The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

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

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

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

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

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]

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 following the receipt of additional information from ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.

Ministerial correspondence

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

Guidelines

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

Acknowledgement

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

General information

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

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

3 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, www.aph.gov.au/regords_monitor.

4 Senate Standing Committee on Regulations and Ordinances, *Guidelines,* www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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

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

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

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

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

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 30 June 2017 and 6 July 2017 (new matters);[1] and matters previously raised in relation to which the committee seeks further information (continuing matters).

Guidelines referred to by the committee are published on the committee's website.[2]

Response required

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

Instrument	**Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00808]**
Purpose	Increases by an indexation amount of 2.3 per cent the annual licence charges paid by Commonwealth entities to the Australian Radiation Protection and Nuclear Safety Agency
Authorising legislation	*Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

1 The committee has deferred its consideration of Migration Amendment (Visa Application Charges) Regulations 2017 [F2017L00831].

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

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement (ES) for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that item 8 of the regulations inserts new table item 23 into clause 1 of Schedule 3 to the Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2000, which incorporates Australian/New Zealand Standard AS/NZS IEC 60825.1:2014 *Safety of laser products, Part 1: Equipment classification and requirements*, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as existing on 1 July 2017.

The ES states:

> Table item 23 refers to an Australian/New Zealand Standard on laser products that was published in 2011. The amendment updates the reference to the most recent version of the Standard that was published in 2014 and adds information on the name of the publishers of the Standard, namely Standards Australia and Standards New Zealand, which is in line with current drafting conventions of the Office of Parliamentary Counsel. This Standard may be obtained from SAI Global (www.saiglobal.com).

While the ES states that this standard is available from the SAI global website, it does not provide further information as to where the standard incorporated into the regulations can be accessed for free. The committee understands the standard to only be available for purchase from the SAI global website.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[3]

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

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

Instrument	**Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843]**
Purpose	Provides an administrative framework to support the appointment of lawyers for young persons who are the subject of control order proceedings under the *Criminal Code Act 1995*
Authorising legislation	*Criminal Code Act 1995*
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the regulations provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[4]

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

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

Instrument	**Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017 [F2017L00826]**
Purpose	Establishes a framework for restrictions on the export of liquefied natural gas to be imposed where the Resources Minister determines there is a reasonable prospect of a supply shortage in the domestic market
Authorising legislation	*Customs Act 1901*
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(c)

Merits review

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

The regulations provide for the minister administering the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (minister) to make decisions regarding when a year will be a domestic shortfall year (section 13GE) and when to grant permissions to liquefied natural gas (LNG) exporters to export LNG in a domestic shortfall year (section 13GC).

The ES to the regulations states:

> The ADGSM [regulations] does not provide for merits review of the Resources Minister's decisions. Decisions of the Resources Minister under new Division 6 would be judicially reviewable.

The committee acknowledges that the decisions of the minister made under the regulations may be subject to judicial review. However, the committee does not consider that a decision is inappropriate for merits review merely because that decision may also be the subject of judicial review. This approach is consistent with the guidance contained in the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?*. In this regard, the publication states:

> The Council's view follows from the fact that the judicial review powers vested in the Federal Court are complementary to, but distinct from,

> merits review powers. Judicial review involves the exercise of the Commonwealth's judicial power and results in findings in law. Merits review involves the exercise of administrative powers and results in a correct and preferable decision. The different realms of operation of the two forms of review mean that they can, and often do, co-exist.[5]

The committee therefore considers that the ES does not provide sufficient information to establish that decisions of the minister possess characteristics that would justify their exclusion from merits review.

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

Instrument	**Do Not Call Register (Access Fees) Determination 2017 [F2017L00841]**
Purpose	Sets subscription fees for the provision of a 'washed list' and provides for the refund of fees for services provided by the Do Not Call Register
Authorising legislation	*Do Not Call Register Act 2006*
Department	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(b)

Unclear basis for determining fees

Secton 7 of the determination sets subscription fees according to eight subscription types, with fees varying according to the maximum amount of telephone numbers that can be submitted for 'washing' against the Do Not Call Register.

The ES to the determination states:

> On 19 March 2017, the ACMA commenced a consultation process on cost recovery arrangements for the Do Not Call Register… The consultation paper, the draft Cost Recovery Implementation Statement and draft

5 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx (accessed 15 August 2017).

> instruments were published on the ACMA's website and provided directly to key industry stakeholders, including associations representing organisations engaged in telemarketing. The ACMA received five submissions to the consultation, although none of these submissions addressed the proposed cost recovery arrangements (including access fees).

However, despite the above reference to 'proposed cost recovery arrangements', the ES does not specify the basis on which the subscription fees have been calculated; for example, whether they are calculated on the basis of cost recovery, or on another basis.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 3) Regulations 2017 [F2017L00790]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Veterans' Affairs
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(c) and (d)

Merits review

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

The regulation adds new item 237 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) establishing legislative authority for spending activities in relation to the Prime Minister's Veterans' Employment Program. While the ES is generally helpful in providing information about the proposed administration of the program, the committee notes that the program will not be subject to merits review. The ES states:

> Spending decisions under the Program will not be subject to merits review arrangements. In accordance with the Commonwealth Procurement Rules, tenderers will be selected on the basis of technical expertise, capability and value for money.

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

The committee's expectations in this regard are set out in the guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 published on the committee's website.[6]

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

Parliamentary scrutiny – ordinary annual services of the government

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

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

Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[7] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[8]

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

7 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2* of 2017, pp 1-5.

8 See *Delegated legislation monitor* 5 of 2014, pp 16-18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

The above regulation seeks to establish legislative authority for Commonwealth government spending to fund the Prime Minister's Veterans' Employment Program ($2.7 million over four years commencing in 2017-18).

It appears to the committee that the above program is a new policy not previously authorised by special legislation; and that the initial appropriation in relation to this new policy may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-18 (which is not subject to amendment by the Senate).

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

Instrument	**Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L00811]** **Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Regulations 2017 [F2017L00803]**
Purpose	Introduces new exemption certificates for acquisitions of securities and residential land and recognises a greater range of commercial uses of land as acquisitions of commercial land Amends the fee structure that applies to foreign investors in Australian property
Authorising legislation	*Foreign Acquisitions and Takeovers Act 1975*
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a) and (b)

Retrospective commencement

Subsection 12(2) of the *Legislation Act 2003* provides that a provision that commences retrospectively does not apply retrospectively in relation to a person (other than the Commonwealth) if it would disadvantage their rights or impose a liability on the person for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly

address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

The Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L00811] (exemption regulations) and the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Regulations 2017 [F2017L00803] were made on 27 June 2017, and commenced retrospectively on 24 June 2017. However, the ESs to both regulations provide no information about the effect of their retrospective commencement on individuals.

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

No statement of compatibility

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

With reference to these requirements, the committee notes that the ES for the exemption regulations 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*.

Instrument	**Migration Amendment (Specification of Occupations) Regulations 2017 [F2017L00818]** **Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017 [F2017L00848]**
Purpose	Clarifies the power of the Minister for Immigration and Border Protection to specify, in a legislative instrument, the occupations which may be nominated, and the applicability of those occupations to identified persons, in relation to four visas; and provides that such an instrument may apply to nominations made before or after the commencement date of the instrument Specifies occupations for nominations that relate to a Subclass 457 – Temporary Work (Skilled) Visa
Authorising legislation	*Migration Act 1958*; Migration Regulations 1994
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

Item 8 of the schedule to the Migration Amendment (Specification of Occupations) Regulations 2017 [F2017L00818] (specification regulations) amends the Migration Regulations 1994 (Migration Regulations) to provide that, in relation to a legislative instrument made for the purpose of paragraph 2.72(10)(aa) of the Migration Regulations, an instrument may specify that it applies to nominations made on or after the day the instrument commences, or made and not finally determined before the day the instrument commences, regardless of whether the application was made before, on or after that day.[9]

The Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017 [F2017L00848] (IMMI 17/060) is made under paragraph 2.72(10)(aa) of the Migration Regulations, and commenced on 1 July

9 Paragraph 2.72(10)(aa) of the Migration Regulations relates to nominations by standard business sponsors for the purpose of the Subclass 457 (Temporary Work) (Skilled) visa (457 visa).

2017. Section 9 of IMMI 17/060 provides that the instrument will apply in relation to nominations of occupations made and not finalised before 1 July 2017. The ES states, in relation to section 9:

> This is regardless of whether, for a nomination in relation to an application for a 457 visa, the application was made before, on or after 1 July 2017. This provision is expressly provided for in Migration Amendment (Specification of Occupations) Regulations 2017 and inserts regulation 6601 to the Regulations. It is noted that the Regulations provide for the refund of a fee in regard to a nomination in 2.73 and an application in 2.12F.

The committee notes that, although IMMI 17/060 is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that a person whose application for a visa was made on or before 1 July 2017 may now be subject to criteria for the grant of the visa that did not apply at the time of their application.

The committee's usual approach in cases such as this is to regard the instrument 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 23(3)(b)). The ESs to the specification regulations and IMMI 17/060 do not address this issue.

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

Instrument	**National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 [F2017L00827]**
Purpose	Specifies the knowledge, qualifications and experience requirements to be met by applicants for registration as greenhouse and energy auditors
Authorising legislation	National Greenhouse and Energy Reporting Regulations 2008
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

Section 17 of the *Legislation Act 2003* (Legislation Act) directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

The committee notes that the ES, in addressing the requirements of 15J(2)(c) of the Legislation Act, refers to public consultation conducted with respect to industry access to audit Standards.[10] However, with reference to the consultation requirements in the Legislation Act, the ES does not provide information regarding consultation undertaken in relation to the instrument itself.

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.[11]

10 Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

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

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

Manner of incorporation

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. However, other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the defintitions of ***ISAE 3000*** and ***ISAE 3410*** in section 4 incorporate the following documents:

- *Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements*, published by the International Federation of Accountants, October 2014, ISBN 978-1-60815-185-1, as amended from time to time (the Handbook); and
- *Assurance Engagements on Greenhouse Gas Statements*, issued by the International Auditing and Assurance Standards Board, March 2012, as amended from time to time (the International Statement).

However, pursuant to section 14 of the *Legislation Act 2003*, the committee understands that, as the Handbook and the International Statement are not Commonwealth disallowable legislative instruments, they may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[12]

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

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

Instrument	**Therapeutic Goods (Authorised Supply of Specified Biologicals) Rules 2017 [F2017L00868]** **Therapeutic Goods (Authorised Supply of Specified Medical Devices) Rules 2017 [F2017L00867]** **Therapeutic Goods (Authorised Supply of Specified Medicines) Rules 2017 [F2017L00859]**
Purpose	Authorise specified classes of health practitioners to supply specified biologicals, medical devices, and medicines
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Unclear meaning of the term 'good medical practice'

These rules authorise health practitioners to supply specified biologicals, medical devices and medicines which have not been approved for inclusion on the therapeutic goods register. The supply of these items to patients is subject to conditions which are set out in paragraph 4(1)(f) of each of the rules.

Sub-paragraph 4(1)(f)(iii) requires the health practitioner to ensure that the items are supplied in accordance with 'good medical practice'. However, neither the rules nor their ESs expressly define the term 'good medical practice'.

The committee is concerned that the term 'good medical practice' is insufficiently precise, such that it may be difficult for a health practitioner or patient to know how the unapproved items may be appropriately supplied.

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

Instrument	**Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853]**
Purpose	Sets out the arrangements for priority review of prescription medicines, lists variations that medicines sponsors may notify to the Therapeutic Goods Administration, and introduces new fees to support these measures
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Items 6, 8 and 9 of Schedule 8 to the regulations set application fees for certain requests to have medical devices, therapeutic goods, or biologicals reinstated on the therapeutic goods register. The items set a fee of $150 if the reinstatement request relates only to one entry and, where such a request relates to more than one entry, a fee of $150 for the first entry plus $50 for each additional entry. However, the ES to the instrument does not specify the basis on which these fees have been calculated.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Instrument	**VET Student Loans (Charges) Regulations 2017 [F2017L00821]**
Purpose	Prescribes the charge payble by an approved course provider for a financial year
Authorising legislation	*VET Student Loans (Charges) Act 2016*
Department	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(b)

Unclear basis for determining fees

Section 8 of the regulations prescribes the charge payable by an approved course provider for a financial year. The fees range between $1,280 and $62,870, depending on whether the provider is a small, medium or a large provider for the financial year. However, the ES does not specify the basis on which these fees have been calculated.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Further response required

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

Correspondence relating to these matters is published on the committee's website.[12]

Instrument	**Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387]**
Purpose	Prescribes a new mandatory Sugar Code of Conduct which regulates the conduct of growers, mill owners and marketers in relation to the supply of cane or the on-supply of sugar
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017[13]
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 5 and 6 of 2017

Consultation

The committee previously commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

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

13 The committee notes that a notice of motion to disallow this instrument was given on 15 August 2017. See *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

With reference to these requirements, the committee notes that the ES for the Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387] (the sugar code) provides no information regarding consultation.

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

The committee further notes that the Prime Minister granted an exemption from the regulation impact statement (RIS) requirements for the sugar code 'because urgent and unforseen events arose requiring a decision before a RIS could be prepared.'[14] The ES to the sugar code states:

> The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.
>
> To ensure the Sugar Code of Conduct (the Code) operates efficiently and effectively as intended, the Regulations also require a review of the Code to take place within 18 months after its commencement.

The committee's guideline on consultation states:

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

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

Minister's first response

The Treasurer advised:

> With regards to consultation, unfortunately due to the events that warranted the Government's intervention in the raw sugar export industry, it was not reasonably practical for the Government to consult on the regulation. The Government started developing the regulations in

14 Australian Government, Department of Prime Minister and Cabinet, *Prime Minister's exemption – Sugar Industry Code*, 5th April 2017, http://ris.pmc.gov.au/2017/04/05/prime-minister%E2%80%99s-exemption-%E2%80%93-sugar-industry-code (accessed 5 May 2017).

> February as a contingency should commercial negotiations fail; however consulting at that time was not appropriate as it would have undermined those negotiations. When it became clear that a commercial outcome was no longer a reasonable possibility, the Government considered the benefits of acting quickly to provide certainty for the industry outweighed the benefits of taking further time to consult before making the regulation.

Committee's first response

The committee thanks the Treasurer for his response.

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

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

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

Minister's second response

The Treasurer advised:

> The Committee notes that while the ES refers to an exemption from the Regulatory Impact Statement process, it does not explicitly state that no consultation was undertaken for the Sugar Code. The Committee has requested that the ES be updated to reflect this in order to be technically compliant with the requirements of the *Legislation Act 2003*.
>
> In my previous response to the Committee, I explained that no consultation was undertaken by the Government due to the events within the raw sugar export industry at the time. Given that this information is now on the public record and outlined in the Committee's report, I do not believe updating the ES will provide any additional benefit to stakeholders or interested persons in explaining the operation of the Regulations. I therefore respectfully decline the Committee's request for the ES to be updated.

Committee's second response

The committee thanks the Treasurer for his response.

The committee notes the Treasurer's advice that he does 'not believe updating the ES will provide any additional benefit to stakeholders or interested persons in explaining the operation of the Regulations' and that he 'therefore respectfully decline[s] the Committee's request for the ES to be updated'.

The committee's concern with respect to consultation is to ensure that an ES is compliant with the descriptive requirements of the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The absence of a description of consultation in an ES (including that no consultation was required) also falls short of the committee's longstanding requirements in relation to the content of ESs.

The expectation that ESs address the matter of consultation predates the enactment of the *Legislation Act 2003* (previously the *Legislative Instruments Act 2003*), which placed a number of the committee's longstanding requirements in relation to the making of delegated legislation and ESs on a statutory basis. The committee regards the extent and nature of consultation in relation to the making of an instrument as a critical aspect of the exercise of the parliament's delegated powers and, accordingly, information regarding consultation as a critical inclusion for ESs.

On this basis, the committee considers that the fact that the information that no consultation was undertaken in relation to the sugar code is now on the public record does not satisfy the committee's request that the ES be updated with the relevant information.

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

Instrument	**Inspector of Transport Security Regulations 2017 [F2017L00510]**
Purpose	Identifies the international obligations that the Inspector of Transport Security must comply with; sets the form of the identity card that must be issued to persons exercising the Inspector's delegated search powers; prescribes the criteria that a person must satisfy to be delegated powers under the *Inspector Transport Security Act 2006*; and details the fee for attendance at a coronial inquiry and the due date for payment
Authorising legislation	*Inspector of Transport Security Act 2006*
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 11 May 2017) Notice of motion to disallow currently must be given by 4 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2017

The committee previously commented on two matters as follows:

Manner of incorporation

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that section 7 of the Inspector of Transport Security Regulations 2017 [F2017L00510] (the regulation) appears to incorporate paragraphs 5.12 and 6.2 of Annex 13 to the Convention on International Civil Aviation (Annex 13). However neither the regulation nor the ES state the manner in which Annex 13 is incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at at a particular time). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

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

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the note to section 7 of the regulation states:

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

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

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

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

Minister's response

The Minister for Infrastructure and Transport advised:

> I have sought advice from the Department of Infrastructure and Regional Development in relation to the Committee's concerns regarding incorporation of and access to Annex 13 of The Convention of International Civil Aviation and an amendment to the statement regarding consultation.
>
> The Department has advised that the Explanatory Statement will be replaced to address these issues.

Committee's response

The committee thanks the minister for his response.

The committee also notes the minister's undertaking to replace the ES to address the committee's concerns. However, the committee remains concerned that in the interim period before the ES is replaced, interested persons will not know the manner in which Annex 13 is incorporated; nor where it can be freely accessed.

The committee therefore requests that the minister provide advice to the committee as to the manner in which Annex 13 is incorporated; and where it can be obtained (in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*).

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

Advice only

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

Instrument	**AD/ELECT/42 Amdt 2 - Bendix Impulse Couplings [F2017L00863]**
Purpose	Corrects a typographical error in a referenced document and removes reference to a repealed document
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the Bendix Service Bulletin No. 623, as in force from time to time (Bendix Service Bulletin).

The ES states:

> The Bendix Service Bulletin referred to in the AD can be obtained from Bendix, however, any Australian aircraft operator which uses Bendix Magnetos are provided with these documents by Bendix by subscription.

The committee acknowledges that anticipated users of the instrument would be in possession of the Bendix Service Bulletin. However, in addition to access for operators of the relevant aircraft in Australia, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

A fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[15] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.[16]

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[17]

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

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15 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 14 August 2017).

16 The committee notes that it has previously commented on a similar issue. See *Delegated legislation monitor* 5 of 2017, AEB 17/1583 - Approval – Means of Compliance with Transport Canada Airworthiness Directive (AD) CF-2011-24 - Wing to Fuselage Attachment Joints - Barrel Nut Cracking [F2017L00368], pp 22-23, www.aph.gov.au/regords_monitor.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 2) Regulations 2017 [F2017L00820]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Defence
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(d)

Parliamentary scrutiny – ordinary annual services of the government

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

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

Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[18] In accordance with the committee's scrutiny

18 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2* of 2017, pp 1-5.

principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[19]

The above regulation seeks to establish legislative authority for Commonwealth government spending on a grant to the Australian International Military Games Limited to plan, oversee, deliver and promote the 2018 Invictus Games in Sydney.

The ES states that funding of up to $7 million will be made available over two years commencing in 2016-17. However, the ES also states:

> Funding for this item will come from Program 2.4: Vice Chief of the Defence Force, which is part of Outcome 2. Details will be set out in the *Portfolio Additional Estimates Statements 2017-18, Defence Portfolio*.

It appears that the above grant is a new policy not previously authorised by special legislation. It is unclear to the committee whether the grant was funded in 2016-17 from already appropriated resources, or if funding for the grant was provided in an appropriation bill.

Therefore, the committee is unable to determine if the appropriation in relation to this grant may have been inappropriately classified as 'ordinary annual services' and thereby improperly included in an appropriation bill which is not subject to amendment by the Senate.

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

19 See *Delegated legislation monitor* 5 of 2014, pp 16-18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 3) Regulations 2017 [F2017L00807]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(d)

Parliamentary scrutiny – ordinary annual services of the government

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

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

Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual

services of the government.[20] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[21]

The above regulation seeks to establish legislative authority for Commonwealth government spending to support the Industry Specialist Mentoring for Australian Apprentices program ($60 million over two years commencing in 2017-18).

It appears to the committee that the above program is a new policy not previously authorised by special legislation; and that the initial appropriation in relation to this new policy may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-18 (which is not subject to amendment by the Senate).[22]

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

20 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 2 of 2017, pp 1-5.

21 See *Delegated legislation monitor* 5 of 2014, pp 16-18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

22 This program was also identified by the Senate Standing Committee for the Scrutiny of Bills as involving initial expenditure that may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-2018. See *Scrutiny Digest* 6 of 2017, p. 3.

Instrument	**Therapeutic Goods Order No. 69 – General Requirements for Labels for Medicines 2017 [F2017L00865]**
Purpose	Repeals the Therapeutic Goods Order No. 69 - General requirements for labels for medicines (27/08/2001) which is due to 'sunset' under the *Legislation Act 2003*
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of purpose and operation of the instrument

Paragraph 15J(2)(b) of the *Legislation Act 2003* requires the ES for a legislative instrument to explain the purpose and operation of the instrument.

The instrument repeals and remakes Therapeutic Goods Order No. 69 – General Requirements for Labels for Medicines (27/08/2001) (TGO 69). The ES notes that TGO 69 is due to sunset on 1 October 2017. The ES further notes that:

> Labelling requirements for medicines have recently been reviewed, and two new labelling Orders have been implemented with a four year transition period. These new labelling Orders, Therapeutic Goods Order No. 91 - Standard for labels of prescription and related medicines (TGO 91) and Therapeutic Goods Order No. 92 - Standard for labels of non-prescription medicines (TGO 92), commenced on 31 August 2016. TGO 91 and TGO 92 are intended to replace TGO 69 at the end of the transition period provided for when those new instruments commenced (1 September 2020).
>
> Although TGO 69 is now more than 16 years old and does not align with international best practice labelling standards, it is being remade to serve throughout this transition period for TGOs 91 and 92 to assist industry to adapt to the requirements in the new instruments. During this time, sponsors can choose between complying with either the requirements of TGO 69, or TGOs 91 or 92, as relevant to their medicine.

In relation to the purpose and operation of the instrument, the ES explains:

> [The instrument] replaces TGO 69, principally to reflect the above transitional arrangements… remove from the scope of the Order medicines that are not required to be entered in the Australian Register of

> Therapeutic Goods because they are authorised for supply by health practitioner notification under subsection 19(7A) of the [*Therapeutic Goods Act 1989]*… and correct a small number of errors.

In the absence of an item-by-item description of the provisions of an instrument, a general statement about changes made by an instrument may be insufficent for the committee to effectively scrutinise the instrument with reference to its scrutiny principles. Further, such an ES may fail to meet the requirements in section 15J of the *Legislation Act 2003*.

In this case, the committee notes that the ES:

- states that the instrument has been remade to serve throughout a transitional period and notes that the changes made in the instrument principally reflect those transitional arrangements; and
- provides information about documents referenced in the instrument.

The committee therefore considers that the definitive description of the changes to TGO 69 may provide sufficient basis for scrutiny of the instrument, notwithstanding the absence of an item-by-item description of all the provisions of the instrument.

The committee draws to the attention of ministers, and instrument-makers more generally, that while in some cases a comprehensive description of the changes to a remade instrument may be sufficent, the committee's preference is that ESs also include an item-by-item description of all the provisions of the instrument, even in cases where the instrument is being remade due to the sunsetting provisions of the *Legislation Act 2003*.

Multiple instruments that appear to rely on section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*)

Instruments	ASIC Supervisory Cost Recovery Levy Regulations 2017 [F2017L00805] Bass Strait Central Zone Scallop Fishery (Closure) Direction 2017 [F2017L00873] Register of Foreign Ownership of Water or Agricultural Land Rules 2017 [F2017L00833] Therapeutic Goods Order No. 69 – General Requirements for Labels for Medicines 2017 [F2017L00865]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

The instruments identified above incorporate by reference Commonwealth disallowable legislative instruments. This means that they incorporate the content of other disallowable legislative instruments without reproducing the relevant text.

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating disallowable legislative instruments, either as in force at a particular time or as in force from time to time.

Section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time. However, neither the text of the instruments identified above, nor their accompanying ESs explain the relevance of these provisions to their operation.

The committee considers that, in the interests of promoting the clarity and intelligibility of delegated legislation, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated; and/or clearly identify the relevance of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) to their operation. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee's expectations in this regard are set out in the guideline on incorporation published on the committee's website.[23]

The committee draws the above to the attention of ministers.

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

Instruments	Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 3) [F2017L00870] ASIC Class Rule Waiver (Amendment) [CW 17/0617] [F2017L00794] ASIC Corporations (Amendment and Repeal) Instrument 2017/545 [F2017L00875] Medicines Advisory Statements Specification 2017 [F2017L00857] National Greenhouse and Energy Reporting (Audit) Amendment (Auditors) Determination 2017 [F2017L00828] National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 [F2017L00827] National Greenhouse and Energy Reporting (Measurement) Amendment (Energy) Determination 2017 [F2017L00829] Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 5) [F2017L00830] Register of Foreign Ownership of Water or Agricultural Land Rules 2017 [F2017L00833] Remuneration Tribunal Determination 2017/11: Remuneration and Allowances for Holders of Full-Time Public Office [F2017L00812] VET Student Loans Amendment Rules (No.1) 2017 [F2017L00793]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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

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.[24]

The committee draws the above to the attention of ministers.

24 For more extensive comment on this issue, see *Delegated legislation monitor* 8 of 2013, p. 511.

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers.

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

Instrument	**Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471]**
Purpose	Adjusts entitlements of divorced or separated spouses, or of separated *de facto* couples (except in Western Australia), under certain orders or agreements splitting particular kinds of future superannuation benefits made in property settlements under the *Family Law Act 1975*
Authorising legislation	Family Law (Superannuation) Regulations 2001
Department	Attorney-General's
Disallowance	Exempt (tabled Senate 9 May 2017)
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2017

The committee previously commented as follows:

Background

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)[2] exempts particular instruments from disallowance, including, by virtue of table item 3 in section 9, instruments (other than regulations) relating to superannuation.

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

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

2 The exemption regulation replaced the former Legislative Instruments Regulations 2004, and was part of a suite of changes to the regime governing legislative instruments implemented by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*).

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

Classification of legislative instrument as exempt from disallowance

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

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

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

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

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

Minister's response

The Attorney-General advised:

> In response to the request from the Committee that I clarify the Determination's status as exempt from disallowance, I can confirm that the Determination is exempt from disallowance, by virtue of table item 3 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015. An updated version of the Determination and supplementary materials will be published as soon as practicable.

Committee's response

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

The committee notes the Attorney-General's undertaking to register a revised version of the instrument on the Federal Register of Legislation as soon as practicable.

The committee also notes its expectation that instruments, ESs and statements of compatibility be drafted with sufficient care to avoid potential confusion for anticipated users which may be caused by inaccurate descriptions of legislation.

Instrument	**Fish Receiver Permits Declaration 2017 [F2017L00400]**
Purpose	Identifies Commonwealth managed fisheries that must utilise a licenced 'Fish Receiver' to acquit and verify the amount of each relevant species of fish caught and landed by operators holding fishing concessions in particular fisheries
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2017

Consultation

The committee previously commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for this declaration provides no information regarding consultation.

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> As noted by the committee, the Explanatory Statement (ES) for the Fish Receiver Permits Declaration 2017 did not provide any information regarding consultation.
>
> I have been advised by the Australian Fisheries Management Authority (AFMA) that no consultation was undertaken with industry stakeholders. The AFMA Chief Executive Officer has advised my office that there has

> been no criticism of the fish receiver permits system and on that basis the Authority did not believe it necessary to consult with industry.
>
> The declaration involves only a minor change to remove the requirement to specify the South Tasman Rise Fishery in the declaration.
>
> The purpose of the Declaration [is] principally to continue the management arrangements under the Fish Receiver Permits Declaration 2007, which is due to sunset in October 2017. The Declaration specifies the Commonwealth fisheries for which a Fish Receiver Permit is required in order to be the first receiver of fish from a person engaged in commercial fishing in the specified fisheries. Existing Fish Receiver Permits will remain in force under the new Declaration.
>
> AFMA also confirmed that it had consulted with the Office of Best Practice Regulation (OBPR) on the issue. The OBPR assessed the proposed Declaration as machinery in nature and as such, a Regulatory Impact Statement was not required (OBPR ID: 22071).
>
> Copies of the revised ES for the Fish Receiver Permits Declaration 2017 to include information about consultation, together with the statement of compatibility with human rights for the Small Pelagic Fishery (Closures) Direction Revocation 2017, are enclosed with this letter. AFMA will arrange for these two documents to be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that no consultation was undertaken with industry stakeholders in relation to the instrument.

The committee notes its view that an absence of criticism is, of itself, insufficient to meet the consultation requirements of the *Legislation Act 2003*.

However, the committee also notes that the replacement ES received by the committee has been registered on the Federal Register of Legislation and the relevant extract from the replacement ES states:

> No consultation was undertaken with industry stakeholders as the Declaration involved a minor change that was machinery in nature. The purpose of the Declaration was principally to continue the management arrangements under the Fish Receiver Permits Declaration 2007, which is due to sunset in October 2017. The Declaration specifies the Commonwealth fisheries for which a Fish Receiver Permit is required in order to be the first receiver of fish from a person engaged in commercial fishing in the specified fisheries. Existing Fish Receiver Permits remain in force under the new Declaration.

The committee has therefore concluded its examination of the above.

Instrument	**Small Pelagic Fishery (Closures) Direction Revocation 2017 [F2017L00514]**
Purpose	Revokes the Small Pelagic Fishery (Closures) Direction No. 1 2015
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 6 of 2017

Statement of compatibility

The committee previously commented as follows:

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

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

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

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> AFMA has reassured me that the appropriate assessment of the instrument was undertaken in line with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. AFMA concluded that the instrument was compatible with human rights. Unfortunately, as a result of an

administrative oversight the statement was not attached to the ES when the package was provided by AFMA to the Federal Register of Legislation.

Copies of the revised ES for the Fish Receiver Permits Declaration 2017 to include information about consultation, together with the statement of compatibility with human rights for the Small Pelagic Fishery (Closures) Direction Revocation 2017, are enclosed with this letter. AFMA will arrange for these two documents to be registered on the Federal Register of Legislation.

Committee's response

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

The committee notes the minister's advice that due to an administrative oversight the statement of compatibility for the instrument was not attached to the ES.

The committee also notes that the replacement ES with the attached statement of compatibility received by the committee has been registered on the Federal Register of Legislation.

Senator John Williams (Chair)