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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, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

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 seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

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

Publications

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

1 For further information on the disallowance process and the work of the committee see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.[3]

Guidelines

Guidelines referred to by the committee are published on the committee's website.[4]

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.[5]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[6]

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[7]

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

3 See www.aph.gov.au/regords_monitor.

4 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

5 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

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

7 Regulations and Ordinances Committee, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 24 May and 4 July 2018 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Guidelines referred to by the committee are published on the committee's website.[1]

Response required

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

Instrument	**Australian Prudential Regulation Authority (confidentiality) determination No.1 of 2018 [F2018L00765]**
Purpose	Provides that certain information given to the Australian Prudential Regulation Authority is non-confidential
Authorising legislation	*Australian Prudential Regulation Authority Act 1998*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[2]

Consultation[3]

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

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1 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(a).

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[4]

The instrument was made under section 57 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act). It determines that certain information provided to the Australian Prudential Regulation Authority (APRA) for the purposes of the National Claims and Policies Database (NCPD) is not confidential. Under the heading of consultation, the ES to the instrument provides a comprehensive overview of the consultation undertaken on options for the level of confidentiality protection to be applied to information in the NCPD. This includes the methodology used, the number and type of responses received from stakeholders, and issues raised in support of and opposition to the proposed options.

However, it would appear from the information provided in the ES that the consultation described ended in November 2009. The ES does not provide any information about more recent consultation undertaken in relation to this instrument, nor does it state that further consultation was considered inappropriate or impracticable, and explain why.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this case, the committee considers that while the ES provides a comprehensive description of consultation undertaken in 2008 and 2009 on relevant matters (that is, the level of confidentiality to be applied to information in the NCPD), it does not provide sufficient information to establish whether consultation was undertaken in relation to the present instrument.

The committee requests the minister's advice as to:

- **whether any consultation was undertaken in relation to the instrument and if so, the nature of that consultation; or**
- **whether no consultation was undertaken and if not, why not.**

4 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

The committee also requests that the explanatory statement be amended to include this information.

Instrument	**Australian Radiation Protection and Nuclear Safety Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00850]** **Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00851]**
Purpose	Amend the Australian Radiation Protection and Nuclear Safety Regulations 1999 to amend license conditions, increase licence application fees, update incorporated standards and codes, and address other minor issues
Authorising legislation	*Australian Radiation Protection and Nuclear Safety Act 1998* *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018) Notice of motion to disallow must be given by 17 September 2018[5]

Access to incorporated documents[6]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

5 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

6 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee's expectations in this regard are set out in its *Guideline on incorporation of* documents.[7]

Part 2 of Schedule 1 to the Australian Radiation Protection and Nuclear Safety Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00850] amends the Australian Radiation Protection and Nuclear Safety Regulations 1999 (principal regulations) to update references to a number of documents incorporated in the principal regulations, to incorporate the most recent version of the documents. The incorporated documents include four Australian and New Zealand standards: AS/NZS IEC 60825.1:2014, AS/NZS IEC 60825.2:2011, AS/NZS IEC 62471:2011 and AS 3786:2014.

Item 9 of Schedule 1 to the Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00851] amends the Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2000 (principal charges regulations) to similarly update references to two of the same standards—AS/NZS IEC 60825.1:2014 and AS/NZS IEC 60825.2:2011—incorporated in the principal charges regulations.

The ESs to the instruments indicate that each of these standards may be obtained from SAI Global. However, the committee's research indicates that these standards are only available from SAI Global for purchase, at a cost of between $181.96 and $329.67 per document. Neither the instrument nor the ES indicates where the documents may be accessed free of charge.

The issue of access to material incorporated into the law by reference to Australian and international standards has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue.[8] The report comprehensively outlined the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made freely available to

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7 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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

interested or affected persons. This might, for example, involve confirming the availability of the document through specific public libraries, or making the document available for viewing upon request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ESs to the relevant instruments.

The committee requests the minister's advice as to how the four Australian and New Zealand standards incorporated in the instruments are or may be made readily and freely available to persons interested in or affected by the instruments; and requests that the explanatory statements be amended to include this information.

Instrument	**Civil Aviation Order 95.32 (Exemption from Provisions of the Civil Aviation Regulations 1988 — Weight-Shift-Controlled Aeroplanes and Powered Parachutes) Instrument 2018 [F2018L00959]**
Purpose	Exempts certain aeroplanes that are weight-shifted control aeroplanes or powered parachutes from specified provisions of the Civil Aviation Regulations 1988, subject to conditions
Authorising legislation	Civil Aviation Regulations 1988 Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[9]

Access to incorporated documents[10]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

9 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

10 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[11]

With reference to these matters, the committee notes that the instrument appears to incorporate the 'LSA standards', as defined in section 21.172 of the Civil Aviation Safety Regulations 1998 (CASR). That section of CASR defines LSA standards as standards issued by the American Society for Testing and Materials for aeroplanes defined as 'light aircraft', and certain other standards prescribed by the Part 21 Manual of Standards made under CASR. The ES states that the standards are incorporated as in force from time to time, and provides a web reference for where they may be accessed.[12] However, the ES also indicates that the standards are only available on payment of a fee.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[13]

The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration

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11 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

12 www.astm.org.

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

of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to how the standards issued by the American Society for Testing and Materials for aeroplanes defined as 'light aircraft, which appear to be incorporated in the instrument, are or may be made readily and freely available to persons interested in or affected by the instrument; and requests that the explanatory statement be amended to include this information.

Instrument	**Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018 [F2018L00819]**
Purpose	Increase fees payable in the federal courts and tribunals, and juror remuneration in the Federal Court of Australia
Authorising legislation	*Administrative Appeals Tribunal Act 1975* *Family Law Act 1975* *Federal Circuit Court of Australia Act 1999* *Federal Court of Australia Act 1976* *Judiciary Act 1903* *Migration Act 1958* *Native Title Act 1993*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 25 June 2018) Notice of motion to disallow must be given by 13 September 2018[14]

Unclear basis for determining fees[15]

The instrument amends relevant regulations[16] (principal regulations) to increase fees payable by persons seeking documents or services from the High Court, Federal

14 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

15 Scrutiny principle: Senate Standing Order 23(3)(a).

Court, Federal Circuit Court, Family Court, Administrative Appeals Tribunal (AAT) and National Native Title Tribunal (NNTT). The explanatory statement (ES) to the instrument explains that the amendments implement the following fee increases:

- regular biennial indexation of fees, with reference to the Consumer Price Index (CPI), as authorised by the principal regulations and scheduled to occur on 1 July 2018 for all of the above courts and tribunals;[17]
- amendment of the principal regulations to increase the frequency of fee indexation for all of the courts and tribunals, from biennial to annual indexation, commencing on 1 July 2019;
- an additional 17.5 per cent increase in High Court fees from 1 July 2018; and
- an additional 3.9 per cent increase in fees for the Federal Court and for general law matters in the Federal Circuit Court, from 1 July 2018.

The committee's usual expectation, in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, is that the ES will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.[18]

In relation to the increases beyond indexation in High Court, Federal Court and Federal Circuit Court fees, the ES states that:

> The 2018-19 Budget provided the High Court with $10.7 million over the forward estimates to implement enhanced security measures. These security measures included capital works following a review of the Court's security, and ongoing funding toward the Court's security needs. The additional ongoing security funding will be funded through increases to fees payable in the High Court of 17.5 percent, and increases of 3.9 percent to the fees payable in the Federal Court and for general federal

16 Administrative Appeals Tribunal Regulations 2015; Family Law (Fees) Regulations 2012; Federal Court and Federal Circuit Court Regulations 2012; High Court of Australia (Fees) Regulations 2012; Migration Regulations 1994 and Native Title (Tribunal) Regulations 1993.

17 Fees for the Migration and Refugee Division of the AAT will also be indexed as of 1 July 2018, although the previous biennial indexation of these fees occurred on 1 July 2017. The ES notes that this will have the effect of introducing annual indexation for these fees from 1 July 2018.

18 In particular, sections 53 and 55 of the Constitution make specific provision in relation to laws imposing taxation. Relevantly, section 55 provides that 'Laws imposing taxation shall deal only with taxation', and section 53 provides that 'a proposed law shall not be taken to…impose taxation, by reason only of its containing provisions…for the demand or payment or appropriation of…fees for services under the proposed law'.

> law matters in the Federal Circuit Court. These increases will be applied in addition to the prescribed increases to fees in these courts for indexation to the Consumer Price Index (CPI) that is set to occur on 1 July 2018.

In relation to the increased frequency of indexation of all fees, the ES advises that:

> as part of the 2018-19 Budget, federal courts' and tribunal fees will be indexed to CPI annually, rather than biennially as is currently the case. This amendment will generate approximately $4.8 million of additional revenue over the forward estimates, while only having a modest impact on court users. This revenue will be applied to Budget repair and priorities within the Attorney-General's and the Minister for Home Affairs' portfolios.

The committee acknowledges that each of the authorising Acts under which the relevant principal regulations are made provides for the imposition of fees via legislative instrument. However, none of these Acts is a specific taxation Act that would authorise the imposition of taxation via the regulations.

In relation to the High Court and federal courts' fee increases of 17.5 per cent and 3.9 per cent respectively, the ES indicates that these will fund ongoing security costs related to the enhanced security measures to be undertaken at the High Court. It is not clear to the committee whether these fee increases have been calculated on the basis of cost recovery for each court (such as the ongoing costs of increased security staff for the provision of services by each of the courts), or whether they will contribute to additional costs beyond cost recovery, such as capital works or upgrades. In addition, it appears to the committee that, to the extent that increased Federal Court and Federal Circuit Court fees will fund enhanced security for the High Court, these may not represent cost recovery for the provision of documents or services by the federal courts.

Further, the ES states that the increase in fees for all of the courts and tribunals arising from doubling the frequency of their indexation is intended to generate revenue for broader Budget repair, and priorities in the Attorney-General's and Home Affairs portfolios. As such, it appears to the committee that these fee increases are not calculated on the basis of cost recovery for the provision of the relevant documents and services from these courts and tribunals. Rather, the committee is concerned that this increase may constitute the purported levying of taxation via the instrument, despite the absence of legislative power to do so.

The committee requests the minister's advice as to:

- **the detailed basis on which each of the increased fees imposed by the instrument has been calculated, and how this relates to cost recovery for the provision of the relevant documents and services; and**

- **if any of the increased fees amount to more than cost recovery, the legislative authority which is relied on for the levying of taxation by the instrument.**

Instrument	**Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 2) Regulations 2018 [F2018L00839]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Education and Training and the Department of Jobs and Small Business
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018) Notice of motion to disallow must be given by 17 September 2018[19]

Merits review[20]

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

The instrument adds four new items to the table in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997, establishing legislative authority for expenditure on activities related to education and training.

One of these is item 277, 'Skills checkpoint for older workers', which provides funding for career guidance and training for older workers to help them remain in the workforce. The explanatory statement (ES) to the instrument explains that the program, managed by the Department of Education and Training, will deliver targeted support services to up to 5,000 individuals per year who are either working but at risk of unemployment, or are recently unemployed. In addition to targeted guidance and support services, from January 2019 participants in the program may also be eligible for a government 'incentive' of up to $2000, provided by the

19 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

20 Scrutiny principle: Senate Standing Order 23(3)(c).

Department of Jobs and Small Business, as a contribution to training linked to the participant's current or potential future employment.

The ES states that both the program and the incentive will be delivered by contracted service providers engaged by the two departments under an open tender procurement process, and that 'the contracts with providers will include complaints handling and review processes regarding both the Program and the Incentive payment'. The ES goes on to state that if participants are dissatisfied with service providers' decisions in relation to the program or incentive, including about eligibility for them, these may be raised with the relevant department. Any review of such a query or complaint will be conducted by a departmental officer who is 'independent from the provider'.

The ES states that further merits review will not be available, because 'neither the Program nor the Incentive are established under legislation providing a right of administrative review' by the Administrative Appeals Tribunal (AAT). The ES adds that in the absence of a legislatively conferred right to AAT review, it is appropriate that persons be able to seek review of decisions from the service provider or the relevant department, and that 'the availability of these options is the primary reason for the absence of merits review by an external body; the fact that relevant decisions are not made under an enactment is a secondary reason'.[21]

The committee is concerned that the ES does not appear to identify any established ground for the exclusion of these decisions from merits review. In this regard, the committee draws attention to the accepted guidelines for government on the issue of merits review, contained in the Attorney-General's Department, Administrative Review Council document, *What decisions should be subject to merit review?*.[22] The committee emphasises that it does not generally consider that review by departmental officials of decisions made by service providers contracted by government constitutes sufficiently independent merits review, or of itself justifies the exclusion of external merits review.

The committee further notes that it does not consider that the fact that decisions are not made under an enactment is an appropriate basis for excluding merits review.

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21 It is noted that the discussion of merits review in the ES also makes reference to the unavailability of review under the *Administrative Decisions (Judicial Review) Act 1997* (AD(JR) Act), and the availability of complaint to the Commonwealth Ombudsman. The committee notes that both references are mistaken in that neither judicial review under the AD(JR) Act, nor complaints to the Commonwealth Ombudsman, constitute forms of merits review.

22 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx.

Rather, the committee would expect that, if merits review by the Administrative Appeals Tribunal (AAT) is appropriate for decisions made in relation to an activity, the necessary reference to AAT review should be included in the relevant instrument or in primary legislation.

In this regard, the committee emphasises that the use of the Financial Framework (Supplementary Powers) Regulations 1997 to authorise spending on programs that otherwise lack legislative authority should not give rise to an effective 'loophole', excluding rights that persons should have to independent merits review of decisions that affect them.

Another initiative inserted by the instrument is item 278, the 'High Achieving Teachers' Program'. This initiative aims to address teacher shortages by recruiting and selecting high achieving individuals, who hold professional or academic experience gained outside of teaching but not a full teaching qualification, for placement in teaching positions in Australian secondary schools with specific teacher workforce challenges, with the provision of appropriate training and support to fulfil these roles and subsequently complete a teaching qualification.

The ES states that the High Achieving Teachers' Program will also be delivered by one or more contracted service providers, selected via an open tender procurement process. However, the ES provides no information regarding how participants for the program will be selected by the service providers, including any relevant criteria and selection process, nor whether independent merits review will be provided for decisions about participation in the program made by providers. The committee is therefore unable to determine whether the implementation of this program will involve decisions that should be subject to independent merits review.

The committee's expectations regarding merits review are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[23]

The committee requests the minister's advice regarding:

- **the characteristics of decisions by service providers in relation to the Skills Checkpoint for Older Workers Program and related Incentive that would justify their exclusion from merits review by an external body independent of the department; and**

23 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

- **whether decisions by service providers in relation to the High Achieving Teachers' Program that affect the interests of participants or potential participants in the program will be subject to independent merits review; and if not, the characteristics of such decisions that would justify their exclusion from merits review.**

Instrument	**Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2018 [F2018L00841]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Foreign Affairs and Trade
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018) Notice of motion to disallow must be given by 17 September 2018[24]

Merits review[25]

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

The instrument adds two new items to the table in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997, establishing legislative authority for expenditure on activities within the Foreign Affairs and Trade portfolio.

One of these is item 282, which provides for financial assistance with travel expenses for the next of kin of Australians who were on the downed Malaysian Airlines flight MH17 in July 2014, and their nominated support persons, to attend the Dutch national prosecution for those events.

24 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

25 Scrutiny principle: Senate Standing Order 23(3)(c).

The explanatory statement (ES) to the instrument states that the activity will be implemented by the Department of Human Services (DHS) on behalf of the Department of Foreign Affairs and Trade (DFAT). DHS will assess claims for assistance in accordance with eligibility criteria set out in policy guidelines for the activity, which will be provided on the DHS website. The ES states that claimants who are not satisfied with a DHS decision in relation to assistance may request an 'independent review' which will be undertaken by a DHS officer who was not involved in the initial decision. If the matter cannot be resolved by DHS review, the policy guidelines will set out a process for referral to DFAT for further review.

At the time of this report, the guidelines for the activity did not appear to be available, so the committee is unaware of the eligibility criteria for the assistance, and whether decisions in relation to the activity will be based only on mandatory (factual) considerations, or will involve a level of discretion by DHS. As such, the committee is unable to determine, from the information provided, whether these decisions should be subject to independent merits review.[26]

In this regard, should the decisions be ones which are appropriate for merits review, the committee notes that it does not generally consider that the availability of review of government decisions by departmental officials would constitute sufficiently independent merits review to satisfy the committee's scrutiny concerns.

The committee's expectations regarding merits review are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[27]

The committee requests the minister's advice regarding:

- **whether decisions made in relation to assistance under the 'MH17 Dutch national prosecution—travel assistance' activity are of a nature suitable for independent merits review; and**
- **if so, whether such review will be provided; or**
- **if not, the characteristics of such decisions that would justify their exclusion from independent merits review.**

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26 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx.

27 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2018 [F2018L00842]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Health
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018) Notice of motion to disallow must be given by 17 September 2018[28]

Merits review[29]

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

The instrument adds eight new items to the table in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997, establishing legislative authority for expenditure on activities within the Health portfolio.

One of these is item 292: Rural and Remote Health Infrastructure Projects, under which the government will provide funding for new and extended health care facilities in regional, rural and remote areas of Australia.

The explanatory statement (ES) to the instrument explains that the program will be broadly consistent with the former Health and Hospital Fund (HHF) program established in 2008-09, and part of the funding will enable existing HHF projects to be revised and completed. For these projects, no new independent review process will be provided, as they were previously assessed and approved by the independent HHF Advisory Board.

However, the program will also extend to providing grants for new health infrastructure projects. The ES states that decisions in relation to new funding

28 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

29 Scrutiny principle: Senate Standing Order 23(3)(c).

recipients 'may be subject to a merits review process'.[30] While the ES states that details will be included in the grant application pack released at the time of the grant round, it goes on to outline that this would involve review of the decision by a departmental officer who was not the original decision-maker. The ES provides no information regarding whether a further, external merits review process will be available if the matter is still not resolved to the satisfaction of the applicant.

The committee notes that it does not generally consider that the availability of review of government decisions by departmental officials would constitute sufficiently independent merits review to satisfy the committee's scrutiny concerns.

The committee's expectations regarding merits review are set out in its Guideline on regulations that amend Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations*.[31]

The committee requests the minister's advice regarding whether new grant decisions made under the Rural and Remote Health Infrastructure Projects activity will be subject to independent merits review; and if not, what characteristics of those decisions justify their exclusion from merits review.

30 The ES notes that decisions that involve direct project funding to state or territory governments will not be subject to independent review, as these will only be provided where such an arrangement is the only option to deliver the required infrastructure to the affected community. The committee notes that in such cases it would appear that there would be no effective remedy to be sought or obtained from a merits review process, which is an established ground for the exclusion of merits review.

31 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997. In relation to established grounds for merits review, the committee also draws attention to the Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx.

Instrument	**Health Insurance (Diagnostic Imaging Services Table) Regulations 2018 [F2018L00858]**
Purpose	Prescribes a new table of diagnostic imaging services for which Medicare benefits will be payable, incorporating minor policy changes and machinery amendments
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 27 June 2018) Notice of motion to disallow must be given by 18 September 2018[32]

Merits review[33]

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

The instrument prescribes diagnostic imaging services for which Medicare benefits are payable, and the relevant Medicare amount payable to providers for each service. Subdivision A of Division 1.2 of Schedule 1 to the instrument applies 'capital sensitivity' to the services provided under the instrument, which has the effect that higher rates of Medicare reimbursement are provided for services performed on newer or upgraded equipment, with reference to the 'effective life age' specified in the instrument for the relevant imaging equipment used to undertake the service.

Clause 1.2.3 of Schedule 1 provides for exemptions from capital sensitivity for (older) equipment used in regional and remote areas. While some exemptions are automatically applied, subclause 1.2.3(4) provides that the secretary may grant exemptions in respect of diagnostic imaging equipment in inner regional areas, where the equipment is operated on a rare and sporadic basis, and provides crucial patient access to diagnostic imaging services. Subclauses 1.2.3(5) to (7) set out the process for such exemptions, providing for an application to be made in writing to the department by a relevant proprietor, subject to certain conditions.

32 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

33 Scrutiny principle: Senate Standing Order 23(3)(c).

Clause 1.2.4 provides that if the secretary refuses to grant an exemption under subclause 1.2.3(4), the applicant may seek reconsideration of the decision by the secretary.

Neither the instrument nor the ES provides any information regarding whether any form of independent merits review is available where applications for exemption are refused by the secretary.

The committee notes that Division 2 of Part IIB of the *Health Insurance Act 1973* provides for certain remote area exemptions to be granted by the minister in relation to diagnostic imaging services. That Division includes provision for merits review by the Administrative Appeals Tribunal (AAT) of decisions by the minister to restrict or refuse such exemptions.[34] This provision in the Act does not appear to extend to AAT review of decisions made by the secretary under an instrument. However, it is not clear to the committee why refusal of an exemption by the secretary under the instrument would not be similarly suitable for independent merits review.

The committee requests the minister's advice regarding whether refusal of an application for exemption made under clause 1.2.3 of Schedule 1 to the instrument would be subject to independent merits review; and if not, what characteristics of such a decision would justify its exclusion from merits review.

34 *Health Insurance Act 1973*, section 23DZD.

Instrument	**Health Insurance (General Medical Services Table) Regulations 2018 [F2018L00766]**
Purpose	Prescribes a new table of general medical services for the 12-month period beginning on 1 July 2018
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[35]

Incorporation of document[36]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection

35 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

36 Scrutiny principle: Senate Standing Order 23(3)(a).

14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

The committee therefore expects instruments or their explanatory statements (ES) to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: 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 an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[37]

With reference to the above, the committee notes that the instrument incorporates the *Australian Type 2 Diabetes Risk Assessment Tool* (Assessment Tool). The instrument provides that the Assessment Tool could in 2018 be viewed on the Department of Health's website. However, neither the instrument nor its ES appears to indicate the manner in which the Assessment Tool is incorporated.

The committee notes that the instrument provides for the manner in which other relevant documents are incorporated,[38] and appreciates that the failure to specify the manner in which the Assessment Tool is incorporated may be an administrative oversight. Nevertheless, the committee expects that instruments or their ESs would set out the manner in which any documents are incorporated by reference, to ensure that persons interested in or affect by an instrument are able to readily understand and access its terms.

The committee requests the minister's advice as to the manner in which the *Australian Type 2 Diabetes Risk Assessment Tool* is incorporated into the instrument. The committee also requests that the instrument or its explanatory statement be amended to include this information.

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37 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

38 For example, section 2.17.10(4) of the instrument specifies that the *ADF Post-discharge GP Health Assessment Tool* is incorporated as existing on 1 July 2018.

Instrument	**Income Tax (Effective Life of Depreciating Assets) Amendment Determination 2018 (No 1) [F2018L00895]**
Purpose	Amends the Income Tax (Effective Life of Depreciating Assets) Determination 2015 to update prescriptions of 'effective lives' for specified assets as a basis to calculate their depreciation for income tax purposes
Authorising legislation	*Income Tax Assessment Act 1997*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[39]

Compliance with authorising legislation[40]

Retrospective effect[41]

The instrument is made under subsection 40-100(1) of the *Income Tax Assessment Act 1997* (ITA Act), which provides that the Commissioner of Taxation may make a written determination specifying the effective life of depreciating assets. The explanatory statement (ES) to the instrument explains that such determinations of 'effective life' provide taxpayers in specific industries who have the specified assets with a basis to calculate the decline in value (depreciation) of the assets for income tax purposes. The ES further notes that under the ITA Act, a taxpayer claiming depreciation for a relevant asset can choose whether to use the 'effective life' determined by the Commissioner, or to self-assess its effective life in accordance with section 40-105 of the Act.

The instrument establishes or amends the 'effective life' for a number of depreciating assets, and sets a 'date of application' for the determined effective life of each asset. In a number of provisions the date of application is a retrospective one, pre-dating the commencement of the instrument.

Subsection 40-100(2) of the ITA Act provides that a determination may specify a day from which it takes effect for depreciating assets specified in it. Subsection 40-100(3)

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39 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

40 Scrutiny principle: Senate Standing Order 23(3)(a).

41 Scrutiny principle: Senate Standing Order 23(3)(b).

provides that a determination may operate retrospectively to a day specified in the determination, if there was no applicable determination at that day for that depreciating asset, or if the determination specifies a shorter effective life for the asset than was previously applicable.

The committee's usual approach in cases where an instrument has retrospective effect is to assess the instrument against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee's expectation is that the retrospective effect of an instrument will be specifically addressed in the ES, and in particular, that the ES will address whether the retrospective provisions have the effect of disadvantaging any person.

While the ES to the instrument provides a broad overview of its effect, it does not discuss the retrospective dates of application included in several provisions. The effect of these dates is not clear to the committee. The committee is also concerned to ensure that the 'effective life' provisions with retrospective application dates are in all cases compliant with the requirements of subsection 40-100(3) of the ITA Act, and that their operation does not have a disadvantageous effect on any taxpayer.

In each case where the 'effective life' determined for an asset by the instrument has a retrospective date of application, the committee seeks the minister's advice as to:

- **whether the retrospective operation of the provision complies with the conditions set out in subsection 40-100(3) of the *Income Tax Assessment Act 1997;* and**
- **whether the operation of the provision would have the effect of disadvantaging any person.**

Instrument	**Marine Order 501 (Administration — national law) Amendment Order 2018 [F2018L00756]**
Purpose	Updates prescribed standards for the purposes of the National Law for marine safety of domestic commercial vessels
Authorising legislation	*Marine Safety (Domestic Commercial Vessel) National Law Act 2012*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[42]

Incorporation of documents[43]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the

42 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

43 Scrutiny principle: Senate Standing Order 23(3)(a).

legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[44]

With reference to the above, the committee notes that item [3] of Schedule 1 to the instrument appears to incorporate the following documents:

- National Standard for Commercial Vessels (NSCV); and
- Uniform Shipping Laws (USL) Code.

However, neither the instrument nor the ES indicates the manner in which those documents are incorporated, or where they may be accessed.

The committee acknowledges that the intent of item [3] of the instrument is to remake section 6A of Marine Order 501 (Administration – national law) 2013 [F2018C00404] (principal instrument), in order to re-number that provision (as section 6) and to prescribe the Marine Surveyors Manual as a standard for the purposes of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2011*

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[44] Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

(National Law Act).[45] The committee also notes that former section 6A prescribed the NSCV and the USL Code for the purpose of the National Law Act.

Nevertheless, given that item [3] of the present instrument remakes section 6A of the principal instrument in its entirety, the committee expects the instrument or its ES to indicate the manner in which the NSCV and the USL Code are incorporated in that provision, and how the documents may be accessed free of charge.

The committee requests the minister's advice as to the manner in which the documents identified above are incorporated, and where they may be accessed. The committee also requests that the explanatory statement be amended to include this information.

Instrument	**Marine Order 507 (Load line certificates — national law) 2018 [F2018L00764]**
Purpose	Repeals and replaces Marine Order 507 relating to load line certificates for domestic commercial vessels
Authorising legislation	*Marine Safety (Domestic Commercial Vessel) National Law Act 2012*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[46]

Offences: legal burdens of proof on the defendant[47]

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 burden of proof for persons in their individual capacities (requiring the

45 The ES to the instrument states that the Marine Surveyors Manual is incorporated as in force from time to time, and indicates that the manual is available free of charge from the Australian Marine Safety Authority website. The committee makes no comment on the incorporation of the Marine Surveyors Manual.

46 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

47 Scrutiny principle: Senate Standing Order 23(3)(b).

defendant, not the prosecution, either to prove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

Subection 15(1) of instrument makes it an offence for the master of a vessel to which the instrument applies, and in relation to which there is either a certificate of survey in force, or to which an exemption under section 143 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law Act) applies, to cause or permit the vessel to be operated:

- without a load line certificate being in force for the vessel; or
- without the vessel displaying the load line mark, or any associated mark, specified in the load line certificate; or
- so that the load line mark, or any associated mark, specified in the load line certificate is submerged in water.

Subsection 16(1) of the instrument creates identical offences applicable to the owner of a vessel.

Subsections 15(4) and (5) provide that it is a defence to a prosecution for an offence to which the physical element in paragraph 15(1)(c)(iii) relates[48] if the defendant proves that:

- had the vessel been floating without a list in still water of the kind for which the associated mark is appropriate, the associated mark would not have been submerged;
- had the vessel been floating without a list in salt water with a specific gravity of 1.025, the load line mark would not have been submerged.

Subsections 16(5) and (6) create identical defences to the offence in subsection 16(1). Additionally, subsection 16(4) provides that it is a defence to a prosecution for an offence to which the physical element in subparagraph 16(1)(c)(ii)[49] relates if the defendant proves that the owner had caused a copy of the relevant mark to be displayed and had no means of knowing that it was no longer displayed.

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48 The physical element specified in subparagraph 15(1)(c)(iii) is that the relevant vessel is operated in such a manner such that the load line mark, or any associated mark, specified in the load line certificate is submerged in water.

49 The physical element specified in subparagraph 16(1)(c)(ii) is that that is that the relevant does not display the load line mark, or any associated mark, specified in the loead line certificate.

Each of the defence provisions identified above requires the defendant to *prove* certain matters in order to make out the relevant defence. Consequently, as a result of section 13.4 of the *Criminal Code*, it appears that those provisions reverse the legal, rather than only the evidential, burden of proof. This places a more substantial burden on the defendant, as it would require the defendant to positively prove particular matters rather than merely raise supporting evidence.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence in relation to, one or more elements of an offence, interfere with this common law right.

The committee's concerns in this regard are heightened by the additional burdens that appear to be placed on defendants under section 157 of the National Law Act. That section provides that the prosecution is not required to prove, in the absence of evidence to the contrary, a number of matters relevant to the offences in sections 15 and 16 of the instruments. These matters include that the defendant was the owner or master of a specified vessel at the time of the relevant offence, that the vessel is a domestic commercial vessel, and that the vessel is subject to the National Law.

The committee's expectation is that the appropriateness of provisions that reverse the burden of proof should be explicitly addressed in the explanatory statement (ES), consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Offences Guide).[50] The Offences Guide states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.[51]

In this instance, the ES to the instrument provides no explanation as to why it is appropriate to reverse the burden of proof in the provisions identified above. It merely states that defences are set out in those provisions. The statement of compatibility similarly fails to identify and address the reversal of the burden of proof as a human rights issue.

The committee requests the minister's advice in relation to the justification for reversing the burden of proof in subsections 15(4) and (5) and 16(4), (5) and (6) of

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50 Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

51 Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 51-52.

the instrument, including why it is considered necessary to reverse the legal, rather than merely the evidential, burden.

Instrument	**Parking Permit Fees Rule 2018 [F2018L00799]** **Pay Parking Fees Rule 2018 [F2018L00798]**
Purpose	[F2018L00798] Sets hourly and daily fees for parking on National Land [F2018L00799] Sets fees for permits issued by the CEO of the National Capital Authority for parking on National Land
Authorising legislation	*National Land (Road Transport) Ordinance 2014*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 21 June 2018) Notice of motion to disallow must be given by 12 September 2018[52]

Unclear basis for determining fees[53]

Schedule 1 to the Pay Parking Fees Rule 2018 prescribes hourly and daily fees, payable on or after 1 July 2018, for parking on National Land. The Schedule sets an hourly fee of $2.90 and a daily fee of $14.00. Schedule 2 to that instrument sets a fee of $67.50 for pre-paid tickets allowing parking for five days.

Schedule 1 to the Parking Permit Fees Rule 2018 prescribes fees, payable on or after 1 July 2018, in relation to the grant or renewal of two specified types of permit for parking on National Land. The fee prescribed in each case is $14.00 per parking space per business day.

The explanatory statements (ESs) to the instruments do not specify the basis on which the fees in the instruments have been calculated. They merely restate the operation and effect of the relevant provisions. The ESs do not cite any legislative provision that provides authority to impose fees via legislative instrument.

52 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

53 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee's longstanding view is that, unless there is specific authority to impose fees in delegated legislation, fees in legislative instruments should be limited to cost recovery. Otherwise, there is a risk that such fees are more properly regarded as taxes, which require specific legislative authority.

Consequently, the committee's expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated.

The committee requests the minister's advice as to the basis on which the fees in each of the instruments have been calculated.

Instrument	**Privacy (Credit Reporting) Code 2014 (Version 2) [F2018L00925]**
Purpose	Updates the Privacy (Credit Reporting) Code 2014 to clarify obligations, reflect current industry practice and ensure consistency with the *Privacy Act 1988*
Authorising legislation	*Privacy Act 1988*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[54]

Incorporation of document[55]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection

54 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

55 Scrutiny principle: Senate Standing Order 23(3)(a).

14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[56]

With reference to the above, the committee notes that paragraph 21.1 of the instrument incorporates an international standard, ISO 10002-2006 *Customer Satisfaction – Guidelines for complaints handling in organisations.* However, neither the instrument nor the ES indicates the manner in which the document has been incorporated, nor where it can be freely accessed.

In relation to access to the document, the committee notes that the issue of access to material incorporated into the law by reference to Australian and international standards has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue.[57] The report comprehensively outlined the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

Where a standard is generally only available for purchase, the committee's expectation, at a minimum, is that consideration be given to any means by which it

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56 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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

may be made freely available to interested or affected persons. This might, for example, involve confirming the availability of the document through specific public libraries, or making the document available for viewing upon request (such as at the offices of the rule-making agency). Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the relevant instrument.

The committee requests the minister's advice as to:

- **the manner in which ISO 10002-2006 *Customer Satisfaction – Guidelines for complaints handling in organisations* is incorporated into the instrument; and**
- **how that document is or may be made readily and freely available to persons interested in or affected by the instrument.**

The committee also requests that the instrument and/or its explanatory statement be amended to include this information.

Instrument	**Regional Investment Corporation Operating Mandate Direction 2018 [F2018L00778]**
Purpose	Directs the Regional Investment Corporation as to the performance of its functions, particularly in relation to the administration of farm business concessional loans and water infrastructure loans
Authorising legislation	*Regional Investment Corporation Act 2018*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 19 June 2018) Notice of motion to disallow must be given by 10 September 2018[58]

Merits review[59]

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

58 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

59 Scrutiny principle: Senate Standing Order 23(3)(c).

citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument was made under section 11 of the *Regional Investment Corporation Act 2018* (RIC Act). That section allows the responsible ministers[60] to give directions to the Regional Investment Corporation (Corporation) about the performance of its functions.

Section 9 of the instrument provides for the administration by the Corporation of the farm business concessional loan program. The section provides that:

- the Corporation may only offer farm business loans under the program in accordance with Schedule 1 to the instrument;[61]
- the Corporation must be satisfied that an applicant fulfils the mandatory requirements in Schedule 1 before offering the applicant a farm business loan; and
- the Corporation will ensure that applicants are informed of the outcome of their loan application as soon as practicable after a decision on their application has been made.

It appears that the Corporation has at least an element of discretion regarding whether to grant a farm business loan and the loan amount. In this regard, a number of the eligibility criteria set out in Schedule 1 to the instrument require an assessment by the Corporation. It also appears that the Corporation may refuse to grant a loan even in circumstances where an applicant meets relevant criteria.

The grant or refusal of a farm business loan has the potential to significantly affect the interests of individuals, and it would therefore appear to the committee that decisions by the Corporation in relation to the grant of farm business loans would be suitable for merits review.

Section 12 of the instrument requires the Board of the Corporation to ensure that the Corporation develops and applies an internal review process for decisions to grant or refuse farm business loans. The section further provides that the internal review process must be transparent, robust and fair, must be carried out by a person who was not the original decision-maker, and must observe principles of procedural fairness. The explanatory statement (ES) states that internal review processes will ensure that applicants can have loan decisions reviewed on their merits.

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60 Under section 4 of the RIC Act, the responsible ministers are the Agriculture Minister and the minister administering the *Public Governance, Performance and Accountability Act 2013*.

61 Schedule 1 to the instrument sets out the policy objectives, loan specifications, mandatory eligibility requirements and approved loan purposes relevant to farm business loans.

However, no information is provided as to whether decisions relating to the grant of farm business loans would be subject to merits review by a tribunal or other external body, such as the Administrative Appeals Tribunal (AAT). The ES also provides no information as to the characteristics of such decisions that would justify excluding such decisions from independent merits review.[62] In this regard, the committee notes that it does not consider internal review by an officer within the Corporation, on its own, to constitute sufficiently independent merits review.

The committee requests the minister's advice as to:

- **whether decisions made by the Regional Investment Corporation in relation to the grant of farm business loans are subject to merits review by an independent tribunal; and**
- **if those decisions are not subject to such merits review, the characteristics of the decisions that would justify excluding merits review.**

62 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx.

Instrument	**Remuneration Tribunal (Compensation for Loss of Office for Holders of Certain Public Offices) Determination 2018 [F2018L00899]** **Remuneration Tribunal (Recreation Leave for Holders of Relevant Offices) Determination 2018 [F2018L00898]**
Purpose	Replace the previous determinations establishing certain entitlements for relevant office holders, with minor amendments to improve clarity and drafting
Authorising legislation	*Remuneration Tribunal Act 1973*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[63]

Description of consultation[64]

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

Under the heading of 'consultation', the ESs to these instruments provide a general overview of the working processes of the Remuneration Tribunal (in identical terms). A further subsection outlines in general terms the (minor) amendments made in the new versions of the instruments. However, the ESs do not indicate whether consultation was undertaken in relation to these instruments and, if consultation was undertaken, the nature of that consultation—or, if no consultation was undertaken in relation to the instruments, explain why not.

63 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

64 Scrutiny principle: Senate Standing Order 23(3)(a).

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Act.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[65]

The committee requests the minister's advice as to what consultation was undertaken in relation to the instrument; and requests that the explanatory statement be amended to provide that information in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Remuneration Tribunal (Members' Fees and Allowances) Amendment Regulations 2018 [F2018L00706]**
Purpose	Increases fees payable to members of the Remuneration Tribunal
Authorising legislation	*Remuneration Tribunal Act 1973*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[66]

Consultation[67]

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

65 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

66 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

67 Scrutiny principle: Senate Standing Order 23(3)(a).

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[68]

With reference to these requirements, the committee notes that the ES to the instrument provides no information regarding consultation. However, the ES provides the following information in relation to the requirement for a regulation impact statement (RIS):

> [a]n assessment was made under guidelines issued by the Office of Best Practice Regulation that a Regulation Impact Statement (RIS) was not required for these Regulations. This is due to the amendments being of a minor or machinery nature and do not substantially alter existing arrangements.

In this regard, the committee notes that requirements regarding the preparation of a RIS are separate to the requirements of the Legislation Act in relation to consultation. As set out in the committee's guideline on consultation:

> [A]lthough 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 minister's advice as to:

- **whether any consultation was undertaken in relation to the instrument and if so, the nature of that consultation; or**
- **whether no consultation was undertaken and if not, why not.**

The committee also requests that the explanatory statement be amended to include this information.

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68 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

Instrument	**Superannuation Amendment (PSS Trust Deed) Instrument 2018 [F2018L00707]**
Purpose	Amends the Public Sector Superannuation Trust Deed and Rules to take account of proposed and recent enactments, and simplify and update other provisions
Authorising legislation	*Superannuation Act 1990*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[69]

Subdelegation[70]

Item 7 of Schedule 1 to the instrument amends paragraph 13.1(a) of the Public Sector Superannuation Scheme (PSS) Trust Deed to allow the Finance Minister to delegate all or any of his or her powers under the Deed, other than the power of delegation, to the Commonwealth Superannuation Corporation (CSC) or a member of the staff of the CSC.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively broad class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated. The committee's preference is that delegates be confined to the holder of nominated offices, to those who possess appropriate qualifications or attributes, or to members of the Senior Executive Service (or equivalent). Where broad delegations are provided for, the committee considers that an explanation of why these are necessary and appropriate should be included in the explanatory statement (ES).

The ES to the instrument provides no explanation as to why it is considered necessary and appropriate to permit the minister to delegate any or all of his or her powers to any member of staff of the CSC, or as to how it is anticipated that this

69 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

70 Scrutiny principle: Senate Standing Order 23(3)(a).

power of delegation would be exercised. It merely restates (in brief) the operation and effect of the relevant provision.

Additionally, the committee is concerned that there is no legislative requirement that a person to whom powers are delegated under paragraph 13.1(a) of the PSS Trust Deed possess the qualifications or attributes necessary to ensure the appropriate exercise of those powers. The committee's expectation in this regard is not necessarily that details of the qualifications or attributes for delegates be specified in the instrument; rather, that there should be a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the power delegated.

The committee seeks the minister's advice as to:

- **why it is considered necessary and appropriate to permit the Finance Minister to delegate any or all of his or her powers and functions under the PSS Trust Deed to any member of staff of the CSC; and**
- **the appropriateness of amending the instrument to require that the minister be satisfied that persons to whom powers are delegated under paragraph 13.1(a) of the Deed have the expertise appropriate to the power delegated.**

Further response required

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

Correspondence relating to these matters is published on the committee's website.[71]

Instrument	**Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503]**
Purpose	Amends the Customs (Prohibited Exports) Regulations 1958 in relation to the export of goods on the Defence and Strategic Goods List, including adding new decision-making criteria for export permits, enhanced powers to revoke permits, and a process for review of decisions
Authorising legislation	*Customs Act 1901*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[72]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Subdelegation[73]

Committee's initial comment

Item 4 of Schedule 1 to the instrument amends the Customs (Prohibited Exports) Regulations 1958 (principal regulations) to repeal section 13E and insert new Division 4A relating to defence and strategic goods. The new Division comprises a replacement section 13E and new sections 13EA to 13EK.

New section 13EJ provides for the delegation by the Defence Minister of certain powers he or she holds under the instrument. The minister's powers to grant export

71 See www.aph.gov.au/regords_monitor.

72 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

73 Scrutiny principle: Senate Standing Order 23(3)(a).

permissions in relation to defence and strategic goods; to impose, vary or remove conditions on such permissions; and to take certain other actions in managing the permissions process (such as requesting additional information, and approving forms) may be delegated to the secretary of the department, or a departmental officer at Acting Executive Level 1 or higher. The minister's power to grant certain export permissions may also be delegated to 'an officer of Customs'. The minister's powers to refuse or revoke permissions may not be delegated.

Section 13EK provides that the secretary may delegate any of his or her powers under section 13EI, which relate to the disclosure of information and documents obtained or generated for the purposes of Division 4A, to a departmental officer at Acting Executive Level 1 or higher.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The instrument sets no limits or requirements in relation to the qualifications or expertise that delegates must possess, and the explanatory statement (ES) provides no justification of the need to subdelegate the minister's and secretary's powers to officials below senior executive service level, nor any explanation of how the delegation powers will be exercised.

The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the minister or secretary be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to

- why it is necessary to allow subdelegation of the minister's and secretary's powers to employees below senior executive service level in new sections 13EJ and 13EK of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument); and
- the appropriateness of amending the instrument to require that the minister or secretary, respectively, be satisfied that officials to whom powers are delegated under sections 13EJ and 13EK have the expertise appropriate to the power delegated.

Minister's response

The Minister for Law Enforcement and Cyber Security[74] advised:

> Minister's delegations within Department of Defence
>
> Subregulation 13EJ(1) of the Export Regulations provides authority for the Minister for Defence (the Minister) to delegate her/his powers under regulation 13E, subregulations 13EB(4), 13EB(5), 13EB(6) and regulation 13EC. Subregulation 13EJ(1) provides that the Minister may delegate her/his powers to an Australian Public Service Employee who holds, or is acting in, an Executive Level 1 (EL 1) position, or an equivalent or higher position, in the Department of Defence.
>
> The Committee's comment that it prefers delegation powers be limited to Senior Executive Service (SES) officers, or those that possess appropriate qualifications or attributes, is noted. The delegation to officers below SES level is required due to the volume of permissions granted by the Defence Export Controls Branch (DEC), which administers the scheme set out in Division 4A of the Regulations. DEC assesses approximately 2,200 permit applications a year under the Export Regulations. Due to this large volume, it would not be appropriate or possible for SES officers to administer the workload without resulting in significant processing delays by DEC and consequent business delays for Australian industry. In addition, the delegation is appropriate as these officers have appropriate training to administer export controls.
>
> The Minister's delegation is limited to approving permits and imposing, varying or removing conditions on those permits, along with requesting information, deferring consideration of an application and approving a form. These decisions need to be made regularly and relate directly to DEC's application assessment operations. Restricting the delegation to SES level officers would result in application assessment timeframe increases and unnecessarily delay Australian business and research operations. Having these decisions delegated to EL officers allows DEC to assess and determine low to medium risk applications in a timely manner, resulting in minimal impact to applicants' business operations.
>
> All delegates must make decisions having regard to the statutory criteria set out in regulation 13E(4) of the Export Regulations. The Minister's delegation of power involves a limited exercise of discretion - that is, whether or not a permit application may engage any of the statutory criteria. Accordingly, it was considered appropriate that junior officers be

74 In his response the minister noted that this instrument was made at the request of the Minister for Defence, who has portfolio responsibility for the export of defence and strategic goods, and that the Department of Defence administers the defence and strategic goods provisions of the export regulations. As such, the minister's response to the committee reflects advice provided to the Department of Home Affairs by the Department of Defence.

able to make a decision to approve or vary an export permit. The power to make an adverse decision, that is, to refuse or revoke a permit, cannot be delegated and must be made by the Minister.

Minister's delegation to an officer of Customs

Subregulation 13EJ(3) of the Export Regulations provides that the Minister may delegate to an officer of Customs the power under regulation 13E to grant permission to export goods listed in Part 1 of the Defence and Strategic Goods List.

ABF officers are located at all sovereign ports and border checkpoints. The dispersed and often remote location of these officials necessitates the delegation of the Minister's powers below the SES and EL levels. This is because the officials at these locations are typically staffed by Australian Public Service officers at APS 1 to 6 work levels.

The delegation of power to officers of Customs is, in practice, restricted to officers identified by a functional area in the instrument of delegation. Furthermore, it is restricted to circumstances where a bona fide traveller is exporting no more than four firearms and the firearms are exported as part of the person's accompanied personal effects.

Secretary's Delegations within Department of Defence

Regulation 13EK of the Export Regulations prescribes the manner in which the Secretary of the Department of Defence (the Secretary) may delegate his/her powers under regulation 13EI. The Committee's comment that it prefers delegation powers be limited to SES officers or those that possess appropriate qualifications or attributes is noted.

The delegation of the Secretary's power under regulation 13EI is restricted to EL 1 officers and above operating within DEC. This level of delegation is appropriate as these officers have appropriate training to administer the export controls. Furthermore, all Defence personnel are bound by existing safeguards when authorising the disclosure of information. The Department of Defence must comply with the Australian Privacy Principals *[sic]*, contained in Schedule 1 of the *Privacy Act 1988* (Privacy Act) when collecting, using and disclosing personal information. The Australian Privacy Principals *[sic]* offer a range of safeguards to ensure appropriate protection of personal information. Any access, use or disclosure of personal information will only occur in accordance with privacy law and policy.

Expertise appropriate to the power delegated

Although no specific qualifications are required to hold the delegation of powers under sections 13EJ and 13EK of the Export Regulations, the delegation is in practice restricted to EL officers in DEC, and ABF officers in certain functional areas as stated previously. These officers have the appropriate training to administer export controls legislation according to their delegation, including an understanding of export control legislation

and their responsibilities in relation to it, good strategic awareness and experience in the security or defence environment.

EL officers within DEC have daily communication with Australian industry and other sectors that apply for export permits and through this contact, develop a good understanding of the nature of transactions they are deciding upon. Officers that are more senior in classification are not in a position to have this level of interaction with applicants. EL officers within DEC have the relationships, knowledge, experience and daily oversight of operations that is required to give full credit to the decision making process.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice regarding the operational need for delegation below senior executive service level in the situations covered by the regulations. The committee also notes the minister's advice that, in each of the situations where a delegation power is provided, the relevant powers are in practice only delegated to officials with appropriate training.

While the committee acknowledges the minister's advice that appropriate care is being taken in the exercise of delegation powers as a matter of policy, the minister's response does not address the committee's concern that there is no *legislative* requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure their proper exercise. The committee reiterates its initial comment that it does not necessarily expect that the details of the qualifications and attributes for authorised persons be set out in the instrument. Rather, where delegations below senior executive service are required, the committee considers that the instrument should include a legislative requirement that the person delegating the powers (in this case the minister or secretary, respectively) be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee has concluded its examination of this matter. However, the committee draws to the attention of the minister and the Senate its concern as to the lack of any legislative requirement that the minister or secretary, respectively, be satisfied that delegates have appropriate expertise to the power or function delegated.

Personal rights and liberties: privacy[75]

Committee's initial comment

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

New section 13EI of the principal regulations (inserted by item 4 of Schedule 1 to the instrument) provides for disclosure by the Secretary of Defence of any information or documents obtained or generated for the purposes of Division 4A of the principal regulations. While the secretary may only disclose information 'for a purpose connected with the administration' of Division 4A, disclosure may be made to a broad range of persons and entities set out in subsection 13EI(1), including governments and authorities of foreign countries. Further, subsection 13EI(2) provides for the minister to specify by legislative instrument other persons or entities to whom disclosure may be made.

Subsections 13EI(3) and (4) provide that the secretary must be satisfied that a recipient of information or documents disclosed under the section will not disclose it further without the secretary's consent.

It appears to the committee that, given the nature of the information and documents that may be provided by applicants under Division 4A, it is possible that information covered by the section could include personal and sensitive information. While the terms of section 13EI limit the purpose for which information can be disclosed, and provide a partial limitation on the possibility of onward disclosure by recipients, it is unclear to the committee what safeguards are in place to ensure the appropriate protection of any personal information that may be disclosed by the secretary (or a delegate), or considered for disclosure, under the provision.

The ES to the instrument provides no information regarding the nature of information that is expected to be disclosed, or circumstances in which such disclosures may be made. Moreover, there is no information in the ES regarding any safeguards in place to protect individuals' privacy in relation to their personal information, including whether consent is sought for such disclosure (as part of the export permission process), and how protection will be ensured for information provided to foreign authorities. The statement of compatibility with human rights does not recognise that the right to privacy may be engaged by the instrument.

The committee seeks the minister's advice as to:

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75 Scrutiny principle: Senate Standing Order 23(3)(b).

- whether information covered by new section 13EI of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) could include personal and sensitive information;
- if so, the justification for authorising the secretary to disclose such information to a broad range of persons and entities, including foreign governments, and persons or entities who may be later determined by legislative instrument; and
- what safeguards are in place to protect the privacy of individuals in relation to such information.

Minister's response

The Minister for Law Enforcement and Cyber Security[76] advised:

> Regulation 13EI of the Export Regulations permits the Secretary to disclose information, or give a document, obtained or generated for the purposes of Division 4A of the Export Regulations, to certain persons and entities. Information obtained or generated under Division 4A includes information provided by persons applying for permission to export goods, and information obtained by the Department of Defence, to assess whether the export of defence or strategic goods may prejudice the security, defence or international relations of Australia. Information disclosed under regulation 13EI of the Export Regulations could include limited personal information; for example name, address or employment details of applicants. Sensitive information is not obtained or generated for the purposes of Division 4A of the Export Regulations.
>
> …
>
> The ability for the Secretary to disclose information to a Minister of the Commonwealth, State or Territory, the head of a Commonwealth entity, a State or Territory or an authority of a State or Territory, is necessary to ensure that the administration and enforcement of export controls is not stymied through the inability to exchange information with relevant persons or entities. For example, while the Department of Defence is responsible for the administration of the permit scheme set out in Division 4A of the Export Regulations, the enforcement is undertaken by the ABF [Australian Border Force]. It is therefore essential that the Secretary can disclose information to the ABF where there has been a suspected breach of export controls to ensure that appropriate enforcement measures can be taken.
>
> The ability for the Secretary to disclose information to a foreign country is also necessary. There are some circumstances under which governments, or authorities of governments, of foreign countries may require to be

76 See footnote 74 above.

notified of information collected through a defence export application. For example, in some instances Australia reports export information to foreign countries in line with reporting obligations set out in the international export regimes of which Australia is a member. Under the Wassenaar Arrangement, Australia has agreed to voluntarily exchange information that will enhance transparency and that will lead to discussions among participating countries on arms transfers. It is in Australia's interest to continue to meet its reporting obligations in line with its international commitments for continued effective international relations. The Secretary's ability to disclose information to foreign governments and authorities, as provided for in regulation 13EI, is essential to allow this reporting to occur.

Information generated for the purposes of Division 4A of the Export Regulations relates to the export of defence and strategic goods and technologies. In many circumstances, information pertaining to such exports will directly relate to national security or the international relations of Australia. It is necessary that the Secretary has the authority to disclose information gathered under Division 4A to the broad range of people and entities listed in regulation 13EI(1) where the information has implications for the security, defence or international relations of Australia. Disclosure to these persons and entities may be necessary to mitigate the potential risk to national security.

While the list of recipients specified in subregulation 13EI(1) is broad, the Regulations provide safeguards to any disclosure. Firstly, information may only be disclosed to those entities and persons in very limited circumstances. Specifically, the Secretary can only disclose information to persons and entities where the disclosure is in connection with the administration of Division 4A of the Export Regulations. This may include where the Department of Defence is collecting information from another Commonwealth entity in order to assess a permit application, and is required to disclose the name and address of the applicant to allow the Commonwealth entity to confirm the identity of the applicant. Therefore, disclosure powers can only be exercised in specific circumstances.

Further, under regulations 13EI(3) and (4), the power is limited so that the Secretary may only disclose the information or give the document if he or she is satisfied that the recipient will not disclose the information or document to anyone else without the Secretary's consent. This provides a further level of assurance that any personal information which is disclosed by virtue of regulation 13EI will still be accorded protection.

Additionally, there are existing privacy safeguards in place under the Privacy Act, which the Department of Defence complies with when collecting, using and disclosing personal information. The Australian Privacy Principals *[sic]* are a broad range of safeguards to ensure appropriate protection of personal information and the Department of Defence complies with these principals *[sic]*. Any access, use or disclosure

> of personal information will only occur in accordance with these existing privacy laws.
>
> The Department of Defence informs applicants that information may be disclosed to a range of entities for the purpose of administering the defence export laws. In accordance with Australian Privacy Principal *[sic]* 5, at the time that an individual lodges an application to export a controlled good, they are provided a privacy notice by the Department of Defence. The privacy notice specifies who is collecting the information and the purpose for which the information is collected. It stipulates that protected information, including any personal information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering export controls, counter proliferation and arms control laws or fulfilling Australia's international obligations in this respect. If an applicant has concerns with this stipulated use of their personal information, they can contact the Department of Defence.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice regarding the limited personal information which may be disclosed under section 13EI, and the justifications for the secretary's power to disclose such information to the broad range of persons and entities provided, including the potential implications for defence and national security, and the need for Australia to comply with its international obligations regarding the export of defence and strategic goods.

The committee also notes the minister's advice that the limit on the purposes for which information may be disclosed under section 13EI, and the requirement that the secretary be satsified that the recipient will not further disclose the information without the secretary's consent, constitute safeguards that will assist in the protection of personal privacy. In addition, the committee notes the minister's advice that the Department of Defence is required to comply with the *Privacy Act 1988* (Privacy Act) when dealing with personal information, although in this respect the committee notes that not all of the broad range of persons to whom information may be disclosed, including state and territory entities, foreign governments, and others who may later be added by legislative instrument, would be subject to the Privacy Act.

Finally, the committee notes that applicants for an export permission under Division 4A are provided with a privacy notice informing them of the potential disclsoure of their personal information under section 13EI, and may discuss any concerns in this regard with the department.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to

understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of this matter.

Retrospective effect[77]

Committee's initial comment

Item 12 of Schedule 1 to the instrument inserts new section 18 into the principal regulations, providing for transitional matters in relation to the introduction of new Division 4A. New subsection 18(3) provides that the new provisions will apply, on and after the instrument's commencement day, to applications for a permission made under the previous section 13E but not yet decided at the time the instrument commenced.

While the instrument, including subsection 18(3), commences prospectively, the committee is concerned that the provision may result in the instrument having a retrospective effect, to the potential detriment of persons who had lodged an application prior to its commencement which was not yet decided at the time the scheme changed. The committee notes that the provisions relating to export permissions under new Division 4A have been substantively changed from the previous section 13E, including through the addition of new decision-making criteria in subsection 13E(4).

The ES provides no information as to whether any person whose application was pending at the time of commencement of the instrument may be disadvantaged by consideration of their application under the new criteria, which the person would not have had the opportunity to address at the time the application was made. The ES does not indicate, for example, how many applications will be subject to new subsection 18(3), and whether those applicants will be given an opportunity to address any new criteria which may be relevant to their applications, before their application is decided.

The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of subsection 18(3) of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 12 of Schedule 1 to the instrument); and if so, what steps have been or will be taken to avoid such disadvantage and to ensure natural justice for applicants.

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77 Scrutiny principle: Senate Standing Order 23(3)(b).

Minister's response

The Minister for Law Enforcement and Cyber Security[78] advised:

> The Department of Defence confirms that while the relevant amendments made by the Defence Amendment Regulations apply prospectively, they will apply even where a regulation 13E application for permission was lodged prior to the commencement of the Defence Amendment Regulations, so long as the Minister had not made a decision on the application when the Defence Amendment Regulations came into force.
>
> This has not had an adverse impact on applicants, nor will it in the future. The decision making criteria, which are now specified in subregulation 13E(4), closely reflect the decision-making criteria considered by the Minister prior to the commencement of the Defence Amendment Regulations. The previous decision-making criteria were listed in policy guidelines, which were publicly available on the Department of Defence's website. Subregulation 13E(4) was drafted to replicate the existing policy guidelines, except for item 12, which was introduced to provide more protections for Australian economic interests. Therefore, applicants are not disadvantaged by the commencement of new regulation 13E, regardless of when they submitted their applications, due to the subregulation 13E(4) decision-making criteria being consistent with policy guidelines which have existed for many years.
>
> Additionally, the Department of Defence complies with the principle of procedural fairness in all administrative decision-making processes. The Department of Defence informs applicants prior to any recommendation to the Minister that an application not be granted, providing the opportunity to amend or withdraw the application should the applicant choose to do so. If an applicant became aware of obligations under the subregulation 13E(4) criteria that they had failed to identify in the guidelines previously available, they would be provided ample opportunity to amend their application.
>
> Procedural fairness is paramount to the Department of Defence, and the new regulation does not disadvantage the rights of, or impose a liability on, any individuals for an act that took place before the date the Defence Amendment Regulations were made.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that no applicant has been, or will be, disadvantaged by the retrospective effect of new subsection 18(3). In this regard the committee notes the minister's advice that the new decision-making criteria inserted by the instrument closely reflect the

78 See footnote 74 above.

criteria that were previously applied under policy guidelines, and were available to applicants. The committee also notes the minister's advice that any applicant whose application is considered for refusal has the opportunity to amend their application to address any deficiencies, prior to the department making a recommendation to the minister to refuse it.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of this matter.

Merits review[79]

Committee's initial comment

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.

New section 13EF of the principal regulations (inserted by item 4 of Schedule 1 to the instrument) provides for merits review by the Administrative Appeals Tribunal (AAT) of decisions made under new Division 4A to refuse or revoke export permissions, or to impose or vary conditions on permissions.

However, section 13EH provides that the Defence Minister may refuse to disclose reasons for the decision to an applicant, where the minister believes that their disclosure 'would prejudice the security, defence or international relations of Australia'. The committee is concerned about the impact that lack of access to reasons for a decision may have on an affected person's ability to obtain effective merits review of that decision.

Understanding the reasons for an administrative decision is essential to the ability of a person to challenge that decision through a merits review process. If an applicant does not know the reasons for the decision it may be very difficult to assess whether grounds exist for challenging the decision, and what evidence the applicant needs to bring forward to make a case in any review proceeding.

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79 Scrutiny principle: Senate Standing Order 23(3)(c).

Importantly, the committee also notes that section 28 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) provides that persons eligible to apply to the AAT for review of a decision are entitled to request, and obtain, a statement of reasons for the decision from the decision maker. This is subject to specific exceptions and qualifications, including subsection 28(2), which provides that the Attorney-General may issue a 'public interest certificate' to restrict disclosure of any matter where disclsoure would be contrary to the public interest for specified reasons, including where it would prejudice the security, defence or international relations of Australia.

Subsection 28(3A) then applies parts of section 36 and 37 of the Act to situations where the Attorney-General has issued a public interest certificate. The referred provisions have the effect that the information withheld from the applicant may still be received and considered by the AAT in any review proceedings, and in some circumstances, the AAT may consider whether disclosure to the applicant is appropriate.

Notably, subsection 36(4) of the AAT Act states that, in considering whether information subject to a public interest certificate should be disclosed to applicants:

> …the Tribunal shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceedings should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the matter contained in the document, as the case may be, would be contrary to the public interest.

It is not clear to the committee how new section 13EH of the principal regulations, in allowing the Defence Minister to withhold reasons, would interact with these provisions of the AAT Act. In addition, it is not clear whether the proposed section 13EH procedure allows for consideration, by the Defence Minister or the AAT, of 'the principle that it is desirable… that the parties to a proceeding should be made aware of all relevant matters', when dealing with decisions that are subject to merits review by the AAT.

The committee seeks the minister's advice regarding:

- the impact that the minister withholding reasons for a decision under new section 13EH of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) may have on the ability of an applicant to seek effective merits review of the decision by the Administrative Appeals Tribunal; and
- how the proposed operation of section 13EH would interact with the provisions of the *Administrative Appeals Tribunal Act 1975* relating to the disclosure of reasons and consideration of reasons in AAT proceedings, particularly sections 28 and 36 of the Act.

Minister's response

The Minister for Law Enforcement and Cyber Security[80] advised:

> An exporter is not precluded from seeking merits review of a decision where the Minister has withheld reasons for a decision under section 13EH of the Export Regulations on the basis that the release of those reasons would prejudice the security, defence or international relations of Australia. The provision is intended to prevent the public release of information subject to a national security classification. By being subject to a national security classification, it is deemed that it is not in the public interest for such information to be publicly released. The Department of Defence anticipates that where the Minister considers that reasons cannot be disclosed as the release would prejudice Australia's security, defence or international relations, a statement setting out the nature of the reasons would be made available to the applicant. The statement would include as much detail as possible without prejudicing the defence, security or international relations of Australia. In the Department of Defence's view, this high-level statement of reasons would be sufficient for applicants to be able to address the concerns held by the Minister as part of the merits review process.
>
> …
>
> Subsection 28(1) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) provides that applicants may request that the decision maker give them a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the original decision. However, as per subsection 28(4) of the AAT Act, such an entitlement to request a statement under subsection 28(1) only exists if a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision has not already been given to the applicant.
>
> Where the Minister has provided the applicant with a notice of a decision under Division 4A of the Export Regulations, this notice would provide as much information as possible on the evidence upon which the Minister's decision was based. This is despite the notice not disclosing all reasons on the basis that such a disclosure would prejudice the security, defence or international relations of Australia. In this instance, it is the Department of Defence's view that the applicant would not be entitled to request a statement from the Minister under subsection 28(1) of the AAT Act by virtue of subsection 28(4) of the AAT Act as a statement of reasons would, subject to the requirements in section 13EH of the Export Regulations, already have been given to the applicant.

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80 See footnote 74 above.

> As per subsection 35(4) of the AAT Act, the Department of Defence anticipates that, should a matter proceed to review by the Administrative Appeals Tribunal (the Tribunal), the Minister would apply for an order from the Tribunal directing that some information provided to the Tribunal be prohibited or restricted from publication or disclosure to some or all parties to the matter. Information would be made available, to the extent possible, to the other parties to the proceedings, or even to appropriately cleared counsel for those parties.
>
> Alternatively, due to the nature of the Minister's decisions under regulation 13EH, the Minister may request that the Attorney-General issue a public interest certificate under section 36 of the AAT Act. Where the Attorney-General issues such a certificate, the Tribunal is required to ensure the information contained in such a document is not disclosed to any person other than a member of the Tribunal for the purpose of the specified review proceedings. As above, information would be made available, to the extent possible, to the other parties to the proceedings.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that section 13EH does not preclude an applicant from seeking merits review of a decision by the AAT, and that a statement of reasons would be made available to the applicant providing as much detail as possible about the reasons for the decision, excepting the information withheld by the Minister for Defence under section 13EH because of that minister's belief that disclosing it would prejudice Australia's security, defence or international relations.

The committee notes the minister's view that such a 'high-level statement of reasons' would be sufficient to enable the applicant to address the reasons for refusal in a merits review process. The committee also notes the minister's advice that, in any relevant AAT proceedings, section 28 of the AAT Act would not operate to allow the applicant to obtain any further information because a limited statement of reasons would already have been provided.

The committee considers that, given the breadth of the discretionary power given to the Minister for Defence to withhold information, and the absence of a requirement that any minimal level of information be provided to an applicant in the 'limited' and 'high-level' statement of reasons proposed, it is not possible to be sure that applicants will in all cases have sufficient information available to them to effectively seek and obtain merits review of that decision.

Moreover, the committee notes that the provisions in the AAT Act allowing the Attorney-General to issue public interest certificates appear to already provide for a process for the protection of Australia's security, defence and international relations. Subsections 28(2), (3) and (3A) of the AAT Act enable the Attorney-General to certify

that the initial decision-maker's reasons do not include information that will prejudice the security, defence or international relations of Australia. As such, the effect of section 13EH of the instrument is already achieved by the process set out in the AAT Act.[81]

In addition, importantly, the existing process under the AAT Act empowers a particular minister, the first law officer of the nation, to make an assessment independently of the decision-maker about what information might be prejudicial to Australia's security, defence or international relations. By establishing that the Minister for Defence may make such a judgement, without reference to the Attorney-General, the instrument may be seen to seek to disable the effect of these provisions.

While noting the potential issuance of an Attorney-General's public interest certificate under the Act *in addition to* the withholding of information by the Minister for Defence, the minister's response does not address why it is necessary to allow the Minister for Defence to decide to exclude information, rather than relying on the provisions that already exist under the AAT Act for the Attorney-General to exercise.

The committee notes the existing power of the Attorney-General under the *Administrative Appeals Tribunal Act 1975* to issue a public interest certificate to restrict disclosure of matters relating to a reviewable decision, where the disclsoure would prejudice the security, defence or international relations of Australia. As such, it remains unclear to the committee why it is necessary that the instrument empower the Minister for Defence to withhold reasons from an applicant on the grounds of prejudice to the security, defence or international relations of Australia. The committee therefore seeks the minister's further advice as to the need for this power in light of the existing provisions in the AAT Act.

81 The committee notes that an equivalent protection is provided in relation to judicial review proceedings by section 14 of the *Administrative Decisions (Judicial Review) Act 1977*.

Advice only

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

Instrument	**AD/BELL 214/6 – Emergency Exit Latch Pin [F2018L00986]** **AD/BELL 214/7 – Collective Sleeve [F2018L00987]**
Purpose	Mandate inspection and maintenance tasks for emergency exit latch pins and collective sleeve parts on Bell 214 series aircraft
Authorising legislation	Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[82]

Access to incorporated documents[83]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[84]

82 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

83 Scrutiny principle: Senate Standing Order 23(3)(a).

With reference to these matters, the committee notes that AD/BELL 214/6 – Emergency Exit Latch Pin [F2018L00986] incorporates the following Bell Helicopter Textron Inc. (BHTI) Service Bulletins:

- BHTI Service Bulletin No. 214-77-1;
- BHTI Service Bulletin No. 214-77-4; and
- BHTI Service Bulletin No. 214-76-4.

That instrument provides that the Service Bulletins are incorporated as in force from time to time.[85]

AD/BELL 214/7 – Collective Sleeve [F2018L00987] incorporates the Bell Helicopter Textron Alert Service Bulletin 214-84-26, as in force at the commencement of the instrument.

The ES to each of the instruments states that:

> The Bell Helicopter Textron Service Bulletin[s] Refered to in the AD…can be obtained from Bell Helocopter Textron, however, any Australian operator which operates the Bell 214 series helicopter is provided with these documents by Bell Helicopter Textron via subscription.

The committee acknowledges that anticipated users of the instruments would be likely to be in possession of the relevant service bulletins for their aircraft. However, in addition to access for Australian aircraft operators, 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.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns

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84 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

85 The committee notes, however, that the ES to the instrument states that the Service Bulletins are incorporated as in force at the time the instrument was issued. While the committee considers that the explanation of the manner of incorporation in the instrument would prevail over a contradictory statement in the ES, the committee emphasises the importance of preparing instruments and ESs with adequate care to avoid misleading or confusing readers.

associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[86]

The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to the Bell Helicopter Textron Service Bulletins incorporated by reference in the instruments.

Instrument	**ASIC Superannuation (Amendment) Instrument 2018/474 [F2018L00709]**
Purpose	Extends a transitional exemption for superannuation providers from requirements to publish information about standard employer sub-plans.
Authorising legislation	*Superannuation Industry (Supervision) Act 1993*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[87]

Incorrect classification of instrument as disallowable[88]

The instrument was made under subsection 328(1) of the *Superannuation Industry (Supervision) Act 1993* (Supervision Act). It extends an exemption provided in the ASIC Superannuation (RSE Websites) Instrument 2017/570 [F2017L00738] (principal

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

87 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

88 Scrutiny principle: Senate Standing Order 23(3)(a).

instrument) until 30 June 2024. The exemption relieves licencees of registrable superannuation entities (RSEs) from compliance with section 29QB of the Supervision Act to the extent that that section requires the publication of information about standard employer-sponsored sub-plans.

The instrument appears to relate to superannuation. Pursuant to table item 3 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation), instruments (other than regulations) relating to superannuation are not subject to disallowance. However, when the instrument was received by Parliament and by the committee, it was classified as disallowable. The committee's research indicates that the Supervision Act does not provide that the instrument is disallowable despite the application of the LEOM Regulation. The committee also notes that the principal instrument was classified as exempt from disallowance when received by Parliament in August 2017.

The committee understands that the instrument has since been reclassified as exempt from disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat. The committee also acknowledges that, in this instance, the misclassification of the instrument did not have the effect of hindering parliamentary oversight. However, the committee remains concerned about the process for the classification of instruments generally, and continues to monitor this issue.

The committee draws the incorrect classification of the instrument as disallowable to the attention of the minister and the Senate.

Instrument	**Health Insurance (Allied Health Services) Amendment (Other Medical Practitioner) Determination 2018 [F2018L00932]**
Purpose	Amends the Health Insurance (Allied Health Services) Determination 2014 to ensure that doctors working in general practice without post-graduate training can continue referring patients for Medicare-eligible allied health services
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[89]

Access to incorporated document[90]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[91]

Item 9 of Schedule 1 to the instrument amends three provisions of the Health Insurance (Allied Health Services) Determination 2014 (principal instrument) to incorporate the 'Practice Standards for Mental Health Social Workers 2014', as in force on 25 September 2014. While the ES explains that this has the effect of

89 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

90 Scrutiny principle: Senate Standing Order 23(3)(a).

91 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

updating the applicable practice standards for relevant mental health workers, the ES provides no information regarding where the document can be obtained.

The committee's research indicates that the document is freely available online.[92] Where an incorporated document is available for free online, the committee considers that, in accordance with the Legislation Act, a best-practice approach is for the ES to provide details of the website where the document can be accessed.

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to the 'Practice Standards for Mental Health Social Workers 2014', incorporated by reference in the instrument.

Instrument	**Industry Research and Development (High Performance Computing—Pawsey Program) Instrument 2018 [F2018L00801]**
Purpose	Establishes legislative authority to provide funding for the High Performance Computing—Pawsey Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Jobs and Innovation (Industry, Innovation and Science)
Disallowance	15 sitting days after tabling (tabled Senate 21 June 2018) Notice of motion to disallow must be given by 12 September 2018[93]

Parliamentary scrutiny: ordinary annual services of government[94]

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 section 33 of the *Industry Research and Devleopment Act 1986* (Industry Act), executive spending may be authorised by specifying schemes in instruments made

92 https://www.aasw.asn.au/document/item/6739.

93 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

94 Scrutiny principle: Senate Standing Order 23(3)(d).

under that Act.[95] The money that funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant instruments. Once the details of the scheme are outlined in the instruments, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

The Senate has resolved that 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.[96] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under section 33 of the Industry 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.

The committee's considerations in this regard are consistent with those set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[97]

The instrument establishes legislative authority for a grant of $70 million to Curtin University to support the Pawsey Supercomputing Centre (Pawsey).[98] The explanatory statement (ES) indicates that the funding will be used to refresh the

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95 In this regard, authorising Commonwealth spending by instruments made under the Industry Act is an approach consistent with authorising spending by regulations made pursuant to the *Financial Framework (Supplementary Powers) Act 1997*. For more extensive comment on this issue, see *Delegated legislation monitor 2 of 2017*, pp. 19-21; and Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, pp. 571-574.

96 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.

97 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

98 The ES explains that Pawsey operations are delivered through an existing unincorporated joint venture (UJV), and the funding will be made available to a university member of the UJV to undertake eligible projects. Curtin University was chosen in consultation with the Pawsey Board of Management as the UJV university member to receive the funding.

Magnus and Galaxy computers hosted by Pawsey, as well as to refresh associated infrastructure including data processing and storage systems. The program will be administered by the Department of Industry, Innovation and Science.

The ES states that funding for the program has been secured through the 2017-18 Portfolio Supplementary Additional Estimates. The ES further states that funding will come from Program 1: Supporting Science and Commercialisation, which is part of Outcome 1 in the Jobs and Innovation (Industry, Innovation and Science) portfolio.

It appears to the committee that the grant to support the Pawsey Program may be a new policy not previously authorised by special legislation, and that the initial appropriation may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in *Appropriation Act (No. 5) 2017-18* (which was not subject to amendment by the Senate).

The committee draws the establishment of legislative authority for what appears to be a new policy not previously authorised by special legislation, and the classification of the initial appropriation for it as ordinary annual services of the government, to the attention of the minister, the Senate and relevant Senate committees.

Instrument	**Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018 [F2018L00672]**
Purpose	Specifies a class of persons as fast track applicants, who will be subject to specified fast-track processing and review of any application for a protection visa
Authorising legislation	*Migration Act 1958*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[99]

Matters more appropriate for parliamentary enactment[100]

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

The instrument was made under paragraph 5(1AA)(b) of the *Migration Act 1958* (Migration Act). It effectively adds a class of persons to the definition of 'fast track applicant' in subsection 5(1) of that Act. The addition means that if a person in the class set out in the instrument applies for a protection visa, they will be subject to processing of the visa and any available review rights as a fast track applicant in accordance with the Act. In particular, decisions to refuse to grant a protection visa to a fast track applicant will be reviewed under a limited merits review process set out in Part 7AA of the Migration Act (discussed further below).

The class of persons designated as fast track applicants by the instrument are unauthorised maritime arrivals who have made a protection claim, which has been considered through an administrative process under the Migration Act or the Migration Regulations 1994 (Migration Regulations), and assessed as not engaging Australia's protection obligations; where the person has sought review of that assessment from the High Court or Federal Circuit Court, and the court either made a declaration that the assessment was not made according to law, or the minister withdrew from the proceedings before the court made a decision. The designation also includes any child of a designated person.

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99 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

100 Scrutiny principle: Senate Standing Order 23(3)(d).

The explanatory statement (ES) to the instrument explains that such persons are currently prevented from making a valid application for a protection visa by subsection 46A(1) of the Migration Act, which effectively bars unauthorised maritime arrivals from applying for visas. Subsection 46A(2) allows the minister to lift the bar, if the minister thinks it is in the public interest to do so.

The ES states that:

> The Government wishes to provide access to the Australian protection visa assessment process for these persons. The Government considers that the 'fast track process' is the appropriate mechanism for the consideration of these persons' protection claims.
>
> The effect of this instrument is that if the Minister lifts the section 46A(1) application bar in respect of these persons, they will have their claims for protection assessed in Australia through the fast track process.

The committee notes that this instrument has the effect of determining procedural and other rights of persons under Australian law, including rights which, in some cases at least, may have already been subject to consideration and declaration by a court. As such, the committee considers that the instrument could be said to change the law in a significant way. In cases of significant change to the law, the committee's longstanding view has been that enactment via primary legislation is more appropriate than via delegated legislation because it ensures that significant proposed changes are subject to the full legislative processes and consideration by Parliament prior to commencement.

The committee recognises that Australia's legal framework in the migration area, established under the provisions of the Migration Act and the Migration Regulations 1994, provides for significant law-making via delegated legislation. In this regard, however, the committee notes that it has expressed concern on several previous occasions about ensuring appropriate parliamentary oversight of changes to migration law.[101]

The committee's views with regard to making significant policy changes in delegated legislation also accord with those of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to Acts that enable significant changes to the law to be made via delegated legislation.

The Scrutiny of Bills committee expressed concern about the power to expand the definition of fast track applicants via legislative instrument, when it considered the proposed insertion of the fast track process into the Migration Act by the Migration

101 See *Delegated legislation monitor 5 of 2018,* pp. 42-44, and the reports referenced therein.

and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. [102]

The Scrutiny of Bills committee noted that most decisions to refuse a visa to fast track applicants would only be eligible for review by the newly-created Immigration Assessment Authority (IAA), whose review powers were limited in two significant ways: a lack of power to vary or set aside a refusal decision (unlike the Administrative Appeals Tribunal, or the former specialist migration tribunals) or to otherwise compel the minister to comply with any direction or recommendation made by the IAA; and the exclusion of certain procedural fairness obligations, because the IAA is obliged (subject to limited exceptions) not to accept or request any new information, or interview the applicant.

The Scrutiny of Bills committee drew its concerns about the adequacy of the IAA's hearing process to the attention of the Senate. Following correspondence with the minister in relation to the IAA's limited remedial powers, the Scrutiny of Bills committee remained concerned about their adequacy and requested that the minister consider whether the Migration Act could be amended to strengthen them.[103]

Bearing in mind these limitations on procedural fairness, the Scrutiny of Bills committee further expressed concern about the appropriateness of providing for the designation of further classes of applicants as fast track applicants (and 'excluded fast track applicants', excluded from all merits review) in delegated legislation. In response, the (then) Minister for Immigration and Border Protection advised that while the bill introduced these concepts to designate a specific, time-limited backlog of unauthorised maritime arrivals:

> the Government also wants the fast track assessment process to have the flexibility to be able to respond to other unforeseen cohorts of irregular arrivals that might seek Australia's protection in the future.
>
> The power to make a legislative instrument to expand both the definition of a 'fast track applicant' and an 'excluded fast track applicant' provides this speed and flexibility.[104]

In response, the Scrutiny of Bills committee expressed the view that:

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102 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 14 of 2014,* 29 October 2014, pp. 31-35.

103 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, p. 936.

104 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, p. 945.

> the operation of the fast track assessment process, and in particular the categories of person to whom it applies, appears to raise significant policy questions. This gives rise to a scrutiny concern relating to the use of delegated legislation, rather than primary legislation, for important matters as the categories of persons to whom its key provisions may apply can be altered by legislative instrument.[105]

The Scrutiny of Bills committee drew this matter to the attention of the Senate and left the question of its appropriateness to the Senate as a whole; and also drew the matter to the attention of this committee.[106]

In addition to noting the concerns expressed by the Scrutiny of Bills committee, the committee further observes that, unlike previous legislative instruments that have expanded the definition of fast track applicant, the present instrument does not simply add a further specific, time-limited group of unauthorised maritime arrivals to the class. Rather, it adds—and therefore limits the procedural rights of—a class of persons effectively seeking re-consideration of a decision which has already been reviewed by a court, and in some cases, which that court has declared was not lawfully made. It is the committee's view that in this regard, the instrument could be regarded as not only adding to, but substantively altering the definition of 'fast track applicant' under the Act.

Moreover, the instrument may be seen as creating a risk that one or more restrictions of the fast track review process will disable the reviewer (IAA) on remittal from complying with the decision made by the court in the judicial review of the original decision. If this is the case, the instrument could be regarded as having the potential effect of interfering with a judicial decision, raising a significant concern regarding the separation of powers.

While recognising that the instrument is lawfully made, given the significance of the changes to the law it enacts, the committee considers that it may have been more appropriate that these changes be effected via amendment to primary rather than delegated legislation.

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105 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, p. 945.

106 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, pp. 945-946. It is noted that the Scrutiny of Bills committee's concerns included that legislative instruments that expanded the definition of fast-track applicant would not be subject to disallowance. However, the bill was subsequently amended prior to its enactment to include subsection 5(1AD) in the Migration Act, which provides that instruments made under subsection 5(1AA) are subject to disallowance.

The committee draws the making of a significant change to the law via delegated legislation to the attention of the Senate.

Instrument	**National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975]**
Purpose	Sets out detailed requirements relating to implementation of the National Redress Scheme for Institutional Child Sexual Abuse, including requirements for institutions to opt into the Scheme and for apportioning costs between institutions
Authorising legislation	*National Redress Scheme for Institutional Child Sexual Abuse Act 2018*
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[107]

Matters more appropriate for parliamentary enactment[108]

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

The instrument establishes detailed rules for the implementation of various aspects of the scheme established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Redress Scheme Act). These include significant matters such as: defining abuse which is not within the scope of the scheme, methodology for determining the responsibility of institutions for redress and apportioning costs between them, requirements for determining the eligibility of certain persons—such as persons in gaol, and child applicants—to access the scheme, and circumstances in which protected information may be disclosed by the scheme's Operator.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered the rule-making powers provided in the Redress Scheme Act, when the bill was introduced into Parliament. The Scrutiny of Bills committee drew attention

107 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

108 Scrutiny principle: Senate Standing Order 23(3)(d).

to a number of clauses providing for the rules to contain matters significant to the scheme. These included powers for the rules to:

- prescribe cases in which the criteria for elibigility for redress, or for when abuse is within the scope of the scheme, do not apply;
- require or permit the Operator to revoke a determination to approve, or not approve, an application for redress; and
- prescribe purposes (additional to those in the Act) for which protected information may be disclosed by government officials.

The committee notes that rules have been made in the instrument addressing each of the above matters.

In relation to these issues the Scrutiny of Bills committee expressed the view that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.[109]

As its comments were tabled after the bill had already passed both Houses of Parliament, the Scrutiny of Bills committee made no further comment, but drew its concerns to the attention of this committee.[110]

The committee's views regarding the prescription of matters central to the redress scheme in the instrument accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that enable significant changes to the law to be made through delegated legislation. In the committee's view, significant elements of the operation of the redress scheme, such as types of abuse falling within the scheme, categories of persons eligible for redress, and provision for the disclosure of sensitive protected information, may be more appropriate for enactment in primary legislation.

The committee draws the provision of significant matters relating to the national redress scheme for institutional child sexual abuse in delegated legislation to the attention of the Senate.

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109 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018,* 20 June 2018, pp. 22, 28, 37.

110 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018,* 20 June 2018, pp. 26, 29, 38.

Anticipated authority[111]

Section 4 of the *Acts Interpretation Act 1901* (Interpretation Act) allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4) of that Act.

The instrument was made on 29 June 2018, and was registered on the Federal Register of Legislation on that date.

The instrument was made under section 179 of the Redress Scheme Act. The Redress Scheme Act commenced on 1 July 2018.

The committee notes that the commencement provision for the instrument provides for it to commence no earlier than the commencement of the Redress Scheme Act. The instrument commenced on 1 July 2018, the same date as the Act.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, ESs to instruments that are made in anticipation of their authorising provisions, and therefore rely on section 4 of the Interpretation Act, should clearly identify that the making of the instrument relies on that section.

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

111 Scrutiny principle: Senate Standing Order 23(3)(a).

Instrument	**Product Emissions Standards Amendment (Temporary Exemption and Other Measures) Rules 2018 [F2018L00917]**
Purpose	Amends the Product Emissions Standards Rules 2017 to temporarily exempt emissions-controlled products from the *Trans-Tasman Mutual Recognition Act 1997*, and make other technical amendments
Authorising legislation	*Product Emissions Standards Act 2017*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[112]

Access to incorporated document[113]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[114]

Item 3 of Schedule 1 to the instrument substitutes table item 1 of subsection 26(1) of the *Product Emissions Standards Rules 2017* (principal instrument). The new subsection incorporates 'Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft, as in

112 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

113 Scrutiny principle: Senate Standing Order 23(3)(a).

114 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

force from time to time' (EU Directive). While the ES discusses the effect of the EU Directive and of the amendments made to the relevant provision, it provides no information regarding where the Directive can be obtained.

The committee's research indicates that the EU Directive is freely available online.[115] Where an incorporated document is available for free online, the committee considers that, in accordance with the Legislation Act, a best-practice approach is for the ES to provide details of the website where the document can be accessed.

The committee notes that the reference to the EU Directive in the substituted provision has not changed from the previous version of the provision. However, the committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not in itself address the committee's scrutiny concerns. Moreover, the committee notes that at the time the principal instrument was made, the committee drew the minister's attention to the absence of information in the instrument or ES regarding access to the same document.[116]

The committee draws to the minister's attention the absence of information in the explanatory statement regarding access to EU Directive 2013/53/EU, incorporated by reference in the instrument.

115 https://eur-lex.europa.eu/eli/dir/2013/53/oj.

116 Regulations and Ordinances Committee, *Delegated legislation monitor 1 of 2018,* 7 February 2018, p. 68.

Instrument	**Product Emissions Standards (Customs) Charges Regulations 2018 [F2018L00761]** **Product Emissions Standards (Excise) Charges Regulations 2018 [F2018L00762]**
Purpose	[F2018L00761] Prescribes the amount of charge to be imposed on the importation of emissions-controlled products [F2018L00762] Prescribes the amount of charge to be imposed on the manufacture of emissions-controlled products
Authorising legislation	*Product Emissions Standards (Customs) Charges Act 2017* *Product Emissions Standards (Excise) Charges Act 2017*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[117]

Matters more appropriate for parliamentary enactment[118]

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

The instruments were made under the *Product Emissions Standards (Customs) Charges Act 2017* (Customs Charges Act) and the *Product Emissions Standards (Excise) Charges Act 2017* (Excise Charges Act). Section 6 of each of those Acts provides, respectively, that the amount of charge imposed on the importation or the manufacture of an emissions controlled product[119] is the amount prescribed by regulations, or worked out in accordance with a method prescribed by regulations.

Each of the instruments prescribes a 'product price' for emissions controlled products, and sets out a method for calculating the amount of charge imposed on the manufacture and importation of such products.

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117 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

118 Scrutiny principle: Senate Standing Order 23(3)(d).

119 The *Product Emissions Standards Act 2017* (Standards Act) allows rules to be made prescribing products as 'emissions controlled products'. The committee previously raised concerns about the prescription of products as 'emissions controlled products' by delegated legislation. See *Delegated legislation monitor 1 of 2018*, pp. 65-66.

The committee notes that concerns were raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) in relation to the Product Emissions Standards (Customs) Charges Bill 2017 and the Product Emissions Standards (Excise) Charges Bill 2017 when those bills were before the Parliament. In particular, the Scrutiny of Bills committee raised concerns that the bills sought to allow customs and excise charges (which are effectively taxes) to be imposed by delegated legislation.

The Scrutiny of Bills committee emphasised that one of the most fundamental functions of the Parliament is to levy taxation, and consequently it is for Parliament, rather than makers of delegated legislation, to set a rate of tax. The Scrutiny of Bills committee also expressed concerns that there appeared to be nothing on the face of the bills that would limit the imposition of customs and excise charges to the recovery of costs associated with regulating emissions controlled products, or that would restrict the amount of charge that could be imposed.[120]

Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of allowing regulations to determine the amount of charge payable in relation to the manufacture and import of emissions-controlled products in the absence of statutory guidance as to the method of calculation or as to the maximum amount of the charge. The Scrutiny of Bills committee also drew its scrutiny concerns to the attention of the Senate and this committee.[121]

The committee's views accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts enabling delegated legislation to set a rate of tax (including rates and charges relating to customs and excise). While recognising that the instrument is lawfully made, in the committee's view, rates of tax are more appropriate for enactment in primary legislation.

The committee draws the Senate's attention to the setting of rates of customs and excise charges in delegated legislation.

120 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2017*, pp. 19-20.

121 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, p. 74.

Instrument	**Social Security (Administration) (Class of Persons – Intent to Claim) Determination 2018 [F2018L00971]**
Purpose	Prescribes classes of persons whose claim for a social security payment or a concession card may be deemed to have been made on the date of the person's first contact with the Department of Human Services
Authorising legislation	*Social Security (Administration) Act 1999*
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[122]

Anticipated authority[123]

Section 4 of the *Acts Interpretation Act 1901* (Interpretation Act) allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4) of that Act.

The instrument was made on 29 June 2018, and was registered on the Federal Register of Legislation on that date.

The instrument was made under section 14A of the *Social Security (Administration) Act 1999* (Administration Act), which was inserted by item 17 of Schedule 11 to the *Social Security Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act). Schedule 11 to the Welfare Reform Act commenced on 1 July 2018.

The committee notes that the commencement provision for the instrument provides for commencement on 1 July 2018. The instrument therefore commenced at the same time as its empowering provision.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that are made in anticipation of their authorising provisions, and

122 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

123 Scrutiny principle: Senate Standing Order 23(3)(a).

therefore rely on section 4 of the Interpretation Act, should clearly identify that the making of the instrument relies on that section.

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

Instrument	**Social Security (Administration) (Job Search Efforts) Determination 2018 [F2018L00776]** **Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1) [F2018L00795]** **Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779]** **Social Security (Declared Program Participant) Determination 2018 [F2018L00777]**
Purpose	Set out matters relating to the implementation of the new targeted compliance framework for persons claiming or receiving specified welfare payments
Authorising legislation	*Social Security (Administration) Act 1999* *Social Security Act 1991*
Portfolio	Jobs and Innovation
Disallowance	15 sitting days after tabling [F2018L00776], [F2018L00777] and [F2018L00779]: tabled Senate 19 June 2018. Notice of motion to disallow must be given by 10 September 2018[124] [F2018L00795]: tabled Senate 21 June 2018. Notice of motion to disallow must be given by 12 September 2018.

Matters more appropriate for parliamentary enactment[125]

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

The Social Security (Administration) (Job Search Efforts) Determination 2018, the Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 and the Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1) were made under Division 3AA of the *Social Security*

124 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

125 Scrutiny principle: Senate Standing Order 23(3)(d).

(Administration) Act 1999 (Administration Act).[126] That Division was inserted by Schedule 15 to the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act). It introduces a new targeted compliance framework for persons claiming or receiving participation payments.[127] The instruments determine a number of matters for the purposes of Division 3AA. They set out:

- matters that the secretary must consider when determining whether a person has undertaken adequate job search efforts;[128]
- matters that the secretary must, and must not, take into account when determining whether a person has a reasonable excuse for not complying with their obligations in relation to a participation payment;[129] and
- circumstances in which a person has, and has not, persistently committed a mutual obligation failure, and circumstances in which participation payments may be reduced or cancelled.[130]

The Social Security (Declared Program Participant) Determination 2018 was made under section 28C of the Administration Act, which was inserted by Schedule 13 to the Welfare Reform Act. The instrument provides that participants in the Community Development Program (CDP)[131] are 'declared program participants',[132] and provides

126 Sections 42AC, 42AI and 42AR respectively. The Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 was also made under section 42 of the Administration Act, as amended by the Welfare Reform Act.

127 'Participation payment' is defined in Schedule 1 to the Administration Act, and includes newstart allowance, youth allowance (where the person is not a new apprentice and is not undertaking full-time study, parenting payments (in certain circumstances), and special benefit (if the person is a nominated visa holder).

128 Social Security (Administration) (Job Search Efforts) Determination 2018.

129 Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018. The Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018 [F2018L00783] repeals and makes minor amendments to other instruments such that the 2018 determination is the only instrument relating to reasonable excuses that applies to participation payments.

130 Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1). As set out in section 42AA of the Administration Act, a person commits a mutual obligation failure for failing to comply with obligations relating to participation payments, such as attending appointments, undertaking activities, or taking action to gain employment.

131 The CDP is the government's remote employment and community development scheme. See https://www.pmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp (accessed 7 August 2018).

for the operation of the compliance framework in Divisions 3A and 3AA of the Administration Act in relation to declared program participants.

The committee notes that concerns were raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) in relation to Schedule 15 of the Welfare Reform Act when the Social Services Legislation Amendment (Welfare Reform) Bill 2017 was before the Parliament.

The Scrutiny of Bills committee expressed the view that significant matters such as safeguards and principles relating to social security payments are matters that would appear to be more appropriate for primary legislation. The Scrutiny of Bills committee noted that enactment in primary legislation would allow for greater parliamentary scrutiny of relevant processes and of any future amendments to them.

The Scrutiny of Bills committee also raised specific concerns regarding the proposal to amend the Administration Act to permit the Secretary to determine, by legislative instrument, matters that the Secretary must *not* take into account when determining whether a person has a reasonable excuse for failing to comply with obligations relating to participation payments. The committee expressed the view that the matters that the Secretary could be bound not to consider could be so broad as to undermine the reasonable excuse provisions set out in the Act.[133]

Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of including these significant matters in delegated legislation. The Scrutiny of Bills committee also drew its scrutiny concerns to the attention of the Senate and this committee.[134]

The committee's views with regard to the instruments made under Division 3AA of the Administration Act accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that leave significant elements of a regulatory scheme, or significant changes to the law, to delegated legislation. In the

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132 As set out in the ES to the Social Security (Declared Program Participant) Determination 2018, 'declared program participants' are subject to the current compliance framework under Division 3A of the Administration Act, while other persons claiming or receiving participation payments are subject to the new targeted compliance framework in Division 3AA.

Further, certain income support recipients who are not declared program participants will no longer be able to obtain certain exemptions from activity test or participation requirements relating to drug or alcohol misuse or dependency. Declared program participants will not be subject to these stricter requirements.

133 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 28-31.

134 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, pp. 96-100.

committee's view, significant matters going to whether a person's social security payments may be reduced or cancelled are more appropriate for enactment in primary legislation.

The Scrutiny of Bills committee did not comment on section 28C of the Administration Act (under which the Social Security (Declared Program Participant) Determination 2018 is made, which provides that participants in the CDP are 'declared program participants'). However, the operation of the social security law with respect to declared program participants would appear to be a similarly significant element of the reformed social security regime. In the view of the committee, this matter would also be more appropriately included in primary rather than delegated legislation.

The committee draws the Senate's attention to the specification in delegated legislation of significant elements of the targeted compliance framework in the *Social Security (Administration) Act 1999*, including matters going to whether a person's social security payments may be reduced or cancelled.

Instrument	**Vehicle Standard (Australian Design Rule 35/06 – Commercial Vehicle Brake Systems) 2018 [F2018L00664]** **Vehicle Standard (Australian Design Rule 38/05 – Trailer Brake Systems) 2018 [F2018L00692]**
Purpose	Update design standards to ensure safe braking for commercial vehicles and large passenger vehicles under normal and emergency conditions
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[135]

Access to incorporated documents[136]

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of* documents.[137]

With reference to the matters above, the committee notes that each instrument incorporates the following Australian and international standards:

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135 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

136 Scrutiny principle: Senate Standing Order 23(3)(a).

137 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

- AS 4945-2000 (Commercial road vehicles – Interchangeable quick connect/release couplings for use with air-pressure braking systems);
- ISO 11992:2003 (including ISO 11992-1:2003, ISO 11992-2:2003 and its Amd.1:2007);
- ISO 3583:1984;
- ISO 7638-1:2003; and
- ISO 7638-2: 2003.

Additionally, Vehicle Standard (Australian Design Rule 35/06 – Commercial Vehicle Brake Systems) 2018 [F2018L00664] appears to incorporate ISO 15037 Part 2: 2002, and Vehicle Standard (Australian Design Rule 38/05 – Trailer Brake Systems) 2018 [F2018L00692] incorporates ISO 1728:2006.

The ES states that each of the standards are incorporated as in force at the commencement of the relevant determination. However, while the ES indicates where the standards may be accessed, it also states that the standards are only available for purchase. The ES indicates that vehicle manufacturers and test facilities would access the standards as part of their professional libraries.[138]

The committee acknowledges that that the anticipated users of the instrument are likely to be in possession of, or able to access, the incorporated standards. However, in addition to access for vehicle manufacturers and test facilities, 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.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny

138 It is noted that the ES to instrument [F2018L00664] does not mention the incorporation of ISO 15037 Part 2: 2002, which is referenced in Appendix 3, Annex 2, section 3.2 of the instrument. This appears to be an oversight and the committee notes that the observations in the ES in relation to the other standards incorporated in the instrument would appear to apply equally to ISO 15037 Part 2: 2002.

concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[139]

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made available to all interested or affected persons. This might, for example, involve noting the availability of the document through specific public libraries, or making the document available for viewing on request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee draws the minister's attention to the absence of any information in the explanatory statement regarding free access to Australian and international standards incorporated by reference in the instrument.

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

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

Correspondence relating to these matters is available on the committee's website.[1]

Instrument	**Air Navigation (Aircraft Noise) Regulations 2018 [F2018L00448]**
Purpose	Regulates noise standards applicable to air navigation and the provision of related noise certificates and approvals
Authorising legislation	*Air Navigation Act 1920*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[2]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Offences: strict liability[3]

Committee's initial comment

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 impose offences of strict liability (which negates the requirement to prove fault), this infringement on a fundamental protection of the criminal law is justified.

The instrument imposes four offences containing elements of strict liability:

- section 6 sets out requirements for different types of aircraft in relation to noise standards, noise certificates and other specified approvals. Subsection 6(4) imposes an offence if an aircraft engages in air navigation without complying with the relevant requirements. Subsection 6(5) applies

1 See www.aph.gov.au/regords_monitor.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(b).

strict liability to elements of the offence, such as the type of aircraft and the existence of a relevant approval;

- section 13 provides for the revocation of a noise certificate, and subsection 13(4) imposes an offence of strict liability if an aircraft operator fails to return a noise certificate that has been revoked (or to have its revocation appropriately noted in relevant flight documents);
- section 20 imposes an offence if a 'large marginally compliant aircraft' operates at a restricted airport in contravention of a relevant ministerial notice. Subsection 20(3) applies strict liability to the matter of whether the aircraft operator's conduct resulted in such a contravention; and
- subsection 21(3) imposes an offence of strict liability if a person ceases to be an inspector, and does not return their identity card within 14 days.

In a criminal law offence, proving fault is usually a basic requirement, but offences of strict liability remove the fault element that would otherwise apply. This means that a person could be punished for doing or failing to do something whether or not they have a guilty intent. This should only occur in limited circumstances.

The committee's expectation is that the explanatory statement (ES) to an instrument should include a justification for any strict liability offences imposed by the instrument, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Offences Guide).[4]

The ES to the instrument provides no information in relation to the imposition of strict liability in the above offences.

The committee requests the minister's advice as to the justification for the imposition of strict liability in each of the offences in sections 6, 13, 20 and 21 of the instrument.

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Transport advised:

> I understand the Committee's concern regarding the inclusion of strict liability offences. The strict liability offences were reviewed as part of the sunsetting process in accordance with the *Legislation Act 2003*. The review of the offences found that the offences remain appropriate to provide a deterrent effect. The offences have existed since the introduction of the Air Navigation (Aircraft Noise) Regulations in 1984 and have resulted in sufficient deterrence that no offences for breaches of the Regulations have been prosecuted within the preceding 10 years. Conduct of such nature in

4 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.

> breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protections of the community with the ability to facilitate industry productivity and growth. A revised ES including justification of strict liability offences will be developed and registered on the Federal Register of Legislation in due course.

Committee's response

The committee thanks the minister for his response and notes his advice that the appropriateness of the strict liability offences in the instrument was reviewed as part of the sunsetting process, and that the offences continue to provide an appropriate deterrent within the regulatory scheme for aircraft noise.

The committee notes the minister's undertaking to register a revised ES, which includes a justification for the strict liability offences, on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Offences: evidential burden of proof on the defendant[5]

Committee's initial comment

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 offence provisions in instruments reverse the burden of proof for persons in their individual capacities (requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

As noted above, subsection 21(3) of the instrument imposes an offence if a person does not return their identity card within 14 days of ceasing to be an inspector. Subsection 21(4) provides an offence-specific defence to the offence, where the person had a 'reasonable excuse' for failing to return the identity card. In so doing, it imposes on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence.[6]

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5 Scrutiny principle: Senate Standing Order 23(3)(b).

6 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is reflected in the Note to subsection 21(4) of the instrument.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

The committee's expectation is that the appropriateness of provisions that have the effect of reversing burdens of proof should be explicitly addressed in the explanatory statement (ES) to the instrument, consistent with the Offences Guide.

The ES to the instrument provides no information in relation to the justification for reversing the evidential burden of proof in subsection 21(4).

The committee requests the minister's advice as to the justification for using an offence-specific defence that reverses the burden of proof in subsection 21(4) of the instrument.

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Transport advised:

> The offence in Section 21 of the Regulations is an offence for which the return of the card is completely within the defendant's knowledge and not available to the prosecution. The offence listed in Section 21 also carries a low penalty (1 penalty) unit. The offence has been put in place to ensure that only aviation inspectors duly authorised can carry out inspections on aircraft. The offence prescribed also ensures there is no danger to public safety through the unauthorised inspection of aircraft which may be unlawful. A revised ES including the evidential burden of proof on the defendant will be developed and registered on the Federal Register of Legislation in due course.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's view that it is appropriate to place the evidential burden of proof on the defendant in relation to the defence in subsection 21(4) because the reason for non-return of the identity card is a matter completely within the knowledge of the defendant and not available to the prosecution, and because the section 21 offence carries a low penalty.

The committee notes the minister's undertaking to register a revised ES, which includes the justification for the evidential burden of proof being placed on the defendant, on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Subdelegation[7]

Committee's initial comment

Section 24 of the instrument provides that the secretary (of the Department of Infrastructure, Regional Development and Cities) may delegate his or her powers under the instrument to any employee of the department, officer of the Civil Aviation Safety Authority or employee of Airservices Australia. No limitations are placed on the level of seniority, qualifications or expertise that delegates must have, and the ES provides no information in relation to the broad subdelegation of powers.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to

- why it is necessary to allow such broad delegation of the secretary's powers under the instrument, to all employees of three government agencies; and
- the appropriateness of amending the instrument to require that the secretary be satisfied that officials to whom powers are delegated under section 24 have the expertise appropriate to the power delegated.

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Transport advised:

> I understand the Committee's concerns regarding the delegation of the Secretary's powers under the instrument. The Department of Infrastructure, Regional Development and Cities (the Department) is currently conducting a review of the Secretary's Delegation Instrument to the Regulations to ensure that individuals have both the relevant qualifications and attributes or are members of the Senior Executive Service. It is expected that the Secretary's Delegation Instrument will only delegate powers to relevant officers with defined roles in those agencies

7 Scrutiny principle: Senate Standing Order 23(3)(a).

with relevant qualifications and attributes. An amendment will be made to the Regulations to require that the Secretary is satisfied that officials to whom powers are delegated have the expertise appropriate to the power delegated, where these employees are not members of the Senior Executive Service.

The Department as part of sunsetting arrangements is currently preparing other amendments to legislative instruments made under the *Air Navigation Act 1920* and the amendment to the Regulations will be progressed at the same time as other legislative instruments. It is anticipated these instruments will be considered by the end of 2018.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the department is currently reviewing the secretary's delegations to ensure that powers are only delegated to officers with relevant qualifications and attributes.

The committee welcomes the minister's undertaking to amend the instrument to require that the secretary be satisfied that powers are delegated only to officials with the expertise appropriate to the power delegated, where those employees are not members of the senior executive service.

The committee has concluded its examination of this matter.

Incorporation of document[8]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative

8 Scrutiny principle: Senate Standing Order 23(3)(a).

instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[9]

With reference to the above, the committee notes that several provisions of the instrument incorporate 'the Annex', defined in section 4 as Volume 1 of Annex 16 to the Chicago Convention,[10] as in force at the commencement of the instrument.

The instrument therefore appears to indicate clearly the date at which the Annex is applied in the relevant provisions of the instrument (the date of commencement of the instrument), consistent with the Legislation Act. In this regard, however, the committee notes that section 10 of the instrument requires noise certificates to 'contain information required by the Annex'. In its explanation of section 10, the ES states that:

> Section 10 references the Annex rather than setting out in the Regulations the form and content of the noise certificate. The provisions of the Annex are subject to regular amendment and specifying the form and content of the noise certificate in the Regulations is likely to result in Australia being non-compliant with obligations under the Chicago Convention. The form and content of noise certificates is set out in procedural guidance issued

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9 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

10 The Chicago Convention is defined in section 3 of the *Air Navigation Act 1920* as the Convention on International Civil Aviation concluded at Chicago on 7 December 1944.

> by Airservices Australia for aircraft operators when applying for a noise certificate.

This explanation appears to the committee to suggest that the form and content requirements for noise certificates would be expected to change from time to time when the Annex is amended. However, section 10 of the instrument can only require that noise certificates contain information required by the Annex as it is incorporated: that is, as it exists at the commencement of the instrument.

In relation to access to the Annex, the ES states that it 'is not a publically available document, however, aircraft operators requiring access to the document are entitled to be provided with a copy upon request'. The ES does not indicate the person or body from whom aircraft operators can request and obtain such access, whether such access is provided free of charge, and why similar access on request can not be provided to members of the public.

The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms. While aircraft operators may be able to access the Annex freely, the committee is also interested in the broader issue of access for other parties who might be affected by, or who are otherwise interested in, the law.

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made available to all interested or affected persons. This might, for example, involve noting the availability of the document through specific public libraries, or making the document available for viewing on request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to:

- whether the requirement in section 10 is that noise certificates contain information required by the Annex as in force at the date of commencement of the instrument, consistent with the definition in section 4 and with the requirements of the *Legislation Act 2003*; and
- how the Annex is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.

The committee also requests that the instrument and/or its explanatory statement be amended to include this information.

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Transport advised:

> Annex 16, Volume I of the Convention on International Civil Aviation (the Chicago Convention) is adopted to increase the stringency of aircraft noise management. The Chicago Convention allows Australia to adopt practices

which incentivise industry to update to modern aircraft types, and it reduces the effects on the community of aircraft noise. It is also adopted to give effect to Australia's obligations as a signatory to the Chicago Convention. Not adopting relevant provisions of Annex 16, Volume I could result in Australia being noncompliant with its international obligations. All Contracting States as members of the International Civil Aviation Organization (ICAO) have access to all Annexes of the Chicago Convention. The form and content of a noise certificate is specified in Attachment G of Annex 16 Volume I. Noise certificates are only issued by Contracting States of ICAO.

The application form for a noise certificate may be amended from time-to-time to ensure that noise certificates issued remain up-to-date, consistent with guidance material and other Contracting States can accept Australian registered aircraft, which are certified by Airservices Australia. Section 14(4) of the *Legislation Act 2003* specifies that if a legislative instrument provides for a form to be used, section 14 does not apply in relation to the form. The information required in the application form for a noise certificate is considered a form for the purposes of the *Legislation Act 2003*. All other remaining provisions of Annex 16, Volume I are those in force at the time of making of the instrument, that is, 1 April 2018.

Annex 16, Volume I is available for purchase on the ICAO website //store.icao.int/annex-16-environmental-protection-volume-1-aircraft-noise-english-printed.html. Aircraft operators can request a copy of Annex 16, Volume I from the Department without charge.

Consistent with the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003* the ES indicates how incorporated documents may be obtained, but does not appear to require that such documents be obtainable without charge. Any person subject to the law is able to obtain a copy upon request. A revised ES including reference that those subject to the law can obtain a copy of Annex 16, Volume I upon request to the Department will be developed and registered on the Federal Register of Legislation in due course.

Committee's response

The committee thanks the minister for his response.

In relation to the operation of section 10 of the instrument, the committee notes the minister's advice that the information referred to in subsection 10(3) will be obtained from the application form for a noise certificate, which is considered a form for the purpose of section 14 of the Legislation Act, and therefore, pursuant to subsection 14(4), not subject to section 14 of the Act.

With regard to access to the Annex, the committee acknowledges that paragraph 15J(2)(c) of the Legislation Act does not expressly require that documents incorporated by reference be obtainable without charge. The committee notes, however, that its scrutiny is not confined to the express requirements of the

Legislation Act. The committee is also concerned to ensure that delegated legislation has certainty of meaning and operation, and conforms to fundamental legal principles. The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms.

In this regard, the committee welcomes the minister's advice that any person subject to the law may obtain a copy of the Annex free of charge on request to the department. The committee notes the minister's undertaking that a revised ES, which includes this information, will be registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Amendment of List of Exempt Native Specimens – NSW Estuary Prawn Trawl, NSW Ocean Trawl and NT Demersal Fisheries, April 2018 [F2018L00575]**
Purpose	Amends the List of Exempt Native Specimens by deleting specimens taken from the New South Wales Estuary Prawn Trawl and Prawn Trawl Fisheries, and the Northern Territory Demersal Fishery; and including specimens taken from those same three fisheries, subject to certain conditions
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[11]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Legislative authority: power to make instrument[12]

Committee's initial comment

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

11 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

12 Scrutiny principle: Senate Standing Order 23(3)(a).

legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under paragraph 303DC(1)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It amends the list of exempt native specimens established under section 303DB of the EPBC Act (exempt specimens list) by including and deleting items from the list.

Subsection 303DC(1A) of the EPBC Act provides that, in deciding whether to amend the exempt specimens list to include a specimen derived from a commercial fishery, the minister must rely primarily on the outcomes of any assessment in relation to the fishery carried out for the purposes of Division 1 or 2 of Part 10 of the EPBC Act. The requirement in subsection 303DC(1A) appears to be a precondition to the making of an instrument under subsection 303DC(1) to amend the exempt specimens list by including a specimen derived from a commercial fishery.

Schedule 2 to the instrument amends the exempt specimens list by including specimens derived from fish or invertebrates taken in the New South Wales (NSW) Estuary Prawn Trawl, NSW Ocean Trawl and Northern Territory (NT) Demersal Fisheries. The committee's research indicates that these fisheries may be commercial fisheries of the type contemplated by subsection 303DC(1A) of the EPBC Act.[13] If so, it would appear that the requirement in that subsection applies to the making of the instrument. Neither the instrument nor its explanatory statement (ES) specifies whether the specimens are derived from a commercial fishery.

The ES to the instrument does state that:

> In determining to include the list of exempt native specimens regard was had to the Australian Government's 'Guidelines for the Ecologically Sustainable Management of Fisheries – 2nd Edition'. Those Guidelines establish the criteria for assessment of the ecological sustainability of the relevant fishery's management arrangements.

However, it is unclear to the committee whether the guidelines referred to in the ES constitute the outcomes of an assessment in relation to the fisheries mentioned in Schedule 2. Moreover, neither the instrument nor the ES provides any further information in relation to whether an assessment was made for the purposes of

13 For example, the NSW Department of Primary Industries lists the NSW Estuary Prawn Trawl and Ocean Trawl Fisheries under the heading of 'commercial fishing'. See https://www.dpi.nsw.gov.au/fishing/commercial/fisheries. Similarly, the NT Department of Primary Industry and Resources lists the NT Demersal Fishery under the heading of 'commercial fisheries.' See https://nt.gov.au/marine/commercial-fishing.

Division 1 or 2 of Part 10 of the Act,[14] and if so, whether it was primarily relied on by the minister in adding the specimens listed in Schedule 2 to the list. It is therefore unclear whether the requirements in subsection 303DC(1A) of the EPBC Act applied and were satisfied in this instance.

The committee requests the minister's advice as to:

- whether the specimens included in the exempt specimens list by the instrument were derived from a 'commercial fishery' within the meaning of subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*;
- if so, whether an assessment was made for the purposes of Division 1 or 2 of Part 10 of the Act in relation to the fisheries from which the specimens listed in Schedule 2 to the instrument were derived; and
- if so, whether the minister relied primarily on the outcomes of such an assessment when deciding whether to amend the list of exempt native specimens to include these specimens.

Minister's response

The Assistant Minister for the Environment advised:

> I am advised by the Department of the Environment and Energy (the Department) that the fisheries identified in the Instrument are commercial fisheries within the meaning of subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).
>
> The Department also advised me that no assessment for the purposes of Division 1 or Division 2 of Part 10 of the EPBC Act was required to be carried out for the three fisheries named in the Instrument. This is because there is no relevant agreement under section 146 of the EPBC Act for the purpose of Division 1 and Division 2, which relates to Commonwealth-managed fisheries. Part 10 is not applicable to the fisheries in question as they are not managed by the Commonwealth. As such, the requirement in subsection 303DC(1A) of the EPBC Act does not apply in the case of these fisheries.
>
> The Australian Government and state and Northern Territory governments have negotiated Offshore Constitutional Settlement (OCS) agreements

14 While Division 1 of Part 10 of the EPBC Act appears to provide some ministerial discretion in relation to certain assessments, Division 2 requires the Australian Fisheries Management Authority (AFMA), prior to determining a management plan for a fishery, to make an agreement with the minister for an assessment of the impacts of actions under the plan on matters protected under Part 3 of the EPBC Act. Similar requirements apply where AFMA proposes to determine that a management plan is not required for a fishery. It therefore appears that assessments in relation to fisheries (as contemplated by subsection 303DC(1A)) may be mandatory in certain circumstances.

that set out the responsibilities for each jurisdiction in the management of offshore fisheries. The *Fisheries Management Act 1991* (Cth) and reciprocal state and Northern Territory legislation provide the legal and administrative basis for governments to make the necessary arrangements to ensure that fishery resources are managed sustainably. The OCS agreements generally provide for state/Northern Territory laws to apply inside three nautical miles (nm), and for Commonwealth laws to apply from three to 200 nm, although there are many variations outlined in the specific agreements.

The Department has assessed the management arrangements for these three fisheries against the *Guidelines for the Ecological Sustainable Management of Fisheries - 2nd Edition*, and in accordance with Parts 13 and 13 A of the EPBC Act. The Department will ensure future explanatory statements are updated to more explicitly explain this arrangement.

Committee's response

The committee thanks the assistant minister for her response. The committee notes the assistant minister's advice that while the fisheries identified in the instrument are 'commercial fisheries' within the meaning of subsection 303DC(1A) of the EPBC Act, no assessment for the purposes of Part 10 of the Act was required because the relevant fisheries are not managed by the Commonwealth. The committee notes the assistant minister's advice that, consequently, the requirements in subsection 303DC(1A) of the EPBC Act do not apply in relation to the instrument.

The committee further notes the assistant minister's advice that the department has assessed the management arrangements for the fisheries identified in the instrument against the *Guidelines for the Sustainable Management of Fisheries – 2nd Edition*, and in accordance with Parts 13 and 13A of the EPBC Act. The committee welcomes the minister's undertaking to ensure that future explanatory statements more explicitly explain these arrangements.

The committee has concluded its examination of the instrument.

Instrument	**Banking (prudential standard) determination No. 1 of 2018 [F2018L00530]** **Banking (prudential standard) determination No. 2 of 2018 [F2018L00531]**
Purpose	[F2018L00530]: Determines Prudential Standard APS 180 Capital Adequacy: Counterparty Credit Risk [F2018L00531]: Determines Prudential Standard APS 112 Capital Adequacy: Standardised Approach to Credit Risk
Authorising legislation	*Banking Act 1959*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[15]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Incorporation of document[16]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative

15 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

16 Scrutiny principle: Senate Standing Order 23(3)(a).

instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[17]

With reference to the matters above, the committee notes that each of the instruments incorporates the Committee on Payment and Market Infrastructures and International Organization of Securities Commission's *Principles for Financial Market Infrastructures* (CPMI-IOSCO Principles). However, neither the instruments nor their (shared) ES indicate the manner in which the CPMI-IOSCO Principles are incorporated or where they may be accessed free of charge.

The committee's research indicates that the CPMI-IOSCO Principles are available for free online.[18] Nevertheless, as noted above the Legislation Act requires the ES to an instrument to contain a description of any incorporated document and to indicate how it may be obtained.

The committee requests the minister's advice as to:

- the manner in which the Committee on Payment and Market Infrastructures and International Organization of Securities Commission's (CPMI-IOSCO) *Principles for Financial Market Infrastructures* is incorporated into the instruments; and

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17 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

18 https://www.bis.org/cpmi/publ/d101.htm.

- how that document is or may be made readily and freely available to persons interested in or affected by the instruments.

The committee also requests that the instruments and/or their explanatory statements be amended to include this information.

Minister's response

The Treasurer advised:

> I note the Committee's concern that while the instruments include references to the Committee on Payment and Market Infrastructures and International Organisation of Securities Commission's Principles for Financial Market Infrastructures (CPMI-IOSCO Principles), the Explanatory Statements (ESs) to the instruments do not provide a description of the incorporated document or indicate where it could be freely accessed.
>
> I have raised the Committee's concerns with the Australian Prudential Regulation Authority (APRA), which is responsible for the instruments. APRA has advised me, that it does not consider the relevant paragraphs incorporate the CPMI-IOSCO principles into the instruments. This is because the status of an institution as a QCCP is dependent on a question of fact, rather than an application of the CPMI-IOSCO principles.
>
> However, APRA has agreed to lodge replacement ESs for inclusion on the Register of Legislative Instruments if, after considering my response, the Committee remains of the view that the CPMI-IOSCO principles have been incorporated by reference.

Committee's response

The committee thanks the Treasurer for his response, and notes the Treasurer's advice that the Australian Prudential Regulation Authority (APRA) does not consider that the instruments incorporate the CPMI-IOSCO principles because the status of an institution as a qualifying central counterparty (QCCP) is dependent on a question of fact, rather than on an application of the CPMI-IOSCO principles.

The committee welcomes the Treasurer's advice that APRA has agreed to lodge replacement ESs for the instruments if the committee remains of the view that the CPMI-IOSCO principles have been incorporated by reference.

The committee notes that the relevant provisions in the instruments provide that an entity is a QCCP where the entity is based in and prudentially supervised in a jurisdiction where the relevant regulator/overseer has established and publicly indicated that it applies, on an ongoing basis, domestic rules and regulations that are consistent with the CPMI-IOSCO principles.

As such, the committee acknowledges that the instruments' reference to the CPMI-IOSCO principles could be regarded as informative of a question of fact, rather than being directly incorporated by reference. However, the committee considers that it would be appropriate for the information in the Treasurer's response to be included

in the ESs, noting the importance of those document as points of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. The committee would also welcome the inclusion in the ESs of information regarding where the CPMI-IOSCI principles may be accessed.

The committee has concluded its examination of the instrument.

Instrument	**CASA 33/18 – Required Communication Performance and Required Surveillance Performance (RCP 240 and RSP 180) Capability Declarations – Direction 2018 [F2018L00616]**
Purpose	Directs certain classes of aircraft operators not to make declarations about their required communication and surveillance performance capabilities unless certain equipment and performance standards are met
Authorising legislation	Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[19]
Previously reported in	*Delegated legislation monitor 7 of 2018*

Access to incorporated documents[20]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

19 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

20 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee's expectations in this regard are set out in its *Guideline on incorporation of* documents.[21]

With reference to these matters, the committee notes that the instrument appears to incorporate the following documents:

- EUROCAE ED-100A/RTCA DO-258A; and
- ICAO Doc 9869 *Performance-based Communications and Surveillance*.

The instrument and ES make clear that these documents are incorporated as in force from time to time.[22] However, no information is provided as to where the documents may be obtained. The committee's research indicates that each of the documents may be obtained online, but only on payment of a fee.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[23]

The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

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21 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

22 Section 3 of the instrument provides that EUROCAE ED-100A/RTCA DO-258A is incorporated as in force from time to time. The ES also states that in relation to both Australian and foreign documents referenced in the instrument for the purposes of definitions, 'unless the contrary intention appears, the reference is taken to be a reference to the relevant document as in force or existing from time to time.' The committee notes that section 98(5D) of the *Civil Aviation Act 1988* provides authority for the instrument to incorporate any document as in force from time to time.

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

The committee requests the minister's advice as to how the documents incorporated by the instrument are, or may be made, readily and freely available to persons interested in or affected by the instrument; and requests that the explanatory statement be amended to include this information.

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Transport advised:

> I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee on the manner of incorporation and access to incorporated documents in relation to this instrument, in particular EUROCAE ED-1OOA/RTCA D0-258A and ICAO Doc 9869 *Performance-based Communications and Surveillance*.
>
> The aforementioned documents are proprietary documents which may be purchased from EUROCAE, RTCA Inc. or ICAO. As a current subscriber, CASA will make the relevant sections of the documents available, in its Canberra or regional offices, by arrangement, and for reading only, to any aircraft operator who is affected by the direction instrument, or to any interested person.
>
> I am advised that CASA will lodge a replacement explanatory statement explaining how and from where the documents can be obtained.

Committee's response

The committee thanks the minister for his response and notes his advice that CASA will make the relevant sections of the documents incorporated in the instrument available at its offices, by arrangement, for reading by any persons interested in or affected by the instrument.

The committee notes that a replacement ES, which includes this information, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Defence Determination, Conditions of Service Amendment (Flexible Service Determination) Determination 2018 (No. 15) [F2018L00496]**
Purpose	Determines conditions of service and provides for their administration in relation to ADF members undertaking flexible service
Authorising legislation	*Defence Act 1903*
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[24]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Consultation[25]

Committee's initial comment

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[26]

The ES to the instrument provides no information regarding consultation.

The committee requests the minister's advice as to:

- whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or

24 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

25 Scrutiny principle: Senate Standing Order 23(3)(a)

26 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

- whether no consultation was undertaken and, if not, why not.

The committee also requests that the explanatory statement be amended to include this information.

Minister's response

The Minister for Defence Personnel advised:

> The Department of Defence has confirmed that extensive internal consultation was undertaken in the making of the Determination with the Chiefs of Service Committee, Navy, Army and Air Force Personnel Branches, relevant areas across Defence People Group and Defence Legal. External consultation was limited to the Defence Force Remuneration Tribunal, as Defence Determination 2018/15 relates directly to the determinations of the Tribunal.
>
> In addition, People Capability Division within the Defence People Group undertook "town hall" type briefings at Defence sites around Australia, and each Service has communicated with members on the intent of the Total Workforce Model for the ADF, which underpins the changes proposed in this Determination. The Total Workforce Model is designed to provide more flexible patterns of service for Australian Defence Force (ADF) members than are currently available so as to assist with workforce attraction and retention. It also makes it easier for former members to return to the ADF and provide service under a range of more flexible arrangements.
>
> Defence has now amended the explanatory statement to note the extensive consultation that was undertaken.

Committee's response

The committee thanks the minister for his response and notes his advice that consultation was undertaken with the Chiefs of Service Committee, Navy, Army and Air Force Personnel Branches as well as the Defence Force Remuneration Tribunal. The committee also notes the minister's advice that consultation was undertaken at Defence sites throughout Australia.

The committee notes that an amended ES which describes the consultation undertaken has been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Incorporation of document[27]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[28]

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27 Scrutiny principle: Senate Standing Order 23(3)(a)

Sections 1.54A and 1.61A of the instrument incorporate, by reference, DFRT Determination No. 2 of 2017, *Salaries* (DFRT determination). The ES to the instrument provides no information regarding the manner in which the DFRT determination is incorporated, nor where it may be accessed.

The committee notes that the DFRT determination is made under section 58H of the *Defence Act 1903* (Defence Act) and that table item 12(b) of section 7 of the Legislation (Exemptions and Other Matters) Regulation 2015 provides that determinations made under section 58H of the Defence Act are not legislative instruments. However, the present instrument is made under section 58B of the Defence Act, and subsection 58B(1A) of that Act provides that determinations made under section 58B may incorporate determinations made under section 58H as if they were legislative instruments: that is, as amended from time to time.

In addition, the committee notes that the DFRT determination appears to be freely available online.[29]

Nevertheless, as noted above, the committee's expectation is that where a document is incorporated by reference, the instrument and/or its ES should clearly set out the manner in which the document is incorporated as well as providing a description of it and where it may be freely accessed, as required by the Legislation Act.

The committee draws to the minister's attention the absence of information in the explanatory statement to the instrument regarding the manner of incorporation of DFRT Determination No. 2 of 2017, and where that document may be freely accessed.

Minister's response

The Minister for Defence Personnel advised:

> In accordance with your request, Defence has also amended the explanatory statement to specify that Defence Force Remuneration Tribunal Determination No. 2 of 2017 is incorporated by reference, as in force from time to time. Section 1.2.SA of the Defence Determination 2016/19, *Conditions of Service*, the determination which is amended by Defence Determination 2018/15, expressly provides that instruments are incorporated as in force from time to time unless otherwise stated.
>
> The amended explanatory statement notes that the Defence Force Remuneration Tribunal Determination No. 2 of 2017 can be located on the

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28 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

29 See https://www.dfrt.gov.au/__data/assets/pdf_file/0017/102563/Det-2-of-2017.pdf (accessed 1 June 2018).

Defence Pay and Conditions website where the document may be freely accessed.

Committee's response

The committee thanks the minister for his response and notes his advice that DFRT Determination No. 2 of 2017 is incorporated as in force from time to time and that it can be freely accessed on the Defence Pay and Conditions website.

The committee further notes that an amended ES, providing information regarding the manner in which DFRT Determination No. 2 of 2017 is incorporated and how it may be accessed free of charge, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Export Control (Animals) Amendment (Export of Livestock) Order 2018 [F2018L00475]**
Purpose	Amends the Export Control (Animals) Order 2004 to require an exporter of livestock to pay the costs of activities undertaken by authorised officers in relation to an approved export program
Authorising legislation	Export Control (Orders) Regulations 1982
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[30]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Consultation[31]

Committee's initial comment

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

30 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

31 Scrutiny principle: Senate Standing Order 23(3)(a)

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[32]

With reference to these requirements, the committee notes that the ES to the instrument only states that 'no consultation was undertaken'. The ES contains no information regarding *why* no consultation was undertaken.

While the committee does not 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 of consultation may be insufficient to satisfy the requirements of the Legislation Act. In this case, the statement 'no consultation was undertaken' does not appear to satisfy the requirement in paragraph 15J(2)(e) of the Legislation Act that the ES explain why no consultation was undertaken.

The committee requests the minister's advice as to why no consultation was undertaken in relation to the instrument; and requests that the explanatory statement be amended to include this information.

Minister's response

The Minister for Agriculture and Water Resources advised:

> The instrument makes provision for costs associated with the export of livestock as provided for in the *Export Control Act 1982* (Act). It requires exporters of livestock to pay reasonable costs of activities undertaken within or outside Australia by an authorised officer under section 9D or 9E of the Act in relation to an approved export program that applies to the export activities of the exporter.
>
> It was not reasonably practicable to undertake consultation as the instrument was required as a matter of urgency, in order to implement the government's response to provide better assurance of animal welfare for livestock exports to the Middle East. Part of the response entailed the provision of authorised officers to act as independent observers on vessels carrying Australian livestock. Significant public concern and community expectations of a swift government response prevented ordinary consultation processes being undertaken on this occasion.
>
> My department has prepared a replacement explanatory statement which includes additional information in relation to why no consultation was

32 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

undertaken. I hope that this information will be of assistance to the Committee.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that it was not considered reasonably practicable to undertake consultation, as the instrument was required as a matter of urgency to meet community expectations of a swift government response to public concerns about the welfare of livestock exports to the Middle East.

The committee further notes the minister's undertaking to register a replacement ES, which includes information as to why no consultation was undertaken, on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 [F2018L00580]**
Purpose	Amends the Export Control (Animals) Order 2004 to provide for the collection and disclosure of personal and commercial information in relation to live animal export activities
Authorising legislation	Export Control (Orders) Regulations 1982
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[33]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Personal rights and liberties: privacy[34]

Committee's initial comment

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

33 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

34 Scrutiny principle: Senate Standing Order 23(3)(b).

Item 3 of Schedule 1 to the instrument inserts new section 6.04 into the Export Control (Animals) Order 2004 (principal instrument). Section 6.04 provides that the secretary (of the Department of Agriculture and Water Resources) may disclose to an agriculture regulator, personal or commercial-in-confidence information that relates to a live animal, or animal reproductive material, for which a notice of intention to export is given on or after 1 July 2018. The secretary may disclose such information when it is obtained by the secretary or an authorised officer under or for the purposes of the principal instrument or the *Export Control Act 1982*.[35]

Subsection 6.04(2) provides that the information may be disclosed for the purposes of ensuring the health and welfare of live animals, or the health and condition of animal reproductive material, in the course of export activities; and/or administering or enforcing the Act, the principal instrument or the Export Control (Prescribed Goods—General) Order 2005.

'Agriculture regulator' is defined in subsection 6.04(3) as:

> (a) A Commonwealth, State or Territory authority or other body that is responsible for the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production; or
>
> (b) a body that is authorised to perform functions or exercise powers in relation to the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production under a Commonwealth law or the law of a State or Territory.

While subsection 6.04(2) limits the purposes for which information may be disclosed, it is not clear to the committee what other safeguards are in place to ensure the appropriate protection of individuals' privacy in relation to personal information that may be disclosed by the secretary under these provisions. This includes whether individuals' consent is sought for the disclosure of their personal information, how disclosed information is to be stored and handled, and whether any restrictions apply to the onward disclosure and retention of the information by those entities to whom the information is disclosed.

The statement of compatibility with human rights included in the explanatory statement (ES) to the instrument recognises that the right to privacy is engaged by the instrument and states that the disclosure 'is limited to agriculture regulators and is reasonable and proportionate to the aim of ensuring the health and welfare of live animals in the course of export activities'. The ES also states that the instrument 'will

35 Paragraph 6.04(1)(c) provides some exceptions to the information that may be disclosed. It does not include information obtained in response to a request made or notice issued by the secretary or as part of an audit conducted under the principal instrument, or obtained under Part III of the *Export Control Act 1982* (which deals with enforcement of the Act).

not have any adverse effect on the wider community as the exchange of information will only occur between agriculture regulators'. However, the ES does not provide further detail about the agriculture regulators to whom information is expected to be disclosed under the instrument, nor the safeguards in place to protect the privacy of the information.

The committee understands that personal information disclosed to Commonwealth authorities and to some businesses and other organisations would be subject to the relevant provisions in the *Privacy Act 1988* (Privacy Act) for the protection of personal information.[36]

The committee notes, however, that the agriculture regulators to whom information may be disclosed, as defined in subsection 6.04(3), may extend to state and territory authorities and also to 'other bodies'. It is not clear to the committee whether or not all of the regulators to whom information may be disclosed under the provision would be subject to the Privacy Act or to equivalent protections under another relevant law (such as applicable state or territory privacy legislation). In particular, the committee is concerned to ensure that information disclosed to 'other bodies' will be subject to appropriate requirements for the protection of individuals' privacy.

The committee requests the minister's more detailed advice as to:

- the nature of the agriculture regulators to whom information may be disclosed under new section 6.04 of the Export Control (Animals) Order 2004, inserted by the instrument;
- whether all bodies to whom information may be disclosed will be subject to the *Privacy Act 1988*; and
- if not, what safeguards are in place to protect individuals' privacy in relation to personal information disclosed to any bodies not subject to the *Privacy Act 1988.*

Minister's response

The Minister for Agriculture and Water Resources advised:

> As defined in the Order, an agriculture regulator is a Commonwealth, state or territory authority or other body that is responsible for the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production; or a body that is authorised to perform functions or exercise powers in relation to the

36 The Privacy Act applies the Australian Privacy Principles to Australian and Norfolk Island government agencies, to all private sector and not-for-profit organisations with an annual turnover of more than $3 million, and to certain other businesses and organisations including health services providers, Commonwealth contracted service providers, and small businesses that voluntarily opt in to the Act. See https://www.oaic.gov.au/agencies-and-organisations/business-resources/privacy-business-resource-10.

health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production under a Commonwealth law or the law of a state or territory.

Legislative responsibility for animal welfare within Australia rests primarily with state and territory governments. All states and territories have contemporary and comprehensive animal welfare legislation in place.

Examples of agricultural regulators include (but are not limited to):

• Commonwealth regulatory bodies, such as the Department of Agriculture and Water Resources

• state and territory animal welfare authorities (for example, the NSW Department of Primary Industries)

• the National Livestock Identification System Limited (where it is authorised to perform functions or exercise powers by a state or territory).

The *Privacy Act 1988* (Privacy Act), applies to Australian Government agencies, including those agencies defined as agricultural regulators.

The Privacy Act regulates the handling of personal information by Australian Government agencies (and the Norfolk Island Administration), and some private sector organisations. Other Australian states and territories have their own equivalent legislative frameworks in place.

Those agriculture regulators which are state or territory bodies or who have been authorised by a state or territory to perform functions or exercise powers will be required to comply with the privacy legislation in place in that state or territory.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that examples of the regulators to whom information may be disclosed under new section 6.04 include, but are not limited to, Commonwealth regulatory bodies, state and territory animal welfare authorities, and the National Livestock Identification System Limited, when it is authorised by a state or territory. The committee notes that, in indicating that this is not a complete list, the minister's response does not fully answer the committee's question as to the nature of the 'other bodies' to whom information may be disclosed.

In addition, the committee notes the minister's advice that Commonwealth agencies and some private sector organisations are subject to the *Privacy Act 1988* (Privacy Act) and that 'other states and territories have their own equivalent legislative frameworks in place' for the protection of privacy.

In this respect, however, the committee's research indicates that not all states and territories provide legislative protection of privacy equivalent to that provided by the Privacy Act at the Commonwealth level.[37]

Given the potential application of the disclosure provision to 'other bodies' not included in the minister's response, and the incomplete information provided about the state and territory legal frameworks in place and their application to the entities covered by the instrument, the committee remains concerned that the instrument may authorise the disclosure of personal information to entities that are not subject to comprehensive and legally enforceable privacy protections.

The committee considers that when making Commonwealth law via legislative instrument, it is incumbent on a rule-maker to ensure that fundamental personal rights and liberties, including the right to privacy, are adequately protected. As such, the committee expects in this case that the rule-maker will ensure that legislative privacy protections for personal information apply to all disclosures authorised by this legislative instrument, whether or not those disclosures involve another jurisdiction. The committee encourages the minister to consider whether further legislative provision and/or administrative action is required to ensure this is the case.

The committee has concluded its examination of the instrument. However, the committee draws to the attention of the minister and the Senate its concerns about the potential impact of the instrument on individuals' fundamental right to privacy. The committee emphasises its expectation that the minister will ensure that adequate legislative privacy protection is provided to all persons whose personal information is disclosed under new section 6.04 of the Export Control (Animals) Order 2004, inserted by the instrument.

37 See https://www.oaic.gov.au/privacy-law/other-privacy-jurisdictions and related links (accessed 3 August 2018). For example, Western Australia and South Australia do not have specific privacy legislation. In South Australia, information privacy principles are applied to the government sector via a Cabinet administrative instruction. While that instruction is binding on public sector agencies it is not a law and not enforceable in court, and it does not directly apply to private entities contracted by government agencies. Government of South Australia, Department of the Premier and Cabinet, *PC012 Information Privacy Principles (IPPS) Instructions,* 6 February 2017, at https://dpc.sa.gov.au/what-we-do/services-for-government/premier-and-cabinet-circulars (accessed 3 August 2018).

Instrument	**Health Insurance (Eligible Collection Centres) Approval Amendment (Application Form) Principles 2018 [F2018L00489]**
Purpose	Amends the Health Insurance (Eligible Collection Centres) Approval Principles 2010 to set out requirements for an application for approval of an eligible collection centre
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[38]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Consultation[39]

Committee's initial comment

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[40]

With reference to these requirements, the committee notes that, under the heading of consultation, the ES to the instrument states:

> The change is administrative in nature and is intended to ensure that the collection of information (which occurs presently) is not impacted by the move to more proactive enforcement of the prohibited practices provisions.

38 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

39 Scrutiny principle: Senate Standing Order 23(3)(a)

40 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

The ES contains no information regarding any consultation undertaken in relation to the instrument, nor does it specify that no consultation was undertaken and explain why not.

While the committee does not interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation, it considers that an overly bare or general description of consultation may be insufficient to satisfy the requirements of the Legislation Act. In this case, the brief description of the nature and intent of the amendments made by the instrument does not appear to satisfy the requirements in paragraphs 15J(2)(d) and (e) of the Legislation Act that the ES either describe the nature of any consultation undertaken in relation to the instrument or explain why no such consultation was undertaken.

The committee requests the minister's advice as to:

- whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or
- whether no consultation was undertaken and, if not, why not.

The committee also requests that the explanatory statement be amended to include this information.

Minister's response

The Minister for Health advised:

> The amendments to the Principles form part of a broader strategy for strengthening enforcement by the Department of legislative requirements relating to pathology Approved Collection Centres (ACCs), consistent with the 2017-18 Budget measure: Pathology ACCs - Enhanced Compliance. The amendments in the Principles are administrative in nature. They support the implementation of the Budget measure through enhancements to existing data collection by requiring applications for ACC approval to provide a response to each question in the prescribed form and include information necessary to support the application.
>
> My Department has consulted extensively with the Pathology and GP sectors since July 2017 on implementation of the Budget measure, including the updating and release of the 'Red Book - Guidance on Laws Relating to Pathology and Diagnostic Imaging – Prohibited Practices' on 30 January 2018 and in roundtable meetings with key stakeholders.
>
> At its November 2017 roundtable with the Pathology and GP sectors, my Department advised that it would be updating the ACCs approval application form to make all fields mandatory from 1 July 2018, giving effect to the amendments in the Principles. There was no objection to this proposal.
>
> As the changes implemented by the Principles are relatively minor and administrative in nature and key stakeholders were informed of their

effects at the roundtable, further consultation regarding the Principles was not considered necessary.

I have instructed my Department to lodge a replacement Explanatory Statement for the Principles which provides a description of the consultation that was undertaken, as outlined above.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the amendments made by the instrument form part of a broader strategy for strengthening the enforcement of legislative requirements relating to pathology Approved Collection Centres. The committee notes the minister's advice that the department consulted extensively on this strategy, including through roundtable meetings with key stakeholders.

The committee further notes the minister's advice that, as key stakeholders were informed of the effects of the amendments made by the instrument at a roundtable meeting, and as the amendments are minor and administrative in nature, further consultation in relation to the instrument was not considered necessary.

Finally, the committee notes that a replacement ES to the instrument, which includes the information above, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Norfolk Island National Park and Norfolk Island Botanic Garden Management Plan 2018-2028 [F2018L00619]**
Purpose	Provides for the management of Norfolk Island National Park and Norfolk Island Botanic Garden
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[41]
Previously reported in	*Delegated legislation monitor 7 of 2018*

Incorporation of documents[42]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative

41 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

42 Scrutiny principle: Senate Standing Order 23(3)(a).

instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. Where a legislative instrument incorporates a document as in force from time to time, the committee expects the ES to set out the legislative authority for the incorporation of the document as in force from time to time.

The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[43]

With reference to the above, the committee notes that the instrument appears to incorporate the following documents:

- Director of National Parks Climate Change Statement 2017-2032 Action Plan (section 2.7.2);
- 'General Safety Rules' (section 3.1.10—defined in Appendix A);
- Parks Australia Compliance and Enforcement Manual (section 4.6.1); and
- Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* (PGPA Act) (sections 4 and 4.4.3).

With respect to the manner in which the documents are incorporated, the committee notes that Appendix A to the instrument defines the 'General Safety Rules' as 'rules for recreational use of remotely piloted aircraft in Commonwealth reserves as determined by the Director of National Parks Aircraft Use Policy as varied from time to time'. However, it is not clear to the committee that such rules would be legislative instruments, and if they are not, the committee notes that neither the instrument nor the ES identifies a legislative provision overriding subsection 14(2) of the Legislation Act which would authorise their incorporation as in force from time to time.

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43 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Neither the instrument nor its ES indicates the manner in which the other three documents noted above are incorporated.[44]

In addition, no information is provided in the instrument or the ES about where these four documents may be obtained.

The committee requests the minister's advice as to:

- the legislative authority for incorporation in the instrument of the 'General Safety Rules' as in force from time to time;
- the manner in which the Director of National Parks Climate Change Statement 2017-2032 Action Plan, the Parks Australia Compliance and Enforcement Manual, and the Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* are incorporated in the instrument; and
- how each of these four documents is or may be made readily and freely available to persons interested in or affected by the instrument.

The committee also requests that the instrument and/or its explanatory statement be amended to include this information.

Minister's response

The Assistant Minister for the Environment advised:

> The Department of the Environment and Energy and the Director of National Parks note that the General Safety Rules cannot be incorporated in the management plan as in force from time to time. In accordance with paragraph 14(1)(b) and subsection 14(2) of the *Legislation Act 2003* ('Legislation Act'), the General Safety Rules may only be incorporated in the management plan as in force at the time the plan commenced. The General Safety Rules refer to an emerging area of policy relating to the use of remote operated aircraft - often referred to as drones - and it is expected that the Rules will need to be updated as the technology and its use evolves.
>
> The Committee also requested clarification on the manner of incorporation of the Parks Australia Compliance and Enforcement Manual, the Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* and the Director of National Parks Climate Change Statement 2017-2032 Action Plan. In accordance with the Legislation Act, these documents are incorporated as in force at the time the management plan commenced. However, these documents

44 With regard to the Chief Executive Instructions made under the PGPA Act, the committee notes that the PGPA Act is defined in Appendix A to include rules made under the Act. However, the Chief Executive Instructions are not rules made under the Act and the committee's research indicates that such instructions would not be legislative instruments.

> also need to be updated during the life of the management plan to maintain best practice and adaptive management.
>
> I advise that the management plan will be amended at the earliest possible opportunity to remove the incorporation of these four documents.

Committee's response

The committee thanks the assistant minister for her response, and notes the minister's advice in relation to the manner of incorporation of the four documents queried by the committee. The committee notes the minister's concern that the incorporation of these documents as in force at the time the instrument commenced may not be appropriate, as each of the incorporated documents will need to be updated during the life of the plan. In that regard, the committee notes that future amendments to the documents which need to be incorporated into the law could be accommodated by amending the instrument in future, when required, to update the relevant dates of incorporation.

The committee notes, however, the assistant minister's undertaking that the management plan will be amended at the earliest possible opportunity to remove the incorporation of the four documents.

The committee has concluded its consideration of the instrument.

Instrument	**Trade and Customs Legislation Amendment (Miscellaneous Measures) Regulations 2018 [F2018L00459]**
Purpose	Amends various regulations to improve and strengthen customs policies and practices, including in relation to labelling requirements, and drug and tobacco controls
Authorising legislation	*Commerce (Trade Descriptions) Act 1905; Customs Act 1901*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[45]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Offences: evidential burden of proof on the defendant[46]

Committee's initial comment

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 burden of proof for persons in their individual capacities (requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

Item 1 of Schedule 1 to the instrument repeals and replaces section 8 of the Commerce (Trade Descriptions) Regulation 2016 (principal regulation), and inserts new section 8A. The new subsection 8(1) prohibits the import of certain goods, while subsection 8(2) provides that the prohibition does not apply if a trade description is applied to the goods in accordance with Division 2 (of the principal regulation). Section 8A imposes an offence if a person contravenes section 8.

By providing a specific exception to the prohibition in subsection 8(1) which triggers the offence, subsection 8(2) imposes on a defendant to the offence in section 8A an evidential burden of proof, requiring the defendant to raise evidence about the defence.[47] The committee notes that the previous version of section 8 of the

45 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

46 Scrutiny principle: Senate Standing Order 23(3)(b).

47 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is reflected in the Note to section 8A of the instrument.

principal regulation contained a similar prohibition, but was not drafted in such a way as to place an evidential burden of proof on defendants.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

The committee's expectation is that the appropriateness of provisions that have the effect of reversing burdens of proof should be explicitly addressed in the explanatory statement (ES) to the instrument, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Powers*.[48]

While the ES to the instrument explains the offence in new section 8A, including justifying the imposition of strict liability in that offence, it provides no information in relation to the justification for reversing the evidential burden of proof.

The committee requests the minister's advice as to the justification for using an offence-specific exception that reverses the burden of proof in relation to the offence in new section 8A of the Commerce (Trade Descriptions) Regulation 2016, inserted by item 1 of Schedule 1 to the instrument.

Minister's response

The Minister for Law Enforcement and Cyber Security advised:

> The *Commerce (Trade Descriptions) Regulation 2016* (the CTD Regulation) is a core piece of legislation that ensures that goods imported into Australia are accurately labelled in accordance with their country of origin, composition and characteristics. When goods are sold domestically, consumers ought to be able to rely on labelling information applied to the goods to make informed purchasing decisions.
>
> Importers and foreign exporters of goods to Australia are required to apply a trade description in accordance with the CTD Regulation. It is expected that such importers and exporters have knowledge of the country of origin, composition and characteristics of their goods, and any other relevant information that would provide information as to the safety of the goods in accordance with Australian consumer protection legislation.
>
> The CTD Regulation lists goods that are prohibited from importation to Australia without a trade description applied in accordance with Division 2. In addition, sections 11 and 12 of the CTD Regulation detail goods that may be imported without a trade description. Collectively, these lists

48 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.

> enable importers and exporters to clearly and readily identify those goods requiring a trade description.
>
> Importers and exporters of goods to Australia are in a stronger position than the Commonwealth to understand the nature of their goods and are equipped to apply accurate labelling information onto these goods. Therefore, where an importer or exporter is alleged to have committed an offence against subsection 8(1) of the CTD Regulation, an importer or exporter who seeks to rely on the defence that a trade description has been applied in accordance with Division 2 will be best placed to readily provide evidence in accordance with subsection 8(2). The need to provide evidence that is not readily accessible to the Commonwealth would be exceptionally costly, whereas this same information would be easily provided by importers and exporters in support of their defence. It should be noted that this is an evidential burden only in accordance with section 13.3 of the *Criminal Code Act 1995*.
>
> This position in respect of evidential burden placed on the defence in new section 8 is also consistent with the original section 8 of the CTD Regulation (and its predecessor, regulation 7 of the *Commerce (Imports) Regulations 1940*). The exception in the original section 8 has merely been removed, and placed in a stand-alone subsection to put it beyond doubt that it is a defence to the offence.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that an importer or exporter who seeks to rely on the defence that the required trade description has been applied will be best placed to readily provide evidence in that regard, and that this evidence would not be readily accessible to the Commonwealth.

The committee notes that the Offences Guide states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of the offence), which results in reversing the burden of proof, where:

- the matter is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[49]

In this regard, the committee considers that whether the goods have the required label applied to them, and whether the trade description on the label complies with legislative requirements, do not appear to be matters that would be peculiarly within the knowledge of the defendant, nor matters that would be significantly more difficult and costly for the relevant regulatory authorities, and therefore the prosecution, to ascertain.

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49 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

The committee therefore considers that it would be more appropriate to include consideration of the matters in subsection 8(2) as an element determining the scope of the offence, rather than separating it as a offence-specific defence with the effect of shifting the evidential burden of proof to the defendant.

The committee has concluded its examination of the instrument. However, the committee draws its concern about the reversal of the evidential burden of proof in relation to the offence established by section 8A of the instrument to the attention of the minister and the Senate.

Instrument	**Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Regulations 2018 [F2018L00515]**
Purpose	Amends seven regulations consequential to the enactment of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*
Authorising legislation	*ASIC Supervisory Cost Recovery Levy Act 2017* *Australian Prudential Regulation Authority Act 1998* *Corporations Act 2001* *National Consumer Credit Protection Act 2009* *Retirement Savings Accounts Act 1997* *Superannuation (Resolution of Complaints) Act 1993* *Superannuation Industry (Supervision) Act 1993*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018[50]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Access to incorporated document[51]

Committee's initial comment

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents

50 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

51 Scrutiny principle: Senate Standing Order 23(3)(a).

to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[52]

With reference to these matters, the committee notes that the instrument appears to incorporate Australian/New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations*. The instrument provides that the standard is incorporated as in force or existing on 29 October 2014.

The ES also provides web references for where the standard may be obtained. However, the references are to websites for SAI Global and Standards New Zealand, and the committee's research indicates that the complete standard is only available from those organisations on payment of a fee. No information is provided in the instrument or the ES as to where the standard may be obtained free of charge.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[53]

The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to how the standard AS/NZS 10002:2014, which appears to be incorporated in the instrument, is or may be made readily and freely available to persons interested in or affected by the instrument; and requests that the explanatory statement be amended to include this information.

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52 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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

Minister's response

The Minister for Revenue and Financial Services advised:

> *The Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Regulations 2018* made amendments to paragraphs 7.6.02(1)(a) and 7.9.77(1)(a) of the *Corporations Regulations 2001* (the **Corporations Regulations**), and paragraph 10(1)(a) and item 2.20 of Schedule 2 of the *National Consumer Credit Protection Regulations 2010* (**Credit Regulations**). These amendments substituted a new reference to the updated Standard into these provisions. For example, the Corporations Regulations formerly referred to a version of the Standard published on 5 April 2006, and the Credit Regulations referred to a version of the Standard in force at the time the Credit Regulation commenced.
>
> The Standard is referred to in the Corporations and Credit Regulations for the purposes of requiring that ASIC must have regard to the Standard when it considers whether to make or approve standards or requirements relating to internal dispute resolution (IDR) systems. ASIC is able to readily source a complete published copy of the Standard when publishing policy like any other person who wishes to obtain a copy as explained below. Further, any IDR requirements set by ASIC based on the Standard are publically available to financial services and credit licensees, or any consumer wishing to use an IDR system: see https://download.asic.gov.au/media/4772056/rg165-published-18-june-2018.pdf
>
> The Explanatory Statement explained that the Standard is available by visiting the Standards web shop at www.saiglobal.com.au or the Standards New Zealand website at www.standards.co.nz (the **Standards Websites**). As a result, the Standard is publicly available.
>
> I note that if a person wishes to access a complete copy of the Standard, the person would need to purchase the Standard from the Standards Websites. However, I also note that the Standard is also freely available at the National Library of Australia and at State and Territory public libraries.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that any internal dispute resolution requirements set by ASIC based on the standard are included in ASIC's regulatory guidance, which is freely available to the public. The committee also notes that the standard itself is freely available at the National Library of Australia and at State and Territory public libraries.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)