, board a vessel or enter premises, and exercise powers and perform functions and duties under Part 9 of the Ordinance. However, under paragraph (c) of subsection 92(2), a person is only authorised by the Ordinance to do such things if they do them in accordance with a direction given to them by the police officer.
If a person assisting did such things other than in accordance with a direction given by the relevant police officer, their actions would not be authorised by the Ordinance, and any such power, function or duty purportedly exercised or performed by them would not be taken to have been exercised by the relevant police officer under subsections 92(3) and 92(4) (see below).

Under subsections 92(3) and 92(4), if a person exercises a power or performs a function or duty under Part 9 of the Ordinance in the course of giving necessary and reasonable assistance to a police officer who is also exercising powers or performing functions or duties under Part 9, and the person does so in accordance with a direction given to them by the police officer, the power, function or duty exercised or performed by the person will be taken for all purposes to have been exercised or performed by the police officer in question. Section 109 of the Ordinance provides that certain provisions of Part 6 do not apply to a police officer in certain circumstances: if s 109 would apply to a police officer exercising a power or performing a function or duty, then, provided the relevant criteria in sections 92 and 109 are satisfied, then [sic] the same exemption would apply to a person assisting who was exercising the power or performing the function or duty.

'For all purposes' an action of a person assisting a police officer, who is acting in accordance with the police officer's directions, is taken to be the action of the instructing police officer. Therefore, the police officer can generally be questioned about the action in the same way as they could be questioned had they taken the action themselves.

Exemptions under section 110 do not apply to a person assisting (only on the basis that they are a person assisting), as section 110 applies to persons assisting the Australian Defence Force or the naval, military or air forces of another country.

**Committee's second response**

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

**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 (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 subparagraph 21(2)(b)(i) of the ordinance incorporates Australian Standard AS 1799.1-2009, as in force at the commencement of the ordinance. However, neither the text of the ordinance nor the ES indicates how AS 1799.1-2009 may be freely 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 first response**

The Minister for Local Government and Territories advised:

Subparagraph 21(2)(b)(i)

Australian Standard AS1799.1-2009 Small Crafts Part One (AS1799.1-2009), sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. Australian Standard AS1799.1-2009 is readily available, but at a cost to the public.

Vessels cannot be registered in the JBT and they must meet the registration conditions set in their home state. Due to the proximity of NSW, the majority of vessels using JBT waters are likely to be registered in NSW. Further, it is likely that most vessels operating in JBT waters will traverse NSW regulated waters. In order to be registered and/or operate in NSW waters vessel operators must comply with regulation 13 of the Marine Safety Regulations 2016 (NSW), which makes similar provision, to section 21 of the Marine Ordinance.

Section 21 of the Marine Ordinance prohibits a vessel operating in JBT waters from having a motor that exceeds the appropriate power rating for the vessel. In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified (or the specification is not apparent) and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799.1-2009.

Noting the comments above, I have instructed my Department to paraphrase this response to address the Guide's requirement to include incorporated documents in the Explanatory Statement.

**Committee's first response**

The committee thanks the minister for her response.

The committee notes the minister's advice that the Australian Standard incorporated into the ordinance is readily available, but at a cost to the public.

In this regard, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. 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.[[50]](#footnote-50) 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 requests the further advice of the minister in relation to the above.

**Minister's second response**

The replacement ES provided by the Minister for Local Government and Territories states:

Section 21 – Offence – exceeding the appropriate power rating for a vessel

This section creates an offence of operating a vessel in JBT waters with
a motor that exceeds the appropriate power rating for the vessel. For
the purposes of practical jurisdictional application subsection 21(2) of the Ordinance reflects section 13 of the NSW Regulations, which expressly refers to Australian Standard AS 1799.1 - 2009 *Small craft – General requirements for power boats* (as in force on the commencement day) and the power rating approved by NSW Roads and Maritime Services (RMS) for vessels of that kind (again, as in force on the commencement day).

In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified, or the specification is not apparent, and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799 .1 -2009. If the vessel does not have an outboard motor, the appropriate power rating is the power rating for vessels of the kind approved by RMS for the purposes of clause 13 of the NSW Regulation
(as in force on the commencement day).

AS 1799.1-2009 sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. It does not apply to boats used for commercial purposes or exclusively for racing, nor to canoes, kayaks, inflatable boats, rigid inflatable boats, yachts or auxiliary yachts.
A hardcopy or PDF version of AS 1799.1-2009 is available for purchase via the publisher's website.[[51]](#footnote-51) Alternatively, AS 1799.1-2009 can be viewed free of charge at the National Library, the Shoalhaven Library, the Department's Library in Canberra, and the Department's Jervis Bay Territory Administration Office (Village Road, Jervis Bay Village, JBT).

**Committee's second response**

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

In concluding, the committee welcomes the minister's advice that AS 1799.1-2009 can be viewed free of charge at various libraries, as well as at the Department of Infrastructure and Regional Development's Jervis Bay Territory Administration Office. However, the committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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| **Instrument** | National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 [F2017L00209] |
| **Purpose** | Sets rules for funding specialist disability accommodation for participants under the National Disability Insurance Scheme |
| **Authorising legislation** | *National Disability Insurance Scheme Act 2013* |
| **Department** | Social Services |
| **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) and (d) |
| **Previously reported in** | *Delegated legislation monitor* 4 of 2017 |

**Access to incorporated 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 (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

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

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

With respect to providing a description of the incorporated documents, the committee understands that NDIS prices and associated arrangements included in these documents are designed to assist disability support providers to understand the way pricing and payments work in the NDIS, and that the documents may be described as administrative in character. However, the committee is interested to understand why it is appropriate for the NDIS Price Guide and Legacy Stock Price List to be issued by the NDIA without Parliamentary oversight given that their application in the rules will determine the amounts that will be funded by the NDIS for specialist disability accommodation.[[52]](#footnote-52)

With respect to indicating how the incorporated documents may be obtained, the committee notes that the NDIS Price Guide is available for free online.[[53]](#footnote-53) Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed. The committee remains concerned about how the Legacy Stock Price List may be obtained.

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

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

**Minister's response**

The Minister for Social Services advised:

Having regard to paragraph 15J(2)(c) of the *Legislation Act 2003*, I will submit a revised Explanatory Statement which includes a description of these documents, as well as website links indicating how the documents may be publicly accessed.

In relation to the Committee's comments on the authority of the National Disability Insurance Agency (NDIA) to issue the NDIS Price Guide and Legacy Stock Price List, the NDIS Act 2013 establishes the NDIA and its functions. The functions are set out in section 118(1) of the NDIS Act 2013 and include:

* 'to manage the financial sustainability of the National Disability Insurance Scheme' (s 118(1)(b)) and
* 'to do anything incidental or conclucive to the performance of the above functions' (s 118(1)(h)).

To undertake these functions, it is appropriate that the NDIA set prices and use other methods to ensure that the prices of supports under the NDIS support financial sustainability.

**Committee's response**

**The committee thanks the minister for his response.**

The committee notes the minister's undertaking to register a revised ES that will include a description of the incorporated documents and where they can be publicly accessed.

The committee also notes the minister's advice that in order for the NDIA to undertake its functions as set out in the *National Disability Insurance Scheme Act 2013*, it is appropriate for the NDIA to 'set prices and use other methods to ensure that the prices of supports under the NDIS support financial sustainability', and that this may include issuing the NDIS Price Guide and Legacy Stock Price List.

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Drafting**

The committee previously commented as follows:

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.

**Minister's response**

The Minister for Health advised:

The F1/F2 determination is one of eleven legislative instruments that were registered for commencement on 1 April 2017 as part of monthly amendments to legislative instruments under the *National Health Act 1953*. As suggested by the Committee, the listing of etanercept on both the F1 list and F2 list was the result of a drafting error in the F1/F2 determination.

Etanercept should have been omitted from the F1 list. This error will be corrected in an amendment to the National Health (Listed drugs on F1 and F2) Determination 2010 (PB93 of 2010) to take effect on 1 June 2017.
This has not caused, and will not cause, any impact to Government, suppliers of etanercept or patients.

**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 advice that the listing of etanercept on both the F1 list and F2 list has not affected, and will not affect, any individuals.

The committee also notes that this error has been corrected in National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 4) (PB 41 of 2017) [F2017L00623], which was registered on the Federal Register of Legislation on 31 May 2017.

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Indexation method**

The committee previously commented as follows:

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.

**Minister's response**

The Minister for Health advised:

I understand that it has not been common practice to provide an explanation of the indexation method in the Private Health Insurance (Benefit Requirements) Rules 2011 (the Rules). The Rules negotiated with relevant parties have been in effect since 2011 and there has been no record of any concern raised regarding the method or this practice since this time by hospitals or private health insurers.

The Committee has also queried whether it would be appropriate for
the indexation method to be specified in the Rules in the future. My Department has progressively been reviewing the regulatory instruments that relate to private health insurance and identified a number of possible amendments that aim to strengthen clarity and administrative efficiencies for stakeholders and the Government.

My preference is that any proposed changes be consolidated within a package of reforms that I will shortly receive from the Private Health Ministerial Advisory Committee (PHMAC). The PHMAC has been actively reviewing the arrangements for private health insurance including standard clinical definitions, contracting, minimum default benefits and second tier default benefits; all of which could impact the Rules. Continuing the Rules in their current form will enable my Department to incorporate all required changes in the most efficient, consistent and holistic manner.

**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 advice that the Department of Health (the department) has identified a number of possible amendments to regulatory instruments that relate to private health insurance, and that these are proposed to be consolidated within a pending package of reforms.

As part of the review for private health insurance, the committee requests that consideration be given to the appropriateness of the current indexation method used to calculate the minimum benefit payable per night for NHTPs; and whether the indexation method should be codified in the principal rules or elsewhere.

The committee notes that the indexation method itself may be described as administrative. However, the indexation method as applied by future instruments may have an impact on the calculation of the minimum benefit that a private health insurance policy that covers hospital treatment must provide to policy holders. If this is the case, the committee would expect the ES to those instruments to contain a detailed justification as to why it is appropriate for the department to decide the indexation rate without Parliamentary oversight.

The committee will continue to monitor this issue.

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| **Instrument** | Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124] |
| **Purpose** | Amends the *Social Security (International Agreements) Act 1999* to set out the terms of the Agreement on Social Security between the Governments of Australia and New Zealand |
| **Authorising legislation** | *Social Security (International Agreements) Act 1999* |
| **Department** | Social Services |
| **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 |

**Incorporation of documents**

The committee previously commented as follows:

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 Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124] (the regulations) insert a new Schedule 3 to the *Social Security (International Agreements) Act 1999*, which contains the text of
the 'Agreement on Social Security between the Government of Australia and the Government of New Zealand' (the agreement). With reference to the above,
the committee notes that Article 1 of the agreement contains definitions which rely on the social security law of New Zealand. Article 18 and Part A of the Schedule to the agreement also incorporate the *New Zealand Privacy Act 1993* and New Zealand privacy laws. However, neither the text of the regulations nor the ES expressly states the manner in which this New Zealand legislation 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.

**Minister's response**

The Minister for Social Services advised:

I note the comments of the Committee with respect to the incorporation of documents and would like to take this opportunity to refer to a
similar request from the Committee that arose in relation to the Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016.

As noted in our previous response, section 8 of the *Social Security (International Agreements) Act 1999* (the International Agreements Act) provides for regulations to add to the Act a Schedule setting out the terms of an agreement between Australia and another country if the agreement relates to reciprocity in social security or superannuation matters.

The Social Security (International Agreements) Amendment (New Zealand) Regulation 2017, which adds a new schedule 3 to the International Agreements Act, must therefore set out the exact terms of the agreement between Australia and New Zealand. The references to the New Zealand social security law contained in definitions appears in Article 1 (Definitions) and the references to the *New Zealand Privacy Act 1993* and the New Zealand privacy laws appear in Article 18 (Exchange of Information)
and Part A (Terms and conditions for exchange of information for social security purposes) of the Schedule to the agreement.

Where the text of an international social security agreement is set out in
a Schedule to the Act, the provisions of the agreement have effect despite anything in the social security law (subsection 6(1) of the Act). However, this only applies to provisions of the agreement that:

* are in force; and
* affect the operation of the social security law (subsection 6(2) of the Act).

The reference to the New Zealand social security law and the *New Zealand Privacy Act 1993* (including, New Zealand privacy laws) do not affect the operation of the social security law.

The Social Security (International Agreements) Amendment (New Zealand) Regulation 2017 does not therefore apply, adopt or incorporate New Zealand social security law or privacy laws (including the *New Zealand Privacy Act 1993*) for the purpose of section 14 of the *Legislation Act 2003*.

For completeness, and the Committee's further information, Article 2 of the Agreement applies the social security laws of Australia and New Zealand, as well as the *New Zealand Veteran's Support Act 2014*, as they apply to or affect the relevant benefits covered under the Agreement,
at the time of signing, and to any legislation that subsequently amends, supplements, consolidates or replaces them.

**Committee's response**

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

The committee also notes the minister’s previous advice provided in relation to a similar issue raised by the committee regarding the Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 [F2016L00720].[[54]](#footnote-54)

The committee understands this advice to mean that where the text of an international social security agreement (agreement) is set out in a Schedule to the *Social Security (International Agreements) Act 1999*, and the content of a document included in that agreement does not affect the operation of domestic social security law, it is regarded as being 'referred to', not 'incorporated'.

The committee understands the minister's advice to be that this circumstance applies to these particular regulations, and there is no need to specify a method of incorporation because the New Zealand legislation is referred to rather than incorporated.

Where future instruments set out the text of an agreement in a Schedule to the *Social Security (International Agreements) Act 1999*, it would be useful for the ES to include information about whether or not the content of a document included in that agreement affects the operation of the social security law. This would assist the committee in its examination of similar instruments.

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| **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) |
| **Previously reported in** | *Delegated legislation monitor* 5 of 2017 |

**Description of 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 instrument provides the following information:

**Consultation**

Native title notification was undertaken in relation to the Instrument.

While the committee does not interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, noting that the ES appears to address only the native title notification requirements in relation to the instrument, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003*.

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

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

**Minister's response**

The Assistant Minister for Agriculture and Water Resources advised:

In developing the Instrument, AFMA notified representative Aboriginal
and Torres Strait Islander bodies under section 24HA(7) of the *Native Title
Act 1993*. An objection was received from one respondent, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation Registered Native Title Body Corporate and the Torres Strait Regional Sea Claim (Part A). This objection was on
the basis that, among other things, the Instrument interfered with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, and collect traditional food and to generally access the area.

The Protected Zone Joint Authority (PZJA) considered this objection. However, the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and
livelihood of traditional inhabitants and the protection of indigenous fauna. In making its decision, the PZJA also committed to a general review of the impact of lnstruments on Native Title rights in the Torres Strait
by April 2018.

The explanatory statement for this Instrument has been updated to provide clarity on the consultation and is enclosed. Subject to your endorsement, my department will arrange for the updated explanatory statement to be registered on the Federal Register of Legislative Instruments [sic].

The updated ES states:

The relevant stakeholders for consultation in relation to the Instrument are Aboriginal and Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants…

To inform the relevant stakeholders about the Instrument a Native title notification under section 24HA(7) of the *Native Title Act 1993* was undertaken. The notification was provided in writing to the Cape York Land Council, including for the Kaurareg Native Title (Aboriginal) Corporation Registered Native Title Body Corporate (RNTBC); Carpentaria Land Council; Malu Lamar (Torres Strait Islander) Corporation RNTBC; and the Torres Strait Regional Authority Native Title Office. The notification included a copy of the Instrument and details of the prohibition of fishing and exemption to the prohibition for traditional fishing.

There was one respondent to the Native Title notification, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation RNTBC and the Torres Strait Regional Sea Claim (Part A). The respondent expressed, on their behalf, objection to the Instrument on the basis that, among other things, the Instrument interferes with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, collect traditional food and to generally access the area.

The Protected Zone Joint Authority (PZJA) considered this objection. However the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and livelihood of traditional inhabitants and the protection of indigenous fauna.
In making its decision, the PZJA also committed to a general review of
the impact of instruments on Native Title rights in the Torres Strait by
April 2018.

**Committee's response**

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

The committee notes the assistant minister's undertaking to register the revised ES which addresses the committee's concerns regarding consultation on the Federal Register of Legislation.

**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)[[55]](#footnote-55) 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.[[56]](#footnote-56) 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. United Nations Treaty Collection, *Treaty Series*, <https://treaties.un.org> (accessed 1 June 2017) and EU External Action Service, *Treaties Office Database*, [http://ec.europa.eu/world/
agreements](http://ec.europa.eu/world/agreements) (accessed 1 June 2017). [↑](#footnote-ref-7)
8. The committee understands that the Australian Airspace Policy Statement 2015 [F2015L01133] is a legislative instrument that is not subject to disallowance. [↑](#footnote-ref-8)
9. 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-9)
10. The egg standard is made under section 134 of the ACL which authorises information standards to be made for the purposes of the ACL scheme. As the egg standard is not a regulation and does not appear to be disallowable under the CCA, ACL or another Act, it appears to be exempt from disallowance. [↑](#footnote-ref-10)
11. The exemption regulation replaced the former Legislative Instruments Regulations 2004, and was part of a suite of changes to the regime governing legislative instruments implemented by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*). [↑](#footnote-ref-11)
12. Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [http://www.arc.ag.gov.au/Publications/Reports/Pages/
Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx](http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx) (accessed 6 June 2017). [↑](#footnote-ref-12)
13. The exemption regulation replaced the former Legislative Instruments Regulations 2004, and was part of a suite of changes to the regime governing legislative instruments implemented by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*). [↑](#footnote-ref-13)
14. See *Delegated legislation monitor* 14 of 2015 (11 November 2015), pp 8–9. [↑](#footnote-ref-14)
15. See *Delegated legislation monitor* 16 of 2015 (2 December 2015), pp 30–33 and Appendix 1. [↑](#footnote-ref-15)
16. See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1. [↑](#footnote-ref-16)
17. See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1. [↑](#footnote-ref-17)
18. 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-18)
19. Resolution Institute, *Current Arbitration Rules*, <https://www.resolution.institute/dispute-resolution/arbitration-rules> (accessed 4 May 2017). [↑](#footnote-ref-19)
20. Attorney-General's Department, *Guide to managing sunsetting of legislative instrument*, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf> (accessed 13 June 2017). [↑](#footnote-ref-20)
21. 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 6 June 2017). [↑](#footnote-ref-21)
22. 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 6 June 2017). [↑](#footnote-ref-22)
23. In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate).
The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010,
pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest
 2 of 2017*, pp 1-5. [↑](#footnote-ref-23)
24. See *Delegated legislation monitor* 5 of 2014, pp 16–18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act*.* [↑](#footnote-ref-24)
25. Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 2) Regulations 2017 [F2017L00442] adds new table item 15 to Part 3 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997
(FF(SP) Regulations). [↑](#footnote-ref-25)
26. Financial Framework (Supplementary Powers) Amendment (Veterans’ Affairs Measures No. 1) Regulations 2017 [F2017L00439] adds new table item 16 to Part 3 of Schedule 1AB to the FF(SP) Regulations. [↑](#footnote-ref-26)
27. 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 6 June 2017). [↑](#footnote-ref-27)
28. For more extensive comment on this issue, see *Delegated legislation monitor* 8 of 2013, p. 511. [↑](#footnote-ref-28)
29. 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-29)
30. 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-30)
31. *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416. [↑](#footnote-ref-31)
32. *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416. [↑](#footnote-ref-32)
33. 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 13 June 2017). [↑](#footnote-ref-33)
34. *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416. [↑](#footnote-ref-34)
35. Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, <https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf> (accessed 2 February 2016), p. 9. [↑](#footnote-ref-35)
36. Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, <https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf> (accessed 2 February 2016), p. 9. [↑](#footnote-ref-36)
37. *Victoria v Commonwealth* (1996) 187 CLR 416. [↑](#footnote-ref-37)
38. *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669. [↑](#footnote-ref-38)
39. 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-39)
40. See *Customs Act 1901*, section 4. This sectionprovides a very broad definition of the term an 'officer of Customs'. [↑](#footnote-ref-40)
41. 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 13 June 2017). [↑](#footnote-ref-41)
42. See Section 19: Offence of operating an unsafe vessel (Penalty: Imprisonment for 20 months or 100 penalty units, or both); Section 24: Offence of reckless or negligent operation of a vessel (Penalty: Imprisonment for 10 months or 50 penalty units, or both); Section 32: Offence of climbing etc. onto a vessel (Penalty: 100 penalty units); Section 36: Offence of interfering etc. with lightships and navigation aids (Penalty: 100 penalty units); Section 59: Offence of middle range prescribed concentration of alcohol (Penalty: Imprisonment for 6 months or 30 penalty units, or both); Section 60: Offence of high range prescribed concentration of alcohol (Penalty: Imprisonment for 10 months or 50 penalty units, or both); and Section 113: Offence of breaching a condition of an exemption (Penalty: 60 penalty units). [↑](#footnote-ref-42)
43. Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), [https://www.ag.gov.au/Publications/Pag
es/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx](https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx) (accessed 16 November 2016). [↑](#footnote-ref-43)
44. See, *Delegated legislation monitor* 6 of 2014, pp 18 and 69 (response received from the First Parliamentary Counsel in relation to Australian Jobs (Australian Industry Participation) Rule 2014). [↑](#footnote-ref-44)
45. Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), [https://www.ag.gov.au/Publications/Pag
es/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx](https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx) (accessed 16 November 2016). [↑](#footnote-ref-45)
46. Subsection 13.3(3) of the *Criminal Code* provides: A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence. [↑](#footnote-ref-46)
47. Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), [https://www.ag.gov.au/Publications/Pag
es/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx](https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx) (accessed 16 November 2016), pp 50-52. [↑](#footnote-ref-47)
48. Section 13.4 of the *Criminal Code* provides: A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly: (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or (b) requires the defendant to prove the matter; or (c) creates a presumption that the matter exists unless the contrary is proved. [↑](#footnote-ref-48)
49. Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (accessed 16 November 2016), pp 50-52. [↑](#footnote-ref-49)
50. 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-50)
51. See SAI Global website <https://infostore.saiglobal.com/store/details.aspx?ProductID=1141233> (accessed 18 April 2017) [↑](#footnote-ref-51)
52. See paragraph 5.4. [↑](#footnote-ref-52)
53. See National Disability Insurance Agency, <https://www.ndis.gov.au/providers/pricing-and-payment> (accessed 28 March 2017). [↑](#footnote-ref-53)
54. *Delegated legislation monitor* 7 of 2016, pp 106-108. [↑](#footnote-ref-54)
55. 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-55)
56. 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-56)