The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Contents

Chapter 2 – Concluded matters

Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

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

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislative Instruments 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 in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

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1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

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

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.[3]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[4]

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.[5]

Senator John Williams (Chair)

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3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, https://www.comlaw.gov.au/.

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

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 18 December 2015 and 4 February 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

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

Instrument	**Australian Meat and Live-stock Industry (Beef Export to the USA – Quota Years 2016-2022) Order 2015 [F2015L02128]**
Purpose	Provides for the administration of a system of quotas for the export of beef, tariff free, to the USA
Last day to disallow	11 May 2016
Authorising legislation	*Australian Meat and Live-stock Industry Act 1997*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the definition of ***processed meat*** in section 6 of the instrument refers to the Harmonized Tariff Schedule of the United States, which is part of 19 USC Chapter 4 (the Tariff Act of 1930). However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the Harmonized Tariff Schedule of the United States is incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its

operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**CASA EX215/15 - Exemption — from the PIRC [F2015L02096]** **CASA EX214/15 - Exemption — from the spinning FAE [F2015L02097]** **CASA EX218/15 - Exemption - from the flight instructor rating flight test [F2015L02115]** **CASA EX219/15 - Exemption - Grade 3, 2 or 1 training endorsement (aeroplane) flight test [F2015L02117]**
Purpose	These instruments exempt certain persons from various requirements under the Civil Aviation Safety Regulations 1998
Last day to disallow	11 May 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ESs to these instruments state:

> By providing alternative compliance mechanisms for a holder or operator, an exemption of its nature is always beneficial and does not require statutory consultation. CASA has been communicating with FIR [Flight Instructor Rating] holders who may wish to take advantage of the exemptions.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In the committee's view, the general statement that exemptions

of this nature are always beneficial and therefore do not require statutory consultation is insufficient to meet those requirements, particularly as there may be instances where consultation is regarded as necessary or convenient—for example, industry-wide consultation may be regarded as appropriate in relation to the development and implementation of proposed statutory exemptions. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ESs to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in each particular case.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

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

Instrument	**CASA EX222/15 - Exemption — from certain prerequisites for an ATPL flight test [F2016L00015]**
Purpose	Exempts applicants with less than a 100% pass in the aeronautical knowledge examination from certain eligibility requirements for the air transport pilot licence flight test
Last day to disallow	11 May 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES to the instrument states:

> By providing alternative compliance mechanisms for a holder or operator, an exemption of its nature is always beneficial and does not require statutory consultation.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In the committee's view, the general statement that exemptions of this nature are always beneficial and therefore do not require statutory consultation is insufficient to meet those requirements, particularly as there may be instances where consultation is regarded as necessary or convenient—for example, industry-wide consultation may be regarded as appropriate in relation to the development and implementation of proposed statutory exemptions. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

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

Instrument	**Complaints Principles 2015 [F2015L02125]**
Purpose	Describes a scheme for the management and resolution of complaints and other concerns about approved aged care services and the investigative functions of the Aged Care Complaints Commissioner in relation to such complaints
Last day to disallow	11 May 2016
Authorising legislation	*Aged Care Act 1997; Aged Care Amendment (Independent Complaints Arrangements) Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

The instrument replaces the existing Complaints Principles 2014 (old principles) and provides for the transfer of aged care complaints functions from the Secretary of the Department of Health to the Aged Care Complaints Commissioner. Part 8 of the instrument specifies application and transitional arrangements for the transfer of these functions, which provide that complaints and applications made under the old principles will be treated as if they were made under the new principles. The committee notes that, although the instrument is not strictly retrospective, the new principles prescribe different processes and timeframes that will be applied to

previously lodged complaints or applications. As a consequence, it appears that a complaint or application not yet completed at 1 January 2016 will be decided according to different processes and timeframes that did not apply at the time of the application.

The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the ES. However, the ES does not address the retrospective effect of this instrument.

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

Instrument	**National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2015 (No. 13) (PB 121 of 2015) [F2015L02085]**
Purpose	Amends the National Health (Highly specialised drugs program) Special Arrangement 2010 (PB 116 of 2010) to make changes relating to the circumstaces for the supply of Eculizumab
Last day to disallow	11 May 2016
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Item 2 of the instrument (the first instrument) amended the entry for Eculizumab in Schedule 3 of the National Health (Highly specialised drugs program for hospitals) Special Arrangement 2010 (PB 116 of 2010) [F2016C00103] (the principal instrument). In the fourth column of the first and second amended table items in Schedule 3 to the principal instrument, one of the amended circumstances for the supply of Eculizumab is as follows:

> Patient must have received treatment with eculizumab for this condition prior to *1 December 201* [sic] (emphasis added).

The committee notes that a more recent instrument, the National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2016 (No. 1) (PB 5 of 2016) [F2016L00076] (the second instrument), appears to correct the incomplete year in the table item as amended, such that the relevant circumstance for the supply of Eculizumab now states:

> Patient must have received treatment with eculizumab for this condition prior to *1 December 2014* (emphasis added).

However, noting that the amendments made by the first instrument were in effect from 18 December 2015 to 1 February 2016, and that the apparent correction in the second instrument was not applied retrospectively, the committee seeks clarification that, for any relevant supplies during that period (if any), the table item was interpreted as applying to patients having received the relevant treatment prior to 1 December 2014 (and that no person was therefore disadvantaged by the apparent error in the first instrument).

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

Instrument	**Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015 [F2015L02092]**
Purpose	Specifies that the definition of Queensland Commission in the *Social Security (Administration) Act 1999* includes, for certain purposes, the Family Responsibilities Commission
Last day to disallow	11 May 2016
Authorising legislation	*Social Security (Administration) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Section 4 of this instrument states:

> The *Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2012* is revoked.

However, the committee notes that the Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2012 (2012 specification) ceased immediately before 1 January 2014. The committee also notes that section 7(3)(b) of the *Acts Interpretation Act 1901* (AIA) provides that the cessation of effect of an Act or part will have the same effect as the repeal or amendment of an Act (this also applies to legislative instruments by virtue of section 13(1) of the *Legislative Instruments Act 2003*). It is therefore unclear to the committee why it is necessary for the 2012 specification to be revoked when it has ceased to operate.

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

Instrument	**Veterans' Entitlements (Dispensed Price for Repatriation Pharmaceutical Benefits/Updating Incorporated Documents) Amendment Instrument 2015 [F2015L02130]** **Military Rehabilitation and Compensation (Dispensed Price for MRCA Pharmaceutical Benefits/Updating Incorporated Documents) Amendment Instrument 2015 [F2015L02137]**
Purpose	These instruments vary the Repatriation Pharmaceutical Benefits Scheme under the *Veterans' Entitlements Act 1986* and the Military Rehabilitation and Compensation Act Pharmaceutical Benefits Scheme under the *Military Rehabilitation and Compensation Act 2004*; and include a new listing
Last day to disallow	11 May 2016
Authorising legislation	*Veterans' Entitlements Act 1986; Military Rehabilitation and Compensation Act 2004*
Department	Veterans' Affairs
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that Schedule 1 of these instruments incorporates by reference a number of documents. In line with committee's expectations, list A of Schedule 1 specifies the manner of incorporation of the documents in that list 'as they exist on 1 January 2016'. However, list B of Schedule 1 incorporates previous editions of three documents that also appear in list A. A note to the schedule states: 'paragraph 43 [of the Repatriation Pharmaceutical Benefits Scheme [F2016C00087]] provides that the later versions of certain documents in list A take precedence over earlier versions of the documents in List B.'

The ES to the instruments states:

> The documents listed in the new Schedule 1 inserted into the Schemes by the attached instruments are incorporated into the Schemes in the form in which those documents were on 1 January 2016 and not in the form in which they may exist from time to time.

The committee notes that the instrument and ES together make clear the intention that the documents in Schedule 1 are incorporated as in force on 1 January 2016, and thus

meet the committee's expectation that instruments and ESs make clear the basis of incorporation to all anticipated users.

However, noting the apparent intention under list B of Schedule 1 to incorporate earlier versions of certain documents (in addition to incorporating those documents as at 1 January 2016), the committee seeks the minister's advice as to the reason for taking this approach in this instance.

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

Instrument	**Variation to the National Environment Protection (Ambient Air Quality) Measure 2015 [F2016L00084]**
Purpose	Updates the National Environment Protection (Ambient Air Quality) Measure in relation to the standards for particles
Last day to disallow	20 June 2016
Authorising legislation	*National Environment Protection Council Act 1994*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the instrument substitutes a new subsection 13(1) which states:

> To the extent practicable, performance monitoring stations should be sited in accordance with the requirements for Australian Standard AS/NZS 3580.1.1:2007 (Methods for sampling and analysis of ambient air – Guide to siting air monitoring equipment). Any variations from AS/NZS 3580.1.1:2007 must be notified to Council for use in assessing reports.

The committee also notes that the instrument substitutes a new Schedule 3 which prescribes Australian Standards Method for Pollutant Monitoring by reference to methods prescribed in 15 other Australian Standards.

However, neither the text of the instrument nor the ES expressly states the manner in which the Australian Standard AS/NZS 3580.1.1:2007 (Methods for sampling and analysis of ambient air – Guide to siting air monitoring equipment) or the 15 other Australian Standards in Schedule 3 are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Access to extrinsic material

As noted above, the instrument substitutes a new subsection 13(1), which references Australian Standard AS/NZS 3580.1.1:2007 (Methods for sampling and analysis of ambient air – Guide to siting air monitoring equipment); and a new Schedule 3 which references 15 other Australian Standards.

The committee notes that the above referenced standards are published by and available for sale from SAI Global Limited for a fee. However, neither the instrument nor the ES provides information about whether the standards are otherwise freely and readily available.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. In this respect, the committee recognises that the implementation of the National Environment Protection (Ambient Air Quality) Measure occurs in a specific regulatory environment; and that it may be unlikely that persons outside this regulatory sphere would require access to the standards incorporated by the instrument. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to have in place arrangements for users outside of the particular commercial or regulatory sector to access such material on a fee-free basis.

The committee draws this matter to the minister's attention.

Further response required

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	**Foreign Judgments Amendment (Miscellaneous) Regulation 2015 [F2015L01892]**
Purpose	Amends the Foreign Judgments Regulations 1992 to remove reference to New Zealand's courts and corrects the names of United Kingdom courts
Last day to disallow	10 May 2016
Authorising legislation	*Foreign Judgments Act 1991*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Drafting

The committee commented as follows:

The regulation amends the Foreign Judgments Regulations 1992 to remove the reference to New Zealand as recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. The regulation also corrects the names of the United Kingdom courts listed in the Schedule as the names of the courts have changed.

The ES to the regulation states:

> Details of the Regulation are set out in the Attachment.

However, no attachment to the ES is provided.

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

Attorney-General's response

The Attorney-General advised:

> I have asked my department to prepare the relevant attachment for inclusion in the Explanatory Statement for the Regulation and register the complete documentation on the Federal Register of Legislative Instruments. The revised Explanatory Statement is attached to this correspondence for your information.

Committee's response

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

However, the committee notes that the revised explanatory statement does not address the additional issues that were identified in relation to this instrument in *Delegated legislation monitor* No. 1 of 2016. The committee notes that these additional concerns may have been overlooked and reiterates its requests for the advice of the Attorney-General in relation to these issues which are set out below.

No statement of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility in relation to an instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies. The statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights, and must be included in the ES for the legislative instrument.

With reference to these requirements, the committee notes that the ES for this instrument does not include a statement of compatibility.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the regulation states:

> The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003* (LIA). The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.The committee's guideline on the requirement to address the question of consultation under the LIA also states:

> It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee therefore considers that the ES for the instrument provides no information regarding consultation for the purposes of the LIA.

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

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis. These comments do not require a response.

Instrument	**Fair Work (Unclaimed Monies Interest Calculations) Instrument 2015 [F2015L02111]**
Purpose	Allows for the calculation of interest on money paid to employees under section 559(3A) of the *Fair Work Act 2009*
Last day to disallow	11 May 2016
Authorising legislation	*Fair Work Act 2009*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This rule was made on 18 December 2015 in reliance on section 559(3B) of the *Fair Work Act 2009*.

Notwithstanding the fact that section 559(3B) of the *Fair Work Act 2009* commenced on 1 January 2016, the rule was made on 18 December 2015; the rule was therefore made in reliance on an empowering provision that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES to the rule does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the ES accompanying any such instrument.

The committee draws this matter to the minister's attention.

Instrument	**Family Assistance (Meeting the Immunisation Requirements) Principles 2015 [F2015L02112]**
Purpose	Sets out decision making principles that the secretary must comply with when making a determination under subsection 6(6) of the *A New Tax System (Family Assistance) Act 1999* that a child meets the immunisation requirements
Last day to disallow	11 May 2016
Authorising legislation	*A New Tax System (Family Assistance) Act 1999*
Department	Social Services; Education and Training
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 4 of the instrument provides: 'permanent humanitarian visa has the same meaning as in regulation 1.03 of the *Migration Regulations 1994*'. The ES also states with respect to section 10:

> ***Permanent humanitarian visa*** is defined in section 4 to have the same meaning as in regulation 1.03 of the *Migration Regulations 1994*. Under that regulation, ***permanent humanitarian visa means***:
>
> - a Subclass 200, 201, 202, 203, 204, 209, 210, 211, 212, 213, 215, 216, 217 or 866 visa; or a Resolution of Status (Class CD) visa; or
> - a Group 1.3 or Group 1.5 (Permanent resident (refugee and humanitarian)) visa or entry permit within the meaning of the *Migration (1993) Regulations*; or
> - a humanitarian visa, or equivalent entry permit, within the meaning of the *Migration (1989) Regulations*; or
> - certain transitional (permanent) visas, within the meaning of the *Migration Reform (Transitional Provisions) Regulations*.

However, neither the text of the instrument nor the ES expressly states the manner in which the relevant provision of the Migration Regulations 1994 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Migration Regulations 1994) can be taken to be references to versions of those instruments as in force from time to time.

However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*, and in the interests of promoting clarity and intelligibility of an instrument to anticipated users, instruments (and, ideally, their accompanying ESs) should clearly state the manner of incorporation of extrinsic material.

The committee draws this matter to the minister's attention.

Instrument	**Southern and Eastern Scalefish and Shark Fishery (Closures) Direction No. 1 2016 [F2016L00044]**
Purpose	Specifies that fishing is not to be engaged in for a period of time in areas of the Southern and Eastern Scalefish and Shark Fishery
Last day to disallow	11 May 2016
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 5 of the determination provides: 'A term used in this Direction that is defined in the *Southern and Eastern Scalefish and Shark Fishery Management Plan 2003* (the Management Plan) has the same meaning in this Direction as it has in the Management Plan.' However, neither the text of the instrument nor the ES expressly states the manner in which the Southern and Eastern Scalefish and Shark Fishery Management Plan 2003 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that

reference to external documents which are Commonwealth disallowable instruments (such as Southern and Eastern Scalefish and Shark Fishery Management Plan 2003) can be taken to be references to versions of those instruments as in force from time to time.

However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*, and in the interests of promoting clarity and intelligibility of an instrument to anticipated users, instruments (and, ideally, their accompanying ESs) should clearly state the manner of incorporation of extrinsic material.

The committee draws this matter to the minister's attention.

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

Instruments	Australian Meat and Live-stock Industry (Beef Export to the USA – Quota Years 2016-2022) Order 2015 [F2015L02128] CASA EX220/15 - Amendment of Exemptions — compliance with SIDs in the maintenance of Cessna aircraft [F2015L02099] CASA EX225/15 - Exemption — from completion of an approved course of training in MCC [F2016L00034] Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 3) [F2015L02098] Civil Aviation Order 100.5 Amendment Instrument 2015 (No. 1) [F2015L02102] Currency (Royal Australian Mint) Determination 2015 (No. 10) [F2015L02075] Education Services for Overseas Students (TPS Levies - Risk Rated Premium and Special Tuition Protection Components) Instrument 2015 [F2015L02089] Electricity Supply Fees Determination 2016 (Jervis Bay Territory) [F2015L02080] Family Assistance (Meeting the Immunisation Requirements) Principles 2015 [F2015L02112]

	Family Law Amendment (Arbitration and Other Measures) Rules 2015 [F2015L02119] Health Insurance (Pathologist-determinable Services) Determination 2015 [F2015L02063] Manual of Standards Part 66 Amendment Instrument 2016 (No. 1) [F2016L00066] My Health Records (Assisted Registration) Rule 2015 [F2015L02055] National Health (Claims and under co-payment data) Amendment (Discount co-payment and patient charges data) Rule 2015 (PB 128 of 2015) [F2015L02061] National Health (Pharmaceutical Benefits - early supply) Instrument 2015 (PB 120 of 2015) [F2015L02129] National Health (Supplies of out-patient medication) Determination 2015 (PB 125 of 2015) [F2015L02135] Plant Health Australia (Plant Industries) Funding Determination 2015 [F2015L02074] Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No. 6) [F2015L02118] Primary Industries (Excise) Levies (Designated Bodies) Amendment Declaration 2015 [F2015L02052] Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015 [F2015L02092] Social Security (Administration) (Exempt Welfare Payment Recipients - Principal Carers of a Child) (Specified Activities) Instrument 2015 [F2015L02086] Vehicle Standard (Australian Design Rule 85/00 – Pole Side Impact Performance) 2015 [F2015L02109] National Health (Supplies of out-patient medication) Determination 2015 (PB 125 of 2015) [F2015L02135]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the

relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[1]

1 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

Chapter 2
Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	**ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030 [F2015L01771]**
Purpose	Broadens the class of financial products to facilitate transfers through ASX Settlement Pty Ltd and extends the statutory warranties and indemnities in Part 7.11 of the *Corporations Act 2001*
Last day to disallow	25 February 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* Nos 16 of 2015 and 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the instrument refers to the 'operating rules of ASX' in its definition of ***AQUA Quote Display Board***. However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the operating rules of ASX are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material or Acts.

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

Assistant Treasurer's first response

The Assistant Treasurer advised:

> ASIC Legislative Instrument 2015/1030, which was prepared and issued by the Australian Securities and Investments Commission (ASIC), makes reference to extrinsic material by way of the definition of "AQUA Quote Display Board", which is defined as having 'the meaning given by the operating rules of ASX'.
>
> The 'operating rules of ASX' refer to the operating rules of the market licensee, ASX Limited, created for the purposes of satisfying section 793A of the *Corporations Act 2001* (the Act). Operating rules of a financial market are defined by the Act as '*any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution and that deal with the activities or conduct of the market; or the activities or conduct of persons in relation to the market*' (section 761A). They are binding and have the effect of a contract underseal between ASX and market participants (e.g. brokers).
>
> ASIC Legislative Instrument 2015/1030 regulates and facilitates the transfer through ASX Settlement Pty Ltd (ASXS) of certain classes of financial products. The parties that facilitate and engage in the trading of these financial products - i.e. ASXS and other clearing and settlement facilities, as well as market operators (e.g. the ASX) and market participants - should therefore understand what is meant by the term 'operating rules of ASX' and should be familiar with the content of these operating rules.
>
> I have raised this issue with ASIC, who have advised that it is common practice for ASIC to refer to the operating rules of a facility in legislative instruments that it drafts. In ASIC's view, the definition of "AQUA Quote Display Board" in ASIC Legislative Instrument 2015/1030, by merely referring to the operating rules of ASX, does not amount to an incorporation of matter by reference to the operating rules of ASX within the meaning of Section 14 of the *Legislative Instruments Act 2003*.
>
> In drafting a legislative instrument, ASIC's test is whether the content of any extrinsic document or material (in this case, the operating rules of ASX) affects the operation of the legislative instrument. A mere reference in a legislative instrument to another document does not apply, adopt or incorporate that extrinsic document. The definition of "AQUA Quote Display Board" is relevant only for the purposes of identifying a certain class of financial products (warrants and interests in unregistered managed investment schemes) to which ASIC Legislative Instrument 2015/1030 relates.

Committee's first response

The committee thanks the Assistant Treasurer for her response.

The committee notes the advice that, in determining whether a document is incorporated by reference, ASIC applies a test to determine whether the content of the document affects the operation of the instrument.

However, the committee notes that the definition of 'AQUA Quote Display Board' could be said to affect the operation of the instrument, because it determines whether a certain class of financial products is subject to the instrument's provisions. It is therefore unclear to the committee the basis on which the definition cited may be regarded as not affecting the operation of the instrument.

The committee requests the further advice of the Assistant Treasurer in relation to this matter.

Assistant Treasurer's second response

The Assistant Treasurer advised:

> ASIC notes the Committee's expectation in relation to the manner of incorporation of extrinsic material, particularly having regard to the needs of users or persons affected by any such instrument. Going forward, ASIC will change its drafting approach to make it apparent both on the face of the instrument and in the accompanying Explanatory Statement when a reference to extrinsic material is fixed in time, or ambulatory (i.e. they are references to extrinsic material as in force from time to time).
>
> ASIC has reiterated its view that mere references to extrinsic material do not engage section 14 of the *Legislative Instruments Act 2003* (LIA). ASIC's view is that legislative instruments that merely point to concepts that are defined in other materials do not affect the operation of the instrument.
>
> In regards to Legislative Instrument 2015/1030, ASIC has further explained that definition of "AQUA Quote Display Board" is relevant for the purposes of identifying certain class of warrants and interests in unregistered managed investment schemes to which the ASIC instrument relates. ASIC considers that the instrument is referring to what are those classes of financial products from time to time. Whether a class of financial product falls within those classes at any particular time turns on whether, as matter of fact, the class of product was admitted to the AQUA Quote Display Board at that time.
>
> While the definition refers to the ASX operating rules, ASIC is of the view that the provisions are not applying, adopting or incorporating those rules for the purposes of section 14 of the LIA either on a fixed or ambulatory basis because nothing turns on the content of those operating rules at any time. Therefore, although the scope of the application of the instrument will technically change depending on the classes of product admitted to the AQUA Quote Display Board, how the instrument operates will not change. As such, ASIC considers these kinds of references to be mere references.
>
> ASIC considers that this approach is consistent with the approach adopted in subsection 32(14) of the [*Interpretation of*] *Legislation Act 1984* (Victoria) which states "A document or matter is not applied, adopted or incorporated in a subordinate instrument by reason only that it is referred to

in the subordinate instrument, or in another document or other matter applied, adopted or incorporated in the subordinate instrument, if the document or matter so referred to does not affect the operation of the subordinate instrument."

Committee's second response

The committee thanks the Assistant Treasurer for her informative response and has concluded its examination of the instrument.

The committee notes in particular the additional advice that, in determining whether a document is incorporated by reference, ASIC applies a test to determine whether the content of the document affects the operation, as opposed to the application, of the instrument. The committee understands that, on the application of this test, the ASX Operating Rules are regarded as not incorporated by reference in this instrument and are referred to only. This advice will assist the committee in its examination of similar instruments in future.

The committee also thanks the Assistant Treasurer for her advice that future instruments will make it apparent when a reference to extrinsic material is a reference to that material as in force at a particular date or as in force from time to time.

Instrument	**ASIC Corporations (Real Estate Companies) Instrument 2015/1049 [F2015L01831]**
Purpose	Exempts real estate agents who offer for sale shares in real estate companies and valuers who value shares in real estate companies from holding a financial services licence
Last day to disallow	1 March 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 4(b) of the instrument refers to the *Transfer of Land Act 1958* of Victoria (TLA). However, neither the text of the instrument nor the explanatory statement (ES) expressly state the manner in which the TLA is incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Assistant Treasurer's response

The Assistant Treasurer advised:

> ASIC notes the Committee's expectation in relation to the manner of incorporation of extrinsic material, particularly having regard to the needs of users or persons affected by any such instrument. Going forward, ASIC will change its drafting approach to make it apparent both on the face of the instrument and in the accompanying Explanatory Statement when a reference to extrinsic material is fixed in time, or ambulatory (i.e. they are references to extrinsic material as in force from time to time).
>
> ASIC has reiterated its view that mere references to extrinsic material do not engage section 14 of the *Legislative Instruments Act 2003* (LIA). ASIC's view is that legislative instruments that merely point to concepts that are defined in other materials do not affect the operation of the instrument.

The Assistant Treasurer also advised:

> ASIC considers that this approach is consistent with the approach adopted in subsection 32(14) of the [*Interpretation of*] *Legislation Act 1984* (Victoria) which states "A document or matter is not applied, adopted or incorporated in a subordinate instrument by reason only that it is referred to in the subordinate instrument, or in another document or other matter applied, adopted or incorporated in the subordinate instrument, if the document or matter so referred to does not affect the operation of the subordinate instrument."

Committee's response

The committee thanks the Assistant Treasurer for her informative response and has concluded its examination of the instrument.

The committee notes in particular the additional advice that, in determining whether a document is incorporated by reference, ASIC applies a test to determine whether the content of the document affects the operation, as opposed to the application, of the instrument. The committee understands that, on the application of this test, the *Transfer of Land Act 1958* of Victoria is not incorporated by reference in this

instrument and is referred to only. This advice will assist the committee in its examination of similar instruments in future.

The committee also thanks the Assistant Treasurer for her advice that future instruments will make it apparent when a reference to extrinsic material is fixed in time or as in force from time to time.

Instrument	**Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015 [F2015L01991]**
Purpose	Aligns the Australian Federal Police's drug and alcohol testing framework with contemporary sample collection and testing procedures
Last day to disallow	11 May 2016
Authorising legislation	*Australian Federal Police Act 1979*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a) and (b)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Access to extrinsic material

The committee commented as follows:

Item 32 of Schedule 1 to this regulation repeals and replaces regulation 13V of the Australian Federal Police Regulations 1979.

The ES for the regulation notes that regulation 13V sets out the standard that the Australian Federal Police (AFP) must comply with in relation to collecting and analysing urine samples for the purposes of a prohibited drug test and that the effect of the new regulation is to update the reference to the new standard that applies – the *Australian/New Zealand Standard AS/NZS 4308 – 2008*, 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine'.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

While the committee notes that the new regulation 13V is helpful in making it clear which particular version of the standard is relied upon, the committee also notes that the standard in question is only available from SAI Global, on the payment of a fee of $220.63. Neither the instrument nor the ES provide information about whether the standard is otherwise freely and readily available.

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

Minister's response

The Minister for Justice advised:

> As noted by the Committee, item 32 of Schedule 1 repeals and replaces regulation 13V of the *Australian Federal Police Regulations* (AFP Regulations).
>
> Regulation 13V sets out the standard with which the Australian Federal Police (AFP) must comply when collecting and analysing urine samples for the purposes of prohibited drug testing. The Amending Regulation updates the standard to the *Australian/New Zealand Standard AS/NZS 4308 - 2008*, 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine' (Standard) from the 2001 version of the standard.
>
> The Committee has requested advice on whether the Standard is freely and readily available so that the people who are subject to the law are able to comply with it. The Committee notes that the Standard is available for a fee of $220.63.
>
> I confirm that the Standard is available without charge to AFP members who are subject to prohibited drug testing under the AFP Regulations. The AFP's Professional Standards Drug Program Project Office, which has carriage of the AFP prohibited drug testing program, offers a copy of the Standard to AFP members before they take such tests. As the drug testing regime in Division 2.4B of the AFP Regulations applies only to AFP members, not to the public at large, it is not necessary to include more detail about the standard in the Amending Regulations or explanatory material.
>
> The AFP also provides advice to members at the time of the drug test about the testing process, both verbally and in the AFP Drug Testing Advice Form.
>
> In addition to this, the AFP National Guideline on prohibited drugs, pharmaceutical products and alcohol provides information about the relevant standards used by the testing program. A copy of the National

> Guideline can be found at http://www.afp.gov.au/about-theafp/information-publication-scheme.

Committee's response

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

Retrospective effect

The committee commented as follows:

Item 7 of Schedule 1 to this regulation inserts new subregulation 5(3), which provides that an AFP employee who is suspended is entitled to be paid remuneration but is not entitled to penalties, composites, overtime or other allowances while suspended.

Item 33 of Schedule 1 inserts application and transitional provisions in relation to the amendments made by the regulation. New subregulation 37(2) provides that the above new provision applies to an AFP employee who is suspended on or after the commencement of these provisions, whether or not the suspension begins on or after the commencement of those provisions. This means that a person who was suspended prior to the commencement of the new provision is subject to requirements that did not apply to them at the time that they were suspended.

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to asses such cases 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 ES to the instrument states that the amendment is appropriate 'as suspended employees are not performing any duties for the AFP and financial entitlements related to working hours and arrangements should not be payable'. The committee acknowledges that it is appropriate that suspended employees are not entitled to allowances related to working hours and arrangements. However, the committee notes that the provision also removes the entitlement to 'other allowances' while an employee is suspended, and it is unclear whether a suspended employee may have been entitled to other allowances before the commencement of this provision that do not relate to their performance of duties and working hours for the AFP.

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

Minister's response

The Minister for Justice advised:

> The Committee has also requested advice on whether the allowances removed by subregulation 5(3) would have been available to suspended employees before the Regulation conunenced, or whether they were solely related to employees' working hours and arrangements.
>
> New subregulation 37(2) provides that the regulation removing the entitlement of suspended employees to penalties, composites, overtime or other allowances (subregulation 5(3)) is to have retrospective effect. This means that employees who were suspended prior to the commencement of

the Regulation became subject to provisions that did not apply to them at the time they were suspended.

Penalty rates, composites and overtime allowances are paid to employees for working patterns, arrangements and conditions. Further, I confirm that all other allowances relate to the performance of employees' duties. These allowances include:

- on call allowance
- close-call allowance
- night-shift allowance
- higher duties allowances
- air security officer allowance
- deployment assistance allowance, and
- remote localities allowance.

I understand from the AFP that no member who was suspended at the time the amendments commenced had previously been entitled to receive any of these allowances.

In these circumstances, it is appropriate for the changes to remove the payment of allowances for suspended employees to have a retrospective effect.

Committee's response

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

Instrument	**Australian Immunisation Register Rule 2015 [F2015L01946]**
Purpose	Prescribes the bodies authorised to have access to protected information contained within the register for the purposes of section 4 of the *Australian Immunisation Register Act 2015*
Last day to disallow	11 May 2016
Authorising legislation	*Australian Immunisation Register Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Description of consultation

The committee commented as follows:

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the regulation states:

> The Department of Humans Services and the Department of Social Services were consulted in the preparation of this legislative instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In this case, the committee notes that the rule appears to be largely mechanical and relevant to inter-agency relationships. However, the committee considers that the information provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Human Services and the Department of Social Services).

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

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

Minister's response

The Minister for Health advised:

> The Act was created to simplify the existing legislative arrangements and fully encompass all requirements for immunisation registers in Australia. The legislation governs the individuals/entities who have access to information stored in the register and who can input information to the Australian Immunisation Register. Extensive consultation was undertaken during the drafting of the new legislation, which includes the Act, the *Australian Immunisation Register (Consequential and Transitional Provisions) Act 2015*, the Rule and the *Health Insurance Regulation Amendment 2015*, which repealed the provisions that defined prescribed bodies from the *Health Insurance Regulation 1975*.
>
> The bodies that are permitted to access protected information from the Australian Immunisation Register (prescribed bodies) were previously defined in the *Health Insurance Regulations 1975*. With the establishment of the Act, the prescribed bodies in the *Health Insurance Regulations 1975* were re-established as prescribed bodies under the Rule. As such, the Rule is considered to be an instrument that is minor and machinery in nature. The list of prescribed bodies in the Rule includes state and territory health

> departments, Primary Health Networks, bodies facilitating research relating to vaccines, and officers, employees or contractors of prescribed bodies.
>
> The nature of the consultation involved in the preparation of the Rule ensured that the prescribed bodies remain relevant and appropriate for the purposes of the Act. For example, following the cessation of Medicare Locals (previously listed as a prescribed body under the former *Health Insurance Regulation 1975*) and the establishment of Primary Health Networks (PHN) it was identified that the Rule would need to reflect this change. Childhood immunisation rates are a national headline indicator for PHNs, and as such, it is important to ensure PHNs have ready access to immunisation data to enable them to monitor their progress against this indicator and to actively promote increased immunisation coverage across Australia. Consultation confirmed that it was appropriate for PHNs to be listed as a prescribed body which will allow PHNs to perform their role.

The Minister also provided an amended explanatory statement which included the following description of consultation:

> Over the past decade a wide range of immunisation stakeholders have advocated the benefits of a whole-of-life immunisation register for Australia.
>
> The Department of Health has consulted with peak bodies, health experts and state and territory health departments represented on the National Immunisation Committee and the Australian Technical Advisory Group on Immunisation, to seek their views on the essential components of a fully effective whole-of-life register and adolescent school-based register. Vaccination providers affected by this change are represented through these peak bodies.
>
> Ongoing engagement will be a key part of the implementation phase, as the expanded registers will play a key role in contributing to improved vaccination rates in Australia to ensure better health outcomes for all Australians throughout their life.
>
> The bodies that are permitted to access protected information from the Australian Immunisation Register (prescribed bodies) were previously defined in the *Health Insurance Regulations 1975*. With the establishment of the new Act, the existing provisions in the *Health Insurance Regulations 1975* were re-established under the Rule.
>
> The Department of Human Services, the Department of Social Services, the Attorney-General's Department (including the Office of the Australian Information Commissioner) were all consulted during the drafting of the Rule.
>
> The nature of the consultation involved ensuring that the prescribed bodies remain relevant and appropriate for the purposes of the Act. For example, following the cessation of Medicare Locals (previously listed as a prescribed body under the former *Health Insurance Regulation 1975*) and the establishment of Primary Health Networks (PHN) it was identified that the Rule would need to reflect this change. Childhood immunisation rates are a national headline indicator for PHNs, and as such, it is important to ensure PHNs have ready access to immunisation data to enable them to

monitor their progress against this indicator and to actively promote increased immunisation coverage across Australia. Consultation confirmed that it was appropriate for PHNs to be listed in the Rule as a prescribed body, which will allow PHNs to perform their role.

During face to face discussions with representatives from the Department of Human Services, the Department of Social Services and the Attorney-General's Department, it was agreed that all bodies listed in the Rule should be authorised to access immunisation information contained within Australian Immunisation Register to allow them to perform their roles.

Committee's response

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

Instrument	**Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015 [F2015L01800]**
Purpose	Aligns the period of time that information relating to debt agreements is retained on the National Personal Insolvency Index with the period of time that the same information is recorded on credit reports under the *Privacy Act 1988*
Last day to disallow	29 February 2016
Authorising legislation	*Bankruptcy Act 1966*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 16 of 2015

No statement of compatibility

The committee commented as follows:

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility in relation to an instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies. The statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights, and must be included in the ES for the legislative instrument.

With reference to these requirements, the committee notes that the ES for this instrument does not include a statement of compatibility.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Attorney-General's response

The Attorney-General advised:

> I have asked my department to prepare a statement of compatibility to be included in the Explanatory Statement for the Regulation and have asked that the updated Explanatory Statement be registered on the Federal Register of Legislative Instruments.

The Attorney-General also provided an updated explanatory statement which includes a statement of compatibility with human rights.

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

Instrument	**Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]** **Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]**
Purpose	Implements UN Security Council Resolution 2199 relating to Syria in Australia; amends the Charter of the United Nations (Sanctions—Iraq) Regulations 2008 to implement UN Security Council Resolution 2199
Last day to disallow	10 May 2016
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* Nos 14 and 16 of 2015 and 1 of 2016

Unclear meaning of the term 'illegally removed'

The committee commented as follows:

These regulations give effect in Australia to obligations arising from United Nations Security Council resolution 2199 (2015), which imposes sanctions on Syria and Iraq. The resolution was adopted under Chapter VII of the Charter of the United Nations on 12 February 2015, and is therefore binding on Australia. Paragraph 17 of the resolution requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological,

historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990, and from Syria since 15 March 2011.

The regulations create offences which are triggered if a person does not comply with the written directions of the Secretary of the Department of Foreign Affairs and Trade regarding 'illegally removed cultural property'.

With reference to the above, the committee notes that the regulations define 'illegally removed cultural property' as an item of:

- Syrian/Iraqi cultural property; or
- archaeological, historical, cultural, rare scientific, or religious, importance;
- that has been illegally removed from Syria on or after 15 March 2011, or from Iraq on or after 6 August 1990.

However, neither the regulations nor the ESs expressly define what the concept of 'illegally removed' means. In particular, it is unclear whether this is to be understood with reference to Syrian/Iraqi, international or Australian law, and whether the concept applies as at the time of the alleged removal of the cultural property or as at a later point in time (for example, when the secretary is considering the making of a written direction).

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

Minister's first response

The Minister for Foreign Affairs advised:

> Australia is under an international legal obligation to implement United Nations Security Council Resolutions (UNSCR) as expeditiously as practicable. The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) and Australia is under an international obligation to implement the terms of the UNSCR into Australian law. The term 'illegally removed' refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, Iraqi, or international law. To clarify this issue, the Department of Foreign Affairs and Trade has prepared revised Explanatory Statements for both Regulations, which are attached for your information.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that 'illegally removed' refers to 'property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, Iraqi, or international law'.

However, the committee notes that, notwithstanding the minister's advice, the term 'illegally removed' (which is not further defined in UN Security Council Resolution 2199 (2015)) remains very broad and imprecise in its apparent application, covering a considerable period of time and different regimes, such as the Assad and Hussein regimes (which may have criminalised certain dealings with cultural property). Given this, the scope and operation of the term 'illegally removed cultural

property' remains unclear to the committee in terms of what types of dealings with cultural property may have been criminalised over the period in question and, as noted in the committee's initial comments, whether 'illegally removed property' is to be understood with reference to Syrian, Iraqi or international law at the time of the alleged removal of the cultural property or at a later point in time.

The committee also acknowledges the minister's efforts to include further information in the ES to assist with the interpretation of the offence provisions in the regulations. However, in addition to the preceding remarks, the committee notes that it would generally expect that the definition of a term relevant to the interpretation and application of an offence provision to be contained in the regulation itself rather than in the ES for the instrument.

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

Minister's second response

The Minister for Foreign Affairs advised:

> The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) (the Resolution) and Australia is under an international obligation to implement the terms of the Resolution into Australian law. The *Charter of the United Nations Act 1945* only provides authority to implement the terms of each UN Security Council Resolution in accordance with Australia's international legal commitments. To give additional definition to the term 'illegally removed' would go beyond the scope and meaning provided in the Resolution. The drafting of the Regulations was consistent with the drafting of the *Charter of the United Nations (Sanctions-Iraq) Regulation 2008* and is in accordance with the implementation of the Resolution by like-minded states.

Committee's second response

The committee thanks the minister for her response.

However, scrutiny principle (b) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers does not trespass unduly on personal rights and liberties.

In this regard, the committee's request of the minister effectively sought an explanation of the scope and operation of the term 'illegally removed cultural property' as it is unclear to the committee what types of dealings with cultural property may have been criminalised over the period in question and, as noted in the committee's initial comments, whether 'illegally removed property' is to be understood with reference to Syrian, Iraqi or international law at the time of the alleged removal of the cultural property or at a later point in time.

First, while the minister's response advises that the term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015), a review of Resolution 2199 (2015) does not assist the committee to understand its meaning. In this regard, the minister does not address the committee's concerns that the term 'illegally removed' remains very broad and imprecise in its apparent application, covering a considerable period of time and different regimes, such as the Assad and

Hussein regimes (which may have criminalised certain dealings with cultural property).

Second, the minister's response advises that 'to give additional definition to the term 'illegally removed' would go beyond the scope and meaning provided in the resolution'. However, the committee notes that the UN Security Council's 7379th meeting, in which resolution 2199 (2015) was adopted, states:

> …by imposing a new ban on the trade in smuggled Syrian antiquities, the resolution both cuts off a source of ISIL revenue and helps to protect an irreplaceable cultural heritage of the region and the world. To help stop that trade, the United States has sponsored the publication of so-called emergency red lists of Syrian and Iraqi antiquities at risk, which can help international law enforcement catch antiquities trafficked out of those countries.

The committee understands this to mean that further documents exist (that is, emergency red lists) that may assist in clarifying the items to which this regulation may apply. The committee therefore remains concerned that the definition of the term 'illegally removed' in these instruments is unclear. As previously noted, the committee would generally expect that the definition of a term relevant to the interpretation and application of an offence provision to be contained in the regulation itself rather than in the ES for the instrument.

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

Minister's third response

The Minister for Foreign Affairs advised:

> The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015). The inclusion of a provision on 'illegally removed cultural property' has been part of the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008* since its original drafting. 'Illegally removed' was not given further definition. The drafting of the term 'illegally removed' is consistent with the *Protection of Moveable Cultural Heritage Act 1986* (Cth) (PMCH Act) which provides a legislative means for the return of cultural property from foreign states. The PMCH Act does not provide a specific definition for illegally removed cultural property despite prohibiting the illegal importation of property that has been removed from a foreign country in contravention of its export laws. Section 14 of the PMCH Act prohibits 'unlawful imports' which are defined as exports from a foreign country that are 'prohibited by a law of that country relating to cultural property' that have been imported into Australia.
>
> The Explanatory Statements for the Syria and Iraq Regulations were amended in letters of 23 November 2015 to the Clerk of the House and Clerk of the Senate. These revised Explanatory Statements make clear that a decision on whether an item is 'illegally removed' is to be made with reference to the laws of the exporting country (Syria or Iraq). There was no intention that the definition of cultural property was to include reference to the International Council of Museums' red lists on Syrian and Iraqi cultural

> property. The laws of Syria and Iraq are to provide the definitive basis for determining if an item has been illegally removed.

Committee's third response

The committee thanks the minister for her response.

The committee notes that the information provided by the minister and in the amended ES provides some clarity to the definition of the term 'illegally removed cultural property', insofar as it indicates that the term is to be understood with reference to the laws of the exporting country (in this case, Syria or Iraq) and to international law more generally.

The committee also acknowledges that the term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015), which itself does not define the term; and that Australia is under an international obligation to implement the terms of that resolution into Australian law.

However, notwithstanding the information provided, the committee remains concerned that the term 'illegally removed' property is insufficiently precise, such that it may be difficult for a person to know what types of dealings with cultural property would constitute an offence under the regulations. For example, it remains unclear whether the offence relates to Syrian or Iraqi law at the time of the alleged removal of the cultural property or at a later point in time. This uncertainty in the application of offences is problematic in terms of the committee's task of ensuring that the exercise of the Parliament's delegated legislative powers does not trespass unduly on personal rights and liberties (scrutiny principle (b)).

In this regard, the committee notes that the Parliamentary Joint Committee on Human Rights (PJCHR) has also expressed concerns about the overly broad and therefore unpredictable nature of the term 'illegally removed' cultural property in these regulations. In its assessment of the regulations against the International Covenant on Civil and Political Rights (ICCPR), the PJCHR concluded as follows:

> …the committee maintains its concern that the offences of dealing with illegally removed cultural property engage and limit the prohibition on arbitrary detention because they are drafted in terms which are insufficiently precise and therefore risk being unpredictable or overly broad. In the absence of further information from the Minister as to why this limitation is proportionate, the committee is unable to conclude that the measures are compatible with international human rights law.[1]

In light of the concerns that the offences for dealing with 'illegally removed' cultural property are drafted in terms which are insufficiently precise and therefore risk offending scrutiny principle (b), which requires the committee to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties, the committee draws this matter to the attention of senators.

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1 Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (22 February 2016) pp 106–107.

However, noting that the information provided by the minister has provided some clarity to the application of the offence provisions, and that the regulations seek to implement Australia's obligations under United Nations Security Council Resolution 2199 (2015), the committee leaves the question of whether the regulations are appropriate to the Senate as a whole.

Accordingly, the committee notes its intention to seek to withdraw, in due course, the current 'protective' notice of motion for the disallowance of Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463] and Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464].

Instrument	**Defence (Security Authorised Members—Military Working Dog Handlers: Training and Qualification Requirements) Determination 2015 [F2015L01943]**
Purpose	Identifies the training and qualification requirements for Military Working Dog Handlers
Last day to disallow	11 May 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 5(2) of the determination, which provides for the training and qualification requirements for Military Working Dog Handlers, states: '[t]he person must satisfy the training and qualification requirements for a security authorised member of the Defence Force—identification and search warden, as set out in the *Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014*'. However, neither the text of the instrument nor the ES expressly state the manner in which the Defence (Security Authorised

Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Minister for Defence advised:

> As you have acknowledged in your letter, section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualifications Requirements) Determination 2014) are taken to be references to versions of those instruments as in force from time to time.
>
> Advice from the Office of Parliamentary Counsel, who drafted the Security Authorised Members Determinations, is that it is their standard drafting practice to not expressly state the manner of incorporation if the material being incorporated is a Commonwealth Act or a Commonwealth disallowable legislative instrument and the intention is the material be incorporated as in force from time to time.
>
> Consistently, I advise that the training and qualification requirements for Military Working Dog Handlers include prerequisites which are listed in the Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualifications Requirements) Determination 2014 as in force from time to time.
>
> To ensure a commitment to a best-practice approach, in future, where an instrument incorporates extrinsic material by reference, the manner of incorporation will be clearly specified in the Explanatory Statement to enable users to have greater understanding.

Committee's response

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

The committee also thanks the minister for her advice that, where future instruments incorporate extrinsic material by reference, the manner of incorporation will be specified to assist readers and users of the instrument.

Instrument	**Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733]** **Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732]** **Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745]**
Purpose	These instruments specify methods for determining the volume or mass of particular excisable substances
Last day to disallow	22 February 2016
Authorising legislation	*Excise Act 1901*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* Nos 15 of 2015 and 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the first instrument refers to the:

- Australian Standard/International Organization for Standardization AS ISO 13443-2007, *Natural gas – Standard reference conditions*; and
- International Organization for Standardization ISO 6976-1995 *Natural gas – Calculation of calorific values, density and Wobbe index from composition.*

The second instrument refers to the American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII* and *Practical Alcohol Tables.*

The third instrument refers to the:

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables for Light Hydrocarbon Liquids – Density Range 0.500 to 0.653 Kg/L at 15º C*; and
- American Petroleum Institute (API) *Manual of Petroleum Measurement Standards, Chapter 11.2.2M – Compressibility Factors for Hydrocarbons: 350-637 kg/m3 Density (15º C) and -46º C to 60º C metering temperature*.

However, while the ESs for the instruments include a hyperlink to these documents as at the time of their publication, neither the text of the instruments nor the ESs expressly state the manner in which the documents are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Assistant Treasurer's first response

The Assistant Treasurer advised:

> The legislative instruments provide the rules for how fuel is to be measured for the purposes of paying excise duty. These new instruments are identical in effect to the former instruments and have been developed merely to reflect minor technical amendments following the commencement of the *Excise Regulation 2015* and the *Excise Tariff Amendment (Ethanol and Biodiesel) Act 2015*.
>
> The material referenced in each of the determinations is incorporated through necessity as they contain numeric correction tables or standard procedures that are required to consistently determine the quantity of each product upon which excise is payable. The use of these referenced materials in the instruments is explained in more detail and exemplified in each explanatory statement. As noted in the Delegated legislation monitor, in the appendices of each explanatory statement hyperlinks are provided where each published standard reference may be purchased.
>
> Each determination specifies quantitative thresholds that must be reached prior to the prescribed requirement for the use of the above correction factors or standard procedures. As such, the users or persons affected by these instruments are limited to large bulk fuel suppliers that currently use the described processes for the internationally accepted standardisation of gaseous and liquid fuels as part of their normal business practice. These major fuel manufacturers and suppliers have a clear understanding of the stated requirements and were consulted during the original development of the instruments.

The Assistant Treasurer also provided a number of examples where the referenced materials are incorporated within the instruments.

Committee's first response

The committee thanks the Assistant Treasurer for her response.

However, the Assistant Treasurer's response has not addressed the concern raised by the committee—namely whether the documents referred to are incorporated as in force from time to time or as in force at a particular date.

In this regard, the committee reiterates its previous comments that neither the instrument nor the ES expressly states the manner of incorporation of the documents in question. The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice or to necessarily consult extrinsic material.

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

Assistant Treasurer's second response

The Assistant Treasurer advised:

> The Committee has sought further information on the renewal of these instruments. The Committee expressed the opinion that the previous response had not addressed the concerns raised by the committee regarding the manner in which certain material had been incorporated within the instruments. Specifically, the Committee sought clarity on whether the documents referred to are incorporated as in force from time to time or as in force at a particular date.
>
> The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instruments and register new determinations and corresponding explanatory statements to include information in order to address the concerns of the Committee. The new legislative instruments will contain directions on the manner of incorporation of the extrinsic material, namely that the current edition of the standard is to be used on the commencement of the respective determinations in addition to any later editions which may be further published from time to time.
>
> The new legislative instruments and explanatory statements will be forwarded to the tabling officers by 18 February 2016 as per the request from the Committee.

Committee's second response

The committee thanks the Assistant Treasurer for her response and has concluded its examination of the instruments.

The committee notes that the following three instruments, made on 17 February 2016, appear to give effect to the Assistant Treasurer's advice in relation to specifying the manner of incorporation of extrinsic material in revised instruments:

- Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2016 (No. 1) [F2016L00130];

- Excise (Mass of CNG) Determination 2016 (No. 1) [F2016L00131]; and
- Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2016 (No. 1) [F2016L00133].

Instrument	**Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138]**
Purpose	Amends the Family Law (Fees) Regulation 2012 to update fees in the Family Court of Australia and the Federal Circuit Court of Australia
Last day to disallow	Disallowed on 11 August 2015
Authorising legislation	*Family Law Act 1975*; *Federal Circuit Court of Australia Act 1999*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 10 of 2015

Whether the instrument is the same in substance as disallowed instrument

The committee commented as follows:

Schedule 2 of the Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780] (the first instrument), which was disallowed by the Senate on 25 June 2015, sought to increase family law fees from 1 July 2015, as follows:

- the full divorce fee in the Federal Circuit Court would have increased from $845 to $1195 ($350 increase);
- the fee for consent orders would have increased from $155 to $235 ($80 increase);
- the fee for issuing subpoenas would have increased from $55 to $120 ($65 increase);
- all other existing family law fee categories (except for the reduced divorce fee) would have increase by an average of 10 per cent; and
- a new fee of $120 would have been established for the filing of amended applications.

Subsequently, on 13 July 2015, the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138] (the second instrument) increased family law fees as follows:

- the full divorce fee in the Federal Circuit Court of Australia increased from $845 to $1200 ($355 increase) and in the Family Court of Australia from $1195 to $1200 ($5 increase);
- the fee for a consent order increased from $155 to $240 ($85 increase);
- the fee for issuing subpoenas increased from $55 to $125 ($70 increase);
- all other existing family law fee categories (except for the reduced divorce fee) increased by an average of 11 per cent; and
- a new fee of $125 was established for the filing of amended applications.

The ES states:

> Family law fee increases that were intended to commence on 1 July 2015 under Schedule 2 of the *Federal Courts Legislation Amendment (Fees) Regulation 2015* were disallowed by the Senate on 25 June 2015. The Government will reintroduce those family law fee increases under the Regulation with an additional $5 increase.

The second instrument was disallowed by the Senate on 11 August 2015.

Section 48 of the *Legislative Instruments Act 2003* places limitations on the remaking of instruments after disallowance, including that an instrument that is 'the same in substance' as a disallowed instrument may not be remade within six months after that disallowance (unless the House that disallowed the instrument approved the making of the second instrument).

The committee notes that an action was brought in the Federal Court to challenge the second instrument on the basis that it was the same in substance as the first (disallowed) instrument and had been re-made within six months of its disallowance, contrary to section 48 of the *Legislative Instruments Act 2003*. In a decision given on 13 August 2015, Dowsett J dismissed the application, finding that section 48 'should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure'.[2]

The committee notes that, in a number of material respects, the Federal Court's interpretation of the concept of 'the same in substance' may be regarded as in conflict with the decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347. In that decision, Chief Justice Latham stated that the question of whether an instrument is the same in substance as a disallowed instrument must be determined by applying such tests as the court may think proper, and by seeking 'to determine in each case whether such differences as exist between the disallowed regulation and the new regulation are differences in substance'.[3] Notably, Chief Justice Latham concluded

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2 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, paragraph 29. The committee understands that an appeal has been lodged with the Full Court of the Federal Court.

3 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 362.

that an equivalent provision to section 48 of the *Legislative Instruments Act 2003* prevented the re-enactment 'within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation *in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*' [emphasis added].[4] The Chief Justice went on to state that this approach 'prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation, would exclude the application of [the equivalent provision to section 48(b) of the *Legislative Instruments Act 2003*]'.[5]

The committee notes that the decision of the Federal Court in relation to the second instrument therefore raises issues central to the committee's function of ensuring that instruments of delegated legislation are made in accordance with statute.

The committee therefore seeks the Attorney-General's advice as to whether he regards the second instrument as being the same in substance as the first instrument for the purposes of section 48 of the *Legislative Instruments Act 2003*.

Further, the committee seeks the Attorney-General's advice as to whether legal advice was provided in relation to the making of the second instrument regarding the question of whether it is the same in substance as the first instrument for the purposes of section 48 of the *Legislative Instruments Act 2003*.

In the event that the Attorney-General confirms that legal advice was provided in relation to this question, the committee requests, in accordance with its usual practice, that the Attorney-General provide the committee with a copy of that advice.

Attorney-General's response

The Attorney-General advised:

> I acknowledge that the Committee is concerned about the framing of the *Family Law (Fees) Amendment (2015 Measures No. 1)* [sic] (the second instrument). The Committee has sought my advice about whether the second instrument is the same in substance as the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (the first instrument).
>
> The current binding judicial authority on this issue is the decision of the Federal Court of Australia in *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834. In that matter, the Federal Court held that the second instrument was not the 'same in substance' as the first instrument. As indicated by the Committee, in making this finding his Honour Justice Dowsett concluded that section 48 of the *Legislative Instruments Act 2003* should be construed as requiring that, for a legislative

4 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

5 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

instrument to be invalid it must be, in substance or legal effect, identical to the previously disallowed measure (at [29]).

In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison' (at [29]). In *Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations)* [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail – between essential characteristics and immaterial features'. In applying this principle, Justice Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure (at [22]).

I therefore refer the Committee to the judgment of the Federal Court. I also note that as the decision is the subject of an appeal before the courts, and I am the respondent in that appeal, it is not appropriate for me to provide further comment.

On the basis that binding Federal Court authority exists that specifically addresses the question of whether the second instrument was the same in substance as the first, and because the instrument is no longer in effect, it is unnecessary to answer the Committee's further questions about previous legal advice.

Committee's response

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

In concluding its examination of the instrument, the committee notes that the appeal to the Full Federal Court of the *Perrett* decision was discontinued on 5 February 2016.[6] However, the committee observes that tensions remain between the interpretation of the concept of 'the same in substance' by the Federal Court in that decision and the authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 362. The committee's examination of any 'same in substance' issues in the future will continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the committee's scrutiny principles.

6 *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 36 of 2015 [F2015L01971]** **Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2015 [F2015L01981]** **Financial Sector (Collection of Data) (reporting standard) determination No. 37 of 2015 [F2015L01984]** **Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2015 - SRS 720.0 - ABS Statement of Financial Position [F2015L01997]** **Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2015 - SRS 721.0 - ABS Securities Subject to Repurchase and Resale and Stock Lending and Borrowing [F2015L01998]** **Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2015 - SRS 722.0 - ABS Derivatives Schedule [F2015L01999]**
Purpose	These instruments determine updated reporting standards with which financial sector entities must comply to ensure that data collected for the purposes of the Australian Bureau of Statistics complies with revised international statistical standards
Last day to disallow	11 May 2016
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the interpretation provision in each of these instruments contains the following definition:

> ***defined benefit RSE*** means an RSE that is a defined benefit fund within the meaning given in *Prudential Standard SPS Defined Benefit Matters*.

However, neither the text of the instruments nor the ESs state the manner in which the document referred to is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as *Prudential Standard SPS Defined Benefit Matters*) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Assistant Treasurer's response

The Assistant Treasurer advised:

> The Committee has also sought advice on the manner in which *Prudential Standard SPS 160 Defined Benefit Matters* (SPS 160) is referred to in a number of reporting standards issued by APRA - the APRA Instruments - which were made for the purposes of the Australian Bureau of Statistics (ABS).
>
> I have raised the issue with APRA who administer these reporting standards on behalf of the ABS. SPS 160 was developed as a technical document for reference by superannuation trustees and actuaries and is an established part of APRA's prudential framework for superannuation trustees. The content of the reporting standards is directed at specialist staff within superannuation trustee operations and in external service providers who are responsible for the reporting of financial information to APRA. These specialists are expert in interpreting APRA's reporting standards to ensure the provision of accurate data.
>
> All cross references to other prudential and reporting standards refer to those prudential standards as in force from time to time, and APRA is confident this would be understood by the intended users of the standards. In many cases, the reporting standards cross references requirements in other relevant standards to assist the reader by adding context, and not for the purpose of incorporating those other documents by reference.
>
> For the reasons outlined above, APRA considers that including further description in the explanatory statement would be appropriate for these instruments. APRA will include further description in a revised explanatory statement and will also include further explanation, where appropriate, for future instruments.

Committee's response

The committee thanks the Assistant Treasurer for her response and has concluded its examination of the instrument.

The committee also thanks the Assistant Treasurer for her advice that APRA will issue revised explanatory statements for these instruments that include further description of the referenced APRA Prudential Standard; and that, for future instruments, descriptions of referenced APRA Prudential Standards will be included as appropriate.

Instrument	**Greenhouse and Energy Minimum Standards (Clothes Washing Machines) Determination 2015 [F2015L01816]** **Greenhouse and Energy Minimum Standards (Dishwashers) Determination 2015 [F2015L01825]** **Greenhouse and Energy Minimum Standards (Rotary Clothes Dryers) Determination 2015 [F2015L01828]**
Purpose	The determinations establish energy labelling and associated testing requirements for clothes washing machines, dishwashers and rotary clothes dryers
Last day to disallow	29 February 2016; 1 March 2016; 1 March 2016
Authorising legislation	*Greenhouse and Energy Minimum Standards Act 2012*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Access to extrinsic material

The committee commented as follows:

Section 3 of the determinations defines key terms used in the determinations.

Section 3 of the first determination defines the terms below as follows:

- ***AS/NZS 2040.1:2005*** means Australian/New Zealand Standard 2040.1:2005 Performance of household electrical appliances – Clothes washing machines – Part 1: Methods for measuring performance, energy and water consumption, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2040.1:2005 is available from Standards Australia Limited.

  Note 2: AS/NZS 2040.1:2005 includes all amendments up to and including AS/NZS 2040.1:2005/Amdt 3:2010 made on 1 April 2012.

- ***AS/NZS 2040.2:2005*** means Australian/New Zealand Standard 2040.2:2005 Performance of household electrical appliances – Clothes washing machines – Part 2: Energy efficiency labelling requirements, as it existed on the date this Determination came into force.

Note 1: AS/NZS 2040.2:2005 is available from Standards Australia Limited.

Note 2: AS/NZS 2040.2:2005 includes all amendments up to and including AS/NZS 2040.2:2005/Amdt 1:2012 made on 20 June 2012.

Section 3 of the second determination defines the terms below as follows:

- ***AS/NZS 2007.1:2005*** means Australian/New Zealand Standard 2007.1:2005 Performance of household electrical appliances – Dishwashers – Part 1: Methods for measuring performance, energy and water consumption, as it existed on the date this Determination came into force.

  Note: AS/NZS 2007.1:2005 is available from Standards Australia Limited.

- ***AS/NZS 2007.2:2005*** means Australian/New Zealand Standard 2007.2:2005 Performance of household electrical appliances – Dishwashers – Part 2: Energy efficiency labelling requirements, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2007.2:2005 is available from Standards Australia Limited.

  Note 2: AS/NZS 2007.2:2005 includes all amendments up to and including AS/NZS 2007.2:2005/Amdt 1:2012 made on 30 May 2012.

Section 3 of the third determination defines the terms below as follows:

- ***AS/NZS 2442.1:1996*** means Australian/New Zealand Standard 2442.1:1996 Performance of household electrical appliances – Rotary clothes dryers – Part 1: Energy consumption and performance, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2442.1:1996 is available from Standards Australia Limited.

  Note 2: AS/NZS 2442.1:1996 includes all amendments up to and including AS/NZS 2442.1:1996/Amdt 4:2006 made on 8 September 2006.

- ***AS/NZS 2442.2:2000*** means Australian/New Zealand Standard 2442.2:2000 Performance of household electrical appliances – Rotary clothes dryers – Part 2: Energy labelling requirements, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2442.2:2000 is available from Standards Australia Limited.

  Note 2: AS/NZS 2442.2:2000 includes all amendments up to and including AS/NZS 2442.2:2000/Amdt 2:2007 made on 30 April 2007.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that the above referenced Australian/New Zealand Standards are published by and available for sale from SAI Global Limited for a fee. However, neither the instrument nor the ES provide information about whether the standards are otherwise freely and readily available.

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

Minister's response

The Minister for Resources, Energy and Northern Australia advised:

> The *Greenhouse and Energy Minimum Standards Act 2012* (the GEMS Act) and associated governmental agreements enable the Commonwealth, states and territories, and New Zealand, to set out specific energy performance and labelling requirements with the aim of reducing energy use for regulated products. GEMS product determinations, including those three mentioned above, reference an industry standard that provide the technical detail for the requirements. In the case of the determinations mentioned above, these standards were developed via a Standards Australia committee, and reference the same standards in the previous determinations. The committee is made up of a diverse range of stakeholders, including industry representatives, consumer advocates and government representatives. The committee members provide their expertise freely, but the intellectual property developed resides with Standards Australia and SAI Global.
>
> While the referenced standards are available for a fee, it should be noted that the legislative instruments do not apply to the general public but rather manufacturers and importers of the regulated products. The stakeholders using these determinations are likely to already have access to the standards via participation in the committee process. However, there are no restrictions preventing interested parties from purchasing the standards, and in the case of new entrants the Australian Government does not consider the fees as unreasonable or an access barrier for industry. Industry stakeholders have broadly supported the Standards Australia process in developing new determinations under the GEMS Act. The Government also views it as a well-functioning practice to ensure effective regulation for the end benefit of Australian consumers.

Committee's response

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

The committee notes in particular the minister's advice that the determinations do not apply to the general public but rather to manufacturers and importers of the products which they regulate.

However, the committee reiterates its view that, notwithstanding cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access, a best-practice approach is for administering agencies and departments to have in place arrangements for users outside of the particular commercial or regulatory sector to access such material on a fee-free basis.

Instrument	**International Organisations (Privileges and Immunities—Asian Infrastructure Investment Bank) Regulation 2015 [F2015L01737]**
Purpose	Provides privileges and immunities to the Asian Infrastructure Investment Bank (the bank) to give effect to Australia's obligations as a prospective member of the bank and facilitating Australia's ratification of the bank's Articles of Agreement
Last day to disallow	21 June 2016
Authorising legislation	*International Organisations (Privileges and Immunities) Act 1963*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* Nos 15 of 2015 and 1 of 2016

Sub-delegation

The committee commented as follows:

Section 13 of the regulation provides that the minister may, by writing, delegate his or her powers under paragraphs 9(1)(b) and (5)(b) of the instrument to 'a person'. Section 9 of the regulation enables the minister to set requirements for the Asian Infrastructure Investment Bank to receive indirect tax concessions for the acquisition of motor vehicles, goods and services.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be

confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers under paragraphs 9(1)(b) and (5)(b) of the regulation to 'a person'.

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

Minister's first response

The Minister for Foreign Affairs advised:

> Section 13 of the regulation is similar to the delegation provisions set out in other regulations governing the presence of international bank organisations operating in Australia (section 11 of the *European Bank for Reconstruction and Development (Privileges and Immunities) Regulations 1992* and section 9A of the *Asian Development Bank (Privileges and Immunities) Regulations 1967).* Section 13 of the regulation was simplified in line with modern drafting practice, relying on section 34AB of the *Acts Interpretation Act 1901* (when read together with section 13 of the *Legislative Instruments Act 2003*).
>
> In October 2013, I signed an Instrument of Delegation revoking all previous delegations and delegating my powers and functions under the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to the SES employee, or acting SES employee, from time to time holding, occupying or performing the duties of the position of Chief of Protocol in the Department of Foreign Affairs and Trade (DFAT). When the regulation commences, this instrument of delegation will be updated to include it in the list of regulations made under the Act, thereby empowering the Chief of Protocol to exercise certain of my powers and functions under the regulation.
>
> The Chief of Protocol will thus be empowered to make decisions on a narrow range of matters involving the indirect tax concession scheme (ICTS). These matters apply only to the ability of the Asian Infrastructure Investment Bank to claim indirect tax benefits when operating in Australia. They have very limited financial implications and do not affect the broader Australian community.

Committee's first response

The committee thanks the minister for her response.

However, notwithstanding the minister's delegation powers and functions under the *International Organisations (Privileges and Immunities) Act 1963* to the SES employee, or acting SES employee, from time to time holding, occupying or performing the duties of the position of Chief of Protocol in the Department of Foreign Affairs and Trade, it remains unclear to the committee why it is necessary for there to be such a broad delegation of the minister's powers under paragraphs 9(1)(b) and 5(b) of the instrument to 'a person'. The committee notes that the minister's intention appears to be for the Chief of Protocol in the Department of Foreign Affairs

and Trade to exercise the powers delegated by the instrument. However, it remains unclear to the committee why this has not been provided for in the instrument itself.

The committee reiterates its expectations regarding sub-delegation that accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

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

Minister's second response

The Minister for Foreign Affairs advised:

> Section 13 of the Regulation provides for the delegation of ministerial powers in relation to a narrow set of determinations regarding the indirect tax concession scheme. This delegation provision is similar to that provided in other regulations governing the operation of international banks in Australia - see section 9A of the *Asian Development Bank (Privileges and Immunities) Regulations 1967* and section 11 of the *European Bank for Reconstruction and Development (Privileges and Immunities) Regulations 1992*. In practice, the delegation of this authority has been to the SES employee, or acting SES employee, holding, occupying or performing the duties of Chief of Protocol in the Department of Foreign Affairs and Trade (the Department) through an Instrument of Delegation. I signed the currently operative Instrument in 2013.
>
> I note the Committee's concern that this practice is not reflected in the current regulations. I therefore assure the Committee that I will take steps as soon as possible to amend the *International Organisations (Privileges and Immunities - Asian Infrastructure Investment Bank) Regulation 2015* to state the specific category of persons to whom I can delegate my powers under these regulations.
>
> This revised delegation will seek to reflect the generally accepted practice, of delegating to the Secretary of the Department or an SES employee or an acting SES employee, in the regulation. This proposed amendment would be similar to the delegation power provided for in other regulations created under the *International Organisations (Privileges and Immunities) Act 1963* (the Act) - (see section 22 of the *Secretariat to the Meeting of the Parties on the Conservation of Albatrosses and Petrels (Privileges and Immunities) Regulations 2008* and section 30 of the *International Tribunal for the Law of the Sea Regulations 2000*). It would also reflect existing practice for delegated authority for regulations created under the Act.

Committee's second response

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

The committee also notes the minister's undertaking to amend the regulation to state the specific category of persons to whom the minister may delegate her powers under the regulation.

Instrument	**Medicines Advisory Statements Specification 2016 [F2015L01916]**
Purpose	Specifies the advisory statements that are required to be set out on the label of medicines (mainly, those other than prescription medicines or certain medicines used mostly in hospitals)
Last day to disallow	11 May 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 4(2) of the specification defines the 'SUSMP' as the Standard for the Uniform Scheduling of Medicines and Poisons, as set out in Schedule 1 of the current *Poisons Standard*. However, neither the text of the instrument nor the ES expressly state the manner in which the Poisons Standard is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Poisons Standard) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Minister for Health advised:

> The committee sought clarification about the operation of the proposed Medicines Advisory Statements Specification 2016 (The Instrument), which incorporates a reference to extrinsic material that is a legislative instrument - the Standard for the Uniform Scheduling of Medicines and Poisons, set out in Schedule 1 of the "**current Poisons Standard**", as defined in s.52A(l) of the *Therapeutic Goods Act 1989*. The extrinsic material intended to be relied upon by The Instrument is the Standard for the Uniform Scheduling of Medicines and Poisons, as set out in Schedule 1 of the Poisons Standard of October 2015.
>
> The Committee's comment that where an instrument incorporates extrinsic material by reference, the manner of its incorporation should be clearly specified in that instrument is duly noted.

Committee's response

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

The committee understands the minister's advice to mean that the Poisons Standard is incorporated as at October 2015 and not as in force from time to time.

Instrument	**Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 [F2015L01836]**
Purpose	Declares Ceduna and the Surrounding Region as a trial area for the cashless welfare debit card trial
Last day to disallow	3 March 2016
Authorising legislation	*Social Security (Administration) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 4 of the instrument refers to the *Local Government Act 1999* (SA) (LGA). However, neither the text of the instrument nor the ES expressly state the manner in which the LGA is incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Minister's response

The Assistant Minister for Social Services advised:

> The *Local Government Act 1999* (SA) outlines how the area and boundaries of a council are defined. The instrument incorporates the area of the District Council of Ceduna in accordance with that Act. It was always intended that the trial area be fixed from the date the instrument was made, making the trial area certain. This is demonstrated by the map contained in the Explanatory Statement which shows a fixed area of Ceduna and the Surrounding Region. It is not anticipated that the area and boundaries of the District Council of Ceduna will change during the six month period that the instrument is in operation.
>
> However, I accept the Committee's expectations that the manner of incorporation of extrinsic material is clearly specified in the instrument and the Explanatory Statement. I consider that including a further description regarding the manner of incorporation of the *Local Government Act 1999* (SA) in the Explanatory Statement would be appropriate for this instrument. I will revise the Explanatory Statement and will endeavour to ensure that future instruments and Explanatory Statements are consistent with the Committee's expectations.

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

The committee also thanks the assistant minister for his advice that a revised explanatory statement will be issued for this instrument which will include a further description regarding the manner of incorporation of the *Local Government Act 1999* (SA).

Instrument	**Therapeutic Goods Amendment (Listed Medicines) Regulation 2015 [F2015L01909]**
Purpose	Specifies the ingredients that can be used in medicines listed on the Australian Register of Therapeutic Goods under section 26A of the *Therapeutic Goods Act 1989* and requirements in relation to those ingredients being contained in such medicines
Last day to disallow	10 May 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Unclear basis for determining fees

The committee commented as follows:

The regulation amends the Therapeutic Goods Regulations 1990 to specify the ingredients that can be used in medicines listed on the Australian Register of Therapeutic Goods and requirements in relation to those ingredients being contained in such medicines. Item 14 of the regulation prescribes evaluation fees for an application or variation under subsection 26BD(1) of the *Therapeutic Goods Act 1989* in relation to an ingredient of excipient. The application fees range from $9870 to $69 000.

The ES to the instrument states:

> The level of these fees reflects the current level of fees charged in the evaluation of ingredients or new excipients under regulation 16GA of the Principal Regulations.

The committee's usual expectation in cases where an instrument of delegated legislation 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 ES makes clear the specific basis on which an individual imposition or change has been calculated. Regulation 16GA of the Therapeutic Goods Regulations 1990 provides for the imposition of an evaluation fee, however, it does not provide the basis on which that fee is to be calculated.

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

Minister's response

The Minister for Rural Health advised:

> The Therapeutic Goods Administration operates on the basis of industry cost recovery using fees and charges established through the *Therapeutic*

Goods (Charges) Act and supporting regulations. The fee for any particular activity is set in relation to the amount of effort required to complete the activity. Fees and charges are reviewed annually in consultation with the regulated sector. Any increase requires ministerial approval and must be compliant with the requirements of the Office of the Best Practice Regulation.

The amounts of the fees specified in item 14 of the Regulation are based on the type and the level of documentation accompanying the application. For example, applications that only require evaluation of quality data are based on a flat fee. Whereas, fees for applications that require evaluation of toxicological and/or clinical information are based on the amount of supporting data accompanying the application. For example, if such documentation is not over 50 pages, is over 50 pages but not over 250 pages, or is over 3000 pages.

The amounts of the fees are designed to reflect the amount of work required to complete the evaluation. For example, the fees for evaluation of applications supported by 50 pages of toxicological or clinical data are much lower than applications supported by over 3000 pages of such data.

The Committee's comment that the Explanatory Statement should make clear the specific basis on which an imposition or charge has been calculated, is duly noted.

Committee's response

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

Appendix 1
Correspondence

ATTORNEY-GENERAL

CANBERRA

MC16-002668

23 FEB 2016

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
PARLIAMENT HOUSE ACT 2600

Dear Mr Powell

I refer to your letter of 4 February 2016 in which you have brought to my attention a matter in the Delegated legislation monitor no 1 of 2016 which is relevant to my portfolio responsibilities. More specifically, you seek my advice on absent documentation purported to be attached to the Explanatory Statement to the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015* (the Regulation).

I have asked my department to prepare the relevant attachment for inclusion in the Explanatory Statement for the Regulation and register the complete documentation on the Federal Register of Legislative Instruments. The revised Explanatory Statement is attached to this correspondence for your information.

The other matter you raise in your letter regarding the *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015*, has been referred to the Minister for Justice, the Hon Michael Keenan MP, for his consideration and reply.

A copy of this response has also been emailed to the committee secretariat.

Thank you for bringing the matter to my attention.

Encl: *Foreign Judgments Amendment (Miscellaneous) Regulation 2015* Explanatory Statement

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

EXPLANATORY STATEMENT

Select Legislative Instrument No. 207, 2015

Issued by the authority of the Attorney-General

Foreign Judgments Act 1991

Foreign Judgments Amendment (Miscellaneous) Regulation 2015

The *Foreign Judgments Act 1991* (the Act) provides a streamlined procedure for the recognition and enforcement of certain judgments of courts prescribed in the *Foreign Judgments Regulations 1992* (the Regulations) based upon reciprocity of enforcement. Under the Act, a foreign judgment may be registered and then enforced as if it was a judgment of a local court. However, the Act only applies to judgments rendered by superior and specified inferior courts in countries nominated in the Regulations.

The Act provides that the legislation will be applied with respect to judgments of courts of a particular country, by regulations, where the Governor General is satisfied that substantial reciprocity of treatment will be given to the enforcement in that country of corresponding Australian judgments.

Section 16 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulation removes the reference to New Zealand from the Regulations since recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. In addition, the Regulation corrects the names of the United Kingdom courts listed in the Schedule as the names of the courts have changed.

Details of the Regulation are set out in the Attachment.

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

The Regulation commenced on the day after the instrument was registered.

Authority: Section 16 of the
Foreign Judgments Act 1991

ATTACHMENT

Details of the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015*.

Section 2 – Commencement

This section provides for the Regulation to commence on the day after this instrument is registered.

Section 3 – Authority

This section provides that the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015* is made under the *Foreign Judgments Act 1991*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Foreign Judgments Regulations 1992

Item [1] – Subregulation 5(1)

Subregulation 5(1) is repealed.

Item [2] – Schedule (table item 1)

Schedule (table item 1) is repealed.

Item [3] – Schedule (cell at table item 27, column headed "Courts")

Cell at table item 27, column headed "Courts" in the Schedule is repealed and substituted with:

Supreme Court of the United Kingdom

Senior Courts of England and Wales

Court of Judicature of Northern Ireland

Court of Session

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letters of 4 February 2016 requesting responses to the issues identified in your Committee's *Delegated legislation monitor*, No. 1 of 2016, concerning the following instruments made by the Australian Securities and Investments Commission (ASIC):

- *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* [F2015L01831] (ASIC Legislative Instrument 2015/1049); and
- *ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030* [F2015L01771] (ASIC Legislative Instrument 2015/1030),

as well as the following instruments made by the Australian Prudential Regulation Authority (APRA), hereafter referred to collectively as the APRA Instruments:

- *Financial Sector (Collection of Data) (reporting standard) determination No.36 of 2015* [F2015L01971];
- *Financial Sector (Collection of Data) (reporting standard) determination No.39 of 2015* [F2015L01981];
- *Financial Sector (Collection of Data) (reporting standard) determination No.37 of 2015* [F2015L01984];
- *Financial Sector (Collection of Data) (reporting standard) determination No.42 of 2015 - SRS 720.0 - ABS Statement of Financial Position* [F2015L01997];
- *Financial Sector (Collection of Data) (reporting standard) determination No.43 of 2015 - SRS 721.0 – ABS Securities Subject to Repurchase and Resale and Stock Lending and Borrowing* [F2015L01998]; and

Parliament House, Canberra ACT 2600, Australia
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- *Financial Sector (Collection of Data) (reporting standard) determination No.44 of 2015 - SRS 722.0 – ABS Derivatives Schedule* [F2015L01999].

The Committee has requested further information in relation to ASIC Legislative Instrument 2015/1030, following my previous response to the Committee's request for advice on the manner in which the operating rules of ASX are incorporated into the instrument. Additionally, the Committee has also sought advice on the manner in which the *Transfer of Land Act 1958* of Victoria is incorporated in ASIC Legislative Instrument 2015/1049.

I have raised these issues with ASIC. ASIC notes the Committee's expectation in relation to the manner of incorporation of extrinsic material, particularly having regard to the needs of users or persons affected by any such instrument. Going forward, ASIC will change its drafting approach to make it apparent both on the face of the instrument and in the accompanying Explanatory Statement when a reference to extrinsic material is fixed in time, or ambulatory (i.e. they are references to extrinsic material as in force from time to time).

ASIC has reiterated its view that mere references to extrinsic material do not engage section 14 of the *Legislative Instruments Act 2003* (LIA). ASIC's view is that legislative instruments that merely point to concepts that are defined in other materials do not affect the operation of the instrument.

In regards to Legislative Instrument 2015/1030, ASIC has further explained that definition of "AQUA Quote Display Board" is relevant for the purposes of identifying a certain class of warrants and interests in unregistered managed investment schemes to which the ASIC instrument relates. ASIC considers that the instrument is referring to what are those classes of financial products from time to time. Whether a class of financial product falls within those classes at any particular time turns on whether, as a matter of fact, the class of product was admitted to the AQUA Quote Display Board at that time.

While the definition refers to the ASX operating rules, ASIC is of the view that the provisions are not applying, adopting or incorporating those rules for the purposes of section 14 of the LIA either on a fixed or ambulatory basis because nothing turns on the content of those operating rules at any time. Therefore, although the scope of the application of the instrument will technically change depending on the classes of product admitted to the AQUA Quote Display Board, how the instrument operates will not change. As such, ASIC considers these kinds of references to be mere references.

ASIC considers that this approach is consistent with the approach adopted in subsection 32(14) of the *Legislation Act 1984* (Victoria) which states "A document or matter is not applied, adopted or incorporated in a subordinate instrument by reason only that it is referred to in the subordinate instrument, or in another document or other matter applied, adopted or incorporated in the subordinate instrument, if the document or matter so referred to does not affect the operation of the subordinate instrument."

The Committee has also sought advice on the manner in which *Prudential Standard SPS 160 Defined Benefit Matters* (SPS 160) is referred to in a number of reporting standards issued by APRA – the APRA Instruments – which were made for the purposes of the Australian Bureau of Statistics (ABS).

I have raised the issue with APRA who administer these reporting standards on behalf of the ABS. SPS 160 was developed as a technical document for reference by superannuation trustees and actuaries and is an established part of APRA's prudential framework for superannuation trustees. The content of the reporting standards is directed at specialist staff within superannuation trustee operations and in external service providers who are responsible for the reporting of financial information to APRA. These specialists are expert in interpreting APRA's reporting standards to ensure the provision of accurate data.

All cross references to other prudential and reporting standards refer to those prudential standards as in force from time to time, and APRA is confident this would be understood by the intended users of the standards. In many cases, the reporting standards cross references requirements in other relevant standards to assist the reader by adding context, and not for the purpose of incorporating those other documents by reference.

For the reasons outlined above, APRA considers that including further description in the explanatory statement would be appropriate for these instruments. APRA will include further description in a revised explanatory statement and will also include further explanation, where appropriate, for future instruments.

I hope this information addresses the Committee's concerns.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS16-000241

18 FEB 2016

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

Dear Senator John

Thank you for your letter of 4 February 2016 to the Attorney-General's Office, regarding the *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015* (the Amending Regulation). Your letter was referred to me for reply as the Amending Regulation falls within my portfolio responsibilities.

I welcome the opportunity to provide the Senate Standing Committee on Regulations and Ordinances with further information regarding access to extrinsic material and the retrospective effect of the Amending Regulation.

Access to Extrinsic Material
As noted by the Committee, item 32 of Schedule 1 repeals and replaces regulation 13V of the *Australian Federal Police Regulations* (AFP Regulations).

Regulation 13V sets out the standard with which the Australian Federal Police (AFP) must comply when collecting and analysing urine samples for the purposes of prohibited drug testing. The Amending Regulation updates the standard to the *Australian/New Zealand Standard AS/NZS 4308 – 2008*, 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine' (Standard) from the 2001 version of the standard.

The Committee has requested advice on whether the Standard is freely and readily available so that the people who are subject to the law are able to comply with it. The Committee notes that the Standard is available for a fee of $220.63.

I confirm that the Standard is available without charge to AFP members who are subject to prohibited drug testing under the AFP Regulations. The AFP's Professional Standards Drug Program Project Office, which has carriage of the AFP prohibited drug testing program, offers a copy of the Standard to AFP members before they take such tests. As the drug testing regime in Division 2.4B of the AFP Regulations applies only to AFP members, not to the public at large, it is not necessary to include more detail about the standard in the Amending Regulations or explanatory material.

The AFP also provides advice to members at the time of the drug test about the testing process, both verbally and in the AFP Drug Testing Advice Form.

In addition to this, the AFP National Guideline on prohibited drugs, pharmaceutical products and alcohol provides information about the relevant standards used by the testing program. A copy of the National Guideline can be found at http://www.afp.gov.au/about-the-afp/information-publication-scheme.

Retrospective Effect

The Committee has also requested advice on whether the allowances removed by subregulation 5(3) would have been available to suspended employees before the Regulation commenced, or whether they were solely related to employees' working hours and arrangements.

New subregulation 37(2) provides that the regulation removing the entitlement of suspended employees to penalties, composites, overtime or other allowances (subregulation 5(3)) is to have retrospective effect. This means that employees who were suspended prior to the commencement of the Regulation became subject to provisions that did not apply to them at the time they were suspended.

Penalty rates, composites and overtime allowances are paid to employees for working patterns, arrangements and conditions. Further, I confirm that all other allowances relate to the performance of employees' duties. These allowances include:

- on call allowance
- close-call allowance
- night-shift allowance
- higher duties allowances
- air security officer allowance
- deployment assistance allowance, and
- remote localities allowance.

I understand from the AFP that no member who was suspended at the time the amendments commenced had previously been entitled to receive any of these allowances.

In these circumstances, it is appropriate for the changes to remove the payment of allowances for suspended employees to have a retrospective effect.

Thank you for the opportunity to clarify these matters.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC16-003066

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

Dear Senator

Thank you for your correspondence of 4 February 2016 in which you seek my advice in relation to the Australian Immunisation Register Rule 2015 [F2015L01946] and the Medicines Advisory Statements Specification 2016 [F2015L01916]. The committee published comments in relation to these instruments in the *Delegated legislation monitor* No.1 of 2016, which are addressed below.

Medicines Advisory Statements Specification 2016 [F2015L01916]

The committee sought clarification about the operation of the proposed Medicines Advisory Statements Specification 2016 (The Instrument), which incorporates a reference to extrinsic material that is a legislative instrument – the Standard for the Uniform Scheduling of Medicines and Poisons, set out in Schedule 1 of the "**current Poisons Standard**", as defined in s.52A(1) of the *Therapeutic Goods Act 1989*. The extrinsic material intended to be relied upon by The Instrument is the Standard for the Uniform Scheduling of Medicines and Poisons, as set out in Schedule 1 of the Poisons Standard of October 2015.

The Committee's comment that where an instrument incorporates extrinsic material by reference, the manner of its incorporation should be clearly specified in that instrument is duly noted.

Australian Immunisation Register Rule 2015 [F2015L01946]

The committee noted that the *Australian Immunisation Register Rule 2015* (the Rule) was made on the 25 November 2015 in reliance on section 31 of the *Australian Immunisation Register Act 2015*, which did not commence until 1 January 2016. The committee noted that this is authorised by subsection 4(2) under the *Acts Interpretation Act 1901*, which allows in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions.

The Rule was made after the *Australian Immunisation Register Act 2015* (the Act) obtained royal assent (12 November 2015) and the powers of the Rule did not come into effect until the Act commenced on 1 January 2016. In the interest of promoting clarity I have amended the explanatory statement (Attachment A) to identify the relevance of subsection 4(2) of the *Acts Interpretation Act 1901* to the operation of the Rule.

The committee also raised concerns about the level of detail contained within the explanatory statement pertaining to consultation undertaken during the drafting of the Rule.

The Act was created to simplify the existing legislative arrangements and fully encompass all requirements for immunisation registers in Australia. The legislation governs the individuals/entities who have access to information stored in the register and who can input information to the Australian Immunisation Register. Extensive consultation was undertaken during the drafting of the new legislation, which includes the Act, the *Australian Immunisation Register (Consequential and Transitional Provisions) Act 2015*, the Rule and the *Health Insurance Regulation Amendment 2015,* which repealed the provisions that defined prescribed bodies from the *Health Insurance Regulation 1975*.

The bodies that are permitted to access protected information from the Australian Immunisation Register (prescribed bodies) were previously defined in the *Health Insurance Regulations 1975*. With the establishment of the Act, the prescribed bodies in the *Health Insurance Regulations 1975* were re-established as prescribed bodies under the Rule. As such, the Rule is considered to be an instrument that is minor and machinery in nature. The list of prescribed bodies in the Rule includes state and territory health departments, Primary Health Networks, bodies facilitating research relating to vaccines, and officers, employees or contractors of prescribed bodies.

The nature of the consultation involved in the preparation of the Rule ensured that the prescribed bodies remain relevant and appropriate for the purposes of the Act. For example, following the cessation of Medicare Locals (previously listed as a prescribed body under the former *Health Insurance Regulation 1975*) and the establishment of Primary Health Networks (PHN) it was identified that the Rule would need to reflect this change. Childhood immunisation rates are a national headline indicator for PHNs, and as such, it is important to ensure PHNs have ready access to immunisation data to enable them to monitor their progress against this indicator and to actively promote increased immunisation coverage across Australia. Consultation confirmed that it was appropriate for PHNs to be listed as a prescribed body which will allow PHNs to perform their role.

For clarity and compliance with the guidelines for interpreting the *Legislative Instruments Act 2003*, I have amended the explanatory statement for the Rule (Attachment A) to include a more detailed description of the purpose and outcome of the consultation.

I trust that this additional information will be sufficient to address the Committee's concerns.

16 FEB 2016

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Australian Immunisation Register Act 2015

Australian Immunisation Register Rule 2015

Outline

Section 31 of the *Australian Immunisation Register Act 2015* (the Act) provides that the Minister may make rules prescribing matters required or permitted by the AIR Act to be prescribed by the rules or necessary or convenient to be prescribed for carrying out or giving effect to the AIR Act.

Section 4 of the AIR Act defines a 'prescribed body' as 'a person prescribed by the rules for the purposes of this definition'.

The *Australian Immunisation Rule 2015* (the Rule) prescribes the prescribed bodies for the purposes of that definition.

Details of the Rule are set out in the Attachment.

The Rule is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Rule commences on 1 January 2016

The Rule is made in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*, which provides that a power under an enactment may be exercised before the commencement of the provision in the enactment conferring the power.

Consultation

Over the past decade a wide range of immunisation stakeholders have advocated the benefits of a whole-of-life immunisation register for Australia.

The Department of Health has consulted with peak bodies, health experts and state and territory health departments represented on the National Immunisation Committee and the Australian Technical Advisory Group on Immunisation, to seek their views on the essential components of a fully effective whole-of-life register and adolescent school-based register. Vaccination providers affected by this change are represented through these peak bodies.

Ongoing engagement will be a key part of the implementation phase, as the expanded registers will play a key role in contributing to improved vaccination rates in Australia to ensure better health outcomes for all Australians throughout their life.

The bodies that are permitted to access protected information from the Australian Immunisation Register (prescribed bodies) were previously defined in the *Health Insurance Regulations 1975*. With the establishment of the new Act, the existing provisions in the *Health Insurance Regulations 1975* were re-established under the Rule.

The Department of Human Services, the Department of Social Services, the Attorney-General's Department (including the Office of the Australian Information Commissioner) were all consulted during the drafting of the Rule.

The nature of the consultation involved ensuring that the prescribed bodies remain relevant and appropriate for the purposes of the Act. For example, following the cessation of Medicare Locals (previously listed as a prescribed body under the former *Health Insurance Regulation 1975*) and the establishment of Primary Health Networks (PHN) it was identified that the Rule would need to reflect this change. Childhood immunisation rates are a national headline indicator for PHNs, and as such, it is important to ensure PHNs have ready access to immunisation data to enable them to monitor their progress against this indicator and to actively promote increased immunisation coverage across Australia. Consultation confirmed that it was appropriate for PHNs to be listed in the Rule as a prescribed body, which will allow PHNs to perform their role.

During face to face discussions with representatives from the Department of Human Services, the Department of Social Services and the Attorney-General's Department, it was agreed that all bodies listed in the Rule should be authorised to access immunisation information contained within Australian Immunisation Register to allow them to perform their roles.

ATTACHMENT

DETAILS OF THE AUSTRALIAN IMMUNISATION REGISTER RULE 2015

Part 1 – Preliminary

Rule 1 – Name

This rule provides that the Rule is the *Australian Immunisation Register Rule 2015.*

Rule 2 – Commencement

This rule states that the provisions within this instrument commence on 1 January 2016 at the same time as the *Australian Immunisation Register Act 2015.*

Rule 3 – Authority

This rule states that the rule is made under the *Australian Immunisation Register Act 2015.*

Rule 4 – Definitions

This rule provides a definition for "Act" which means the *Australian Immunisation Register Act 2015.*

Part 2 – Prescribed Bodies

Prescribed bodies in relation to the *Australian Immunisation Register Act 2015* are referenced within Part 2 of the Rule. The prescribed bodies include state and territory Health Departments and Primary Health Networks. The Act provides for prescribed bodies to access protected information for certain purposes as described in subsection 22(2) of the *Australian Immunisation Registers Act 2015.*

Other bodies prescribed in rule 6 of the Rule are bodies which facilitate research relating to vaccines and are:

- the Australian Institute of Health and Welfare,
- the Australian Bureau of Statistics,
- the Australian Institute of Family Studies; and
- the Sydney Children's Hospital Network (Randwick and Westmead), which may otherwise be known or referred to as the National Centre for Immunisation Research and Surveillance.

Rule 8 also prescribes employees, officers or contractors of the prescribed bodies as being prescribed bodies.

Statement of Compatibility with Human Rights

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

AUSTRALIAN IMMUNISATION REGISTER RULE 2015

This Rule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

Section 31 of the *Australian Immunisation Register Act 2015* (AIR Act) provides that the Minister may make rules prescribing matters required or permitted by the AIR Act to be prescribed by the rules or necessary or convenient to be prescribed for carrying out or giving effect to the AIR Act.

Section 4 of the AIR Act defines a 'prescribed body' as 'a person prescribed by the rules for the purposes of this definition'.

The Rule prescribes the prescribed bodies for the purposes of that definition.

Human rights implications

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

Conclusion

The Rule is compatible with human rights.

The Hon Sussan Ley MP, the Minister for Health

ATTORNEY-GENERAL

CANBERRA

MC15-009957

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
PARLIAMENT HOUSE ACT 2600

11 FEB 2016

Dear Senator Williams

I refer to the letter of 4 December 2015 from Mr Ivan Powell, requesting, as identified in the Delegated legislation monitor No. 16 of 2015, that a statement of compatibility be prepared in relation to the *Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015* [F2015L01800].

I have asked my department to prepare a statement of compatibility to be included in the Explanatory Statement for the Regulation and have asked that the updated Explanatory Statement be registered on the Federal Register of Legislative Instruments.

A copy of this response has also been emailed to the committee secretariat.

Thank you again for writing on this matter.

Encl. *Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015* - Explanatory Statement

EXPLANATORY STATEMENT

Select Legislative Instrument 2015 No.

Issued by the authority of the Attorney-General

Bankruptcy Act 1966

Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015

The *Bankruptcy Act 1966* (the Act) governs the law of personal insolvency in Australia by providing for three regulated forms of debt management - bankruptcy, debt agreements and personal insolvency agreements. The Act also provides a framework for registering and regulating trustees and administrators.

Section 315(2)(b) of the Act provides that the Governor-General may make regulations which specify matters that must be, or may be, entered in the Index.

Part IX of the Act specifies that certain debt agreement information must be listed on the National Personal Insolvency Index (NPII).

Items 21 to 23D of Schedule 8 of the *Bankruptcy Regulations 1996* set out the information regarding debt agreements which must be included on the NPII.

The Regulation aligns, as much as possible, the period of time that information regarding debt agreements and debt agreement proposals is retained on the NPII with the period of time that the same information is recorded on credit reports under the *Privacy Act 1988* (the Privacy Act). The relevant provisions of the Privacy Act commenced on 12 March 2014. Currently, information about debt agreements and debt agreement proposals is recorded permanently on the NPII while the Privacy Act provides for information about debt agreements and debt agreement proposals to be stored for a finite period of time on credit reports.

The Regulation allows for debtors who proactively seek to reach agreement with their creditors regarding repayment of their debts via a debt agreement not to be discouraged from doing so (where appropriate) - noting that the average return to creditors in a debt agreement is higher than that obtained in bankruptcy. Unlike bankruptcy, information on debts agreements would only be stored on the NPII for a finite period of time. A debtor may be more inclined to enter a debt agreement rather than becoming bankrupt, as there would be no permanent record of the arrangement (as opposed to bankruptcy, which is recorded on the NPII indefinitely).

Consultation was conducted in late 2012 as part of the *Review of Debt Agreements under the Bankruptcy Act: Proposals Paper*. Ten submissions were received and the proposals were generally supported by key stakeholders in the industry with minimal opposition.

Details of the Regulation are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

The Regulation commenced on 19 November 2015.

Authority: Section 315(2)(b) of the *Bankruptcy Act 1966*

Statement of Compatibility with Human Rights

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

Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The Regulation aligns, as much as possible, the period of time that information regarding debt agreements and debt agreement proposals is retained on the National Personal Insolvency Index (NPII) with the period of time that the same information is recorded on credit reports under the *Privacy Act 1988* (the Privacy Act). The relevant provisions of the Privacy Act commenced on 12 March 2014. Currently, information about debt agreements and debt agreement proposals is recorded permanently on the NPII while the Privacy Act provides for information about debt agreements and debt agreement proposals to be stored for a finite period of time on credit reports.

The Regulation allows for debtors who proactively seek to reach agreement with their creditors regarding repayment of their debts via a debt agreement not to be discouraged from doing so (where appropriate) - noting that the average return to creditors in a debt agreement is higher than that obtained in bankruptcy. Unlike bankruptcy, information on debt agreements would only be stored on the NPII for a finite period of time. A debtor may be more inclined to enter a debt agreement rather than becoming bankrupt, as there would be no permanent record of the arrangement (as opposed to bankruptcy, which is recorded on the NPII indefinitely).

Human rights implications

This impact of this Disallowable Legislative Instrument on the following human right has been considered:

- the right to privacy and reputation

<u>The right to privacy and reputation</u>

- Article 17 of the *International Covenant on Civil and Political Rights* provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy may be engaged if the Disallowable Legislative Instrument involves the collection, security, use, disclosure or publication of personal information.

- The Disallowable Legislative Instrument contains provisions to require applicants to provide information about their debt agreement or debt agreement proposal to the

Official Receiver and such information will be available publicly on the NPII. Under current arrangements, this information would remain on the NPII permanently.

- The Disallowable Legislative Instrument promotes human rights by enhancing the privacy and reputation of applicants by providing that information about debt agreements and debt agreement proposals to be stored for a finite period of time on the NPII.

- Information relating to a debt agreement must be removed within 1 month of a certain day and information relating to a debt agreement proposal must be removed within 1 year of a certain day.

- The retention period will depend on the terms of the debt agreement and the circumstances in which it is complied with. Generally, information is likely to be retained for no more than five years and in most cases will be retained for less than that.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

ATTACHMENT

Details of the *Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015*.

Section 2 – Commencement

This section provides for the Regulation to commence on 19 November 2015.

Section 3 – Authority

This section provides that the *Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015* is made under the *Bankruptcy Act 1966*.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item [1] – After Division 2A of Part 13

Division 2A states when information must be removed from the NPII.

Provision 13.05A states information relating to a debt agreement must be removed within 1 month of a certain day.

Provision 13.05B states information relating to a debt agreement proposal must be removed within 1 year of a certain day.

Item [2] - At the end of Division 3 of Part 16

Provision 16.14 states information relating to debt agreements or debt agreement proposals, whose retention periods have already expired, must be removed from the NPII as soon as practicable after the day of commencement.

Item [3] – Schedule 8 (table item 22B)

This item substitutes Schedule 8 (table item 22B), incorporating an amendment stating that the item applies only in respect of pre-1 July 2007 debt agreements.

Item [4] – Schedule 8 (table item 22D)

This item substitutes Schedule 8 (table item 22D), incorporating an amendment stating that the item applies only in respect of pre-1 July 2007 debt agreements.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

I write in response to the 4 February 2016 letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) which seeks my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions-Syria) Regulations 2015*, the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015* and the *International Organisations (Privileges and Immunities – Asian Infrastructure Investment Bank) Regulation 2015.*

Charter of the United Nations (Sanctions-Syria) Regulations 2015* and the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015

The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015). The inclusion of a provision on 'illegally removed cultural property' has been part of the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008* since its original drafting. 'Illegally removed' was not given further definition. The drafting of the term 'illegally removed' is consistent with the *Protection of Moveable Cultural Heritage Act 1986 (Cth)* (PMCH Act) which provides a legislative means for the return of cultural property from foreign states. The PMCH Act does not provide a specific definition for illegally removed cultural property despite prohibiting the illegal importation of property that has been removed from a foreign country in contravention of its export laws. Section 14 of the PMCH Act prohibits 'unlawful imports' which are defined as exports from a foreign country that are 'prohibited by a law of that country relating to cultural property' that have been imported into Australia.

The Explanatory Statements for the Syria and Iraq Regulations were amended in letters of 23 November 2015 to the Clerk of the House and Clerk of the Senate. These revised Explanatory Statements make clear that a decision on whether an item is 'illegally removed' is to be made with reference to the laws of the exporting country (Syria or Iraq). There was no intention that the definition of

cultural property was to include reference to the International Council of Museums' red lists on Syrian and Iraqi cultural property. The laws of Syria and Iraq are to provide the definitive basis for determining if an item has been illegally removed.

International Organisations (Privileges and Immunities – Asian Infrastructure Investment Bank) Regulation 2015

Section 13 of the Regulation provides for the delegation of ministerial powers in relation to a narrow set of determinations regarding the indirect tax concession scheme. This delegation provision is similar to that provided in other regulations governing the operation of international banks in Australia – see section 9A of the *Asian Development Bank (Privileges and Immunities) Regulations 1967* and section 11 of the *European Bank for Reconstruction and Development (Privileges and Immunities) Regulations 1992*. In practice, the delegation of this authority has been to the SES employee, or acting SES employee, holding, occupying or performing the duties of Chief of Protocol in the Department of Foreign Affairs and Trade (the Department) through an Instrument of Delegation. I signed the currently operative Instrument in 2013.

I note the Committee's concern that this practice is not reflected in the current regulations. I therefore assure the Committee that I will take steps as soon as possible to amend the *International Organisations (Privileges and Immunities – Asian Infrastructure Investment Bank) Regulation 2015* to state the specific category of persons to whom I can delegate my powers under these regulations.

This revised delegation will seek to reflect the generally accepted practice, of delegating to the Secretary of the Department or an SES employee or an acting SES employee, in the regulation. This proposed amendment would be similar to the delegation power provided for in other regulations created under the *International Organisations (Privileges and Immunities) Act 1963* (the Act) – (see section 22 of the *Secretariat to the Meeting of the Parties on the Conservation of Albatrosses and Petrels (Privileges and Immunities) Regulations 2008* and section 30 of the *International Tribunal for the Law of the Sea Regulations 2000*). It would also reflect existing practice for delegated authority for regulations created under the Act.

I trust this information is of assistance.

22 FEB 2016

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC16-000387

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

Dear Senator ~~Williams~~ John

Thank you for the Committee's letter of 4 February 2016 seeking advice on incorporation of legislative extrinsic material in the Defence (Security Authorised Members–Military Working Dog Handlers: Training and Qualifications Requirements) Determination 2015.

As you have acknowledged in your letter, section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1) (a) of the *Legislative Instruments Act 2003)* has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Defence (Security Authorised Members–Identification and Search Wardens: Training and Qualifications Requirements) Determination 2014) are taken to be references to versions of those instruments as in force from time to time.

Advice from the Office of Parliamentary Counsel, who drafted the Security Authorised Members Determinations, is that it is their standard drafting practice to not expressly state the manner of incorporation if the material being incorporated is a Commonwealth Act or a Commonwealth disallowable legislative instrument and the intention is the material be incorporated as in force from time to time.

Consistently, I advise that the training and qualification requirements for Military Working Dog Handlers include prerequisites which are listed in the Defence (Security Authorised Members–Identification and Search Wardens: Training and Qualifications Requirements) Determination 2014 as in force from time to time.

To ensure a commitment to a best-practice approach, in future, where an instrument incorporates extrinsic material by reference, the manner of incorporation will be clearly specified in the Explanatory Statement to enable users to have greater understanding.

Yours sincerely

MARISE PAYNE

17 FEB 2016

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Ref: MS16-000018

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

17 FEB 2016

Dear Senator Williams John

The Senate Standing Committee on Regulations and Ordinances has requested further information in relation to the issues identified in the *Delegated legislation monitor* No. 1 of 2016 concerning the *Excise (Mass of CNG) Determination 2015 (No. 1)* [F2015L01733], *Excise (Volume of Liquid Fuels – Temperature Correction) Determination 2015 (No. 1)* [F2015L01732] and *Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1)* [F2015L01745] for which I am the responsible minister.

The legislative instruments provide the rules for how fuel is to be measured for the purposes of paying excise duty. These new instruments are identical in effect to the former instruments and have been developed merely to reflect minor technical amendments following the commencement of the *Excise Regulation 2015* and the *Excise Tariff Amendment (Ethanol and Biodiesel) Act 2015*.

The Committee has sought further information on the renewal of these instruments. The Committee expressed the opinion that the previous response had not addressed the concerns raised by the committee regarding the manner in which certain material had been incorporated within the instruments. Specifically, the Committee sought clarity on whether the documents referred to are incorporated as in force from time to time or as in force at a particular date.

The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instruments and register new determinations and corresponding explanatory statements to include information in order to address the concerns of the Committee. The new legislative instruments will contain directions on the manner of incorporation of the extrinsic material, namely that the current edition of the standard is to be used on the commencement of the respective determinations in addition to any later editions which may be further published from time to time.

The new legislative instruments and explanatory statements will be forwarded to the tabling officers by 18 February 2016 as per the request from the Committee.

Parliament House Canberra ACT 2600 Australia
Telephone: 02 6277 7360 Facsimile 02 6273 0434

ATTORNEY-GENERAL

CANBERRA

MC15-004856

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

19 OCT 2015

Dear Mr Powell

Thank you for your letter of 11 September 2015 on behalf of the Standing Committee on Regulations and Ordinances.

I acknowledge that the Committee is concerned about the framing of the *Family Law (Fees) Amendment (2015 Measures No. 1)* (the second instrument). The Committee has sought my advice about whether the second instrument is the same in substance as the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (the first instrument).

The current binding judicial authority on this issue is the decision of the Federal Court of Australia in *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834. In that matter, the Federal Court held that the second instrument was not the 'same in substance' as the first instrument. As indicated by the Committee, in making this finding his Honour Justice Dowsett concluded that section 48 of the *Legislative Instruments Act 2003* should be construed as requiring that, for a legislative instrument to be invalid it must be, in substance or legal effect, identical to the previously disallowed measure (at [29]).

In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison' (at [29]). In *Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations)* [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail – between essential characteristics and immaterial features'. In applying this principle, Justice Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure (at [22]).

I therefore refer the Committee to the judgment of the Federal Court. I also note that as the decision is the subject of an appeal before the courts, and I am the respondent in that appeal, it is not appropriate for me to provide further comment.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

On the basis that binding Federal Court authority exists that specifically addresses the question of whether the second instrument was the same in substance as the first, and because the instrument is no longer in effect, it is unnecessary to answer the Committee's further questions about previous legal advice.

The responsible adviser for this matter in my Office is Mr James Lambie who can be contacted on (02) 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

THE HON JOSH FRYDENBERG MP
MINISTER FOR RESOURCES, ENERGY AND NORTHERN AUSTRALIA

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

MC16-001110

12 FEB 2016

Dear Senator John

Thank you for your Committee Secretary's letter concerning the report from the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 1 of 2016. The report made comments about the Greenhouse and Energy Minimum Standards (GEMS) determinations for clothes washing machines [F2015L01816], dishwashers [F2015L01825] and rotary clothes dryers [F2015L01828].

The *Greenhouse and Energy Minimum Standards Act 2012* (the GEMS Act) and associated governmental agreements enable the Commonwealth, states and territories, and New Zealand, to set out specific energy performance and labelling requirements with the aim of reducing energy use for regulated products. GEMS product determinations, including those three mentioned above, reference an industry standard that provide the technical detail for the requirements. In the case of the determinations mentioned above, these standards were developed via a Standards Australia committee, and reference the same standards in the previous determinations. The committee is made up of a diverse range of stakeholders, including industry representatives, consumer advocates and government representatives. The committee members provide their expertise freely, but the intellectual property developed resides with Standards Australia and SAI Global.

While the referenced standards are available for a fee, it should be noted that the legislative instruments do not apply to the general public but rather manufacturers and importers of the regulated products. The stakeholders using these determinations are likely to already have access to the standards via participation in the committee process. However, there are no restrictions preventing interested parties from purchasing the standards, and in the case of new entrants the Australian Government does not consider the fees as unreasonable or an access barrier for industry. Industry stakeholders have broadly supported the Standards Australia process in developing new determinations under the GEMS Act. The Government also views it as a well-functioning practice to ensure effective regulation for the end benefit of Australian consumers.

Yours sincerely

JOSH FRYDENBERG

ASSISTANT MINISTER TO THE PRIME MINISTER
ASSISTANT MINISTER FOR SOCIAL SERVICES

MS16-000203

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letters of 4 February 2016 to Senior Advisers in both Minister Porter's Office and mine regarding the incorporation of a local government area into the *Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015* (F2015L01836).

The *Local Government Act 1999* (SA) outlines how the area and boundaries of a council are defined. The instrument incorporates the area of the District Council of Ceduna in accordance with that Act. It was always intended that the trial area be fixed from the date the instrument was made, making the trial area certain. This is demonstrated by the map contained in the Explanatory Statement which shows a fixed area of Ceduna and the Surrounding Region. It is not anticipated that the area and boundaries of the District Council of Ceduna will change during the six month period that the instrument is in operation.

However, I accept the Committee's expectations that the manner of incorporation of extrinsic material is clearly specified in the instrument and the Explanatory Statement. I consider that including a further description regarding the manner of incorporation of the *Local Government Act 1999* (SA) in the Explanatory Statement would be appropriate for this instrument. I will revise the Explanatory Statement and will endeavour to ensure that future instruments and Explanatory Statements are consistent with the Committee's expectations.

Thank you for raising this matter with me.

Yours sincerely

Senator the Hon. Fiona Nash
Minister for Rural Health
Deputy Leader of The Nationals in the Senate

Ref No: MC16-003048

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 4 February 2016 requesting clarification of the basis for the calculation of fees under the Therapeutic Goods Amendment (Listed Medicines) Regulation 2015 [F2015L01909] (the Regulation).

The Therapeutic Goods Administration operates on the basis of industry cost recovery using fees and charges established through the *Therapeutic Goods (Charges) Act* and supporting regulations. The fee for any particular activity is set in relation to the amount of effort required to complete the activity. Fees and charges are reviewed annually in consultation with the regulated sector. Any increase requires ministerial approval and must be compliant with the requirements of the Office of the Best Practice Regulation.

The amounts of the fees specified in item 14 of the Regulation are based on the type and the level of documentation accompanying the application. For example, applications that only require evaluation of quality data are based on a flat fee. Whereas, fees for applications that require evaluation of toxicological and/or clinical information are based on the amount of supporting data accompanying the application. For example, if such documentation is not over 50 pages, is over 50 pages but not over 250 pages, or is over 3000 pages.

The amounts of the fees are designed to reflect the amount of work required to complete the evaluation. For example, the fees for evaluation of applications supported by 50 pages of toxicological or clinical data are much lower than applications supported by over 3000 pages of such data.

The Committee's comment that the Explanatory Statement should make clear the specific basis on which an imposition or charge has been calculated, is duly noted.

Yours sincerely

FIONA NASH

15 FEB 2016

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Appendix 2
Guideline on consultation

Purpose

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

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

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

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

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

Requirements of the *Legislative Instruments Act 2003*

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

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

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

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

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

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

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

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

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

- **Specific examples listed in the Act**: Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

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

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances or by contacting the committee secretariat at:

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