

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

Monitor 8 of 2017

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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

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

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 See www.aph.gov.au/regords_monitor.

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

5 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.⁷

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

7 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 26 May 2017 and 29 June 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

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

Response required

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

| | |
|--------------------------------|---|
| Instrument | Australian Radiation Protection and Nuclear Safety Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00781] |
| Purpose | Amends the Australian Radiation Protection and Nuclear Safety Regulations 1999 to increase licence application fees by an indexation amount of 2.3 per cent |
| Authorising legislation | <i>Australian Radiation Protection and Nuclear Safety Act 1998</i> |
| 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

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.

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

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 following Australian/New Zealand Standards into the Australian Radiation Protection and Nuclear Safety Regulations 1999 (ARPANS Regulations), as existing on 1 July 2017:

- Australian/New Zealand Standard AS/NZS IEC 60825.1:2014 Safety of laser products, Part 1: Equipment classification and requirements;
- Australian/New Zealand Standard AS/NZS IEC 60825.2:2011 Safety of laser products, Part 2: Safety of optical fibre communication systems (OFCS); and
- Australian/New Zealand Standard AS/NZS IEC 62471:2011 Photobiological safety of lamp and lamp systems.

The ES states that these standards are available from the SAI global website, but does not provide further information as to where the standards incorporated into the ARPANS Regulations can be accessed for free. The committee understands the standards 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.²

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

2 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 | Banking (prudential standard) determination No. 2 of 2017 - Prudential Standard APS 001 – Definitions [F2017L00661] |
| Purpose | Incorporates definitions used in prudential standards relating to authorised deposit-taking institutions |
| Authorising legislation | <i>Banking Act 1959</i> |
| Department | Treasury |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 June 2017) Notice of motion to disallow currently must be given by 11 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 the definitions of 'limited assurance' and 'reasonable assurance' in section 5 of the instrument incorporate the *Framework for Assurance Engagements* issued by the Auditing and Assurance Standards Board (AUASB) from time to time. However, neither the instrument nor the ES provides a description of this document or indicates where it can be freely accessed.³

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers

3 The committee notes that it has previously commented on a similar issue. See *Delegated legislation monitor* 10 of 2016, Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 – Prudential Standard 3PS 310 - Audit and Related Matters [F2016L01437] and Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016 – Prudential Standard CPS 510 Governance [F2016L01432], pp 29-32.

that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*. However, in this case the committee notes that the *Framework for Assurance Engagements* issued by the AUASB is available for free online.⁴ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁵

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

| | |
|--------------------------------|---|
| Instrument | Building and Construction Industry (Improving Productivity) (Federal Safety Officers) General Directions 2017 [F2017L00655] |
| Purpose | Directs Federal Safety Officers how to conduct themselves when exercising powers and performing functions under the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> |
| Authorising legislation | <i>Building and Construction Industry (Improving Productivity) Act 2016</i> |
| Department | Employment |
| Disallowance | 15 sitting days after tabling (tabled Senate 14 June 2017) Notice of motion to disallow currently must be given by 6 September 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |

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.

4 See Auditing and Assurance Standards Board, *Framework for Assurance Engagements*, <http://www.auasb.gov.au/Pronouncements/Framework-for-Assurance-engagements.aspx> (accessed 21 July 2017).

5 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.

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 section 4 of the instrument incorporates the Federal Safety Officer Code of Conduct (FSO Code of Conduct), dated 1 January 2015, issued by the Federal Safety Commissioner.

Pursuant to section 14 of the *Legislation Act 2003*, as the FSO Code of Conduct is not a Commonwealth Act or disallowable instrument, it may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14. The committee is not aware of any legislation that alters the operation of section 14 in relation to this instrument and therefore understands the FSO Code of Conduct to be incorporated as in force at the commencement of the instrument. However, neither the text of the instrument nor the ES expressly states that the FSO Code of Conduct is incorporated as in force at the commencement of the instrument.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated. 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 of documents published on the committee's website.⁶

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

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

6 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.

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 FSO Code of Conduct. However, neither the instrument nor the ES provides a description of this document or indicates where it can be freely accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁷

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

| | |
|--------------------------------|--|
| Instrument | Defence Determination 2017/18, Overseas conditions of service (Budget measure 2017-18 – Overseas allowances) amendment [F2017L00657] |
| Purpose | Gives effect to the outcome of a whole-of-Government review of overseas entitlements, allowances, financial support and conditions of service provided to Australian Government employees stationed overseas as it applies to the Australian Defence Force |
| Authorising legislation | <i>Defence Act 1903</i> |
| Department | Defence |
| Disallowance | 15 sitting days after tabling (tabled Senate 14 June 2017) Notice of motion to disallow currently must be given by 6 September 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |

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.

⁷ 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.

Subsection 58B(1A) of the *Defence Act 1903* (Defence Act) provides that determinations made by the Defence Force Remuneration Tribunal (DFRT) under section 58H of the Defence Act may be incorporated into defence determinations made under section 58B, either as in force at a particular time or as in force from time to time. The determination is made under section 58B of the Defence Act.

Schedule 3 of the determination inserts new subsection 15.2A.15(1) into Defence Determination 2016/19, Conditions of service [F2016L00643] (the COS determination) which incorporates DFRT Determination 2 of 2017, *Salaries*. However, neither the determination nor the ES states the manner in which the DFRT determination 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 at a particular time or as in force from time to 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 of documents published on the committee's website.⁸

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

Legal certainty

Schedule 3 of the determination inserts new Part 2A into the COS determination. New section 15.2A.12, as inserted by this determination, sets out the methodology that is to be used to calculate the cost of living adjustment (COLA) for Australian Defence Force (ADF) members posted on or after 1 July 2017. The ES explains that the purpose of the COLA is:

to maintain the purchasing power of a member's disposable income at locations where the cost of goods and services is more expensive than in Australia.

The methodology that is used to calculate the COLA includes the application of a 'spendable salary factor' which is calculated by an independent data provider. With respect to the calculation of the 'spendable salary factor', the ES explains:

8 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.

This calculation is applied prior to applying the post index to reflect the cost of living difference between Australia and the host country. The independent data provider's methodology is their intellectual property and cannot be disclosed publicly as it does not belong to the Commonwealth and would be in breach of the terms and conditions under which it is obtained.

The committee appreciates that this determination implements the government's decision to standardise allowances across departments and agencies, and that the COLA calculation (including the 'spendable salary factor') is a core part of this outcome. However, the committee is interested in exploring how ADF members may confirm that their COLA has been calculated correctly, when it appears that the details of the 'spendable salary factor' used to determine the COLA will not be disclosed.

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. Without more specific information regarding the 'spendable salary factor', it is unclear to the committee whether an ADF member could access or obtain a copy of the 'spendable salary factor' that was used to determine their COLA.

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

| | |
|--------------------------------|--|
| Instrument | Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting Recovery Plan (Boggomoss Snail) (21/06/2017) [F2017L00736] |
| Purpose | Adopts a recovery plan for the boggomoss snail |
| Authorising legislation | <i>Environment Protection and Biodiversity Conservation Act 1999</i> |
| 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) |

Drafting

The instrument adopts a recovery plan for the boggomoss snail made by the Queensland Department of Environment and Heritage Protection. The instrument states:

This recovery plan replaces the recovery plan which was adopted under subsection 269A(7) of the *Environment Protection and Biodiversity Conservation Act 1999* [F2008L02578] for the species specified below:

| Species | Recovery Plan |
|------------------------------|---|
| <i>Adclarkia dawsonensis</i> | Dr Stanistic, J., Queensland Museum (2008) Recovery Plan for the Boggomoss Snail <i>Adclarkia dawsonensis</i> . |

However, it is unclear to the committee how this instrument replaces the previous boggomoss snail recovery plan, which was adopted in Environment Protection and Biodiversity Conservation Act 1999 - section 269A - Instrument Adopting Recovery Plans (06/07/2008) (WA, QLD) [F2008L02578] (the 2008 instrument). In this regard, the committee notes that the 2008 instrument is still in operation, and has not been amended to remove the reference to the previous plan.

The committee is interested in the effect, if any, of having two instruments in operation which both appear to adopt a recovery plan for the same species.

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

| | |
|--------------------------------|---|
| Instrument | Hazardous Waste (Regulation of Exports and Imports) Legislation Amendment (2017 Measures) Regulations 2017 [F2017L00788] |
| Purpose | Makes amendments to hazardous waste regulations that are consequential to the <i>Hazardous Waste (Regulation of Exports and Imports) Amendment Act 2017</i> and <i>Hazardous Waste (Regulation of Exports and Imports) Levy Act 2017</i> to provide full cost recovery of the hazardous waste permitting scheme |
| Authorising legislation | <i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i> |
| 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* 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 instrument states:

Relevant industry stakeholders have been consulted in relation to the amendments. The Office of Best Practice Regulation (OBPR) was consulted in relation to the making of the Regulations. OBPR advised that a Regulation Impact Statement was not required, as the changes do not have more than a minor regulatory impact on business, community organisations or individuals.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the committee considers that the ES, while stating that 'relevant industry stakeholders have been consulted in relation to the amendments', does not provide an informative description of consultation that was undertaken specifically in relation to this instrument.

The committee further notes that the requirements regarding the preparation of a regulation impact statement (RIS) are separate to the requirements of the *Legislation Act 2003* in relation to consultation. As set out in the committee's guideline on 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's expectations in this regard are set out in the guideline on consultation published on the committee's website.⁹

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*.

Sub-delegation

Schedule 1, item 5 of the regulation amends paragraph 44(b) of the Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996 (OECD Regulations) to provide that the minister's functions and powers can be delegated to an Australian Public Service (APS) employee who holds, or is acting in, an Executive Level 2 (or equivalent) position in the Department of Environment and Energy (the department).

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to legislation that allows 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 in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

The committee acknowledges that amended paragraph 44(b) of the OECD Regulations is similar to section 60 in the *Hazardous Waste (Regulation of Exports*

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

and Imports) Act 1989 (the Act),¹⁰ which extends delegations to Executive Level 2 officers within the department. However, the committee notes that the rationale for this item in the ES indicates that it may be possible to limit the delegated decision-making powers of the Executive Level 2 officers to certain types of decisions. In this regard, the committee notes that the ES states:

The Minister would only delegate powers and functions to an Executive Level 2 officer where the officer had day-to-day responsibility for the administration of the Act (including the OECD Regulations). This would not prevent significant decisions being made by persons of a higher classification, but would enable Executive Level 2 officers to exercise Ministerial functions and powers where it was appropriate for decisions to be made at this level. This may include:

- administrative actions that are required under the OECD Regulations (some of which are required within relatively short statutory timeframes) that do not influence how hazardous wastes are to be managed, such as the notification and acknowledgement of permit applications; and
- permitting decisions that are routine in nature, non-controversial, and low-risk.

However, these limitations on the types of powers and functions that may be exercised by Executive Level 2 officers are not included in the regulation; nor does the regulation include a general legislative requirement that the minister be satisfied that the Executive Level 2 officer have the appropriate qualifications and attributes to ensure the proper exercise of the delegated powers.

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

Delegation of legislative power—setting level of fee by regulation

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).

The committee notes that amendments made to the Act by the *Hazardous Waste (Regulation of Exports and Imports) Amendment Act 2017* removed a cap on the fee

10 The committee notes that the Senate Standing Committee for the Scrutiny of Bills commented on item 14 of the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016, which amended section 60 of the Act, in *Scrutiny Digest 1 of 2017*, pp 83-86.

amount that may be prescribed under regulations made under the Act for permit applications for the export, import and transit of hazardous waste.

These amendments were identified by the Scrutiny of Bills committee as a delegation to the executive of the Parliament's power to legislate significant matters – in this case the setting of the amount of fees – and were referred to this committee's attention.¹¹ In particular, the Scrutiny of Bills committee noted that while the intention of the amendment was to allow a level of fee to be set that is linked to cost recovery, the legislative provisions require only that the amount of the fee be reasonably related to the expenses incurred (or to be incurred) by the Commonwealth in relation to the relevant application.¹²

The committee notes that Schedule 2 of the regulation makes amendments relating to cost recovery arrangements for permits under the Act and regulations made under the Act.

The committee takes this opportunity to share and reiterate the view of the Scrutiny of Bills committee that important matters should be included in primary legislation unless a compelling justification is provided for their inclusion in delegated legislation.

The committee draws the above to the attention of the Senate.

| | |
|--------------------------------|---|
| Instrument | Higher Education (HELP Program Commonwealth Officers) Instrument 2017 [F2017L00622] |
| Purpose | Specifies 'HELP program Commonwealth officers' for the purposes of paragraph 180-28(7)(c) of the <i>Higher Education Support Act 2003</i> |
| Authorising legislation | <i>Higher Education Support Act 2003</i> |
| Department | Education and Training |
| 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) |

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2017*, pp 80-82.

12 See subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

Sub-delegation

Section 4 of the instrument specifies the Australian Government Actuary (AGA) and Commonwealth officers employed by the Office of the AGA as 'HELP program Commonwealth officers' for the purposes of paragraph 180-28(7)(c) of the *Higher Education Support Act 2003* (HESA Act). While the committee acknowledges that subsection 180-28(8) of the HESA Act permits the minister to specify such officers, the term 'Commonwealth officer' is defined very broadly in the HESA Act.

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 in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service. In the absence of specific qualification requirements of a delegate, the committee expects instruments to include a general requirement that the person delegating a power be satisfied that a delegate has the appropriate qualifications or attributes to perform the delegated functions.

With respect to specifying 'Commonwealth officers' employed by the AGA, the ES states:

Commonwealth officers employed by the Office of the Australian Government Actuary are included in this determination to ensure designated officers within that Office are able to use and disclose HESA information.

However, the ES provides no further justification for the need to specify all 'Commonwealth officers' employed by the AGA as 'HELP program Commonwealth officers' who, pursuant to subsection 180-28(5) of the HESA Act, may use and disclose HESA information to assist in the development or administration of the higher education loan program.

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

| | |
|--------------------------------|---|
| Instrument | National Health (Weighted average disclosed price – October 2017 reduction day) Determination 2017 (PB 44 of 2017) [F2017L00676] |
| Purpose | Determines a weighted average disclosed price for certain brands of pharmaceutical items with a data collection period ending 31 March 2017 |
| Authorising legislation | <i>National Health Act 1953</i> |
| Department | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 September 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 this instrument states:

This instrument affects certain pharmaceutical companies with medicines listed on the PBS [pharmaceutical benefits scheme]. Pharmaceutical companies were consulted in relation to the introduction of price disclosure requirements during the policy development for introduction of price disclosure in 2007 during implementation phases, and during the development and implementation of the further PBS reforms of 2010, pricing changes in 2012, simplified price disclosure amendments in 2014 and measures announced in the 2015 PBS Access and Sustainability Package. Consultation occurred through meetings with peak industry bodies. Further information on price disclosure was also disseminated through peak industry bodies, during meetings with the Price Disclosure Working Group and directly to companies through information sessions conducted in March 2011, June 2012, and March 2016, and distribution of associated educational material at the time of amendments.

Pharmaceutical companies with a listed or delisted brand subject to the price disclosure requirements for the 2017 October Cycle disclosed information relevant to this determination directly to Australian Healthcare Associates Pty Ltd (AHA), known as the Price Disclosure Data Administrator (PDDA). AHA is prescribed in subregulation 85(6) as the person to whom, in accordance with paragraph 99ADC(1)(a), a responsible person is to provide price disclosure information. The PDDA provided responsible persons with an opportunity to check that the information disclosed to the PDDA was translated correctly to PDDA data files. This was done prior to that data being used to apply the method set out in the Regulations to arrive at the WADP [weighted average disclosed price] for listed brands.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the ES primarily describes historical consultation that took place in relation to the introduction and implementation of price disclosure. The remainder of the consultation description discusses a process for disclosing data, and the provision of an opportunity for the supplier of a particular brand of a medicine on the PBS (the responsible person) to check that data has been translated correctly. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that consultation for this determination was considered unnecessary (or inappropriate) for this reason.¹³

The committee's expectations in this regard are set out in the guideline on consultation published on the committee's website.¹⁴

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

13 The committee notes that it previously commented on a similar issue on an advice-only basis. See *Delegated legislation monitor 1 of 2017*, National Health (Weighted average disclosed price – April 2017 reduction day) Determination 2016 [F2016L01963], pp 61-62.

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

| | |
|--------------------------------|---|
| Instrument | Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2017 [F2017L00673] Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2017 [F2017L00674] |
| Purpose | Declare that a ship or vessel only engaged in intra-state trade will be subject to the work health and safety legislation of the state in which they operate |
| Authorising legislation | <i>Occupational Health and Safety (Maritime Industry) Act 1993; Seafarers Rehabilitation and Compensation Act 1992</i> |
| Department | Employment |
| Disallowance | 15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 September 2017 |
| Scrutiny principle | Standing Order 23(3)(d) |

Relationship of instruments to a bill that is currently before the Parliament

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 Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2017 prescribes ships or vessels only engaged in intrastate trade as non-prescribed ships or units for the purposes of the *Occupational Health and Safety (Maritime Industry) Act 1992*.

The Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2017 declares that a certain type of ship which is only engaged in intrastate trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992*.

The committee notes that key elements of the instruments may be described as 'mirroring' amendments in the Seafarers and Other Legislation Amendment Bill 2016 (seafarers bill). The seafarers bill was introduced in the House of Representatives on 13 October 2016.

The statements of compatibility (SOCs) to the instruments explain that the instruments do not create any change and continue interim measures taken in 2015, while legislative reform is being pursued. The SOC states:

The Seafarers and Other Legislation Amendment Bill 2016 (Seafarers Bill) is currently before the Parliament and would remove the need for continued reliance on the instrument to clarify the coverage of the Seacare scheme...

However, the ESs for the instruments provide no further information as to the relationship of the instruments with the seafarers bill. The committee is concerned that the pre-emptive use of delegated legislation in this way may have the capacity to circumvent the will of the Parliament as expressed through the enactment of primary legislation.¹⁵

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

| | |
|--------------------------------|--|
| Instrument | Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 4) [F2017L00603] |
| Purpose | Amends the Private Health Insurance (Benefit Requirements) Rules 2011 to insert, move and remove Medicare Benefits Schedule items |
| Authorising legislation | <i>Private Health Insurance Act 2007</i> |
| Department | Health |
| 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)(b) |

Drafting

Item 2 of this instrument adds a Medicare Benefits Schedule (MBS) item to Schedule 1 of the Private Health Insurance (Benefit Requirements) Rules 2011 (the benefit requirements rules).

¹⁵ The committee notes that it has previously commented on a similar issue. See *Delegated legislation monitor 6* of 2015, Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 [F2015L00335]; and Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 [F2015L00336], pp 21-24.

With reference to this item, the ES states:

This MBS item was listed on the MBS as of 1 May 2017, however this number was not included in the 1 May 2017 Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 3) due to a timing error within the Department.

However, the committee notes that, as this instrument commenced on 27 May 2017, it appears possible that patients covered by private health insurance who received treatment covered by the omitted MBS item between 1 May to 26 May 2017 would not have been paid hospital accommodation benefits during this period.

The committee is concerned about the effect, if any, on individuals during the period in which the MBS item was not included in the benefit requirements rules.

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

| | |
|--------------------------------|--|
| Instrument | Radio Licence Fees Regulations 2017 [F2017L00778] Television Licence Fees Amendment Regulations 2017 [F2017L00780] |
| Purpose | Enable eligible commercial radio and television broadcasting licensees to claim a 100 per cent rebate of licence fees payable in the accounting period ending on 31 December 2016, or a day in 2017 other than 31 December |
| Authorising legislation | <i>Radio Licence Fees Act 1964; Television Licence Fees Act 1964</i> |
| 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)(d) |

Relationship of instruments to a bill that is currently before the Parliament

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).

These regulations provide for eligible commercial radio and television broadcasting licensees to claim a 100 per cent rebate of licence fees payable in the accounting period ending on 31 December 2016, or a day in 2017 other than 31 December.

The committee notes that key elements of the regulations may be described as 'mirroring' amendments in the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (the broadcasting bill) which proposes the abolition of radio and television licence fees payable after 31 December 2016. The broadcasting bill was introduced in the House of Representatives on 15 June 2017 and the third reading agreed to on 21 June 2017. The regulations were made of 27 June 2017, at which time the bill was still being considered by the Senate.¹⁶

The ESs to the regulations explain that the regulations have been made to ensure 'the policy objective of the [broadcasting] Bill is achieved in the interim in the event it does not receive Royal Assent by 30 June 2017'.

However, the ESs for the regulations provide no further information as to the relationship of the regulations with the broadcasting bill. The committee is concerned that the pre-emptive use of delegated legislation in this way may have the capacity to circumvent the will of the Parliament as expressed through the enactment of primary legislation.

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

16 The committee notes that the broadcasting bill was introduced in the Senate on 22 June 2017 and is currently in second reading debate.

| | |
|--------------------------------|--|
| Instrument | Social Security (Exemptions from Non-payment and Waiting Periods - Activities) Specification 2017 [F2017L00719] |
| Purpose | Revokes and replaces the Social Security (Exemptions from Non-payment and Waiting Periods – Activities) Specification 2015 to reflect the extension of the ordinary waiting period to new payment types from 1 July 2017 |
| Authorising legislation | <i>Social Security Act 1991</i> |
| Department | Social Services |
| 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) |

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 the definition of ***Stream C employment services*** in section 5 of the instrument incorporates the *jobactive Deed 2015-2020*. However, neither the instrument nor the ES state the manner in which this document 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 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 of documents published on the committee's website.¹⁷

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.

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 instrument incorporates the *jobactive Deed 2015-2020*. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

In this instance, the committee notes that the *jobactive Deed 2015-2020* is available for free online.¹⁸ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.¹⁹

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

18 Department of Employment, *Document library - jobactive Deed 2015-2020*, <https://docs.employment.gov.au/documents/final-jobactive-deed-2015-2020> (accessed 4 August 2017).

19 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.

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.²⁰

| | |
|--------------------------------|--|
| Instrument | Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] |
| Purpose | Exempts operators of low-momentum ultralight aeroplanes from particular requirements of the Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998 |
| Authorising legislation | Civil Aviation Regulations 1988; Civil Aviation Safety Regulations 1998 |
| Department | Infrastructure and Regional Development |
| Disallowance | 15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor 6 of 2017</i> |

Manner of incorporation

The committee previously commented as follows:

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 subsection 6.1(c) of the Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] (the order) provides that an aeroplane to which the order applies must be flown in specified classes of airspace;

²⁰ See www.aph.gov.au/regords_monitor.

and that the definition of those classes of airspace in the note to subsection 6.1(c) incorporates the Australian Airspace Policy Statement.²¹ However, neither the order nor the ES expressly states the manner in which the Australian Airspace Policy Statement 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 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 of documents published on the committee's website.²²

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

Minister's response

The Minister for Infrastructure and Transport advised:

The Civil Aviation Safety Authority (CASA) has pointed to the reference to the Australian Airspace Policy Statement being included in a note to paragraph 6.1(d) of Civil Aviation Order 95.10. The note states *Classes of airspace are defined in the Australian Airspace Policy Statement*, clarifying the requirement for the aircraft to be flown in class A, B, C, or D airspace in accordance with the requirements of paragraph 6.4. There is no entry in the Explanatory Statement relating to the content of the note.

CASA has advised that in its view, mention of the Australian Airspace Policy Statement in this way is not an incorporation by reference, but simply a guidance note for where a person can ascertain the scope of the classes of airspace.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that, in CASA's view the Australian Airspace Policy Statement is not incorporated into the order.

21 The committee understands that the Australian Airspace Policy Statement 2015 [F2015L01133] is a legislative instrument that is not subject to disallowance.

22 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.

However, the committee notes that the definitions of classes A, B, C, or D airspace (as set out in the Australian Airspace Policy Statement) could be said to affect the operation of the instrument, because these definitions determine the classes of airspace in which aircraft subject to the order are permitted to fly. It is therefore unclear to the committee how the Australian Airspace Policy Statement is not incorporated into the order.

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

| | |
|--------------------------------|---|
| Instrument | <p>Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516]</p> <p>Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452]</p> <p>Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518]</p> |
| Purpose | <p>Specifies construction, design, performance and labelling requirements for babies' dummies;</p> <p>Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear; and</p> <p>Extends the interim ban on certain decorative alcohol fuelled devices by a period of 30 days from 16 May 2017</p> |
| Authorising legislation | <i>Competition and Consumer Act 2010</i> |
| Department | Treasury |
| Disallowance | <p>15 sitting days after tabling</p> <p>[F2017L00452] (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017</p> <p>[F2017L00516]; [F2017L00518] (tabled Senate 13 June 2017) Notice of motion to disallow currently must be given by 5 September 2017</p> |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor 6 of 2017</i> |

The committee previously commented as follows:

Background

Subsection 44(1) of the *Legislation Act 2003* (LA) provides:

Section 42 [disallowance of legislative instruments] does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

- (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
- (b) authorises the instrument to be made by the body or for the purposes of the body or scheme;

unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

The explanatory memorandum to the *Legislative Instruments Act 2003*²³ explains:

Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.

In 2010 the *Trade Practices Act 1974* was amended to be named the *Competition and Consumer Act 2010* (CCA) and to establish the Australian Consumer Law (ACL). The amendments were made pursuant to the agreements of the Council of Australian Governments (COAG) made on July and October 2008, to create a single national consumer law for Australia, including a national product safety law, and the *Intergovernmental Agreement for the Australian Consumer Law*, signed by COAG in July 2009.

The ACL therefore appears to facilitate the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States.

Sections 104 and 105 of the ACL authorise safety standards to be made; and section 109 authorises interim bans to be made for the purposes of the ACL scheme.

23 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*.

Section 131E of the CCA provides that instruments made under these sections of the ACL are to be made by legislative instrument. Neither the ACL, CCA or another Act appear to otherwise have the effect that legislative instruments made under these sections are disallowable. Therefore, it appears that by virtue of paragraph 44(1)(a) of the LA such legislative instruments would be exempt from disallowance.

Classification of legislative instruments as subject to disallowance

The Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516] (the dummy standard) is made under section 104 of the ACL. The purpose of the dummy standard is to ensure babies' dummies and dummy chains have safety features that reduce the risk of injury.

The Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) is made under section 105 of the ACL. The purpose of the nightwear standard is to reduce the risk of child death and injury associated with nightwear catching fire.

The Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518] (the interim devices ban) is made under section 109 of the ACL. The purpose of the interim devices ban is to minimise the risk of injury to persons due to uncontrolled fire while refuelling, lighting or being in close proximity to an alcohol fuelled device.

As set out above, the dummy standard and the nightwear standard are made under sections 104 and 105 of the ACL; and the interim device ban is made under section 109. Therefore, as these standards appear to facilitate the operation of an intergovernmental scheme, are not regulations and do not appear to be disallowable under the CCA, ACL or another Act, the committee understands that these instruments may be exempt from disallowance in accordance with subsection 44(1) of the LA.

However, the ESs to the dummy standard, the nightwear standard and the interim devices ban state the following in relation to each instrument:

This legislative instrument is subject to disallowance under Chapter 3, Part 2 of the *Legislation Act 2003*.

It is therefore unclear to the committee whether these standards have been properly described as subject to disallowance.

The committee is also interested to understand more about the apparent inconsistent approach to the classification of instruments made under the ACL. For example, the committee notes that the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474] (the egg standard) also

seems to be covered by the operation of section 44(1) of the LA, but it is classified as exempt from disallowance (and thereby removed from the effective oversight of the Parliament).²⁴

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

Minister's response

The Minister for Small Business advised:

Classification of legislative instruments as subject to disallowance

I appreciate the Committee drawing my attention to the explanatory statements to the above legislative instruments which describe the instruments as subject to disallowance under the *Legislation Act 2003*. As the Committee notes, subsection 44(1) of the *Legislation Act 2003* provides that legislative instruments are not subject to disallowance if they are made under certain legislation facilitating the operation of an intergovernmental scheme.

I can advise the Committee the ACL facilitates the operation of an intergovernmental scheme and the above legislative instruments are not subject to disallowance. The contrary references in the explanatory statements are incorrect and will be rectified shortly.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that these instruments are not disallowable.

The committee also notes the minister's undertaking to correct references in the ESs to the instruments being subject to disallowance.

However, the committee is concerned that when these instruments were received by both the Parliament and the committee they had been classified as subject to disallowance, and thereby tabled as subject to disallowance. The committee also remains concerned about the classification process generally, and is interested in understanding how these misclassifications occurred and whether there is any further action that needs to be taken to ensure this situation does not occur again in the future.

24 The egg standard is made under section 134 of the ACL which authorises information standards to be made for the purposes of the ACL scheme. As the egg standard is not a regulation and does not appear to be disallowable under the CCA, ACL or another Act, it appears to be exempt from disallowance.

The committee also notes that it has since received another instrument, Further Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00664], which also appears to have been misclassified as subject to disallowance.

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

Access to incorporated document

The committee previously commented as follows:

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 Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) incorporates Australian/New Zealand Standard AS/NZS 1249:2014 *Children's nightwear and limited daywear having reduced fire hazard*, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force immediately before the commencement of the nightwear standard.

The note to the definition of 'Australian Standard' in the nightwear standard, as well as the ES, state:

The Australian Standard could in 2017 be purchased from SAI Global's website (<https://www.saiglobal.com>). The Australian Competition and Consumer Commission [ACCC] can make a copy of the standard available for viewing at one of its offices, subject to licensing conditions.

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.²⁵ 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.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.²⁶

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

Minister's response

The Minister for Small Business advised:

Access to Australian standards incorporated by reference

I note the Committee's concerns about the incorporation of Australian and international standards in the Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 and public access to those standards.

I appreciate the issue of access to incorporated documents is an issue of ongoing concern to the Committee. On 28 September 2016, the Australian Competition and Consumer Commission (ACCC) advised the Committee of the need to incorporate Australian and international standards in product safety standards and the ACCC's processes for providing limited public access to standards free of charge. It is not possible to make these standards freely available more broadly because independent standards organisations own the copyright in the standards and are only willing to grant limited licences to the Government.

I have enclosed a copy of the ACCC's advice to the Committee as the advice remains relevant to the issues raised in the Committee's recent correspondence.

Committee's response

The committee thanks the minister for his response.

25 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 6 June 2017).

26 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.

The committee notes the minister's advice that it is not possible to make the incorporated standard freely available more broadly, because independent standards organisations own the copyright in the standards and are only willing to grant limited licences to the Government.

The committee has concluded its examination of the above. However, the committee reiterates its concerns about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

Drafting

The committee previously commented as follows:

The instrument appears 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 to the 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.²⁷

The committee draws the above to the attention of the minister.

Minister's response

The Minister for Small Business advised:

Power to vary instruments

I appreciate the Committee's suggestion that explanatory statements refer to subsection 33(3) of the *Acts Interpretation Act 1901* where a legislative instrument varies or revokes a principal instrument in reliance on that subsection. Future legislative instruments made under the ACL and relying on subsection 33(3) to vary or revoke an instrument will include wording in

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

the explanatory statement on this point to improve the clarity of the instrument to anticipated users.

Committee's response

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

The committee thanks the minister for the advice that where future legislative instruments made under the ACL vary or revoke an instrument the ES to such an instrument will identify the relevance of subsection 33(3) of the *Acts Interpretation Act 1901* to its operation.

| | |
|--------------------------------|--|
| Instrument | Legal Services Directions 2017 [F2017L00369] |
| Purpose | Repeals and remakes Legal Services Directions 2005 [F2006L00320] which sunsetted on 1 April 2017 |
| Authorising legislation | <i>Judiciary Act 1903</i> |
| Department | Attorney-General's |
| Disallowance | 15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017 |
| Scrutiny principle | Standing Order 23(3)(a) and (d) |
| Previously reported in | <i>Delegated legislation monitors 5 and 6 of 2017</i> |

Manner of incorporation

The committee previously commented as follows:

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 sections 1 and 3 of Appendix F to the directions incorporate the Legal Services Multi-use List (LSMUL). However, neither the text of the directions nor the ES expressly states the manner in which the LSMUL 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 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.

Minister's first response

The Attorney-General advised:

Paragraphs 1 and 3 of Appendix F to the 2017 Directions incorporate LSMUL. The Committee has commented that neither the text of the 2017 Directions nor the Explanatory Statement expressly state the manner in which the LSMUL is incorporated into the 2017 Directions.

The 2017 Directions incorporate the LSMUL as in force from time to time.

Committee's first response

The committee thanks the Attorney-General for his response.

The committee notes the Attorney-General's advice that the LMSUL is incorporated as in force from time. However, pursuant to section 14 of the *Legislation Act 2003* the committee understands that, as the LMSUL is not a Commonwealth disallowable legislative instrument, it 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 requests the further advice of the Attorney-General in relation to the above.

Minister's second response

The Attorney-General advised:

I note the Committee's acknowledgement of my prior response on the issue of incorporation of the Legal Services Multi-Use List (LSMUL) from time to time. I also note the Committee's statement of its understanding that 'as the LSMUL is not a Commonwealth disallowable legislative instrument, it 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*' ('Legislation Act').

The reference to the LSMUL in the 2017 Directions does not apply, adopt or incorporate any matter within the meaning of section 14 of the Legislation Act.

The 2017 Directions prescribe that certain Commonwealth entities may only contract with an external legal services provider to undertake Commonwealth legal work if the external legal services provider is included on the LSMUL. The 2017 Directions simply make reference to the LSMUL as an administrative document, and the firms listed on the LSMUL change regularly as new firms are added or old ones removed.

Committee's second response

The committee thanks the Attorney-General for his response.

The committee notes that the Attorney-General's first response advised that the directions incorporated the LSMUL; and that the Attorney-General's second response advises that the directions do not incorporate the LMSUL.

To ensure that incorporation by reference is effective; does not have unintended consequences; and is clear on the face of the instrument, the committee expects instrument-makers to clearly identify whether documents are incorporated at the time of drafting.

Based on the Attorney-General's most recent advice that the directions do not incorporate the LMSUL, the committee has concluded its examination of the above.

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to seek to ensure that an instrument does not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in scrutinising whether matters are being appropriately dealt with as primary or delegated legislation. In this regard, the committee notes the following guidance from the Legislation Handbook:

While it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation, the following are examples of matters generally implemented only through Acts of Parliament...provisions imposing obligations on individuals or organisations to...desist from activities (e.g. to prohibit an activity and impose sanctions for engaging in an activity).

With reference to the above, the committee notes that paragraph 14 in Part 3 of Schedule 1 and section 5 of Appendix G of the directions enables the Attorney-General to impose sanctions for non-compliance with the directions. A note to paragraph 14 in Part 3 of Schedule 1 of the directions provides:

Examples demonstrating the range of sanctions and the manner in which OLSC [The Office of Legal Services Commissioner] approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that this guidance material does not appear to be available on the OLSC website and the ES provides no further information in relation to the range of sanctions that may be imposed by the Attorney-General for non-compliance with the directions.

With respect to section 5 of Appendix G, the ES to the Directions states:

This provision ensures that the Attorney-General may continue to impose sanctions for non-compliance with the 2005 Directions after those Directions are repealed.

However, neither the directions nor the ES appear to:

- set any limitations or provide any guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; nor
- justify the need for the Attorney-General to be granted such broadly defined sanction powers; nor
- explain the reasons for enabling the Attorney-General to impose sanctions for non-compliance with the Directions in delegated as opposed to primary legislation.

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

Minister's first response

The Attorney-General advised:

Paragraph 14 of Part 3 of Schedule 1 of the 2017 Directions states, '[t]he Attorney-General may impose sanctions for non-compliance with the Directions.' The note to this paragraph states, '[e]xamples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.'

The Committee has commented that neither the 2017 Directions nor the Explanatory Statement set any limitations or provide any guidance as to what sanctions could be imposed, justification of the need for such a

broadly defined power, and the reasons for this power to be in the 2017 Directions rather than in primary legislation.

Section 55ZG of the *Judiciary Act 1903* states, '[c]ompliance with a Legal Services Direction is not enforceable except by, or on the application of, the Attorney-General.' Compliance with the 2017 Directions (per paragraph 14) derives its legislative basis from section 55ZG of the *Judiciary Act 1903*.

The OLSC website contains guidance material regarding its approach to compliance with the 2017 Directions in a document entitled the 'Compliance Framework'. It is available at <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-20Compliance%20Framework.pdf>

Committee's first response

The committee thanks the Attorney-General for his response.

The committee acknowledges the Attorney-General's advice that compliance with the directions derives its legislative basis from section 55ZG of *Judiciary Act 1903*.

The committee also acknowledges that the note to paragraph 14 of Part 3 of Schedule 1 of the directions, which provides that the Attorney-General may impose sanctions for non-compliance with the Directions, states:

Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that the guidance material referred to by the Attorney-General does not provide information about the range of sanctions that may be imposed.

The committee therefore remains concerned that neither the Compliance Framework nor the Attorney-General's response:

- provides guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; or
- justifies the need for the Attorney-General to be granted such broadly defined sanction powers.

The committee requests the further advice of the Attorney-General in relation to the above.

Minister's second response

The Attorney-General advised:

The Committee acknowledges my advice about the legislative basis for the power to impose sanctions for non-compliance with the 2017 Directions. I also referred the Committee to a document published by the Office of Legal Services Coordination in my Department entitled 'Compliance Framework'.

The Compliance Framework outlines the sanctions contemplated by the Directions 2017 at paragraph 20, which states:

Pursuant to s 55ZF(1)(b) of the Judiciary Act, the Attorney-General may issue a direction to an agency that is to apply generally to Commonwealth legal work, or in relation to a particular matter. Such a direction may be made in order to enforce and/or direct compliance with an existing requirement under the Directions, or to address a risk not adequately addressed by the Directions.

The range of sanctions is thus set out in the Judiciary Act itself.

Committee's second response

The committee thanks the Attorney-General for his response.

The committee understands the Attorney-General's advice to mean that, pursuant to the Compliance Framework, the power to impose sanctions for non-compliance with the 2017 directions is limited to issuing a direction to enforce and/or direct compliance:

- with an existing requirement under the 2017 directions; or
- to address a risk not adequately addressed by the 2017 directions.

While the above limits on the imposition of sanctions for non-compliance with the 2017 directions form part of the administrative framework for compliance across the Commonwealth with the 2017 directions, the committee remains concerned that these limitations are not contained in legislation.

The committee requests the further advice of the Attorney-General in relation to the above.

| | |
|--------------------------------|---|
| 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 <i>Legislation Act 2003</i> |
| Authorising legislation | <i>Migration Act 1958; Legislation Act 2003</i> |
| 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 The committee withdrew the notice of motion to disallow [F2016L01809] on 22 June 2017 ²⁸ |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitors 1, 3 and 7 of 2017</i> |

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:

28 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 18 July 2017).

- 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 sunseting well in advance of an instrument's sunset date.²⁹

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 sunseting 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 sunseting and information about the review process for the Migration Regulations.

The purpose of the sunseting 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 sunseting exemption. However, there is a long standing principle that sunseting 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:

- 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 sunseting;
- 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

29 Attorney-General's Department, *Guide to Managing Sunseting of Legislative Instruments* (2016), <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunseting-of-legislative-instruments-april2014.doc> (accessed 2 February 2016).

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 sunseting 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 sunseting 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 sunseting 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 sunseting 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 sunseting 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 sunseting requirements of the *Legislation Act 2003* (LA).

The purpose of sunseting 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 sunseting and section 50 of the LA provides for the sunseting 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 sunseting 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 sunseting to be delayed and that short delays such as one year are not inconsistent with the objective of the sunseting 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 sunseting cycle.

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

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 sunseting 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 sunseting scheme of the LA rather than introducing the new sunseting 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 sunseting requirements of the *Legislation Act 2003* (as implemented by the Legislation (Exemptions and Other Matters) Amendment

(Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]);³⁰ 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.

Minister's further response

The Minister for Immigration and Border Protection advised:

Formal consultations between the Department of Immigration and Border Protection, the Office of Parliamentary Counsel and the Attorney-General's Department began in February 2016 in relation to the sunseting of the Migration Regulations 1994 (the Migration Regulations). As a result of these discussions, and the briefing provided to me, I wrote to the Attorney-General seeking an exemption from the sunseting regime.

The Attorney-General agreed to this proposal, on the condition that a review requirement was incorporated into the Migration Regulations. This requirement was inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 in November 2016.

The Committee has queried:

- why an extension was not sought to delay the sunseting 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 sunseting scheme; and
- why 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.

The answers to both these questions are inter-related, since the decisions to introduce a review process into the Migration Regulations, and to exempt these regulations from sunseting, were not taken because there was insufficient time available to conduct a review of the Migration Regulations. Instead, these decisions were made because – for the reasons outlined below – it was considered inappropriate for the Migration Regulations to sunset.

The Migration Regulations are large and complex, and underpin Australia's visa framework. This framework supports the Government's international priorities and obligations by facilitating:

30 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.

- temporary entry of people into Australia to undertake education, tourism, working holidays or skilled work (more than 7.7 million temporary visas were granted in 2015-16); and
- permanent migration.

Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.

In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for:

- the millions of visa holders whose visa conditions and the grounds on which their visa is held, including when that visa ceases, are determined by the Migration Regulations;
- the millions of current or future visa applicants whose eligibility for an Australian visa is determined by the Migration Regulations;
- sponsors and potential sponsors; and
- industries where the conduct of business is reliant on migrants, either as employees or clients.

The Migration Regulations were exempted from sunseting on the basis that the new review process met the objectives of the sunseting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).

There is no question that the Migration Regulations are still needed – as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.

In addition, as a deregulation measure, in 2012-2013 the Migration Regulations were comprehensively reviewed and were amended in 2014 to remove redundant provisions and regularise terminology (see the Migration Amendment (Redundant and Other Provisions) Regulation 2014 for further details about these amendments).

The process involved individual consideration of every provision of the Migration Regulations and categorisation as 'still required', 'possibly redundant', and 'redundant'. The relevant policy area was then consulted to provide instructions to repeal, or justification to keep the provisions.

The process also involved updating cross references and terminology, and certain drafting practices.

In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy, including the announcements made on 9 May 2017, as part of the 2017-18 Budget, that the Government:

- has committed \$95.4 million in the 2017-18 Budget to support new technologies for my Department to bolster the prosperity of the nation and to protect Australia into the future; and
- will initiate a long-term programme of work to enhance the visa system and deal with the increasing number of movements across Australia's border (more than 700,000 people arrive in or depart from Australia each week, and this number is expected to increase by about 20 per cent over the next few years).

Further information about these changes can be found here: <http://www.minister.border.gov.au/peterdutton/2017/Pages/budget-2017-18.aspx>

In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.

Committee's third response

The committee thanks the minister for his response.

The committee's request for further information regarding the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] arose from concerns regarding the exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003*; and in particular, the absence of a statutory requirement under the new review arrangements to remake the Migrations Regulations after each review.

The committee notes the minister's advice that a remake of the Migration Regulations would:

- require complex and administratively difficult transitional provisions; and
- this would likely have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for visa holders, sponsors and industries where the conduct of business is reliant on migrants.

The committee also notes the minister's advice that 'the Migration Regulations are large and complex, and underpin Australia's visa framework' and that 'remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources'. However, the committee's focus where an exemption from sunseting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated (including the opportunity to consider disallowance of instruments that have been remade due to sunseting).

The committee remains concerned that exemption of the Migration Regulations from the sunseting requirements of the *Legislation Act 2003*, reduces Parliament's oversight of these regulations as there is no statutory requirement to remake the regulations after each review.

The committee further considers that a review of the Migration Regulations is a significant matter and that the processes and outcomes of such a review should be subject to parliamentary scrutiny.

The committee considers that an exemption from sunseting of a significant piece of delegated legislation (such as the Migration Regulations) could be more appropriately contained in primary legislation (see for example section 54 of the *Legislation Act 2003*). The committee reiterates its view that significant matters should be included in primary legislation unless a compelling justification is provided for their inclusion in delegated legislation.

The committee's notice of motion to disallow the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] must be resolved or withdrawn within 15 sitting days after it was given.

The committee considers that the information provided by the Minister for Immigration and Border Protection and the Attorney-General does not adequately address the committee's request for a justification for the exemption of the Migration Regulations from the sunseting requirements of the *Legislation Act 2003*.

Therefore, the committee requests that the minister provide detailed advice as to:

- **why it is appropriate for the Migration Regulations to be exempt from the sunseting requirements of the *Legislation Act 2003*;**
- **why it is appropriate to provide for this exemption in delegated legislation; and**
- **why it is appropriate to reduce Parliament's oversight of these regulations, noting that there is no statutory requirement to re-make the regulations after each review (including the opportunity to consider disallowance of instruments that have been remade due to sunseting).**

| | |
|--------------------------------|--|
| 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 | <i>Migration Act 1958</i> |
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

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.

Minister's response

The Minister for Immigration and Border Protection advised:

The WHM VAC Regulations give effect to the decision made by Government in the Mid-Year Economic and Fiscal Outlook to maintain the VACs for Working Holiday Maker visas at \$440, in order to help fund the Government's upcoming Seasonal Worker Incentives trial. As noted by the Committee, this trial will provide incentives for eligible Australian job seekers to undertake horticultural seasonal work.

I consider that it was appropriate to make these changes via delegated legislation, in light of subsection 13(5) of the *Legislation Act 2003*, which provides that an amendment of a legislative instrument by an Act does not prevent the instrument, as so amended, from being amended or repealed by a person who is currently authorised under the enabling legislation for the instrument to make instruments of the same kind.

I therefore consider there is a clear basis for changing the VACs for the Working Holiday Maker visas via delegated legislation, rather than by parliamentary enactment.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the above. However, noting that the regulation may be described as reversing previous amendments contained in primary legislation, the committee draws this matter to the attention of the Senate.

Unclear basis for determining fees

The committee previously commented as follows:

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.

Minister's response

The Minister for Immigration and Border Protection advised:

As noted by the Committee, the effect of the WHM VAC Regulations is to maintain the VACs for Working Holiday Maker visas at \$440. This has been the VAC amount for these visas since 1 July 2015, when the VACs were indexed from \$420 to \$440. Continuation of the VAC of \$440 is not expected to have a negative impact on demand as the VAC is relatively small compared to the costs and expenses of travel to and staying in Australia. The pricing of the Working Holiday Maker visa products is not expected to change Australia's relative position against similar international countries. In addition, I note that this VAC amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. I therefore consider that \$440 is an appropriate VAC for these visas.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that the regulation maintains the current VAC amount for working holiday makers and that the amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*.

While the VAC amount remains unchanged, the minister's response does not address the question of the specific basis on which the amount has been calculated; for example, whether the VAC is 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 (including where an instrument maintains a current charge) is that the relevant ES make clear the specific basis on which the charge has been calculated.

The committee requests the further 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 | <i>Migration Act 1958</i> |
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Unclear basis for determining fees

The committee previously commented as follows:

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.

Minister's response

The Minister for Immigration and Border Protection advised:

The Australia-New Zealand bilateral relationship is one of the closest and most comprehensive bilateral relationships Australia has with any country. It has been built on the Trans-Tasman Travel Arrangement (TTTA) and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER).

In line with the 2016 Government announcement, the Skilled Independent (subclass 189) (New Zealand stream) visa pathway was created within the Skilled Independent category of the General Skilled Migration (GSM) component of Australia's annual Migration Programme. The pathway is directly aimed at New Zealand citizens who have made, and continue to make, a demonstrated economic contribution to Australia, which is consistent with the GSM parameters.

The visa application charge (VAC) imposed on the New Zealand stream under the Skilled Independent (subclass 189) is the lowest of the range of skilled visas. Other pathways to permanent residence for New Zealand citizens under other skilled or family streams attract a higher VAC.

Further, in recognition of the special bilateral relationship, concessional arrangements to the VAC were introduced solely for the New Zealand stream. Applicants need only pay 20 per cent of the overall VAC at the time of application (as the first instalment of the VAC). The remaining 80 per cent 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.

I note that the amount of the VAC does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. For this reason, and in light of the above, I consider the VAC for these visas is appropriate.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice about the Australia-New Zealand bilateral relationship; that the VAC for the New Zealand stream under the Skilled Independent (subclass 189) is the lowest of the range of skilled visa; and that the amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*.

However, the minister's response does not address the question of the specific basis on which the charges have been calculated; for example, whether the VAC is calculated on the basis of cost recovery or on another basis.

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 | Amendment of the List of Exempt Native Specimens (Queensland East Coast Otter Trawl Fishery) (23/05/2017) [F2017L00601] |
| Purpose | Varies the conditions of inclusion of product from the Queensland East Coast Otter Trawl Fishery |
| Authorising legislation | <i>Environment Protection and Biodiversity Conservation Act 1999</i> |
| Department | Environment and Energy |
| 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) |

Incorrect classification of legislative instrument as exempt from disallowance

This instrument is made under paragraph 303DC(1)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* and is subject to disallowance. However, when this instrument was received by both the Parliament and the committee it had been incorrectly classified as exempt from disallowance.

The incorrect classification of instruments as exempt from disallowance has the potential to hinder the effective oversight of instruments by Parliament.

While the committee understands that this instrument has been re-classified correctly, the committee remains concerned about the classification process generally, and 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 | Christmas Island Utilities and Services (Water, Sewerage and Building Application Services Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L00747] Cocos (Keeling) Islands Utilities and Services (Water, Sewerage and Building Application Services Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L00748] |
| Purpose | Update fees payable for the supply of water, sewerage and building application services in Christmas and Cocos (Keeling) Islands |
| Authorising legislation | Christmas Island Utilities and Services Ordinance 2016; Cocos (Keeling) Islands Utilities and Services Ordinance 2016 |
| 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) |

Drafting

Section 2 of each of these instruments provides for their commencement on the day after registration. The committee notes that both instruments were registered on the Federal Register of Legislation on 26 June 2017.

However, in relation to section 2, the ES to each instrument states:

This section provides that this Determination is to commence on 1 July 2017.

The committee understands that the instruments commenced on 27 June 2017, being the day after the instruments were registered. However, the committee notes that ESs should be drafted with sufficient care to avoid potential confusion for anticipated users of instruments which may be caused by discrepancies between the text of an instrument and its ES.

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

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|--------------------------------|---|
| Instrument | Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 4) Regulations 2017 [F2017L00787] |
| Purpose | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Agriculture and Water Resources |
| Authorising legislation | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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)(a) |

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.³¹ 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.³²

The above regulation seeks to establish legislative authority for Commonwealth government spending on grants to support the establishment of the National Institute for Forest Products Innovation (\$4 million over five years from 2016-17).

It appears to the committee that the above grant 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. 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.

31 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.

32 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 (Health Measures No. 3) Regulations 2017 [F2017L00785] Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulations 2017 [F2017L00783] |
| Purpose | Amend the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Health |
| Authorising legislation | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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)(a) |

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.³³ 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.³⁴

The above regulations seek to establish legislative authority for Commonwealth government spending on grants to support the Women's Rugby League World Cup 2017 (\$500,000 in 2016-17) and the Australian bid for 2023 FIFA Women's World Cup (\$1 million in 2016-17).

The ESs to the regulations state that funding of \$500,000 and \$1 million, respectively, will be made available in 2016-17. However, the ESs also state:

Funding for this item will come from Program 3.1: Sport and Recreation, which is part of Outcome 3. Details will be set out in the *Portfolio Additional Estimates Statements 2017-18, Health Portfolio*.

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

Therefore, the committee is unable to determine if the appropriation in relation to these new grants 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.

33 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.

34 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 | Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015 [F2017L00643] |
| Purpose | Prescribes the form for the certificate to be given under subsection 27B(3) of the <i>Foreign Evidence Act 1994</i> |
| Authorising legislation | <i>Foreign Evidence Act 1994</i> |
| Department | Attorney-General's |
| 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) |

Drafting

Pursuant to subsection 27B(3) of the *Foreign Evidence Act 1994*, this instrument prescribes a form that enables the the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain foreign government material through mutual assistance processes, thereby enabling material obtained through agency-to-agency channels to be considered as evidence.

Subsection 15G(1) of the *Legislation Act 2003* requires rule-makers to lodge legislative instruments for registration as soon as practicable after the instrument is made.

With reference to this requirement, the committee notes that this instrument was made on 23 January 2015 and not registered until 5 June 2017. With regard to the requirements of subsection 15G(1) of the *Legislation Act 2003*, the committee notes that it received the following advice from the Attorney-General's Department (department) about the delay in registering the instrument:

Due to an administrative oversight at Departmental level, the requirements of the *Legislation Act 2003* (Cth) regarding registration and the need for accompanying documents were not fulfilled. When the Department became aware of the issue, steps were taken to satisfy those requirements as soon as practicable.

Subsection 27B(3) and the proposed certificate have not been relied on to date and accordingly no-one has been impacted by the failure to register the Instrument earlier.³⁵

35 This correspondence is published on the committee's website at www.aph.gov.au/regords_monitor.

The committee thanks the department for the above advice, and, noting that no-one has been impacted by the delay in registering the instrument, the committee will not pursue this matter further. However, as the instrument includes what are now incorrect references to the *Legislative Instruments Act 2003* and the Federal Register of Legislative Instruments, the committee notes that its preference in such circumstances is that instruments be remade to include updated references.

The committee draws the above to the attention of ministers and instrument-makers.

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|--------------------------------|---|
| Instrument | Greenhouse and Energy Minimum Standards (Double-capped Fluorescent Lamps) Determination 2017 [F2017L00652] Greenhouse and Energy Minimum Standards (Self-ballasted Compact Fluorescent Lamps for General Lighting Services) Determination 2017 [F2017L00653] |
| Purpose | Establish minimum energy efficiency, labelling and product performance requirements, and associated requirements for conducting tests, for double-capped fluorescent lamps and self-ballasted compact fluorescent lamps |
| Authorising legislation | <i>Greenhouse and Energy Minimum Standards Act 2012</i> |
| Department | Environment and Energy |
| 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 the definitions in section 3 of the instruments incorporate various Australian/New Zealand Standards as they existed on the day the instruments came into force. The ESs to the instruments state:

Selected definitions and text are extracted in the Determination from the relevant Australian or Australian/New Zealand Standards. This is done with the intention of making it possible to determine if a product is covered (or excluded) by the Determination without having to refer to the relevant standard. The standards referenced in the Determination are available to purchase from Standards Australia, through its exclusive licensee SAI Global. The Australian Government envisages that the parties most likely to wish to access the referenced documents are members of industry whose products are covered by the Determination. Those parties can readily purchase the standards online at the SAI Global website. If a member of the regulated community or the general public was interested in accessing the standards referenced in the Determination without purchasing them, they could access them at the National and State Libraries, and a range of public libraries, universities, and other education and training providers.

The committee acknowledges the usefulness of including extracts from the relevant Standards in the instruments to allow users to determine if a product is covered (or excluded) without having to refer to the relevant standard. However, it remains concerned that the incorporated standards may not be available at the sources identified in the ES. In this regard, the committee understands that National and State Libraries' negotiations with SAI Global for continued community access to Australian Standards have been unsuccessful and that online access to Australian Standards may no longer be available at these libraries. The committee is also concerned that, of these libraries, only the National Library of Australia may hold a comprehensive collection of Australian Standards in hardcopy, and that even this collection may not be complete.

A fundamental principle of the rule of the 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.³⁶ This report comprehensively outlines the significant scrutiny

36 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 6 June 2017).

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

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.³⁷

The committee will continue to monitor this issue.

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

Drafting

With respect to Greenhouse and Energy Minimum Standards (Self-ballasted Compact Fluorescent Lamps for General Lighting Services) Determination 2017 [F2017L00653], the committee notes that the definition of AS/NZS 4847.1:2010 in section 3 of the instrument states:

AS/NZS 4847.1:2010 means *and* , as it existed on the day this Determination came into force.

The committee understands that this incomplete definition was included in error and that the definition should read as follows:

AS/NZS 4847.1:2010 means *Australian/New Zealand Standard AS/NZ 4847.1:2010 – Self-ballasted lamps for general lighting services Test methods - Energy performance*, as it existed on the day this Determination came into force.

The committee notes that instruments and their accompanying ESs should be drafted with sufficient care to avoid potential confusion for anticipated users.

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

37 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 | GST—free Supply (National Disability Insurance Scheme Supports) Determination 2017 [F2017L00734] |
| Purpose | Specifies supplies of supports for participants in the National Disability Insurance Scheme that are GST free |
| Authorising legislation | <i>A New Tax System (Goods and Services Tax) Act 1999</i> |
| 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) |

Drafting

Section 4 of the instrument provides that supplies of supports for participants in the National Disability Insurance Scheme (NDIS) are GST-free if they are specified in the following determinations:

- GST-free Supply (Care) Determination 2017;
- (A New Tax System (Goods and Services Tax) (GST free Supply—Residential Care—Government Funded Supplier) Determination 2015; and
- GST-free Supply (Health Services) Determination 2017.

Sub-paragraph 4(b)(iv) of the instrument also provides that supplies of supports for participants in the NDIS are GST-free if they are specified in 'such later replacement determination[s] from time to time that has been made under sections 38-15, 38-25 and 38-30 of the GST Act [*A New Tax System (Goods and Services Tax) Act 1999*]' . The committee considers that sub-paragraph 4(b)(iv) indicates an intention to incorporate the above three determinations as in force from time to time.

However, while sub-paragraph 4(b)(iv) refers to determinations made under sections 38-15, 38-25 and 38-30 of the GST Act, the committee understands the above three determinations incorporated in sub-paragraphs (i) to (iii) to be made under section 177-10 of the GST Act for the purposes of sections 38-15, 38-25 and 38-30 of that Act.

The committee understands the three determinations to be incorporated as in force from time to time. However, the committee notes that instruments should be drafted with sufficient care to avoid potential confusion for anticipated users which may be caused by inaccuracies in descriptions of legislation.

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

| | |
|--------------------------------|---|
| Instrument | Health Insurance (Diagnostic Imaging Services Table) Regulations 2017 [F2017L00679] |
| Purpose | Prescribes diagnostic imaging services and the benefits payable for such services |
| Authorising legislation | <i>Health Insurance Act 1973</i> |
| Department | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 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 paragraph 2.4.4(b) of the instrument incorporates the NEMA Standards Publication NU 2-2007, Performance Measurements of Positron Emission Tomographs, published by the National Electrical Manufacturers Association (USA) (NU 2-2007). The ES to the instrument states:

Clause 2.4.4 incorporates the Requirements for PET Accreditation (Instrumentation & Radiation Safety) 2nd Edition (2012), issued by the Australian and New Zealand Society of Nuclear Medicine Inc, and the NEMA Standards Publication NU 2-2007, Performance Measurements of Positron Emission Tomographs, published by the National Electrical Manufacturers Association (USA) – as existing at the time when the proposed Regulations commence.

However, the committee notes that NU 2-2007, published by the National Electrical Manufacturers Association (USA), appears to only be available online for a fee of \$100, and the ES does not provide any information as to whether NU 2-2007 is otherwise freely available.

The committee notes that it has previously raised a similar issue in relation to access to NU 2-2007 and received advice from the Minister for Health and Aged Care that owners or operators of the Position Emission Tomography nuclear scanning equipment, could be reasonably expected to have access to the NU 2-2007, or information about the equipment's compliance with the standard, as a matter of course.³⁸

However, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. A fundamental principle of the rule of the 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.³⁹ 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's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.⁴⁰

The committee will continue to monitor this issue.

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

38 See *Delegated legislation monitor* 8 of 2016, Health Insurance (Diagnostic Imaging Services Table) Regulation 2016 [F2016L01303] and Health Insurance (Pathology Services Table) Regulation 2016 [F2016L01304], pp 74-77.

39 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 6 June 2017).

40 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 | Higher Education Support (Australian Business Academy Pty Ltd) VET Provider Approval Revocation 2017 [F2017L00639] Terrorism Insurance Act 2003 – Risk Retention Direction 2017 [F2017L00610] |
| Purpose | Notifies the Australian Business Academy Pty Ltd that their registration as a vocational education and training provider is revoked Directs the Australian Reinsurance Pool Corporation (APRC) with respect to the extent to which the insured retains risk under a contract of reinsurance with the APRC |
| Authorising legislation | <i>Higher Education Support Act 2003; Terrorism Insurance Act 2003</i> |
| Department | Education and Training; Treasury |
| Disallowance | Exempt (tabled Senate 13 June 2017) |
| Scrutiny principle | Standing Order 23(3)(a) |

Incorrect classification of legislative instrument as subject to disallowance

The Higher Education Support (Australian Business Academy Pty Ltd) VET Provider Approval Revocation 2017 [F2017L00639] is made under Schedule 1A, Subdivision 5-AA, subclause 29B(2) of the *Higher Education Support Act 2003* (HESA Act). The instrument notifies the Australian Business Academy Pty Ltd that their registration as a vocational education and training provider is revoked. By virtue of subclause 29B(3) of Schedule 1A to the HESA Act this notice of revocation is not subject to disallowance.

The Terrorism Insurance Act 2003 – Risk Retention Direction 2017 [F2017L00610] directs the Australian Reinsurance Pool Corporation (APRC) with respect to the extent to which the insured retains risk under a contract of reinsurance with the APRC. As this instrument is a direction by a minister to a body (APRC), by virtue of table item 2 of section 9 of the Legislation (Exemption and Other Matters) Regulation 2015 [F2016C01049], the instrument is not subject to disallowance.

However, the committee notes that when the above instruments were received by both the Parliament and the committee they had been incorrectly classified as subject to disallowance.

The incorrect classification of instruments has the potential to hinder the effective oversight of delegated legislation by Parliament.

While the committee understands that these instruments have been re-classified correctly, the committee remains concerned about the classification process generally, and 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 | <p>Industry Research and Development (Cyber Security Small Business Program) Instrument 2017 [F2017L00685]</p> <p>Industry Research and Development (Onshore Gas Social and Economic Research Fund Program) Instrument 2017 [F2017L00752]</p> |
| Purpose | Prescribe the Cyber Security Small Business Program; and the the Onshore Gas Social and Economic Research Fund Program |
| Authorising legislation | <i>Industry Research and Development Act 1986</i> |
| Department | Industry, Innovation and Science |
| Disallowance | <p>15 sitting days after tabling (tabled Senate 20 June 2017) Notice of motion to disallow currently must be given by 12 September 2017</p> <p>15 sitting days after tabling (tabled Senate 8 August 2017) Notice of motion to disallow currently must be given by 16 October 2017</p> |
| Scrutiny principle | Standing Order 23(3)(a) |

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 subsection 33(3) of the *Industry Research and Development Act 1986* which was inserted by the *Industry Research and Development Amendment (Innovation and Science Australia) Act 2016*, executive spending may be authorised by specifying

schemes in instruments made under that Act.⁴¹ 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 instruments. Once the details of the scheme are outlined in the instruments, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

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.⁴² In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of instruments made under subsection 33(3) of the the *Industry Research and Development Act 1986* therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.

The committee notes that these instruments seek to authorise the Commonwealth to spend money in relation to the Cyber Security Small Business Program (\$12 million over four years from 2016-17) and the Onshore Gas Social and Economic Research Fund (\$4 million over four years from 2016-17).

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.

41 For more extensive comment on this issue, see *Delegated legislation monitor 2 of 2017*, pp 19-21; and Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, pp 571-574.

42 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.

| | |
|--------------------------------|--|
| Instrument | Military Rehabilitation and Compensation (Accelerated Access to Rehabilitation) Determination 2017 [F2017L00759] |
| Purpose | Determines a class of persons who may be eligible for early access to rehabilitation services |
| Authorising legislation | <i>Military Rehabilitation and Compensation Act 2004</i> |
| Department | Veterans' Affairs |
| 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) |

Drafting

Section 2 of the instrument provides for its commencement immediately after the commencement of items 1 to 6 of Schedule 3 to the *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017*. Clause 2 of that Act provided for items 1 to 10 of Schedule 3 to commence on 1 July 2017.

However, the note to the commencement provision of the instrument states:

Section 2 of the *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017* provides for those items to commence on the 28th day after the *Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2017* receives the Royal Assent.

The committee understands that the instrument commenced on 1 July 2017, being the day specified for commencement of items 1 to 6 of Schedule 3 to the *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017*. However, the committee notes that instruments, and any explanatory notes to provisions contained in instruments, should be drafted with sufficient care to avoid potential confusion for anticipated users which may be caused by inaccurate descriptions of legislation.

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

Multiple instruments that appear to rely on subsection 4(2) of the *Acts Interpretation Act 1901*

| | |
|---------------------------|--|
| Instruments | <p>ASIC Corporations (Life Insurance Commissions) Instrument 2017/510 [F2017L00636]</p> <p>Independent Parliamentary Expenses Authority (President of the Remuneration Tribunal Fees and Allowances) Rule 2017 [F2017L00751]</p> <p>Military Rehabilitation and Compensation (Accelerated Access to Rehabilitation) Determination 2017 [F2017L00759]</p> <p>National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Determination 2017 [F2017L00784]</p> <p>Social Security (Exemptions from Non-payment and Waiting Periods - Activities) Specification 2017 [F2017L00719]⁴³</p> <p>Social Security (Experiencing a Personal Financial Crisis) Instrument 2017 [F2017L00712]</p> |
| Scrutiny principle | Standing Order 23(3)(a) |

Drafting

The instruments identified above were made in reliance on empowering provisions that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ESs to the instruments do not explain the relevance of subsection 4(2) to their operation.

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

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

43 The issue only applies in relation to sections 500WA(3) and 549CA(4) of the enabling legislation. See section 2 of the *Social Services Legislation Amendment Act 2017*.

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*)

| | |
|----------------------------------|--|
| <p>Instruments</p> | <p>Financial Sector (Collection of Data) (reporting standard) determination No. 11 of 2017 [F2017L00724]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2017 - Reporting Standard SRS 330.0 Statement of Financial Performance [F2017L00725]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2017 - Reporting Standard SRS 330.1 Statement of Financial Performance [F2017L00726]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2017 [F2017L00729]</p> <p>Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2017 [F2017L00730]</p> <p>Health Insurance (General Medical Services Table) Regulations 2017 [F2017L00680]</p> <p>Marine Order 502 (Vessel identifiers — national law) 2017 [F2017L00753]</p> |
| <p>Scrutiny principle</p> | <p>Standing Order 23(3)(a)</p> |

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 | |
|-------------|--|
| | Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 2) [F2017L00733] |
| | ASIC Corporations (Amendment) Instrument 2017/577 [F2017L00760] |
| | Auditing Standard ASA 2017-1 Amendments to Australian Auditing Standards [F2017L00693] |
| | Autonomous Sanctions (Designated Persons and Entities – Democratic People’s Republic of Korea) Amendment List 2017 [F2017L00637] |
| | Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675] |
| | Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) (Luxury Goods) Instrument 2017 [F2017L00635] |
| | Christmas Island Utilities and Services (Water, Sewerage and Building Application Services Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L00747] |
| | Cocos (Keeling) Islands Utilities and Services (Water, Sewerage and Building Application Services Fees) Amendment (2017 Measures No. 1) Determination 2017 [F2017L00748] |
| | Customs (Australian Trusted Trader Programme) Amendment (2017 Measures No. 1) Rule 2017 [F2017L00769] |

Defence Home Ownership Assistance Scheme (Average House Price and Median Interest Rate) Amendment Determination 2017 [F2017L00662]

Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Belarus, Cuba, Ethiopia, Mauritius and Zambia) Determination 2017 [F2017L00737]

Export Control (Plants and Plant Products) Amendment (Small Horticultural Products Registered Establishments) Order 2017 [F2017L00626]

GST—free Supply (National Disability Insurance Scheme Supports) Amendment Determination 2017 [F2017L00722]

Immigration (Education) (Functional English) Specification 2017 [F2017L00720]

National Health (Subsection 84C(7)) Amendment Determination 2017 (No. 1) (PB 52 of 2017) [F2017L00671]

National Health (Weighted average disclosed price – October 2017 reduction day) Determination 2017 (PB 44 of 2017) [F2017L00676]

Health Insurance (Accredited Pathology Laboratories — Approval) Amendment Principles 2017 (No. 2) [F2017L00681]

Health Insurance Legislation Revocation (2017 Measures No.1) Determination 2017 [F2017L00668]

Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2017 [F2017L00673]

Part 21 Manual of Standards Amendment Instrument 2017 (No. 1) [F2017L00619]

Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 4) [F2017L00603]

Private Health Insurance (Complying Product) Amendment Rules 2017 (No. 2) [F2017L00776]

Private Health Insurance (Registration) Rules 2017 (No 2) [F2017L00670]

Radiocommunications (Duration of Community Television Transmitter Licences) Determination (No. 1) of 2008 (Amendment No. 1 of 2017) [F2017L00765]

| | |
|----------------------------------|--|
| <p>Scrutiny principle</p> | <p>Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2017 [F2017L00674]</p> <p>Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Amendment Determination 2017 [F2017L00659]⁴⁴</p> <p>Tertiary Education Quality and Standards Agency (Information) Guidelines 2017 [F2017L00630]</p> <p>Therapeutic Goods Information Specification 2017 [F2017L00638]</p> <p>VET Student Loans (Courses and Loan Caps) Amendment Determination (No. 1) 2017 [F2017L00616]</p> <p>VET Student Loans (Courses and Loan Caps) Amendment Determination (No. 2) 2017 [F2017L00617]</p> <p>Standing Order 23(3)(a)</p> |
|----------------------------------|--|

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.⁴⁵

The committee draws the above to the attention of ministers.

44 The instrument was disallowed by the Senate on 21 June 2017.

45 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 | Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1) [F2017L00451] |
| Purpose | Clarifies the basis on which the AUSTRAC CEO can suspend a remittance dealer's registration and exempts licensed trustees from complying with specified provisions in the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> when they provide certain designated services |
| Authorising legislation | <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> |
| Department | Attorney-General's |
| Disallowance | 15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor</i> 6 of 2017 |

Manner of incorporation

The committee previously commented as follows:

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.

¹ See www.aph.gov.au/regords_monitor.

With reference to the above, the committee notes that the definition of people smuggling in subparagraph 59.11(5)(c)(ii) of Schedule 1 incorporates the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol). However, neither the instrument nor the explanatory statement (ES) expressly states the manner in which the Protocol 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 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.

Minister's response

The Minister Assisting the Prime Minister for Counter-Terrorism advised:

Section 14(1)(b) of the *Legislation Act 2003* provides that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.

Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* provides that the AUSTRAC CEO may, by writing, make rules prescribing matters required or permitted by any other provision of the Act. Section 75H(1) provides that the rules may make provision for and in relation to the suspension of registrations on the Remittance Sector Register by the AUSTRAC CEO. Accordingly, Chapter 59 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules)* sets out matters to be considered by the AUSTRAC CEO when deciding to suspend a registration – including whether a registered remitter or any of its key personnel has been charged, prosecuted and/or convicted in relation to people smuggling. The amendments to Chapter 59 in Instrument No. 1 allow the AUSTRAC CEO to consider 'significant money laundering, financing of terrorism or people smuggling risk' when deciding whether or not to cancel a remittance dealer's registration.

The definition of 'people smuggling' in Chapter 59, which incorporates a reference to the Protocol, was first introduced into the AML/CTF Rules in 2011 by the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2011 (No.7) (Instrument No. 7)*.

Instrument No. 7 was registered on 28 October 2011 and commenced on 1 November 2011.

However, as Instrument No. 1 will repeal and substitute Chapter 59 of the AML/CTF Rules, the definition in the new Chapter 59 will now incorporate the Protocol as it exists at the time of the commencement of Instrument No. 1. This is despite the fact that the amendments to Chapter 59 made by Instrument No. 1 did not include any changes to the definition of people smuggling.

Committee's response

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

Access to incorporated documents

The committee previously commented as follows:

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 Protocol. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

While the committee notes that the Protocol is available for free online from some international organisations' websites,² neither the instrument nor the ES states where it can be accessed.

Where an incorporated document is available for free online, the committee considers a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

2 United Nations Treaty Collection, *Treaty Series*, <https://treaties.un.org> (accessed 1 June 2017) and EU External Action Service, *Treaties Office Database*, <http://ec.europa.eu/world/agreements> (accessed 1 June 2017).

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

Minister's response

The Minister Assisting the Prime Minister for Counter-Terrorism advised:

The Protocol seeks to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants' and is available at: www.treaties.un.org.

To further address the concerns of the Committee, an approved replacement Explanatory Statement will be lodged on the Federal Register of Legislation and is attached for your reference.

Committee's response

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

The committee notes the minister's undertaking to register the replacement ES that was provided to the committee on the Federal Register of Legislation.

| | |
|--------------------------------|--|
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Unclear meaning of export and import sanctioned goods

The committee previously commented as follows:

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).³

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)),⁴ 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:

3 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.

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

- 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
- 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 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.

Minister's response

The Minister for Foreign Affairs and Trade advised:

Subregulation 5(3) of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008 (the Regulations) provides that the Minister for Foreign Affairs may, by legislative instrument, specify documents for subparagraph 5(1)(c)(i) of the Regulations. The DPRK Documents list specifies seven documents listing items that are prohibited under the Regulations for export to, importation from, or related service provision to the DPRK, as required by UNSCR 1718.

These seven documents or their predecessors are named in several UNSCRs as listing items subject to the prohibitions in UNSCR 1718. Five of the documents are issued by the UN Security Council Committee established pursuant to UNSCR 1718. The other two documents, which were referred to in the Committee's *Delegated legislation monitor 7* of 2017, are issued by the Nuclear Suppliers Group and have been circulated by the International Atomic Energy Agency. The documents are written in a standard format for export control lists, which require descriptions of items to be concise with a precise scope.

Accordingly, I confirm the documents specified by the DPRK Documents list are an internationally accepted reference for those industries, persons and companies that trade in such goods.

I also confirm the Department of Foreign Affairs and Trade provides a free service which can make determinations as to whether a good is an import or export sanctioned good under the DPRK Documents list.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the goods listed in the documents referred to are 'an internationally accepted reference for those industries, persons and companies that trade in such goods', and that the Department of Foreign Affairs and Trade provides a free service which can make determinations as to whether a good is an import or export sanctioned good.

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

The committee requests that ESs to future similar instruments include a statement 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
- the department provides a free service which can make determinations as to whether a good is an import or export sanctioned good under the instrument.

The committee has concluded its examination of the instrument.

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| 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 | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

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).⁵

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.

Minister's response

The Minister for Finance, on behalf of the Minister for Communications, advised:

The Australian Government (the Government) has committed to delivering high-speed broadband to all Australian homes and businesses over the National Broadband Network (the network) by 2020. The forecast base case for funding the network is \$49 billion, with \$29.5 billion provided by the Government as equity and up to \$19.5 billion delivered through a loan to nbn on commercial terms.

As detailed in the Explanatory Statement, the Government has capped the amount of equity contributions to nbn at \$29.5 billion which is expected to be fully utilised in 2017. nbn will require up to \$19.5 billion in additional funding to complete the rollout of the 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 nbn 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.

The Government's decision to proceed with legislative authority through delegated legislation rather than primary legislation for the loan to nbn was undertaken having regard to a range of constitutional and other legal considerations. An amendment to the FFSP Regulations is appropriate as

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

the loan to nbn is a one-off commercial loan agreement for a specific purpose for a short, fixed duration.

In its request, the Committee has drawn attention to scrutiny principle 23(3)(d) of the Committee's terms of reference. In consideration of this principle, legislative authority required for government provision of this loan does not fundamentally change the law, is not lengthy or complex, does not change relationships or community attitudes and is not part of a uniform laws scheme.

As announced by Shareholder Ministers on 18 November 2016, a Government loan on commercial terms represents the most cost effective way to raise debt and secure funding to complete the rollout of this important national infrastructure project.

In taking account of the above matters, I consider it remains appropriate for legislative authority for government provision of a loan to nbn to occur through delegated legislation.

Committee's response

The committee thanks the ministers for their response.

The committee notes the advice of the Minister for Communications that 'the [\$19.5 billion] loan to nbn is a one-off commercial loan agreement for a specific purpose for a short, fixed duration'; and that the 'legislative authority required for government provision of this loan does not fundamentally change the law, is not lengthy or complex, does not change relationships or community attitudes and is not part of a uniform laws scheme.'

The committee also notes the advice of the Minister for Communications that 'it remains appropriate for legislative authority for government provision of a loan to nbn to occur through delegated legislation'.

The committee has concluded its examination of the above. However, it draws to the attention of the Senate its role to identify matters which may be more appropriate for parliamentary enactment and also draws attention to the magnitude of the amount of Commonwealth spending that the regulation seeks to authorise (\$19.5 billion).

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| 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 | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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)(a) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Constitutional authority for expenditure

The committee previously commented as follows:

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*,⁶ 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'.

6 *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.

Minister's response

The Minister for Finance, on behalf of the Minister for Health, advised:

Item 217 references the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with section 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Youth Cancer Services program (the program) listed in item 217 will support a national approach to improve cancer treatment services for adolescents and young adults with cancer.

The program will provide a clear national mechanism for providing adolescents and young adults with cancer access to clinical trials across the nation. The clinical trials are of national importance as they will build the capacity of medical research for the nation.

The program will establish a national minimum dataset on adolescents and young people with cancer. The program will facilitate the collection of nationally consistent and coordinated data.

The Explanatory Statement for the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 will be replaced to correct the omission of the reference to sections 61 and 51(xxxix) of the Constitution for item 217.

Committee's response

The committee thanks the ministers for their response and has concluded its examination of the above.

The committee notes the ministers' undertaking to register a replacement ES on the Federal Register of Legislation to correct the omission of the reference to sections 61 and 51(xxxix) of the Constitution for item 217.

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| 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 | <i>Fuel Tax Act 2006</i> |
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Description of 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 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*.

Minister's response

The Minister for Infrastructure and Transport advised:

I am advised that the omission of information in relation to consultation was an oversight on the part of the Department of Infrastructure and Regional Development and that, upon further investigation, appropriate consultation has been undertaken in relation to the rate of the Road User Charge. An amended Explanatory Statement describing the nature of the consultation undertaken in relation to the instrument is enclosed as requested.

Relevant excerpt from the replacement ES:

Public consultation on the level of the Road User Charge was undertaken by the National Transport Commission (NTC) as part of its development of the 2014 Heavy Vehicle Charges Determination. The NTC undertook further public consultation in 2016 on *Options for improving the accuracy and stability of the PAYGO heavy vehicle charges methodology*. During those consultations, industry stakeholders were generally supportive of a reduced Road User Charge and were also generally supportive of further changes to be considered by governments in the future. States and territories have also been consulted.

Committee's response

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

The committee notes that the replacement ES provided to the committee has now been registered on the Federal Register of Legislation.

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|--------------------------------|---|
| Instrument | Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00437] |
| Purpose | Amends the Migration Regulations 1994 in relation to former holders of Norfolk Island entry permits, protection visas and registered migration agents |
| Authorising legislation | <i>Migration Act 1958</i> |
| Department | Immigration and Border Protection |
| Disallowance | 15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor 6 of 2017</i> |

Classification of 'instrument in writing'

The committee previously commented as follows:

Schedule 4 of the Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 (the regulation) inserts new regulation 9M into the Migration Agents Regulations 1998 providing:

Application for approval as CPD [continuing professional development] provider

- (1) A person may apply to the Minister for approval as a CPD provider.
- (2) The application must be:
 - (a) in the form approved in writing by the Minister; and
 - (b) accompanied by the fee specified by the Minister in an instrument in writing for the purposes of this paragraph.
- (3) A fee specified in an instrument made under paragraph (2)(b) may be nil.

The ES to the regulation states:

New regulation 9M provides that a person (which includes an incorporated body) may apply to the Minister for approval as a CPD provider. The application must be made in the form approved by the Minister, and must be accompanied by the fee specified by the Minister in a legislative instrument.

The committee understands that legislative instruments made under the Migration Agents Regulations 1998 are subject to disallowance. However, the committee

requests the minister's general advice as to whether there are any exceptions to this; and in relation to this specific matter, the committee seeks confirmation that an 'instrument in writing' made under new regulation 9M which specifies the relevant fee will be a disallowable legislative instrument.

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

Minister's response

The Minister for Immigration and Border Protection advised:

The Committee has requested confirmation that an 'instrument in writing' made under new regulation 9M of the Migration Agents Regulations 1998 (the Migration Agents Regulations) will be a disallowable legislative instrument. I confirm that the instrument in writing referred to by the Committee is a legislative instrument and is subject to disallowance.

Instruments in writing referred to in the Migration Agents Regulations are generally legislative instruments and are subject to disallowance. The only exception is the Minister's approval in writing of a form for the purposes of paragraph 9M(2)(a). By virtue of item 6 of the table in regulation 6 of the Legislation (Exemptions and Other Matters) Regulations 2015, instruments prescribing or approving forms are not legislative instruments.

Committee's response

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

Merits review

The committee previously commented as follows:

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. In this respect, the committee also seeks to ensure that affected individuals are given adequate notice of administrative decisions and are provided with reasons for a decision.

With reference to the above, the committee notes that Schedule 4 of the regulation inserts new regulation 9T into the Migration Agents Regulations 1998, which allows the minister to cancel a person's approval as a CPD provider by written notice.

However, the committee notes that neither the regulation nor the ES:

- sets any requirements for the content of the written notice of cancellation, for example, that the notice set out the reasons for making the decision to cancel a person's approval as a CPD provider; or
- provides information as to whether a person who receives a notice of cancellation can request a reconsideration of the initial decision on its

merits (i.e. that the decision is subject to merits review), or how such a person may be notified of avenues for complaint or review.

With reference to the committee's scrutiny principle 23(3)(c), if the decision to cancel an approval as a CPD provider is not subject to merits review, the committee would expect the ES to the regulation to provide a justification for the exclusion of the decision from merits review.

The committee draws the minister's attention to the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?* as providing useful guidance for justifying the exclusion of merits review.⁷

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

Minister's response

The Minister for Immigration and Border Protection advised:

I confirm that no provision is made for merits review of a decision to cancel approval as a CPD provider. This is because such a provision would not be appropriate within the context of the arrangements for CPD providers under the regulations, as outlined below.

A person may be approved as a CPD provider only if the person meets the requirements set out in new regulation 9P. This requires a rigorous assessment before approval may be given. Approval will be for a period of two years. A condition of approval is that the CPD provider must comply with the standards specified for CPD providers.

If it came to notice that a CPD provider had failed to comply with the conditions of approval, the Office of the Migration Agents Registration Authority (the OMARA) within the Department of Immigration and Border Protection would place the initial emphasis on assisting the CPD provider to remedy the failure. The OMARA would aim to work with the CPD provider over time to ensure the quality of CPD activities delivered.

Cancellation of approval would be a final option. It is expected that it would occur, if at all, only in exceptional circumstances. I note that under the current regulations, approval as a provider of approved activities may be revoked if the person fails to comply with the conditions to which approval is subject (see paragraph 9H(1)(b) of the current Migration Agents Regulations 1998). To date, no revocations have occurred.

As the period of approval is only for two years, approval is likely to expire while any failure to comply with conditions of approval is under consideration. This makes cancellation unnecessary. The benefits of merits

7 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 6 June 2017).

review in this situation would be greatly reduced or even negligible because if a cancellation decision was made the decision would operate for such a short period of time its effect would be spent by the time of review. The position will remain the same after these amendments come into effect.

The Attorney-General's Department, Administrative Review Council guidelines, *What decisions should be subject to merits review?* (1999), to which the Committee refers, include as a factor that may justify excluding merits review an exception extending to decisions which operate for such a short period that their effect would be spent by the time of review (paragraph 4.50).

In the circumstances described above, it is considered that this exception appropriately applies to a decision to cancel approval as a CPD provider.

A decision to cancel approval as a CPD provider would be subject to judicial review. The requirements of lawful decision making include the requirement that in making a decision to cancel approval, the rules of natural justice (or procedural fairness) must be observed. The process followed by the Department would ensure that a CPD provider who is considered to have failed to comply with the specified standards or other conditions of approval is fully informed of the failure and given the opportunity to rectify it.

A decision to cancel approval would not be made until the person had been given the opportunity to address the issues. If a decision to cancel approval as a CPD provider was made, the written notice of the decision that is required to be given to the person would include the full reasons for it.

Committee's response

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

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

Sub-delegation

The committee previously commented as follows:

Schedule 4 of the regulation inserts new regulation 9U into the Migration Agents Regulations 1998, which provides that the Minister for Immigration and Border Protection (the minister) may delegate to an Australian Public Service (APS) employee in the Department of Immigration and Border Protection any or all of the minister's functions under new Part 3C (Approval of CPD providers), other than the power to make, vary or revoke a legislative instrument. This includes the power to cancel a person's approval as a CPD provider under new regulation 9T.

The ES provides the following description of the sub-delegation of the minister's powers under new regulation 9U:

Powers of the Migration Agents Registration Authority are currently delegated by the Minister, acting under section 320 of the Migration Act, to employees in the Office of the Migration Agents Registration Authority within the Department of Immigration and Border Protection. The power under new regulation 9U for the Minister to delegate the Minister's powers under new Part 3C to any APS employee will allow delegation of these powers to the same employees and will provide flexibility if administrative arrangements in the future require powers relating to migration agents to be exercised by employees in other areas of the Department.

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.

However, the committee notes that neither the regulation nor the ES provides information about whether a delegate who exercises the powers of the minister under new Part 3C is required to be at a certain APS level, such as a member of the senior executive service.

In addition, the committee is concerned that new regulation 9U contains no requirement that the minister be satisfied that an APS employee to whom the minister's powers under Part 3C are delegated is appropriately trained or qualified for the role.

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

Minister's response

The Minister for Immigration and Border Protection advised:

The power of delegation in new regulation 9U reflects the Minister's power of delegation under the *Migration Act 1958* of functions related to migration agents. Subsection 320(1) provides that:

The Minister may delegate any of the Migration Agents Registration Authority's powers or functions under this Part to a person in the Department who is appointed or engaged under the Public Service Act 1999, for any period when the [Migration Institute of Australia] is not appointed under section 315.

This power of delegation leaves details such as the level of the delegate's position to the Minister's discretion, requiring only that the delegate must

be an APS employee in the Department. New regulation 9U is in similar terms. The delegation power in new regulation 9U applies only to the Minister's functions in new Part 3C (Approval of CPD providers).

The terms of the power give the Minister sufficient flexibility to ensure that the relevant functions may be delegated appropriately as required to ensure efficient administration of the regulations.

Powers would be delegated to occupants of positions in the Department where the criteria of the position ensured that the occupant would have qualifications relevant to exercise of the function. The positions to which the delegation is made could include positions in the Senior Executive Service.

In practice, the delegation of the Minister's functions under new Part 3C would only be made to an officer of the Office of the Migration Agents Registration Authority (the OMARA) who is trained in the exercise of those functions. Key decisions, such as a decision to grant approval as a CPD provider, would be made by the Director of the OMARA, which is an Executive Level 2 position.

Committee's response

The committee thanks the minister for his response.

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

The committee acknowledges that pursuant to subsection 320(1) of the *Migration Act 1958* the minister may delegate any of the Migration Agents Registration Authority's powers or functions under new Part 3C to an APS employee within the Department.

The committee also notes the minister's advice that, in practice, the powers would be delegated 'to occupants of positions in the Department where the criteria of the position ensured that the occupant would have qualifications relevant to exercise of the function'; and that 'key decisions, such as a decision to grant approval as a CPD provider, would be made by the Director of the OMARA, which is an Executive Level 2 position.' While this advice may reflect the department's approach to the relevant delegations, the committee remains concerned that there is currently no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the absence of a legislative requirement that a person to whom the powers of the minister under new Part 3C and new regulation 9U are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the power, the committee draws this matter to the attention of the Senate.

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| 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: <i>Child Welfare Act 2009</i> , <i>Juries Act 1960</i> and <i>Domestic Violence Act 1995</i> |
| Authorising legislation | <i>Norfolk Island Act 1979</i> |
| 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) |
| Previously reported in | <i>Delegated legislation monitor 7 of 2017</i> |

Sub-delegation

The committee previously commented as follows:

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 ordinance 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.

Minister's response

The Minister for Local Government and Territories advised:

In relation to the Committee's query concerning the provision allowing the Child Welfare Officer to delegate his or her functions to any 'public sector employee' I can provide the following advice. The power to delegate to that class of persons was in the *Child Welfare Act 2009* (NI) prior to the Ordinance commencing. Section 32(a) of the *Child Welfare Act 2009* (NI) was enacted in the Ordinance to preserve rather than expand that particular delegations power. Its inclusion in the Ordinance was therefore a change in form rather than substance.

However, having considered the provision in light of the Committee's comments, I accept the power of the Child Welfare Officer to delegate functions to any public sector employee is broader than required. I therefore undertake to bring forward a legislative change to narrow the scope of this delegation power. I intend to introduce this change later in 2017.

Concerning the Committee's request for information on the provision establishing an acting Manager of the Norfolk Island Health and Residential Aged Care Service (NIHRACS) I can provide the following information. NIHRACS is a small entity of around 50 staff whose operations are overseen by the NSW Government on behalf of the Commonwealth. The small size and relatively flat structure of NIHRACS mean it would not be straightforward to define legislatively who is qualified to be appointed as an acting Manager of NIHRACS.

In addition, the Department of Infrastructure and Regional Development considered it undesirable to include qualifications for an acting Manager of NIHRACS given there are no such requirements specified in the *Norfolk Island Health and Residential Aged Care Service Act 1985* (NI) for a person to be a Manager of NIHRACS. It would not be appropriate to have additional or more stringent qualification requirements for an acting position than for a permanent position.

The NSW Government provides advice to the Australian Government on staffing of NIHRACS, and this helps ensure only suitable persons are appointed to senior positions in NIHRACS. The Australian Government would consult NSW officials as part of their oversight role before my delegate or I appoint an acting Manager of NIHRACS. I am satisfied this process of consultation with experts in NSW will ensure only appropriately qualified persons are appointed as acting NIHRACS managers.

Committee's response

The committee thanks the minister for her response.

The committee also thanks the minister for undertaking to amend the ordinance in 2017 to narrow the classes of people to whom the Norfolk Island child welfare officer can delegate his or her functions under section 32.

The committee notes the minister's advice regarding the size of NIHRACS and the difficulties in specifying the qualification requirements of a person to be appointed as an acting Manager of NIHRACS.

The committee also notes the minister's advice that a consultation process would take place between the Australian Government and NSW officials before a delegate was appointed an acting Manager of NIHRACS; and that the minister is 'satisfied this process of consultation with experts in NSW will ensure only appropriately qualified persons are appointed as acting NIHRACS managers.'

However, while the above process forms part of NIHRAC's administrative framework, the committee remains concerned that there is currently no general legislative requirement for delegations to be made only to people with appropriate qualifications.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the absence of a general legislative requirement for delegations to be made only to people with appropriate qualifications, the committee draws this matter to the attention of the Senate.

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| Instrument | Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] |
| Purpose | Revokes and remakes the Private Health Insurance (Health Insurance Business) Rules 2016 to update the kinds of statistical information to be provided by hospitals to insurers and by private hospitals to the Department of Health |
| Authorising legislation | <i>Private Health Insurance Act 2007</i> |
| Department | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow currently must be given by 16 August 2017 |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor 6 of 2017</i> |

Drafting

The committee previously commented as follows:

Section 17 of the Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] (the rules) provides that certain insurance is not health insurance business if it covers prescribed matters or persons. Subsection 17(2) provides:

Despite subrule (1), during the period from the commencement of these Rules until 1 July 2008, the business referred to in that subrule is health insurance business if it is conducted by a private health insurer.

However, as the rules commenced on 1 July 2017, it is unclear to the committee whether subsection 17(2) contains a drafting error, or whether the inclusion of the subsection in the rules is unnecessary, as it is no longer operational.

The committee notes that this provision has remained in the Private Health Insurance (Health Insurance Business) Rules since 2007.

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

Minister's response

The Minister for Health advised:

As you note, the Rules commenced on 1 July 2017, therefore subrule 17(2) (which creates an exemption until 1 July 2008) would appear to be unnecessary. It appears most likely that subrule 17(2) has been inadvertently carried over from previous versions of the Rules, resulting in the current non-operational provision.

I can confirm that it is no longer necessary to include any form of subrule 17(2) in the Rules. On that basis, I will ensure that this issue will be addressed when the Rules are next amended or remade.

Committee's response

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

The committee notes the minister's undertaking to remove subrule 17(2) when the rules are next amended or remade.

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|--------------------------------|--|
| Instrument | Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] |
| Purpose | Specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to applications for skilled migration under the Migration Regulations 1994 |
| Authorising legislation | Migration Regulations 1994 |
| Department | Immigration and Border Protection |
| Disallowance | Exempt (tabled Senate 9 May 2017) |
| Scrutiny principle | Standing Order 23(3)(a) |
| Previously reported in | <i>Delegated legislation monitor 6 of 2017</i> |

The committee previously commented as follows:

Background

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)⁸ exempts particular instruments from disallowance, including by virtue of table item 20 in section 10, instruments made under Schedules 1 and 2 of the Migration Regulations 1994 (Migration Regulations).

In its previous comments on the exemption regulation, the committee noted that the descriptions in the ES of table items in section 10 generally provided justifications for the exemption of particular instruments from disallowance, explaining why their particular nature or character required the exemption.⁹

However, no such justification was provided for table item 20. Accordingly, the committee sought a response from the Attorney-General in relation to this question.

In response, the Attorney-General advised:

It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.

Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act...¹⁰

The Attorney-General also provided the following examples of the nature and purpose of instruments commonly made under Schedules 1 and 2 of the Migration Regulations:

- Form required to make a valid visa application;
- The manner and place for lodging applications;¹¹ and

8 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*).

9 See *Delegated legislation monitor* 14 of 2015 (11 November 2015), pp 8-9.

10 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), pp 30-33 and Appendix 1.

11 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1.

- Specify members of industry associations in relation to certain streams.¹²

In concluding this matter, the committee noted the Attorney-General's advice that exempting such instruments from disallowance ensures certainty in operational matters and provides for administrative matters to support the machinery of the migration program.

Classification of legislative instrument as exempt from disallowance

The Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] (the instrument) is made under Schedules 1 and 2 of the Migration Regulations. It specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration.

As set out above, the committee generally understands instruments made under Schedules 1 and 2 of the Migration Regulations to be exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation.

However, paragraph 16 of the ES to this instrument states:

Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance...

The committee requests the minister's general advice as to whether all instruments made under Schedules 1 and 2 of the Migration Regulations are exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation, or whether there are any exceptions to this. In particular, with reference to the Attorney-General's previous advice about the nature of instruments made under Schedules 1 and 2 of the Migration Regulations, and the examples provided of the nature and purpose of such instruments, it is unclear to the committee that the current instrument (which specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration) is properly characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify its exemption from disallowance (and thereby removal from the effective oversight of the Parliament).

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

Minister's response

The Minister for Immigration and Border Protection advised:

12 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1.

I confirm that all instruments made under Schedules 1 and 2 of the Migration Regulations are exempt from disallowance by virtue of table item 20 in section 10 of the Exemption Regulation.

However the instrument in question, Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/04 (IMMI 17/040, F2017L00450) specified matters under provisions in Parts 1, 2A and 5 and Schedules 1 and 2 of the Migration Regulations.

In relation to these provisions, only an instrument or a provision of an instrument specifying matters under Part 2A of the Migration Regulations is disallowable.

Consequently, the Explanatory Statement for IMMI 17/040 should have identified which parts of the instrument were or were not disallowable, rather than stating that the instrument as a whole was disallowable. However, I note that the instrument amended by IMMI 17/040 was itself repealed on 2 July 2017 by the Migration (IMMI 17/081: Specification of Occupations, a Person or Body, a Country or Countries) Repeal Instrument 2017 and replaced with the following instruments, which do not combine disallowable and non-disallowable provisions:

Migration (IMMI 17/060: Specification of Occupations - Subclass 457 visa) Instrument 2017;

Migration (IMMI 17/071: Specification of Occupations - Subclass 407 visa) Instrument 2017;

Migration (IMMI 17/072: Specification of Occupations and Assessing Authorities) Instrument 2017; and

Migration (IMMI 17/080: Specification of Occupations and Assessing Authorities - Subclass 186 visa) Instrument 2017

In future, disallowable and non-disallowable provisions will not be combined in one instrument.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that, in future, disallowable and non-disallowable provisions will not be combined in one instrument and that the following instruments were registered on the Federal Register of Legislation on 30 June 2017 and have been received by the committee and appear to be correctly classified as either exempt, or subject to, disallowance:

- Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017 [F2017L00848] classified as subject to disallowance;
- Migration (IMMI 17/071: Specification of Occupations—Subclass 407 Visa) Instrument 2017 [F2017L00834] classified as subject to disallowance;

- Migration (IMMI 17/072: Specification of Occupations and Assessing Authorities) Instrument 2017 [F2017L00850] classified as exempt from disallowance; and
- Migration (IMMI 17/080: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2017 [F2017L00851] classified as exempt from disallowance.

However, the committee is concerned that when this instrument was received by both the Parliament and the committee it had been classified as exempt from disallowance, and thereby tabled as exempt from disallowance. While the committee acknowledges that this instrument has now been repealed and replaced (by individual, correctly classified instruments), the incorrect classification of this instrument as exempt from disallowance may have hindered the effective oversight of the instruments by Parliament.

The committee remains concerned about the classification process generally and the potential for errors to hinder the effective oversight of instruments by Parliament.

The committee will continue to monitor this issue.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the classification process generally and the potential for errors to hinder the effective oversight of instruments by Parliament, the committee draws this matter to the attention of ministers, instrument-makers, the Office of Parliamentary Counsel and the Senate.

Senator John Williams (Chair)