The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 7 of 2017

21 June 2017

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

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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.
- **Appendix 1 Guidelines on consultation and incorporation of documents**: includes the committee's guidelines on addressing the consultation requirements of the *Legislation Act 2003*[3] and its expectations in relation to instruments that incorporate material by reference.
- **Appendix 2 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.

Acknowledgement

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

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.[4]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[5]

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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.

3 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015.*

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

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[6]

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

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

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 12 May 2017 and 25 May 2017 (new matters).

Response required

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

Instrument	**Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539]**
Purpose	Incorporates goods referenced in seven documents into the definition of export and import sanctioned goods in the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008
Authorising legislation	Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008
Department	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a) and (b)

Unclear meaning of export and import sanctioned goods

This instrument gives effect in Australia to obligations arising from United Nations Security Council Resolution 1718 (2006), which requires member states to prevent the export of certain items to the Democratic People's Republic of Korea (DPRK).[1]

1 The resolution was adopted under Chapter VII of the Charter of the United Nations, and is therefore considered binding on Australia. See explanatory statement, p. 1.

This instrument repeals and replaces the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Document List 2014 [F2014L01746] to specify seven documents that determine goods that are prohibited for export to, or importation from, DPRK. Goods described in these documents are included in the definition of export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 [F2016C01044] (DPRK Sanctions Regulations), which create offences for the export or import of sanctioned goods.

In accordance with its scrutiny principles 23(3)(a) and (b), the committee is interested to ensure that persons potentially subject to these offence provisions are able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of the DPRK Sanctions Regulations.

The committee notes that the seven listed documents do not appear to contain precise descriptions of goods, such as would generally meet the committee's expectations in relation to appropriate drafting standards for the framing of an offence. For example, the documents INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2 appear to provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods.

In this respect, the committee notes its previous consideration of a similar instrument (Charter of the United Nations (Sanctions - Iran) Document List Amendment 2016 [F2016L00116] (Iran list)),[2] about which it raised concerns that persons potentially subject to offence provisions may not be able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions — Iran) Regulations 2008 [F2015C00063]. In concluding its examination of the Iran list, the committee noted the Minister for Foreign Affairs' advice that the goods listed in the documents referred to in the Iran list are an 'internationally accepted reference point for those industries, persons and companies that trade in such goods' and that the Department of Foreign Affairs and Trade (the department) provides a free service which, in doubtful cases, can make determinations as to whether a good is an import or export sanctioned good.

Given this previous advice, the committee wishes to confirm that:

- the goods listed in the documents specified by the instrument are an internationally accepted reference for those industries, persons and companies that trade in such goods; and

2 See *Delegated legislation monitor* 5 of 2016, p. 53.

- the department provides a free service which can make determinations as to whether a good is an import or export sanctioned good under this instrument.

In this regard, the committee notes its expectation that the explanatory statement (ES) to this instrument (and future similar instruments) include a statement to this effect.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2017 [F2017L00550]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Communications and the Arts
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 22 May 2017) Notice of motion to disallow currently must be given by 13 June 2017
Scrutiny principle	Standing Order 23(3)(d)

Matter more appropriate for parliamentary enactment

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

The Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2017 [F2017L00550] (the regulation) seeks to establish legislative authority for the Commonwealth government to fund a loan to NBN Co Limited (for $19.5 billion commencing in 2017-18).[3]

3 Adds new table item 210 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997.

The ES to the regulation states:

> The Government has capped the amount of equity contributions to NBN Co at $29.5 billion which is expected to be fully utilised in 2017. NBN Co will require an additional $19.5 billion to complete the rollout of the National Broadband Network, which the Government has decided to provide through a loan on commercial terms from 2017-18, with the full amount of the loan to be repaid by 30 June 2021. The loan will ensure that NBN Co has certainty that the full cost of funding the rollout is secured on commercial terms and will enable the company to focus on completing the rollout.

Given the magnitude of the amount of Commonwealth spending that the regulation seeks to authorise ($19.5 billion), the committee is interested in exploring why it is appropriate for such matters to be included in delegated legislation, and whether consideration has been given to authorising such spending in primary legislation.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Health
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 22 May 2017) Notice of motion to disallow currently must be given by 13 June 2017
Scrutiny principle	Standing Order 23(3)(a)

Constitutional authority for expenditure

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 2*,[4] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ESs for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544] (the regulation) adds new item 217 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative authority for Commonwealth government spending for the Youth Cancer Services program.

The committee notes that the objective of the Youth Cancer Services program as set out in new item 217 includes a reference to measures 'that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation'.

4 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

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

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the external affairs power, particularly the treaty implementation aspect (section 51(xxix));
> - the social welfare power (section 51(xxiiiA)); and
> - the statistics power (section 51(xi)).

The objective of the program appears to reference the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). However, these powers are not identified as supporting heads of power in relation to the item in the ES. It is therefore unclear to the committee whether the regulation is seeking to rely on these heads of legislative power to authorise the addition of item 217 to Schedule 1AB (and therefore the spending of public money under this item).

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

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

Instrument	**Fuel Tax (Road User Charge) Determination 2017 [F2017L00532]**
Purpose	Sets the rate of the road user charge at 25.8 cents per litre
Authorising legislation	*Fuel Tax Act 2006*
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

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

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

Instrument	**Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017 [F2017L00576]**
Purpose	Amends the Migration Regulations 1994 to provide for a visa application charge of $440 for the Subclass 417 (Working Holiday) visa and Subclass 462 (Work and Holiday) visa
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a) and (d)

Matter more appropriate for parliamentary enactment

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 primary rather than delegated legislation).

On 24 November 2016 the *Treasury Laws Amendment (Working Holiday Maker Reform) Act 2016* was passed by both houses of Parliament. It included amendments to the Migration Regulations 1994 (Migration Regulations) to reduce the visa application charge (VAC) for working holiday makers by $50, to $390, from 1 July 2017.

Item 1 of the Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017 [F2017L00576] (the regulation) amends the Migration Regulations to increase the VAC for working holiday makers by $50, to $440, from 1 July 2017.

The committee notes that the regulation may be described as reversing amendments made to the VAC for working holiday visas previously agreed to in primary legislation. However, the ES for the regulation provides no information as to the reason for introducing these changes via delegated legislation rather than primary legislation.

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

Unclear basis for determining fees

As noted above, item 1 of the regulation increases the VAC for working holiday makers by $50, to $440. As the regulation reverses a previous reduction in the VAC which had not yet commenced, the committee notes that the regulation may therefore be described as maintaining the current VAC.

While the ES briefly notes a government decision to maintain the VAC when finalising the working holiday maker reform package, it does not appear to state the basis on which the VAC has been calculated, other than to indicate:

> The revenue of not proceeding with the planned $50 reduction in the visa application charge will fund the Seasonal Worker Incentives Trial which will provide incentives for eligible Australian job seekers to undertake horticultural seasonal work.

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	**Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549]**
Purpose	Amends the Migration Regulations 1994 to create a new permanent visa stream for certain New Zealand citizens, lower the maximum age permitted to apply for a Subclass 189 (Skilled – Independent) visa in the Points-tested stream, and remove the requirement for certain persons departing Australia to complete a passenger card
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Item 2 of the Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549] (the regulation) inserts new subitems 1137(3), (4), (4E) and (4F) into the Migration Regulations 1994, which set out various visa application charges (VAC) for the Subclass 189 (Skilled—Independent) visas in the Points-tested stream and permanent visa stream for certain New Zealand citizens.

In this regard, the ES to the regulation provides the following general information about the VAC :

> The total amount of the visa application charge (VAC) will be consistent with the General Skilled Migration Programme, however concessional arrangements have been introduced to the New Zealand stream, allowing 20 per cent of the VAC to be paid at time of lodgement and the remainder to be paid before the visa grant.

With reference to the VAC for the new Points-tested stream the committee notes that the regulation substantially replicates the current Subclass 189 visa.

With reference to the VAC for the new permanent visa stream for certain New Zealand citizens, the ES states:

> Subitems 1137(4E) and (4F) set out the first and second instalment of the visa application charge ('VAC') payable for the New Zealand stream. The overall VAC payable (first and second instalments) is the same as the first instalment of the VAC payable for the Points-tested stream, which is

> $3600. However, consistent with the announcement on 19 February 2016, applicants are only required to pay 20% of the overall VAC at the time of application (as the first instalment of the VAC). The remaining 80% of the overall VAC is charged as the second instalment of the VAC, which is only payable by the applicant before the visa is granted.

However, the ES does not appear to state the basis on which the VAC for either stream has 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	**Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 [F2017L00581]**
Purpose	Amends the Norfolk Island Continued Laws Ordinance 2015 to amend the following Norfolk Island enactments: *Child Welfare Act 2009*, *Juries Act 1960* and *Domestic Violence Act 1995*
Authorising legislation	*Norfolk Island Act 1979*
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

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.

With reference to the above, the committee notes that Schedule 1, item 3 of the Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 [F2017L00581] (the ordinance) amends the Norfolk Island Continued Laws Ordinance 2015, and thereby the *Child Welfare Act 2009* (Norfolk Island) to allow the Norfolk Island child welfare officer to, under section 32, delegate his or her functions to the following classes of people:

(a) a public sector employee; or

(b) an employee under the *Norfolk Island Health and Residential Aged Care Service Act 1985*; or

(c) a person with expertise in the provision of child welfare services who is approved, in writing, by the Commonwealth Minister; or

(d) an APS employee who holds, or is acting in, an Executive Level 2, or equivalent, position in the Department.

The ES to the ordinance states:

> The amendment…expands the delegation power to allow the child welfare officer to delegate his or her functions to a person with expertise in the provision of child welfare services approved by the Minister, or an APS employee who holds or performs the duties of an EL2 position, or an equivalent or higher position, in the Department. The amendment is intended to enable the child welfare officer to access suitable expert assistance in discharging his or her functions under the Act and to enable future unknown contingencies to be addressed.

The committee notes that new subsections 32(b) through (d) appear to be appropriately limited. However, with respect to new subsection 32(a), the committee notes that 'public sector employee' is defined in the Norfolk Island Continued Laws Ordinance 2015 as 'an employee in the public service except the general manager of the Norfolk Island Regional Council', and does not appear to be otherwise limited.

The committee further notes that Schedule 1, item 10 of the ordinance amends the Norfolk Island Continued Laws Ordinance 2015, and thereby the *Norfolk Island Health and Residential Aged Care Service Act 1985* (Norfolk Island) to allow the Commonwealth Minister to appoint 'a person' to act as the manager of the Norfolk Island Health and Residential Aged Care Service (NIHRACS).

The ES to the ordinance states:

> Allowance for an acting position provides flexibility for situations when the NIHRACS manager is absent from duty or from Norfolk Island, or is unable to perform the duties of the office.

However, neither the instrument nor the ES sets a limit on the category of persons who can be appointed as acting manager, or provides any further information about the qualifications or attributes required of a person who acts as the manager.

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

Further response required

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

Correspondence relating to these matters is included at Appendix 2.

For the purposes of disallowance the sitting of the Senate on 31 March 2017 has been counted as a sitting day.[5]

Instrument	**Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]** **Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]**
Purpose	Amends the Migration Regulations 1994 to introduce a new statutory review process; and amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the *Legislation Act 2003*
Authorising legislation	*Migration Act 1958*; *Legislation Act 2003*
Department	Immigration and Border Protection; Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 29 November 2016 and 7 February 2017 respectively) The time to give a notice of motion to disallow expired on 28 March 2017 and 31 March 2017 respectively The committee gave notices of motion to disallow on 28 March 2017 and 31 March 2017 respectively[6]
Scrutiny principle	Standing Order 23(3)(a)

5 For guidance regarding the interpretation of the expression 'sitting day' in section 42 of the *Legislation Act 2003*, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15, pp 446–447.

6 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 16 June 2017).

Previously reported in	*Delegated legislation monitors* 1 and 3 of 2017

Exemption from sunsetting

The committee previously commented as follows:

Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amends the Migration Regulations 1994 (Migration Regulations) to introduce a new statutory review process. The process requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations and to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

The ES to the review regulation states:

> The purpose of the review requirement is to ensure that the Migration Regulations are kept up to date and provisions are in force for so long as they are needed. In this way, the Regulation provides a rigorous integrity measure to ensure the Migration Regulations are examined, and determined fit for purpose, on a regular and ongoing basis. Specifically, this ensures that the Migration Regulations remain subject to ongoing monitoring for their impact and relevance, while also benefitting from appropriate deregulation, including the removal of unnecessary, confusing or outdated provisions.

Item 10 of the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption regulation) amends the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt the Migration Regulations from the sunsetting scheme under the *Legislation Act 2003*.

The committee notes that pursuant to section 50 of the *Legislation Act 2003*, but for the exemption regulation, the Migration Regulations would have been required to be re-made due to sunsetting on or before 1 October 2018.

The ES for the amending regulation states:

> The Migration Regulations contain an alternative statutory review mechanism inserted by the Migration Amendment (Review of the Regulations) Regulation 2016, which requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations, including to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

For this reason, it is appropriate to provide an exemption from sunsetting for the Migration Regulations.

Neither the ES to the review regulation nor the exemption regulation provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.[7]

The committee is concerned that neither the ES to the review regulation nor the exemption regulation provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

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

Attorney-General's initial response

The Attorney-General advised:

> The Committee has sought further advice on the broader justification for the exemption of the Migration Regulations 1994 from sunsetting and information about the review process for the Migration Regulations.
>
> The purpose of the sunsetting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.
>
> The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunsetting exemption. However, there is a long standing principle that sunsetting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:

7 Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (April 2014), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-april2014.doc (accessed 2 February 2016).

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunsetting;
- the instrument is part of an intergovernmental scheme; and
- the instrument is subject to a more rigorous statutory review process.

I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.

The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.

Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.

The Committee may be interested to know that the Migration Regulations are amended numerous times each year to update policy settings for the Australian immigration programmes. This has been the case since the Migration Regulations commenced in September 1994. Redundant provisions were removed from the Migration Regulations in 2012. The amendment history of the Migration Regulations is set out in the endnotes and now runs to more than 400 pages.

Committee's first response

The committee thanks the Attorney-General for his response.

The committee notes the advice of the Attorney-General and Minister for Immigration and Border Protection that the Department of Immigration and Border Protection has not commenced the review, and that timeframes for the initial review under the new process were put in place to ensure that adequate resources and time are allocated. However, the Attorney-General's response does not provide

information as to why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sunsetting date for the Migration Regulations would have been 1 October 2018.

Recognising that the process to review and action review recommendations for instruments can be lengthy, the committee reiterates its expectation that departments and agencies plan for sunsetting well in advance of an instrument's sunset date. The committee remains concerned that the effect of the introduction of the new process for review of the Migration Regulations is that the timeframes set in place by the sunsetting regime under the *Legislation Act 2003* are avoided.

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

Minister's subsequent response

The Minister for Immigration and Border Protection advised:

> The Committee requested further advice about why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sun-setting date for the Migration Regulations 1994 (the Regulations) would have been 1 October 2018.
>
> The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change. As part of the Budget, an announcement was made in relation to improving technologies to manage our visa processing platform, and the Prime Minister and I have since made announcements about changes to Australian citizenship.
>
> I am advised by the Attorney General that the *Legislation Act 2003* provides the flexibility for sunsetting to be delayed. Relatively short delays such as 1 year are not inconsistent with the objective of the sun-setting regime, which is to ensure that legislative instruments are kept up to date and remain in force for only as long as they are needed.

Committee's second response

The committee thanks the Minister for his response.

The committee's request for advice in relation to these regulations arose from concerns about possible implications of the exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003* (LA).

The purpose of sunsetting is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. To achieve this goal, the LA provides that legislative instruments are automatically repealed after a fixed period of time (subject to some exceptions). This automatic repeal is called sunsetting and section 50 of the LA provides for the sunsetting of all instruments

around the tenth anniversary of each instrument's registration on the Federal Register of Legislation. This means that every ten years, if, after a review, it is assessed that an instrument is still required, an instrument is usually remade (with or without amendments). This process provides greater opportunity for Parliament to ensure the content of instruments is current and to ensure Parliament maintains effective and regular oversight of legislative instruments (including the possibility of parliamentary disallowance of the remade instrument).

In light of the above, where a regulation provides an exemption from sunsetting for a particular instrument or a class of instruments, the committee is concerned about the potential implications of the exemption and why it is appropriate for such an exemption to be provided.

The committee acknowledges the Attorney-General's advice that the LA provides the flexibility for sunsetting to be delayed and that short delays such as one year are not inconsistent with the objective of the sunsetting regime. The committee also notes that the alternative statutory review mechanism inserted by the review regulation requires the Department of Immigration and Border Protection (the department) to conduct periodic reviews of the Migration Regulations, similar to the 10-year sunsetting cycle.

The committee further notes the justification provided by the minister for the exemption of the Migration Regulations from sunsetting:

> The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change. As part of the Budget, an announcement was made in relation to improving technologies to manage our visa processing platform, and the Prime Minister and I have since made announcements about changes to Australian citizenship.

The committee also notes the Attorney-General's advice that he was:

> …satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed.

However, it remains unclear to the committee why an extension was not sought to delay the sunsetting of the Migration Regulations for an additional year to allow time for the initial review of the Migration Regulations to be conducted as part of the sunsetting scheme of the LA rather than introducing the new sunsetting scheme contained in the review regulation.

In particular, the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to re-make the Migration

Regulations after each review to ensure the Parliament maintains effective and regular oversight of the Migration Regulations.

The committee gave a protective notice of motion to disallow the Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] on 28 March 2017. This motion to disallow must be resolved or withdrawn within 15 sitting days after it was given otherwise the regulation will be deemed to be disallowed. Noting the information provided by the minister and Attorney-General to date, the committee has resolved, on this occasion, to withdraw the protective notice of motion for this regulation.

However, in light of the committee's concerns regarding the exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003* (as implemented by the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]);[8] and the absence of a statutory requirement to re-make the Migrations Regulations after each review, the committee requests the further advice of the ministers in relation to the above.

8 The committee gave a protective notice of motion to disallow the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] on 31 March 2017. This motion currently must be resolved or withdrawn by 15 August 2017.

Advice only

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

Instrument	**AD/A320/43 Amdt 3 - Passenger Doors 1 and 4 [F2017L00578]** **AD/A320/63 Amdt 1 - Lavatories Smoke Detection [F2017L00579]** **AD/A320/64 Amdt 1 - Avionics Hatch 231 AF [F2017L00555]** **AD/A320/65 Amdt 3 - Fuselage Reinforcement Section 18 [F2017L00556]** **AD/A320/70 Amdt 1 - Landing Gear Retraction Control Circuit [F2017L00566]** **AD/A320/77 Amdt 1 - Loral DFDR F800 Damping Rack Installation [F2017L00563]** **AD/A320/82 Amdt 1 - Wing Rear Spar Pressurised Floor Pick-Up Angles [F2017L00564]** **AD/A320/85 Amdt 1 - Probe Heat Computer [F2017L00562]** **AD/A320/123 Amdt 1 - Ram Air Turbine Actuator [F2017L00565]** **AD/PW100/4 Amdt 1 - Fuel Pump Input Drive Shaft [F2017L00536]**
Purpose	To repeal and replace previous airworthiness directives
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

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

With reference to the above, the committee notes that AD/A320/43 Amdt 3 - Passenger Doors 1 and 4 [F2017L00578] (AD/A320/43) incorporates Airbus Service Bulletins A320-52-1064 and A320-52-1064 as in force from time to time; and Airbus All Operator Telex A320/AOT 52-07 as in force at the commencement of the instrument.

The ES to the AD/A320/43 states:

> The Airbus Service Bulletins and the Airbus All operators telex referred to in the AD can be obtained from Airbus, however, any Australian airline or operator which operates the A320 aircraft is provided with these documents by Airbus by subscription.[9]

The committee also notes that AD/PW100/4 Amdt 1 - Fuel Pump Input Drive Shaft [F2017L00536] (AD/PW100/4) incorporates the Pratt and Whitney Canada Service Bulletin No. 20946.

The ES to the AD/PW100/4 states:

> The Pratt and Whitney Canada Service Bulletin can be obtained from Pratt and Whitney Canada, however, any Australian airline or operator which operates aircraft fitted with the affected engines are provided with these documents by Pratt and Whitney Canada by subscription.

The committee notes the advice contained in the ESs for the above directives, that operators of the relevant aircraft are provided with the incorporated service bulletins and operator telex by subscription. The committee's understanding is that these service bulletins and operator telex may not be available for free.

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9 The committee notes that the following instruments also incorporate various service bulletins: [F2017L00579], [F2017L00555], [F2017L00556], [F2017L00566], [F2017L00563], [F2017L00564], [F2017L00562] and [F2017L00565]. The ESs to each of the directives state that operators are provided with the service bulletins by subscription.

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

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

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

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

Instrument	**Australian Communications and Media Authority (Annual Carrier Licence Charge) Direction 2017 [F2017L00542]**
Purpose	Directs the Australian Communications and Media Authority to provide that a 'non-participating person' under the Telecommunications (Participating Persons) Determination 2015, for the eligible revenue period immediately preceding a financial year, will not be liable to pay an annual carrier licence charge for that financial year
Authorising legislation	*Australian Communications and Media Authority Act 2005*
Department	Communications and the Arts
Disallowance	Exempt (tabled Senate 22 May 2017)
Scrutiny principle	Standing Order 23(3)

Incorrect classification of legislative instrument as subject to disallowance

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2016C01049] exempts particular instruments from disallowance, including, in table item 2 of section 9, an instrument that is a direction by a Minister to any person or body.

The Australian Communications and Media Authority (Annual Carrier Licence Charge) Direction 2017 [F2017L00542] (the direction) is made under section 14 of the *Australian Communications and Media Authority Act 2005* (ACMA Act). Section 14 of the ACMA Act provides that the minister may give written directions to the Australian Communications and Media Authority (ACMA) in relation to the performance of its functions and the exercise of its powers.

The ES to the direction states:

> The Direction is a legislative instrument for the purposes of the *Legislation Act 2003.* The Determination is a class of instruments specified at item 2 of the table at section 9 of the *Legislation (Exemptions and Other Matters) Regulations 2015* for the purposes of paragraph 42(2)(b) of the Legislation Act, and is therefore exempt from disallowance.

The committee therefore understands the direction to be exempt from disallowance. However, the committee notes that when this instrument was received by both the Parliament and the committee it had been classified as subject to disallowance, and thereby tabled as subject to disallowance.

While the committee understands that the direction has since been re-classified as exempt from disallowance, it remains concerned about the classification process generally, and the potential for administrative errors to hinder the effective oversight of instruments by Parliament.

The committee will continue to monitor this issue.

The committee draws this matter to the attention of ministers, instrument-makers, and the Office of Parliamentary Counsel.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2017 [F2017L00548]** **Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 2) Regulations 2017 [F2017L00560]** **Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544]** **Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 1) Regulations 2017 [F2017L00558]**
Purpose	The regulations amend the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Attorney-General's Department; Department of the Environment and Energy; Department of Health and Department of the Prime Minister and Cabinet
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(d)

Parliamentary scrutiny – ordinary annual services

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.[10] 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.[11]

The above regulations seek to establish legislative authority for the Commonwealth government to fund:

- the Protecting the Rights of Older Australians initiative (for $15 million over three years from 2016-17);[12]
- the Surf Life Saving Cleaner Outboard Engines Scheme (for $1 million over four years from 2016-17);[13]
- a grant to Surf Life Saving Australia (for $10 million over four years from 2016-17);[14] and
- the Smart Cities and Suburbs Program (for $50 million over two years from 2017-18).[15]

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10 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.

11 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.

12 Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2017 [F2017L00548] adds new table item 213 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

13 Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 2) Regulations 2017 [F2017L00560] adds new table item 214 to Part 4 of Schedule 1AB to the FF(SP) regulations.

14 Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544] adds new table item 18 to Part 3 of Schedule 1AB to the FF(SP) regulations.

15 Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 1) Regulations 2017 [F2017L00558] adds new table item 224 to Part 4 of Schedule 1AB to the FF(SP) regulations.

It appears to the committee that the above programs are new policies not previously authorised by special legislation; and that the initial appropriation in relation to these new policies may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2016-2017, or Appropriation Bill (No. 1) 2017-18 (which are 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.

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	Primary Industries (Excise) Levies Amendment (Tea Tree Oil) Regulations 2017 [F2017L00573] Primary Industries (Customs) Charges Amendment (Tea Tree Oil) Regulations 2017 [F2017L00580] Primary Industries Legislation Amendment (Wine) Regulations 2017 [F2017L00567] Primary Industries Levies and Charges Collection Amendment (Tea Tree Oil) Regulations 2017 [F2017L00570] Public Governance, Performance and Accountability (Financial Reporting) Amendment (Tiered Reporting and Other Measures) Rules 2017 [F2017L00541] Rural Industries Research and Development Corporation Amendment (Tea Tree Oil) Regulations 2017 [F2017L00572]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

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

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

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

The committee considers that, in the interests of promoting the clarity and intelligibility of delegated legislation, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated; and/or clearly identify the relevance of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation*

Act 2003) to their operation. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

The committee draws the above to the attention of ministers.

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

Instruments	Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] Comptroller-General of Customs (Warrants) Amendment Directions 2017 [F2017L00521] Comptroller Amendment Directions (Warrants) 2017 [F2017L00523] Public Governance, Performance and Accountability (Financial Reporting) Amendment (Tiered Reporting and Other Measures) Rules 2017 [F2017L00541]
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.[16]

The committee draws the above to the attention of ministers.

16 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 included at Appendix 2.

Instrument	**Seacare Authority Code of Practice Approval 2017 [F2017L00326]**
Purpose	Provides guidance on ways to meet occupational health and safety standards and manage commonly understood hazards and control measures for health and safety risks at work on vessels
Authorising legislation	*Occupational Health and Safety (Maritime Industry) Act 1993*
Department	Employment
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 5 and 6 of 2017

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

Manner of incorporation

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

The code incorporates the Australian OffShore Support Vessel Code of Safe Working Practice (the AOSC code) and the Code of Safe Working Practice for Australian Seafarers (the COSW code). With reference to the above, the committee notes that the code sets out the full text of both the AOSC and COSW codes which in turn incorporate various Australian and international standards. However, neither the

text of the code nor the ES expressly states the manner in which the Australian and international standards are incorporated.

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

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

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

Access to incorporated documents

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

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

With reference to the above, the committee notes that the code incorporates various Australian and international standards. However, the ES does not contain a description of these documents, nor indicate how the documents may be obtained.

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

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

Minister's first response

The Minister for Employment advised:

> The Instrument reapproves the Seacare Authority Code of Practice 1/2000, as made by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority). The Code was reapproved in its current form for an interim period to enable the Seacare Authority to complete its review of the Code.
>
> The Code itself incorporates two codes developed by the private sector and adopted by the Seacare Authority in 2000. These are set out in full in the instrument I approved. The Department of Employment was aware

that there were references to standards and other guidance material in the Code. However, as made clear in the explanatory statement, no amendment was made to the Code when I reapproved it for an interim period pending completion of the Seacare Authority's review.

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

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

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

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

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

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

Committee's first response

The committee thanks the minister for her response.

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

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

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

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

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

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

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

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

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

The committee notes that the process to review instruments, and to act in response to review recommendations, can be lengthy, and the committee expects agencies to plan for sunsetting well in advance of an instrument's sunset date.[1]

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

Minister's second response

The Minister for Employment advised:

> The *Occupational Health and Safety (Maritime Industry) Act 1993* gives legislative authority for the code of practice to incorporate a document as in force at the time the code of practice is approved or as amended by the body from time to time. Where documents are incorporated as amended from time to time, the references in the code of practice state this. In some instances the code of practice is silent on whether the document is as amended or as in force at a point in time. The Department of Employment's view is that in these cases the documents are incorporated as in force at a point in time.
>
> As previously noted, I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawn his attention to the need for the

1 Attorney-General's Department, *Guide to managing sunsetting of legislative instrument*, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf (accessed 13 June 2017).

> replacement code to meet modern drafting standards. In addition, the department tabled detailed advice on modern drafting requirements, including the requirements for incorporating documents, at the Seacare Authority meeting on 15 June 2017.
>
> Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.

Committee's second response

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

The committee notes the minister's advice that:

- where the code incorporates a document as in force from time to time this is specified; and
- where the code is silent as to the manner of incorporation of a document it is incorporated as in force at a point in time.

The committee understands this to mean that where the code does not specify the manner of incorporation of a document, it is incorporated as in force at the commencement of the code, pursuant to section 14 of the *Legislation Act 2003*.

In these circumstances, the committee reiterates its expectation that the ES to the replacement code will clearly state the manner in which documents are incorporated in all instances, so as to enable persons interested in or affected by the code to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Senator John Williams (Chair)

Appendix 1

Guidelines

Guideline on consultation

Purpose

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

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislation Act 2003* (the Act)[1] 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 *Legislation Act 2003*

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

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1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

It is important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

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

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

Describing the nature of consultation

To meet the requirements of section 15J of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

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

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

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

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

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning supporting this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 15J of the Act.

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

Guideline on incorporation

Purpose

This guideline provides information on the committee's expectations in relation to legislative instruments that incorporate, by reference, Acts, legislative instruments or other external documents, without reproducing the relevant text of the incorporated material in the instrument.

Where an instrument incorporates material by reference, the committee expects the instrument and/or its explanatory statement (ES) to:

1. specify the manner in which the Act, legislative instrument, or other document is incorporated;
2. identify the legislative authority for the manner of incorporation specified;
3. contain a description of the incorporated document; and
4. include information as to where the incorporated document can be readily and freely accessed.

These expectations reflect the fact that incorporated material becomes a part of the law.

The guideline includes brief background information, an outline of the legislative requirements and guidance about the committee's expectations in relation to ESs.

Manner of incorporation

Instruments may incorporate, by reference, Acts, legislative instruments and other documents as they exist at different times (for example, as in force from time to time, as in force at a particular date or as in force at the commencement of the instrument). However, the manner in which material is incorporated must be authorised by legislation.

Legislative framework

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Commonwealth Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Authorising or other legislation may also provide that other documents can be incorporated into instruments as in force from time to time. However, in the absence of such legislation, other documents may only be incorporated as at the commencement of the legislative instrument (see subsection 14(2) of the *Legislation Act 2003*).

Committee's expectations

The committee expects instruments (and ideally their accompanying ESs) to clearly specify:

- the manner in which Acts, legislative instruments and other documents are incorporated (that is, either as in force from time to time or as in force at a particular time); and
- the legislative authority for the manner of incorporation.

This enables a person interested in or affected by an instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Below are some examples of reasons provided in ESs for the incorporation of different types of documents that the committee has previously accepted:

- **Commonwealth Acts and disallowable legislative instruments**

  Section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

- **State and Territory Acts**

  Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory Acts can be taken to be references to versions of those Acts as in force from time to time.

- **Other documents (for example, Commonwealth instruments that are exempt from disallowance, Australian and international Standards)**

  A section of the authorising (or other) legislation is identified that operates to allow these documents to be incorporated as in force from time to time.

Description of, and access to, incorporated documents

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely (i.e. without cost) access its terms. This principle is supported by provisions in the *Legislation Act 2003*.

Legislative framework

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

Committee's expectations

The committee expects ESs to:

- contain a description of incorporated documents; and
- include information about where incorporated documents can be readily and freely accessed (for example, at a particular website).

In this regard, the committee's expectations accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to provisions of bills that authorise material to be incorporated by reference, particularly where the material is not likely to be readily and freely available to the public.

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[2] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with the appropriate justification, the committee has previously accepted:

- copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;
- the relevant extracts from the incorporated documents are set out in full in the instrument or ES; or

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2 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3 (accessed 10 January 2017).

- copies of incorporated documents will be made available free of charge to people affected by, or interested in, the instrument on request to the administering agency.

Appendix 2

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-001410

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 23 March 2017, in which the Committee requested further information about the *Migration Amendment (Review of the Regulations) Regulation 2016* and the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016.*

The Committee requested further advice about why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sun-setting date for the *Migration Regulations 1994* (the Regulations) would have been 1 October 2018.

The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change. As part of the Budget, an announcement was made in relation to improving technologies to manage our visa processing platform, and the Prime Minister and I have since made announcements about changes to Australian citizenship.

I am advised by the Attorney General that the *Legislation Act 2003* provides the flexibility for sun-setting to be delayed. Relatively short delays such as 1 year are not inconsistent with the objective of the sun-setting regime, which is to ensure that legislative instruments are kept up to date and remain in force for only as long as they are needed.

I trust that this information is of assistance to the Committee.

Yours sincerely

PETER DUTTON 15/06/17

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Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-047775

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Seacare Authority Code of Practice Approval 2017

This letter is in response to the letter of 15 June 2017 from the Senate Regulations and Ordinances Committee's Secretary requesting information about a scrutiny issue identified in the Committee's Delegated Legislation monitor 6 of 2017. The Committee has sought my advice on the manner in which the Australian and international standards are incorporated within the text of the Seacare Authority Code of Practice Approval 2017 (F2017L00326) (the Instrument).

The *Occupational Health and Safety (Maritime Industry) Act 1993* gives legislative authority for the code of practice to incorporate a document as in force at the time the code of practice is approved or as amended by the body from time to time. Where documents are incorporated as amended from time to time, the references in the code of practice state this. In some instances the code of practice is silent on whether the document is as amended or as in force at a point in time. The Department of Employment's view is that in these cases the documents are incorporated as in force at a point in time.

As previously noted, I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawn his attention to the need for the replacement code to meet modern drafting standards. In addition, the department tabled detailed advice on modern drafting requirements, including the requirements for incorporating documents, at the Seacare Authority meeting on 15 June 2017.

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

Thank you for your attention to this matter.

Yours sincerely

Senator the Hon Michaelia Cash
28 / 6 / 2017