The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 4 of 2018

28 March 2018

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Amanda Stoker (from 22 March 2018)	Queensland, LP
Senator Linda Reynolds	Western Australia, LP
Senator the Hon Lisa Singh	Tasmania, ALP

Former members

Senator Jane Hume (until 22 March 2018)	Victoria, LP

Secretariat

Ms Anita Coles, Secretary
Ms Shennia Spillane, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Morana Kavgic, Legislative Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

Contents

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]

---

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 2018*, 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 1 and 7 March 2018 (new 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	**Cheques Regulations 2018 [F2018L00211]**
Purpose	Remakes the Cheques Regulations 1987, removing redundant provisions, updating language, and reflecting current drafting practice
Authorising legislation	*Cheques Act 1986*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[2]

Unclear basis for determining fees[3]

Section 10 of the instrument provides that, if a person asks the eligible authority to provide information contained in the register of notices established by section 8, and pays the fee determined under subsection 10(2) or (3), the authority must, as soon as possible, provide the information. Section 10(2) prescribes a fee of $20 for providing information from one notice in the register, while subsection 10(3) sets out a formula for determining a (higher) fee for providing information contained in more than one such notice.

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

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).

costs or payment is that the explanatory statement (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.

The committee notes that paragraph 65A(5)(d) of the *Cheques Act 1986* provides that the regulations may make provision for fees to be charged in relation to providing information from the register of notices. However, the ES to the instrument does not specify the basis on which the fees in section 10 have been calculated. It merely states that sections 8 to 10 of the instrument replicate the corresponding provisions in the previous version of the instrument (the Cheques Regulations 1987), with minor changes.

The committee requests the minister's advice as to the basis on which each of the fees in section 10 of the instrument has been calculated.

Instrument	**National Gallery Regulations 2018 [F2018L00212]**
Purpose	Makes provision for a range of matters relating to the National Gallery of Australia including financial limits for the purchase and disposal of assets, security arrangements and offences to protect the gallery, and rules for the service of liquor
Authorising legislation	*National Gallery Act 1975*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[4]

Evidential burdens of proof on the defendant[5]

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, the infringement on well-established and fundamental personal legal rights is justified.

Subsection 9(1) of the instrument makes it an offence for a person to sell or supply liquor on Gallery land or in a Gallery building.[6] Subsection 9(2) sets out a defence, which provides that subsection 9(1) does not apply if:

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

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

- the person selling or supplying liquor is authorised to do so by the Gallery's Council under subsection 8(1); or
- the person supplying liquor (other than by way of sale) obtained the liquor on Gallery land or in a Gallery building from an authorised liquor supplier.

Subsection 21(1) of the instrument makes it an offence for a person to allow an animal belonging to the person, or under the person's control, to enter or remain in a Gallery building. Subsection 21(2) sets out a defence, which provides that subsection 21(1) does not apply if:

- the person is a person with a disability (within the meaning of the *Disability Discrimination Act 1992*), and the animal is an assistance animal; or
- the person is a member of a police force acting in accordance with the person's duties.

Section 25 of the instrument sets out two general defences, which provide that it is a defence to a prosecution for any offence under Parts 3 or 4 that:

- when the relevant conduct was engaged in, the Council had consented in writing to the conduct; or
- the person accused of the offence is a member of the Council, the Director of the Gallery or a Gallery staff member, acting in accordance with the person's duties.

In relation to each of the provisions above, the defendant bears the evidential burden of raising the relevant defence or exemption.[7]

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. In relation to the above defences, the explanatory statement (ES) states that it is appropriate that the evidential burden be reversed because the matters to be established are 'within the knowledge' of the defendant.

However, the committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers*[8]

---

6 Section 3 of the *National Gallery Act 1975* defines 'Gallery' as the National Gallery of Australia established by that Act.

7 Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it 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.[9]

In this case, it is not apparent to the committee that the matters set out in the defences in subsections 9(2) and 21(2), and section 25, are matters that would be peculiarly within the defendant's knowledge. For example, whether a person had been authorised by the Council to sell liquor would appear to be a matter of which the Council would be particularly apprised, as would whether the Council had consented in writing to particular conduct.

Further, the committee notes that a matter being 'within the knowledge' of a person does not equate to the matter being *peculiarly* within that person's knowledge. In this respect, the committee notes that, for a number of other defences established by the instrument,[10] the ES expressly states that the reversal of the evidential burden of proof is justified because relevant matters would be peculiarly within the knowledge of the defendant.

The committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in subsections 9(2) and 21(2), and section 25, of the instrument. The committee's assessment would be assisted if the minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

---

8 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf, pp. 50-52.

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

10 See, for example, the defences in subsections 12(6) and 24(2).

Instrument	**Sea Installations Regulations 2018 [F2018L00214]**
Purpose	Remakes the Sea Installations 1989, updating them to remove obsolete references relating to obtaining a new sea installations permit
Authorising legislation	*Sea Installations Act 1987*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[11]

Unclear basis for determining fees[12]

Section 8 of the instrument prescribes fees payable in relation to applications to renew a permit to operate sea installations and prescribed vessels. For sea installations, the fee amounts vary based on installation costs. For prescribed vessels, the fee is determined by reference to a formula set out in subsection 8(2).

Sections 9, 10 and 11 of the instrument prescribe fees payable for applications to vary permits relating to sea installations and prescribed vessels. For sea installations, the fee amounts vary based on installation costs, with additional fees prescribed for applications to vary a permit to make additions to the installation or to permit additional members of the public to visit the sea installation. For prescribed vessels, the fee is determined by reference to a formula set out in subsection 11(2).

The explanatory statement (ES) to the instrument does not specify the basis on which the application fees have been calculated, merely restating the operation and effect of the relevant provisions.

The committee's longstanding view is that, unless there is specific authority in primary legislation 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.

---

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).

The committee requests the minister's advice as to the basis on which the application fees in sections 8, 9, 10 and 11 of the instrument have been calculated.

Instrument	**Telecommunications Code of Practice 2018 [F2018L00171]**
Purpose	Sets out conditions to be complied with by carriers undertaking inspection, installation and maintenance activities covered by Divisions 2, 3, and 4 of Schedule 3 to the *Telecommunications Act 1997*
Authorising legislation	*Telecommunications Act 1997*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[13]

Drafting: references to industry standards[14]

Sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the instrument each provide that, when engaging in the activity to which the relevant chapter relates,[15] a carrier must conduct the activity in accordance with any standard that relates to the activity, is recognised by the Australian Communications and Media Authority (ACMA) as a standard for use in that industry, and is likely to reduce a risk to the safety of the public if the carrier complies with the standard.

In relation to section 2.7, the explanatory statement (ES) states:

> This section requires a carrier which engages in an authorised activity to do so in accordance with any relevant industry standard recognised by the Australian Communications and Media Authority (ACMA) that is likely to reduce a risk to the safety of the public. This section is a restatement of clause 12 of Schedule 3 to the [*Telecommunications Act 1997*].
>
> This section deals primarily with safety standards but is related to the more general requirement for compliance with standards and codes in section 2.13 [which relates to compliance with standards and codes under Part 6 of the Act].

The ES contains virtually identical statements (with minor additions to reflect the purpose of the relevant chapter) in relation to sections 3.7, 4.7, 5.7 and 6.7.

---

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

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

15 For example, chapter 2 of the instrument relates to the inspection of land. Section 2.7 therefore imposes obligations in relation to land entry activities.

While sections 2.7, 3.7, 4.7, 5.7 and 6.7 appear to be restatements of clause 12 of Schedule 3 to the *Telecommunications Act 1997* (Telecommunications Act), the committee notes that there is no indication in the instrument or the ES as to the standards to which those provisions refer, and where the standards may be obtained.

The committee's research indicates that the ACMA is required under section 136 of the Telecommunications Act to maintain registers of codes and standards, and that these registers (and the standards they contain) may be accessed for free online.[16] However, in the interests of promoting the clarity and intelligibility of legislative instruments for persons interested in or affected by them, the committee considers that a best-practice approach would be for the instrument or its accompanying ES to indicate that the standards and codes to which the instrument refers may be accessed on the ACMA registers, and to provide a web address where those registers may be accessed.

Additionally, the instrument makes reference (in notes) to standards that may not appear on the ACMA registers[17] and neither the instrument nor its ES appears to indicate what those standards are (aside from the one example given in the notes) or how they may be obtained. Again, in the interests of promoting clarity and intelligibility for readers, and ensuring that everyone interested in or affected by the law has access to its terms, the committee's preference would be that the instrument or its ES indicate what the relevant standards are and where they may be obtained free of charge. If it is not possible to list all the standards that relate to obligations under the instrument, the ES should provide assurances as to where the relevant standards can be identified and accessed.

The committee requests the minister's advice as to the standards to which sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the instrument refer, and how those standards may be accessed free of charge.

Drafting: reference to a provision that has been repealed[18]

Subsection 2.14(1) of the instrument provides information on carriers' obligations under clause 55 of Schedule 3 to the Telecommunications Act. The subsection states that clause 55 requires the Environment Secretary to be notified where a carrier proposes to install a facility before 1 January 1999, if the installation is not authorised and there are special Commonwealth environment or heritage concerns.

---

16 See https://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telecommunications-industry-codes-and-standards.

17 For example, the notes to sections 2.7, 4.7 and 6.7 refer to the Australian Radiation Protection Standard for Maximum Exposure Levels in Radiofrequency Fields – 3kHz to 300GHz (RPS3), available at https://www.arpansa.gov.au/sites/g/files/net3086/f/legacy/pubs/rps/rps3.pdf.

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

Subsection 2.14(2) then states that if a land entry activity includes the installation of a facility, the relevant carrier must comply with clause 55 of Schedule 3 to the Telecommunications Act.

However, clause 55 was repealed in 2014 by the *Omnibus Repeal Day (Autumn 2014) Act 2014*,[19] on the basis that the clause 'ceased to have practical effect on 1 January 2001'.[20] Section 2.14 of the instrument therefore appears to reference obligations in relation to a provision that no longer exists. Moreover, there does not appear to be another provision in the Telecommunications Act that is equivalent to former clause 55. The ES provides no further information in this regard, merely restating the operation and effect of the relevant provisions.

Compliance with ministerial Codes of Practice is a licence condition imposed on telecommunications carriers.[21] A failure to comply with licence conditions may result in the imposition of a civil penalty, and may ultimately lead to the cancellation of the carrier's licence.[22] The committee notes that the obligations referred to in section 2.14 appear to be historical, given the reference to activities undertaken before 1 January 1999. Nevertheless, given the importance of compliance with licence conditions, and the potential consequences of noncompliance, the committee is concerned that the references in section 2.14 of the instrument to a repealed provision—and particularly the imposition of a requirement in relation to that provision—could generate confusion for carriers in relation to their obligations under the instrument.

The committee requests the minister's advice as to why section 2.14 of the instrument appears to require compliance with a legislative provision that has been repealed, and whether this section should be removed or clarified.

19 See item 244, Schedule 2 to the *Omnibus Repeal Day (Autumn 2014) Act 2014*.

20 See Explanatory Memorandum, Omnibus Repeal Day (Autumn 2014) Bill 2014, p. 47.

21 See clause 15 of Schedule 3 to the *Telecommunications Act 1997*.

22 See Australian Communications and Media Authority, *ACMA Compliance and Enforcement Policy,* August 2010 (updated December 2017), https://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/compliance-enforcement-policy.

Advice only

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

Instrument	**Australian National Audit Office Auditing Standards 2018 [F2018L00179]**
Purpose	Updates the standards required of the auditing profession in Australia
Authorising legislation	*Auditor-General Act 1997*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[23]

Access to incorporated documents[24]

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*.[25]

Paragraph 5(b) of the instrument incorporates the International Standard of Supreme Audit Institutions ISSAI 3000 *Standard for Performance Auditing*, endorsed 2016, by the International Organisation of Supreme Audit Institutions

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

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

25 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.

(INTOSAI). However, while the ES indicates why the standard has been incorporated, neither the instrument nor the ES indicates where the standard can be accessed. The committee's research indicates that this standard may be accessed for free online.[26] However, the committee considers that a best-practice approach is for the ES to provide details of where the standard can be accessed.

Additionally, sections 4 and 5 of the instrument incorporate a number of Australian standards made and issued by the Australian Auditing and Assurance Standards Board (AUASB).[27] The committee notes that these standards are legislative instruments that can be obtained free of charge on the Federal Register of Legislation (FRL). However, in the interests of promoting clarity and intelligibility for readers, the committee considers that a best-practice approach would be to indicate in the ES that the standards can be obtained on the FRL, or to provide a web address where the relevant standards may be accessed.[28]

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to documents incorporated by reference in the instrument.

26 See http://www.issai.org/en_us/site-issai/issai-framework/4-auditing-guidelines.htm.

27 In particular ASA 805, ASRE 2400, ASRE 2400, ASAE 3000, ASAE 3100, ASAE 3150, ASAE 3500 and ASRS 4400. The instrument also appears to incorporate standards made by the AUASB pursuant to paragraph 227B(1)(a) of the *Australian Securities and Investments Commission Act 2001* and section 336 of the *Corporations Act 2001.*

28 For example, ASA 805 may be accessed at http://www.auasb.gov.au/admin/file/content102/c3/ASA_805_2016.pdf.

Instrument	**Legislation (Radiocommunications Instruments) Sunset-altering Declaration 2018 [F2018L00186]**
Purpose	Aligns the sunsetting dates of 21 instruments relating to radiocommunications spectrum management processes
Authorising legislation	*Legislation Act 2003*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[29]

Deferral of sunsetting[30]

Under section 50 of the *Legislation Act 2003* (Legislation Act), all legislative instruments registered on the Federal Register of Legislation[31] after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.[32] This process is called 'sunsetting'.

Section 51A of the Legislation Act allows the Attorney-General to align the sunsetting of instruments where two or more instruments are to be reviewed together. The Attorney-General must be satisfied that all the instruments to be reviewed would, apart from section 51A, be repealed by section 50 or 51 of the Legislation Act; that they are the subject of a single review; and that making the declaration to align their sunsetting dates will facilitate the undertaking of the review and the implementation of its findings. The new sunsetting date must not be more than five years after the earliest day on which any of the relevant instruments would have been repealed.

The declaration aligns the sunsetting dates of 21 legislative instruments that would otherwise sunset between 1 April 2018 and 1 October 2022. The explanatory statement (ES) states:

> DoCA [The Department of Communications and the Arts] and the ACMA [Australian Communications and Media Authority] are consulting on a Radiocommunications Bill Package. It is anticipated that the package will

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

30 Scrutiny principles: Senate Standing Order 23(3)(a) and (d).

31 It is noted that prior to the commencement of the *Acts and Instruments (Framework Reform) Act 2015* on 5 March 2016, the Federal Register of Legislation was known as the Federal Register of Legislative Instruments.

32 The sunsetting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the date of sunsetting determined by the table set out in subsection 50(2) of the Legislation Act.

> include a re-write of the Radiocommunications Act and the Radiocommunications Taxes Collection Act, and will significantly update the spectrum management framework. If the proposed Bills become law, the instruments relevant to the spectrum management process will need to be replaced by new instruments reflecting the updated legislative framework. The opportunity to conduct a single, comprehensive review of these 21 instruments will provide DoCA and the ACMA with opportunities to efficiently reduce red tape and deliver clearer legislation.

The ES further states that the aligned sunsetting date in the instrument will facilitate the undertaking of the review and the implementation of its findings, by allowing sufficient time for review recommendations to be fully considered, instruments to be amended or remade as necessary, and any required changes to administrative processes to be implemented.

The committee notes that, in the case of some of the instruments, the declaration has the effect of deferring the sunsetting date by the maximum period of five years permitted by section 51 of the Legislation Act. All the instruments covered by the declaration will now have a new sunsetting date of 1 April 2023.

With reference to the above, the committee notes that the 2017 report of the Attorney-General's Department's Sunsetting Review Committee emphasised that agencies should commence planning for sunsetting instruments 'well before the sunsetting date' and take 'early action to review and, where necessary, begin the process of remaking the legislative instruments'.[33]

The committee draws the extension of the sunsetting dates for 21 instruments, to 1 April 2023, to the attention of the Senate.

33 Sunsetting Review Committee, *Report on the Operation of the Sunsetting Provisions in the* Legislation Act 2003, Attorney-General's Department, September 2017, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Report-on-the-Operation-of-the-Sunsetting-Provisions-in-the-Legislation-Act-2003.pdf, pp. 10-11.

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	**Defence Determination (Short-term overseas duty travel and benchmark schools) 2018 (No. 2) [F2018L00050]**
Purpose	Provides for the payment of travel costs for members on short-term duty in Marshall Islands, Micronesia and Palau; amends education allowances for the children of Defence personnel posted in Canada; and corrects an error in allowances payable for prior service on Operations AUGURY and MANITOU
Authorising legislation	*Defence Act 1903*
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[2]
Previously reported in	*Delegated legislation monitor 2 of 2018*

Retrospective effect[3]

Committee's initial comment:

Schedule 4 to the instrument amends Defence Determination 2017/40, Deployment allowance – amendment [F2017L01636] (principal instrument), which commenced on 15 December 2017. The principal instrument had amended certain deployment allowances, including those relating to Operations AUGURY and MANITOU. Schedule 2 to the principal instrument contained transitional provisions which included, under subclause 1.3 and clause 3, provision for the payment of an allowance of $85.45 per day retrospectively to members who served on Operations

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).

AUGURY and MANITOU between November 2016 and November 2017, and did not receive deployment allowance at the time.

Schedule 4 of the present instrument amends the relevant transitional provisions in Schedule 2 of the principal instrument, to reduce those entitlements from $85.45 to $85.44 per day. The explanatory statement (ES) to the instrument states that:

> The rate of AUD 85.45 was a typographical error and would create a disparity between the rates payable to members. It would also create an increased risk of incorrect administration and incorrect payments.

It appears to the committee that a consequence of this amendment is that any person who has been paid the allowance of $85.45 per day under the relevant provisions of the principal instrument will now be disadvantaged by the retrospective effect of the amendment.

The committee's usual approach in cases such as this 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.

The ES does not specifically address the issue of the retrospective effect of the reduction of allowances in Schedule 4 to the instrument. The ES does not indicate whether any persons have been paid an allowance between the commencement of the principal instrument on 15 December 2017 and the commencement of the amendment on 25 January 2018, and if so, whether any action is intended by Defence to recover the overpayment now resulting from the retrospective operation of the amendment.

The committee acknowledges that in this instance the change to the relevant allowances is very small, such that the potential disadvantage to each affected individual would only amount to a maximum of $3.63. However, the committee emphasises the general principle that, where an instrument has a retrospective effect that is potentially disadvantageous to an individual, this should be considered, and measures taken to ensure that the instrument does not have such effect.

In this regard, the committee notes that Schedule 3 to the instrument also applies certain provisions of the instrument retrospectively, providing eligibility for education costs amended by Schedule 2 as if those changes had commenced on 24 February 2017. In this case, however, the changes appear to be clearly and only beneficial in effect.

The committee requests the minister's advice as to whether any persons have been disadvantaged by the retrospective reduction of allowances effected by Schedule 4 to the instrument, and if so, what measures have been taken to redress this disadvantage.

In addition, the committee notes its general expectation that, where a legislative instrument has retrospective effect, this will be specifically addressed in its explanatory statement, particularly to indicate whether the retrospective provisions have the effect of disadvantaging any person.

Minister's response

The Minister for Defence Personnel advised:

> Retrospective reduction of Deployment Allowance and redress measures
>
> Schedule 4 of Defence Determination (Short-term overseas duty travel and benchmark schools) 2018 (No.2) [F2018L00050] is an amending determination to Defence Determination 2017/40, Deployment allowance - amendment [F2018C00080]. It seeks to amend the transitional Deployment Allowance rates for both Operation AUGURY and Operation MANITOU from AUD 85.45 to AUD 85.44. This correction of a typographical error appears to have unintentionally created a potential for debt to the Commonwealth.
>
> As the relevant provisions commenced on 25 January 2018, it does not retrospectively affect benefits payable to members prior to 25 January 2018. For this reason it is neither retrospective in application nor detrimental in effect.
>
> How retrospectivity will be addressed in the future
>
> Defence notes the Committee expects that in the future the Explanatory Statement of a Determination should specifically address retrospective effect. Defence undertakes to provide more comprehensive advice in the Explanatory Statement when retrospectivity is applied and to ensure there is no retrospective disadvantage to members.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that, as the relevant provisions commenced on 25 January 2018, they did not retrospectively affect benefits payable to members prior to 25 January 2018, and were therefore not retrospective in application or detrimental in effect.

In this regard, the committee notes that its concern was about the retrospective *effect* of the provisions in question, not their retrospective commencement. While the instrument commenced prospectively on 25 January 2018, the amendment of transitional provisions in the (2017) principal instrument potentially affected members who had been paid the allowances between the commencement of the principal instrument on 15 December 2015 and the commencement of the present instrument on 25 January 2018, by creating a debt to the Commonwealth. The potential for the instrument to create a debt is recognised in the minister's response.

However, the committee notes the minister's advice that the amendments have not in fact disadvantaged any individual.

The committee welcomes the minister's undertaking that Defence will provide more comprehensive advice in future ESs to instruments with retrospective application, and will ensure that there is no disadvantage to members.

The committee has concluded its examination of the instrument.

Instrument	**Migration (IMMI 18/004: Specification of Occupations—Subclass 457 Visa) Instrument 2018 [F2018L00044]** **Migration (IMMI 18/006: Specification of Occupations—Subclass 407 Visa) Instrument 2018 [F2018L00047]**
Purpose	Specify occupations on the Medium and Long-term Strategic Skills List and the Short-term Skilled Occupation List for the purpose of nominations for Subclass 457–Temporary Work (Skilled) Visas, and Subclass 407 (Training) Visas, respectively
Authorising legislation	Migration Regulations 1994
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[4]
Previously reported in	*Delegated legislation monitor 2 of 2018*

Drafting[5]

Committee's initial comment:

The instruments set out occupations eligible for nomination for temporary work and training visas for skilled foreign workers. They do so by listing, in each instrument, lists of occupation titles with corresponding references to the 'ANZSCO code' for each occupation. A note in the 'Definitions' section (section 4) of each instrument states that a number of terms used in the instrument are defined in the Migration Regulations 1994 (regulations), including ANZSCO.

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

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

Section 1.03 of the regulations provides the following definition of ANZSCO:

> **ANZSCO** has the meaning specified by the Minister in an instrument in writing for this definition.

Neither the instruments, their explanatory statements (ES), nor the regulations provide any further information regarding whether the minister has made such an instrument in writing, what that instrument is, or how it defines ANZSCO. The committee observes that the consequence of this is that the note in each instrument regarding the definition of ANZSCO provides no practical assistance to a reader seeking to understand the term.

The committee is aware that ANZSCO is the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics. The committee observes, nonetheless, that the use of the term 'ANZSCO' is prominent in the operative provisions of both of these instruments, and that the instruments are likely to be of interest and relevance to a large number of persons, including employers, training providers and potential visa applicants, not all of whom have legal expertise.

The committee therefore considers that, in the interests of promoting the clarity and intelligibility of the instruments to persons interested in or affected by them, the instruments or their explanatory statements should include a meaningful definition of ANZSCO (or more useful direction as to where such a definition can be found); and ideally, information about where ANZSCO can be accessed.

The committee requests the minister's advice as to the use of 'ANZSCO' within the instruments, and whether a more meaningful definition of the term can be included in the instruments or their explanatory statements, to improve the clarity and intelligibility of the instruments to persons interested in or affected by them.

Minister's response

The Minister for Citizenship and Multicultural Affairs advised:

> Since the Committee made its observations, the Instruments have been repealed and replaced with new instruments, which address changes to the Regulations made by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (the Amendment Regulations). The new Instruments and Amendment Regulations commenced on 18 March 2018.
>
> It was not considered appropriate to include a definition of 'ANZSCO' in the replacement instruments, as this could lead to multiple and potentially inconsistent definitions of the one term appearing in the enabling Regulations and the instruments.
>
> However, the Committee's concerns in relation to the definition of 'ANZSCO' were taken into account in drafting the explanatory statements for the replacement instruments. It is proposed that the following

information will be set out in the explanatory statements to the replacement instruments, as relevant:

> Regulation 1.03 of the Regulations provides the following definition of ANZSCO: 'ANZSCO has the meaning specified by the Minister in an instrument in writing for this definition.'
>
> The instrument made under regulation 1.03 for the definition of ANZSCO is the Migration (IMMI 18/051: Specification of Occupations and Assessing Authorities) Instrument 2018. Section 5 of IMMI 18/051 provides that:
>
> > For the purposes of regulation 1.03 of the Regulations, 'ANZSCO' means the Australian and New Zealand Standard Classification of Occupations published by the Australia Bureau of Statistics, as in force on 18 March 2018.
>
> ANZSCO may be accessed on the Australian Bureau of Statistics website.

Committee's response

The committee thanks the minister for his response. Pursuant to the minister's advice, the committee notes that ANZSCO is now substantively defined in section 5 of the Migration (IMMI 18/051: Specification of Occupations and Assessing Authorities) Instrument 2018 [F2018L00299], which was made on 15 March 2018 and commenced on 18 March 2018.

The committee also notes that an instrument has been registered on the Federal Register of Legislation which repeals and replaces the Migration (IMMI 18/006: Specification of Occupations—Subclass 407 Visa) Instrument 2018 [F2018L00047], and that the explanatory statement to the new instrument includes the information set out in the minister's response regarding the definition of ANZSCO.[6]

The committee further notes that a number of other migration instruments made since this matter was raised with the minister, and which also refer to ANZSCO, have similarly explained the term in their explanatory statements.[7]

While it appears that the Migration (IMMI 18/006: Specification of Occupations—Subclass 407 Visa) Instrument 2018 [F2018L00047] remains in force and has not yet been replaced, the committee notes the minister's undertaking to include the same

---

6 Migration (IMMI 18/050: Specification of Occupations—Subclass 407 Visa) Instrument 2018 [F2018L00300].

7 Migration (IMMI 18/035: Specification of Exempt Occupations) Instrument 2018 [F2018L00287]; Migration (IMMI 18/043: Specification of Occupations—Subclass 187 Visa) Instrument 2018 [F2018L00295]; Migration (IMMI 18/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2018 [F2018L00298]; Migration (IMMI 18/048: Specification of Occupations—Subclass 482 Visa) Instrument 2018 [F2018L00302].

information in the explanatory statement to a new instrument replacing this instrument, when made.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)