

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Membership of the committee

## Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Claire Moore	Queensland, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Linda Reynolds	Western Australia, LP
Senator Zed Seselja	Australian Capital Territory, LP

## Secretariat

Mr Ivan Powell, Secretary  
Ms Jessica Strout, Acting Principal Research Officer  
Ms Eloise Menzies, Senior Research Officer

## Committee legal adviser

Mr Stephen Argument

## Committee contacts

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3066  
Email: [regords.sen@aph.gov.au](mailto:regords.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_regord\\_ctte](http://www.aph.gov.au/senate_regord_ctte)



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

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislative Instruments Act 2003*.<sup>1</sup>

## Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.<sup>2</sup>

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

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index).

## Structure of the monitor

The monitor is comprised of the following parts:

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

## Acknowledgement

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

## General information

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

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.<sup>4</sup>

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.<sup>5</sup>

## Senator John Williams (Chair)

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

4 Parliament of Australia, *Senate Disallowable Instruments List*, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/leginstruments/Senate\\_Disallowable\\_Instruments\\_List](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List).

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2016*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](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 5 February 2016 and 25 February 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

### Response required

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

<b>Instrument</b>	<b>Charter of the United Nations (Sanctions - Iran) Document List Amendment 2016 [F2016L00116]</b>
<b>Purpose</b>	Amends the Charter of the United Nations (Sanctions-Iran) Document List 2014 to incorporate goods referenced in five documents into the definition of export and import sanctioned goods
<b>Last day to disallow</b>	21 June 2016
<b>Authorising legislation</b>	<i>Charter of the United Nations (Sanctions — Iran) Regulations 2008</i>
<b>Department</b>	Foreign Affairs and Trade
<b>Scrutiny principle</b>	Standing Order 23(3)(b)

### Unclear meaning of export and import sanctioned goods

This instrument gives effect in Australia to obligations arising from decisions of a former United Nations 1737 (Iran) Sanctions Committee as required by United Nations Security Council Resolution 2231 (2015). The resolution was adopted under Chapter VII of the Charter of the United Nations on 20 July 2015, and is therefore binding on Australia.

This instrument amends the Charter of the United Nations (Sanctions-Iran) Document List 2014 (Iran list) to add five documents to the list of documents that determine goods that are prohibited for export to, or importation from, Iran. 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 — Iran) Regulations 2008 (Iran Sanctions Regulations), which create offences for the export or import of sanctioned goods.

However, it is unclear to the committee whether the five documents added to the Iran list contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the first and second documents, INFCIRC/254/Rev.12/Part 1 and NFCIRC/254/Rev.12/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. The committee is therefore concerned that persons potentially subject to these 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 Iran Sanctions Regulations.

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

<b>Instrument</b>	<b>Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2016 (No. 1) [F2016L00130]</b> <b>Excise (Mass of CNG) Determination 2016 (No. 1) [F2016L00131]</b> <b>Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2016 (No. 1) [F2016L00133]</b>
<b>Purpose</b>	These instruments specify methods for determining the volume or mass of particular excisable substances
<b>Last day to disallow</b>	22 June 2016; 22 June 2016; 27 June 2016
<b>Authorising legislation</b>	<i>Excise Act 1901</i>
<b>Department</b>	Treasury
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **Incorporation of extrinsic material**

These instruments remake earlier instruments in response to the committee's previous inquiries as to the manner of incorporation of extrinsic material. The committee had sought this information from the Assistant Treasurer in keeping with its expectation that explanatory statements (ESs) clearly state the manner of incorporation of extrinsic material.<sup>1</sup>

<sup>1</sup> The earlier instruments were the Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732]; the Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733]; and the Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745]; see *Delegated legislation monitor* No. 15 of 2015; and Nos 1 and 2 of 2016.

The committee's examination of the remade instruments raises the following issue with respect to the incorporation of extrinsic material in the revised instruments.

Section 14 of the *Legislative Instruments Act 2003* provides for the incorporation of extrinsic material into instruments. Legislative material may be incorporated as in force from time to time or at a particular date. Non-legislative material may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation alters the operation of section 14.

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

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables for Light Hydrocarbon Liquids – Density Range 0.500 to 0.653 Kg/L at 15° C*; and
- American Petroleum Institute (API) *Manual of Petroleum Measurement Standards, Chapter 11.2.2M – Compressibility Factors for Hydrocarbons: 350-637 kg/m<sup>3</sup> Density (15° C) and -46° C to 60° C metering temperature*.

The second instrument refers to the:

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

The third instrument refers to the:

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII*; and
- *Practical Alcohol Tables*.

The instruments also seek to incorporate the 'current version [of these documents] as they exist at the time of commencement of the determination or any version that comes into existence thereafter.' The committee understands this to mean that the documents are incorporated 'as in force from time to time' (to use the language of section 14 of the *Legislative Instruments Act 2003*).

However, the committee has not been able to identify any provision in the *Excise Act 1901* or any other Act that expressly allows for the incorporation of these documents, which are non-legislative in character, as in force from time to time.

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

<b>Instrument</b>	<b>Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134]</b>
	Revokes the Health Insurance (Section 19AB Exemptions) Guidelines 2015 and provides guidance for applying district of workforce shortage determinations
<b>Last day to disallow</b>	27 June 2015
<b>Authorising legislation</b>	<i>Health Insurance Act 1973</i>
<b>Department</b>	Health
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **Sub-delegation**

Subsection 13(1) of the instrument provides that the minister may delegate some or all of his or her powers or functions under the instrument, other than the delegation power, to an 'officer'. Subsection 13(2) provides that 'officer' has the same meaning as in subsection 131(4) of the *Health Insurance Act 1973*, which defines this as an officer of the Department of Health; a person performing the duties of an office in the Department of Health; the Chief Executive of Medicare; or an Australian Parliamentary Service employee within the Department of Human Services.

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

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers under the instrument to an 'officer'.

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

### **Incorporation of extrinsic material**

Section 14 of the *Legislative Instruments Act 2003* provides for the incorporation of extrinsic material into instruments. Legislative material may be incorporated as in force from time to time or at a particular date. Non-legislative material may only be incorporated as in force at the commencement of the instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that section 5 of the instrument defines various terms in the instrument as having the same meaning given in Health Insurance Regulations 1975 and Migration Regulations 1994. However, neither the text of the instrument nor the ES expressly states the manner in which these regulations are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Health Insurance Regulations 1975 and Migration Regulations 1994) can be taken to be references to versions of those instruments as in force from time to time.

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

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

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

<b>Instrument</b>	<b>Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]</b>
<b>Purpose</b>	Provides for the custody and use of the records of the Royal Commission into Trade Union Governance and Corruption
<b>Last day to disallow</b>	21 June 2016
<b>Authorising legislation</b>	<i>Royal Commissions Act 1902</i>
<b>Department</b>	Prime Minister and Cabinet
<b>Scrutiny principle</b>	Standing Order 23(3)(b)

### **Sharing of information gathered in circumstances where the witness was not afforded the privilege against self-discrimination**

This regulation enables information gathered by the Royal Commission into Trade Union Governance and Corruption (TURC) to be given, accessed and used by different persons and bodies. The committee notes that witnesses before Royal Commissions are afforded only a limited privilege against self incrimination (as per section 6A of the *Royal Commissions Act 1902* (RC Act)).

This regulation dispenses with the requirement to individually notify the person or body who initially provided such information to the TURC, when information will be transferred to a different person or body. Under the regulation, copies and access to such information may be given to a person or body who:

performs a function relating to law enforcement purposes within the meaning of section 9 of the [RC] Act; or

is responsible for advising a Minister of the Commonwealth, of a State or of a Territory about the administration of a law of the Commonwealth, of that State or of that Territory.

The committee notes that section 9 of the RC Act (Custody and use of records of Royal Commission) provides that regulations may provide for the custody, use or transfer of, or access to, Royal Commission records; and that such records may be dealt with without consent, notice or opportunity to be heard.

However, notwithstanding these provisions, scrutiny principle (b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties.

In this respect, the committee notes that the ES for the regulation provides no information as to the necessity and scope of the intended purposes for which the TURC records are to be shared without the knowledge of affected individuals. Similarly, there is no information as to the necessity of the regulation permitting the provision of TURC records to a person 'responsible for advising a Minister...about the administration of a law', which would appear to encapsulate a large class of persons, with little or no specificity as to their official function, qualifications or attributes.

Without information regarding these matters, the committee is unable to be satisfied that the regulation will not trespass on an individual's rights and liberties (for example, their right to privacy and right to be afforded natural justice).

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

<b>Instrument</b>	<b>Therapeutic Goods Legislation Amendment (Charges Exemptions and Other Measures) Regulation 2016 [F2016L00109]</b>
<b>Purpose</b>	Amends the annual charges exemption (ACE) scheme to pre-qualify sponsors of these products for ACE and amends the ACE scheme in the Therapeutic Goods Regulations 1990 to accommodate in vitro diagnostic medical devices
<b>Last day to disallow</b>	21 June 2016
<b>Authorising legislation</b>	<i>Therapeutic Goods Act 1989</i>
<b>Department</b>	Health
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **Unclear basis for determining fees**

This regulation amends the annual charges exemption (ACE) scheme in the Therapeutic Goods Regulations 1990 (the regulations) to pre-qualify sponsors of certain products for ACE; amends the ACE scheme to accommodate in vitro diagnostic medical devices; and makes amendments intended to update and improve consistency in the regulations.

Item 33 of Schedule 4 to the regulation substitutes an updated table of fees for notifications of trial sites for a clinical trial for a medicine or other type of therapeutic good (not being a biological). The fee is \$335. The ES to the regulation states:

Item 33 repeals table items 14 and 14A of Part 2 of Schedule 9 of...[the regulations] and instead creates new items 14 and 14A that make clear that the fee is payable for each notification of an additional trial site or additional trial sites (when notified together) for a clinical trial for a medicine or other type of therapeutic goods (not being a biological).

Item 34 of Schedule 4 to the regulation substitutes an updated fee for providing advice in relation to prescription medicine at the request of the sponsor of the medicine for the purpose of listing the medicine as a pharmaceutical benefit. The fee is \$2085. The ES to the regulation states:

Item 34 repeals table item 18 of Part 2 of Schedule 9 of [the regulations] and replaces it with a new item 18 to clarify when a fee is payable in relation to the provision of advice about prescription medicines proposed to be listed on the Pharmaceutical Benefits Schedule. Item 18 makes clear that a fee is payable when advice is provided in relation to a prescription medicine at the request of the sponsor of the medicine for the purpose of listing the medicine as a pharmaceutical benefit...

Item 35 of Schedule 4 to the regulation substitutes an updated table of fees for notification of a trial site for a clinical trial for a biological. The fee is \$320. The ES to the regulation states:

Item 35 repeals table item 17 of Part 2 of Schedule 9A of...[the regulations] and replaces it with new item 17 that clarifies that the fee is required to be paid for each notification of an additional trial site or additional trial sites (when notified together) for a clinical trial for a biological.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated. While the committee notes that the fees described above reflect existing fees and seek to clarify the instances and circumstances in which they are required to be paid, the ES does not state the basis on which the fees have been calculated.

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

## Further response required

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

Correspondence relating to these matters is included at Appendix 1.

<b>Instrument</b>	<b>Christmas Island Marine Traffic and Harbour Facilities Determination 2015 [F2015L01591]</b> <b>Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 [F2015L01593]</b>
<b>Purpose</b>	The instruments set the Port charges for Christmas Island and Cocos (Keeling) Island Ports and the Port conditions for cargo movement on the wharf area of Christmas Island Port
<b>Last day to disallow</b>	10 May 2016
<b>Authorising legislation</b>	Utilities and Services Ordinance 1996
<b>Department</b>	Infrastructure and Regional Development
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> Nos 14 and 16 of 2015

### Unclear basis for determining fees

The committee commented as follows:

Schedule 1 of these instruments sets the Port charges for the Christmas Island and Cocos (Keeling) Island Ports.

The committee's usual expectation in cases where instruments of delegated legislation carry 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. With reference to these requirements, the committee notes that the ESs for these instruments provide no indication as to the basis on which the fees have been calculated or set.

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

### Minister's first response

The Minister for Territories, Local Government, and Major Projects advised:

The 2015 Determinations replaced, and were based on, arrangements for Christmas Island contained in the Marine Traffic and Harbour Facilities Determination No 1 of 2003 (the 2003 Determination). Advice from the contractor which manages both ports for the Australian Government,

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Patrick Ports, is that the charges in the 2003 Determination were comparable to those in place in similar remote ports in Western Australia and that these should be continued.

### **Committee's first response**

#### **The committee thanks the minister for his response.**

The committee notes the minister's advice that the port charges set by the instruments were comparable to those in similar remote ports in Western Australia. However, the minister's response does not address the question of the specific basis on which the charges have been calculated.

#### **The committee reiterates its request for the advice of the minister in relation to this matter.**

### **Minister's second response**

I have instructed the Department of Infrastructure and Regional Development to ensure that the Explanatory Statements for the Determinations are amended and are made available to the Committee. The amendments will address the basis upon which charges have been calculated...

### **Committee's second response**

#### **The committee thanks the minister for his response.**

The committee notes that revised explanatory statements (ES) for these instruments were tabled in the Senate on 22 February 2016. These revised ESs are included in Appendix 1. The revised ESs describe in further detail the process for comparing port fees and charges in Indian Ocean Territories with those in Western Australian ports. In relation to Christmas Island, the way in which the fees and charges are implemented in relation to wharfage, mooring, berth hire, port dues and equipment hire is also set out. However, the revised ESs do not address the question of the specific basis on which the charges have been calculated; for example, whether the port fees and charges are calculated on the basis of cost recovery or on another basis.

#### **The committee reiterates its request for the advice of the minister in relation to this matter.**

## Advice only

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

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

<b>Instruments</b>	<p>ASIC Credit (Amendment) Instrument 2016/62 [F2016L00105]</p> <p>Carbon Credits (Carbon Farming Initiative) Amendment (Extended Accounting Period) Rule 2016 [F2016L00099]</p> <p>Charter of the United Nations (Sanctions - Iran) (Specified Entities) List Instrument of Repeal 2016 [F2016L00097]</p> <p>Excise (Mass of CNG) Determination 2016 (No. 1) [F2016L00131]</p> <p>Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2016 (No. 1) [F2016L00133]</p> <p>Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2016 (No. 1) [F2016L00130]</p> <p>Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134]</p> <p>My Health Records Rule 2016 [F2016L00095]</p> <p>Pay as you go withholding - Variation and exemption of withholding requirements for certain payments made to religious practitioners [F2016L00107]</p> <p>Tertiary Education Quality and Standards Agency (Register) Guidelines 2016 [F2016L00101]</p> <p>Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 Amendment 8 [F2016L00108]</p> <p>Vehicle Standard (Australian Design Rule 42/04 - General Safety Requirements) 2005 Amendment 5 [F2016L00128]</p> <p>Vehicle Standard (Australian Design Rule 42/04 - General Safety Requirements) 2005 Amendment 6 [F2016L00129]</p> <p>Water and Wastewater Services Fees Determination 2016 (Jervis Bay Territory) [F2016L00100]</p>
<b>Scrutiny principle</b>	<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.<sup>2</sup>

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



## Chapter 2

### Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

<b>Instrument</b>	<b>Agricultural and Veterinary Chemicals Legislation Amendment (Simplified Formulation Variations and Other Measures) Regulation 2015 [F2015L02042]</b>
<b>Purpose</b>	Amends the Agricultural and Veterinary Chemicals (Administration) Regulations 1995 and the Agricultural and Veterinary Chemicals Code Regulations 1995 to provide simplified formulation variations and processes for registering or varying a suite of chemical products; and to declare restricted chemical products
<b>Last day to disallow</b>	11 May 2016
<b>Authorising legislation</b>	<i>Agricultural and Veterinary Chemicals (Administration) Act 1992; Agricultural and Veterinary Chemicals Code Act 1994</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

#### Unclear basis for determining fees

The committee commented as follows:

The regulation amends the Agricultural and Veterinary Chemicals (Administration) Regulations 1995 (Administration Regulations) and the Agricultural and Veterinary Chemicals Code Regulations 1995 (Principal Code Regulations) to provide for various efficiency measures. Item 7 of Schedule 1 of the regulation substitutes an updated table of fees and periods for completion of modules, levels and types of assessments in Schedule 7 of the Principal Code Regulations. The fees range from \$460 to \$27 920.

The explanatory statement (ES) to the regulation states:

Item 7 replaces Schedule 7 to remove the spent 1 July 2014 fee provisions and correct errors in the fees for items 5.6 and 6.3. The fee in item 5.6 has been reduced so that it is the same as the fee in item 5.1. The fee in item 6.3 has been reduced to correct an error... Section 164 of the Agvet Code

(Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*) provides specific authority for fees to be prescribed in regulations, including the manner and the time in which they are due and payable.

Similarly, item 5 of Schedule 2 of the regulation substitutes a new subsection 71A(1) in the Principal Code Regulations to provide for fees payable for an application for renewal of the registration of a chemical product. The fees prescribed are \$2150 for a five year period, or \$430 for a 12-month period. The ES to the regulation states:

The fee for a one-year renewal period is unchanged and the fee for the five-year renewal period is five times the fee payable for a one-year renewal.

Finally, item 7 of Schedule 3 of the regulation provides that the fee for an application to make an interchangeable constituent determination made under new regulation 19AEB of the Principal Code Regulations will be the modular assessment fee (as provided for in the table in Schedule 7 of the Principal Code Regulations).

The ES states:

For the authorities in subsections 164(1) and 165(1) of the Agvet Code, item 7 amends the table in Part 2 of Schedule 6 to specify that the assessment period for an application under regulation 19AEB is the modular assessment period, and the fee is the modular assessment fee. The amendment also provides that the extended assessment period is one and one third of the modular assessment period, rounded up to the nearest whole month, plus a month (similar to the existing item 28).

While section 164 of the Agvet Code provides authority for fees to be prescribed in regulations, it does not provide the basis on which those fees are to be calculated. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

While the committee notes that the fees in Schedule 7 have been amended to correct errors, the ES does not state either the basis on which the correct amount of the fees is to be calculated, or the basis for calculation of the modular assessment fee that is to apply to applications under new regulation 19AEB.

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

### **Minister's response**

The Minister for Agriculture and Water Resources advised:

The fees set out in the amended Schedule 7 of the Administration Regulations and the fee payable for the renewal of the registration of a chemical product were calculated in accordance with the cost recovery arrangements of the Australian Pesticides and Veterinary Medicines Authority. These fees were set in *Agricultural and Veterinary Chemicals Legislation Amendment (2013 Measures No. 2) Regulation 2013*. This instrument was in part informed by a cost recovery impact statement.

The fees set out [in] Item 7 of Schedule 1 and Item 5 of Schedule 2 continue to be the fees for each application or the annual renewal of the registration of a chemical product determined in the 2013 instrument.

The modular fees that apply to applications under new regulation 19AEB of the Principal Code Regulations are calculated in accordance with regulation 70A, consistent with other modular fee applications items in Schedule 6 of the Principal Code Regulations

### Committee's response

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

<b>Instrument</b>	<b>Export Charges (Imposition—General) Regulation 2015 [F2015L01873]</b> <b>Export Charges (Imposition—Customs) Regulation 2015 [F2015L01876]</b>
<b>Purpose</b>	The regulations prescribe charges for the export of regulated goods; and prescribe who is liable to pay a specified charge and the persons or classes of persons that are exempt from a charge
<b>Last day to disallow</b>	16 March 2016
<b>Authorising legislation</b>	<i>Export Charges (Imposition—General) Act 2015; Export Charges (Imposition—Customs) Act 2015</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

### Access to extrinsic material

The committee commented as follows:

Section 5 of each regulation defines key terms used in the regulations. The regulations provide: '*Australian Standard for Meat* means the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption* (AS 4696–2007), published on 31 July 2007'.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information, including standards or industry databases, is not publically available or is

available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

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

In this respect, the committee notes that AS 4696–2007 can be purchased from the Commonwealth Scientific and Industrial Organisation (CSIRO) for a fee. However, neither the instrument nor the ES provide information about whether AS 4696-2007 is otherwise freely and readily available.

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

**Minister's response:**

The Minister for Agriculture and Water Resources advised:

The Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption (AS 4696:2007), referenced in the *Export Charges (Imposition—General) Regulation 2015* and *Export Charges (Imposition—Customs) Regulation 2015* can be purchased or downloaded free of charge from the CSIRO website at <http://www.publish.csiro.au/pid/5553.htm>.

I have asked my department to ensure that the accessibility of extrinsic material is taken into account when working with the Office of Parliamentary Counsel to develop regulations and when drafting explanatory statements.

**Committee's response**

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

<b>Instrument</b>	<b>Farm Household Support Minister's Amendment Rule 2015 [F2015L01948]</b>
<b>Purpose</b>	Increases the activity supplement by \$1000 for Farm Household Allowance recipients to spend on 'high value' activities in their final (third) year of payment
<b>Last day to disallow</b>	11 May 2016
<b>Authorising legislation</b>	<i>Farm Household Support Act 2014</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

## Consultation

The committee commented as follows:

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

The Office of Parliamentary Counsel drafted the Amendment Rule. Extensive stakeholder consultation was also undertaken as part of the ACWP [Agricultural Competitiveness White Paper].

In the committee's view, the generalised statement that extensive consultation was undertaken as part of the ACWP is insufficient to meet the requirements of the *Legislative Instruments Act 2003*. Where consultation has taken place, the ES to an instrument should set out the method and purpose of consultation, the bodies, groups and/or individuals consulted and the issues raised in consultations and the outcomes of the consultation process.

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

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

## Minister's response

The Minister for Agriculture and Water Resources advised:

The Farm Household Support Minister's (Amendment) Rule 2015 (Minister's Amendment Rule) is an instrument that gives effect, in terms announced in the Agricultural Competitiveness White Paper, to a decision to alter an entitlement under the Farm Household Allowance programme.

The additional case management and \$1,000 activity supplement under the Farm Household Allowance (FHA) measure of the Agricultural Competitiveness White Paper is beneficial to FHA recipients and is a decision of government. The development of a white paper on the competitiveness of the agricultural sector was an election commitment by the Australian Government in the Coalition's Policy for a Competitive Agricultural Sector.

The White Paper process stimulated considerable public interest in the future of the sector. In the preparation of the White Paper, the views of the Australian public were considered through calls for public submissions on an issues paper and then a Green Paper. Throughout the issues and Green Paper consultation processes, more than 1,000 submissions were received and over 1,100 people were engaged in rural, regional and metropolitan areas in all States and Territories. Consultation involved farmers, industry associations, researchers, finance sector representatives, supply chain participants, and State and Territory governments through written submissions, roundtable meetings and one-on-one discussions.

Section 18 of the *Legislative Instruments Act 2003* provides for circumstances where further consultation is unnecessary or inappropriate if appropriate consultation had already been undertaken by someone other than the rule-maker.

I have instructed my department to amend the Explanatory Statement in accordance with the requirements of the *Legislative Instruments Act 2003* and in line with my advice above, prior to the disallowance period ending on 11 May 2016.

## 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 advice that the department will amend the explanatory statement to include a description of consultation in accordance with the requirement of the *Legislative Instruments Act 2003*.

<b>Instrument</b>	<b>Fisheries Management Amendment (Fees) Regulation 2015 [F2015L01856]</b>
<b>Purpose</b>	Increases fees for the processing of paper logbooks
<b>Last day to disallow</b>	16 March 2016
<b>Authorising legislation</b>	<i>Fisheries Management Act 1991</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

### **Imposition of fees**

The committee commented as follows:

The regulation amends the Fisheries Management Regulations 1992 to increase fees for the furnishing of logbooks when electronic communication is not used. The committee notes that Schedule 1, item 1 of the regulation increases the fee for the furnishing of a log book for each fishing day in various Fisheries from \$8.40 to \$11; from \$12 to \$18.40; and from \$2.40 to \$4.00.

The ES to the instrument states:

Fees are charged per fishing day for the processing of paper logbooks. Fees are not charged for the processing of electronic logbooks as there is little cost associated with processing these records.

Increasing the use of fee for service arrangements increases the incentive to use more cost efficient electronic services. This reduces the overall costs to the fishing industry.

It appears that the primary purpose of the fee increase is to penalise users of paper logbooks to create or increase an incentive to use electronic services. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

The committee notes that section 168 of the *Fisheries Management Act 1991* (FMA Act) provides that regulations may prescribe fees in respect of various activities under the FMA Act. However, the committee is concerned that this regulation uses a method of encouraging the use of electronic logbooks, by increasing the fee for processing paper logbooks, which may not be authorised under the FMA Act.

In this respect, the committee notes that neither the instrument nor the ES provide information about whether it is both permitted and appropriate for this regulation to

apply fees which use an incentive as their basis rather than fees which reasonably reflect the cost of providing the service.

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

### **Minister's response**

The Minister for Agriculture and Water Resources advised:

Following the introduction of electronic log books, the Australian Fisheries Management Authority (AFMA) introduced a fee for service for processing paper logbooks on 1 July 2014. Prior to this, charges related to processing paper logs were charged through the levy base.

Logbooks contain information about how much fish is caught, where and when it was caught and the type and amount of fishing gear used to catch it. This information is analysed to determine the status of fish stocks and work out how much catch is sustainable.

In mid-2015, AFMA undertook a post-implementation review of the fees imposed following twelve months of fees for service being in place. The review identified that the existing cost AFMA was charging for paper log book data entry was not sufficient to cover full costs for this activity. Following consultation with the Commonwealth Fisheries Association, the fee for service on the entry of paper based logbooks was increased to cover the full cost incurred by AFMA.

Although the fee for service arrangements for paper log books potentially creates an incentive to use electronic systems, this was not the primary purpose of the increase in fees. Rather, the increase in fees was required to recover the full cost incurred by AFMA in processing the logbooks, and is consistent with AFMA's cost recovery policy.

### **Committee's response**

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

<b>Instrument</b>	<b>Primary Industries (Excise) Levies Amendment (Sweet Potatoes, Chestnuts and Olives) Regulation 2015 [F2015L02039]</b> <b>Primary Industries (Customs) Charges Amendment (Sweet Potatoes and Chestnuts) Regulation 2015 [F2015L02040]</b>
<b>Purpose</b>	These regulations amend the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 to introduce a new statutory levy and a new export charge on sweet potato growers, increase the Emergency Plant Pest Response levy on chestnuts and name the Australian Olive Association as the eligible industry body for olives
<b>Last day to disallow</b>	11 May 2016
<b>Authorising legislation</b>	<i>Primary Industries (Excise) Levies Act 1999; Primary Industries (Customs) Charges Act 1999</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

### Unclear basis for determining fees

The committee commented as follows:

The regulations amend the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 respectively, to introduce a new statutory levy and export charge on sweet potato growers and increase the Emergency Plant Pest Response (EPPR) levy on chestnuts. Item 5 of Schedule 1 of the first regulation provides for marketing, vegetable research and development (R&D) and Plant Health Australia (PHA) components of levy to be set at 1, 0.485 and 0.0150 per cent, respectively, of the amount paid for the sweet potatoes at the first point of sale.

The ES to the first instrument states:

Previously, there was no Australian Government marketing levy or charge on sweet potatoes...Sweet potatoes are now a separate leviabale horticultural commodity with R&D and marketing component of levy and with scope for a PHA and an EPPR component of levy (Part 30 of Schedule 15 of the Regulation).

HIA Ltd [Horticulture Innovation Australia Ltd] is the relevant industry services body for the administration of the sweet potato industry levies and charges for marketing and is the body to manage money collected from this levy and charge imposed on sweet potato growers...The Regulation

implements a levy component to be paid to HIA Ltd on fresh sweet potatoes at a marketing rate of levy of one per cent (1%) of the value of the sweet potato at the first domestic point of sale. The sweet potato marketing levy and export charge is expected to raise approximately \$800 000 annually.

In relation to the charge, the ES to the second instrument states:

The Regulation implements an export charge, to be paid to HIA Ltd, on fresh sweet potatoes at a rate of charge of one per cent (1%) of the free on board value of the sweet potatoes immediately before export.

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

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

### **Minister's response**

The Minister for Agriculture and Water Resources advised:

I note that the committee generally requires the specific basis on which an individual levy/charge imposed by delegated legislation has been calculated to be made clear in the relevant Explanatory Statement.

The rate of the levy/charge on sweet potatoes was determined on the basis of a proposal to the government from the Australian Sweet Potato Growers Inc (ASPG). ASPG proposed to introduce a marketing levy on sweet potatoes of 1 per cent of the amount paid for sweet potatoes at the first point of sale to fund the implementation of the industry's strategic marketing plan. ASPG also proposed that no change be made to the rate of the research and development (R&D; 0.485 per cent of amount paid at first point of sale), Plant Health Australia (PHA; 0.0150 per cent of amount paid at first point of sale) and Emergency Plant Pest Response components (EPPR; 0 per cent of the amount paid at first point of sale) of the levy/charge already paid on sweet potatoes as a leviable/chargeable vegetable under Part 17 of Schedule 15 [Vegetables] of the *Primary Industries (Excise) Levies Regulations 1999* and Part 17 of Schedule 10 of the *Primary Industries (Customs) Charges Regulation 2000*.

Therefore, the introduction of a marketing levy/charge of 1 per cent on sweet potatoes was the only substantive change introduced by the regulations. The R&D, PHA and EPPR levy/charge components were already established on sweet potatoes when formerly defined as a vegetable.

I note that the relevant Explanatory Statements do refer to sweet potatoes as already being a leviable/chargeable vegetable for the purposes of R&D, PHA and EPPR, but the rates of those pre-existing levies/charges on sweet potatoes are not stated. If necessary, I can instruct the department to include these rates in the explanatory statements.

### Committee's response

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

The committee also thanks the minister for his offer to issue a revised ES to include the information provided as to the basis for calculating the fees imposed by these regulations. However, the committee regards the publication of the minister's response above as sufficient in this instance.

<b>Instrument</b>	<b>Primary Industries Levies and Charges Collection Amendment (Sweet Potatoes and Honey) Regulation 2015 [F2015L02041]</b>
<b>Purpose</b>	Sets details for the payment by growers of a new statutory levy and export charge on sweet potatoes to fund marketing activities and increases the estimated revenue threshold below which a honey levy payer is eligible to apply for exemption from lodging quarterly returns
<b>Last day to disallow</b>	11 May 2016
<b>Authorising legislation</b>	<i>Primary Industries Levies and Charges Collection Act 1991</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(b)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

### Insufficient information regarding strict liability offences

The committee commented as follows:

The regulation creates a new strict liability offence for failing to keep records. The offence carries a penalty of 10 penalty units (or \$1700).

Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences (particularly strict liability offences) in delegated legislation. The committee notes that in this case the ES provides no explanation of or justification for the framing of the offence.

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

### **Minister's response**

The Minister for Agriculture and Water Resources advised:

I note that the committee generally requires a detailed justification for the inclusion of strict liability offences in delegated legislation.

Section 30 of the *Primary Industries Levies and Charges Collection Act 1991* specifically provides that regulations made under that Act may prescribe account and record keeping requirements and establish offences, punishable on conviction by a fine not exceeding 10 penalty units for a failure to comply with requirement of the regulations. It is appropriate for the record keeping requirements, and associated offence provisions, to be detailed in the *Primary Industries Levies and Charges Collection Regulations 1991*. Consistent with the other record keeping offences in the *Primary Industries Levies and Charges Collection Regulations 1991*, the offence is a strict liability offence. If necessary, I can instruct the department to include this justification in the explanatory statement.

### **Committee's response**

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

The committee also thanks the minister for his offer to issue a revised ES including the information provided as to the justification for the strict liability offence. However, the committee regards the publication of the minister's response above as sufficient in this instance.

In concluding its examination of the instrument, the committee notes its expectations that, where an instrument makes provision for offences, the ES provide a full justification for the need, scope and framing of those offences. This is particularly so in cases of strict liability.

The committee further draws the minister's attention to the discussion of strict and absolute liability offences in the Attorney-General's *A Guide to Framing Commonwealth Offence, Infringement Notice and Enforcement Powers*, as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

<b>Instrument</b>	<b>Quarantine Charges (Imposition—Customs) Amendment (Cost Recovery) Regulation 2015 [F2015L01864]</b>
<b>Purpose</b>	Adjusts and prescribes new charges for matters connected with the administration of the <i>Quarantine Act 1908</i> ; and prescribes who is liable to pay a specified charge and the persons or classes of persons that are exempt from a charge
<b>Last day to disallow</b>	16 March 2016
<b>Authorising legislation</b>	<i>Quarantine Charges (Imposition—Customs) Act 2014</i>
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

### **Incorporation of extrinsic material**

The committee commented as follows:

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

With reference to the above, the committee notes that Schedule 1, item 5 of the regulation defines quarantine station as a place appointed as a quarantine station by Quarantine Proclamation 1998. However, neither the text of the instrument nor the ES expressly state the manner in which the Quarantine Proclamation is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Quarantine Proclamation 1998) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

## Minister's response

The Minister for Agriculture and Water Resources advised:

Consistent with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the *Legislative Instruments Act 2003*, the intention is for references to the *Quarantine Proclamation 1998* to be read as the '*Quarantine Proclamation 1998* as in force from time to time'. Therefore, should the places appointed as quarantine stations by the *Quarantine Proclamation 1998* change, the updated places appointed as quarantine stations would also apply for the purposes of the definition of quarantine station in the *Quarantine Charges (Imposition-Customs) Amendment (Cost Recovery) Regulation 2015*.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

## Committee's response

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

The committee also thanks the minister for his advice that for future instruments the department will address the manner in which extrinsic material has been incorporated.

<b>Instrument</b>	<b>Southern Squid Jig Fishery Total Allowable Effort Determination 2015 [F2015L01945]</b>
<b>Purpose</b>	Determines the total allowable effort in the Southern Squid Jig Fishery for the 2016 fishing year
<b>Last day to disallow</b>	11 May 2016
<b>Authorising legislation</b>	<i>Fisheries Management Act 1991</i> ; Southern Squid Jig Fishery Management Plan 2005
<b>Department</b>	Agriculture and Water Resources
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 1 of 2016

## Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as,

respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that section 4 of the determination provides: '[t]erms used in this Determination that are defined for the purposes of the *Southern Squid Jig Fishery Management Plan 2005* have the same meanings in this Determination as they have in that Plan'. However, neither the text of the instrument nor the ES expressly state the manner in which the Southern Squid Management Plan 2005 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Southern Squid Jig Fishery Management Plan 2005) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

#### **Minister's response**

The Minister for Agriculture and Water Resources advised:

Consistent with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the *Legislative Instruments Act 2003*, the intention is for references to the Southern Squid Jig Fishery Management Plan 2005 to be read as the 'Southern Squid Jig Fishery Management Plan 2005 *as in force from time to time*'. Therefore, should the definitions in the Management Plan change, the updated definitions would also apply to the Determination.

I am aware that the Committee places considerable reliance on explanatory statements to understand legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

#### **Committee's response**

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

The committee also thanks the minister for his advice that for future instruments the department will address the manner in which extrinsic material has been incorporated.



# **Appendix 1**

## **Correspondence**





**PAUL FLETCHER MP**  
Federal Member for Bradfield  
Minister for Major Projects,  
Territories and Local Government

*PDR ID: MC15-006342*

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

Dear Senator Williams

**Further advice for the Senate Standing Committee on Regulations and Ordinances**

I write in response to the letter dated 4 December 2015 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) concerning the content of the Explanatory Statements accompanying the Christmas Island Marine and Harbour Facilities Determination 2015, the Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 and the Removal of Prisoners (Territories) Regulation 2015.

I have instructed the Department of Infrastructure and Regional Development to ensure that the Explanatory Statements for the Determinations are amended and are made available to the Committee. The amendments will address the basis upon which charges have been calculated, the consultation that was undertaken, and any reference to the Governor-General will be replaced with the correct reference to the Administrator.

I have also instructed the Department to ensure that the Explanatory Statement for the Removal of Prisoners (Territories) Regulation 2015 is amended to reflect the consultation that was undertaken for the purposes of making this instrument. The Department will make the updated Explanatory Statement available to the Committee.

Following my letter of 1 December 2015 on these same matters I understand that the Department contacted the Committee's Secretariat staff to assure the Committee that the Explanatory Statements for the above-mentioned legislative instruments would be amended as per the Committee's requests.

18 / 1 /2016



Australian Government

Department of Infrastructure and Regional Development

Dr Rosemary Laing  
Clerk of the Senate  
Senate Table Office  
Suite SG-25  
Parliament House  
CANBERRA ACT 2600

For the attention of the Assistant Legislation Officer

Dear Dr Liang,

**Updated Explanatory Statements to the:  
*Removal of Prisoners (Territories) Regulation 2015;*  
**Christmas Island Marine Traffic and Harbour Facilities Determination 2015;**  
**and the Cocos (Keeling) Islands Marine Traffic and Harbour Facilities  
Determination 2015.****

On 12 November 2015 the Senate Standing Committee on Regulations and Ordinances (the Committee) wrote to the Senior Adviser within the Office of the Minister for Infrastructure and Regional Development, drawing attention to *Delegated Legislation Monitor* No. 14 of 2015 (the Monitor).

***Removal of Prisoners (Territories) Regulation 2015***

The Committee noted in the Monitor that:

Consultation

‘Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where the instrument is likely to have an effect on business.

However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate.

The Explanatory Statement which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).

With reference to these requirements, the committee notes that the Explanatory Statement for this instrument provides no information in relation to consultation...

## S e c u r i t y   C l a s s i f i c a t i o n

The Committee requests the advice of the Minister in relation to this matter; and requests that the Explanatory Statement be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

The Minister responded to the Committee on 1 December 2015 and advised that:

‘The Department consulted the Attorney-General’s Department and the Administrator (of Christmas Island and Cocos (Keeling) Islands) on the 2015 Regulation. The Department did not consider that further consultation with the territory communities was necessary give the 2015 Regulation did not change the arrangements in place under the previous Regulations.

I have asked the Department to ensure it provides this information for new instruments in the future. I thank the Committee for its assistance in relation to this matter’.

### **Christmas Island Marine Traffic and Harbour Facilities Determination 2015 and the Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015**

The Committee noted in the Monitor that:

#### Basis for determining charges

‘...the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated...the committee notes that the ESs for these instruments provide no indication as to the basis on which these fees have been calculated or set’.

#### Consultation

‘Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. The ES...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.

...the committee notes that the ESs for these instruments provide no information in relation to consultation’.

#### Drafting

‘The committee notes that these instruments are identified as made under section 4 of the *Utilities and Services Ordinance 1996*. Section 4 enables the Administrator to impose on a person a fee in relation to the provision...of a utility...

However, while the instruments appear to have been made by the Administrator, the ESs to the instruments state: The Governor-General has made this Determination in accordance with the power granted to him under section 4 of the *Utilities and Services Ordinance 1996*.

## S e c u r i t y   C l a s s i f i c a t i o n

The committee requests the advice of the minister in relation to [these matters]; and requests that the ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003*'.

The Minister responded to the Committee on 1 December 2015 and advised that:

‘...Advice from the contractor which manages both ports for the Australian Government, Patrick Ports, is that the charges in the 2003 Determination were comparable to those in place in similar remote ports in Western Australia and that these should be continued.

... the Department consulted with Patrick Ports and the Office of Best Practice Regulation. The Department also wrote to Mr Barry Haase, the Administrator of the Territories....advising that the 2015 Determinations were being made and briefing him on the outcomes of the consultations.

I have instructed the Department to update the explanatory statements to reflect the correct information’.

The Department subsequently contacted the Committee to ensure that all aspects of the Committee’s requirements were addressed.

Please arrange for the enclosed updated Explanatory Statements to be tabled.

If you require any further information please contact Karen Lindsay by phone on 02 6274 8113 or email [Karen.Lindsay@infrastructure.gov.au](mailto:Karen.Lindsay@infrastructure.gov.au).

Yours sincerely

Karly Pidgeon  
General Manager  
Indian Ocean Territories Branch  
February 2016

Attachment: Updated Explanatory Statements

## EXPLANATORY STATEMENT

Issued by the authority of the Administrator of the Territory of Christmas Island

### **Christmas Island Marine Traffic and Harbour Facilities Determination 2015**

#### Authority

The Administrator of the Territory of Christmas Island has made this Determination in accordance with the power granted to him under section 4 of the *Utilities and Services Ordinance 1996 (CI)*.

This Determination is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

#### Purpose and Operation

The purpose of this Determination is to set out the Port charges and conditions for cargo movement at the Christmas Island Port.

This Determination is re-making the Marine Traffic and Harbour Facilities Determination No. 1 of 2003 (the 2003 Determination) that sunset on 1 October 2015, thereby ensuring the continued effective operations of the Christmas Island Port.

#### Impact on Port users

The Determination does not create any additional regulatory impacts for Port users.

The Determination makes minor amendments to the Conditions set out in the 2003 Determination.

The 2003 Determination sets a ten day period in which cargo must be removed from the wharf following delivery or reception on the wharf prior to shipping.

During consultation with the Christmas Island Harbour Master it was noted that increased Port activities have caused difficulties in managing the transit of cargo through the Port due to the ten day period and physical limitations of the Port area.

This Determination will address this issue by allowing the Christmas Island Harbour Master to extend the time in which cargo must be removed from the wharf following delivery or reception on the wharf, beyond ten days from time-to-time. The Christmas Island Harbour Master must provide at least 14 days' notice of any such variation through a public Community Bulletin.

#### Consultation

The Department of Infrastructure and Regional Development consulted with the Administrator of the Territory of Christmas Island, the Christmas Island Port operations contractor, Patrick Stevedoring Pty Ltd, and the Office of Best Practice Regulation within the Department of Prime Minister and Cabinet.

Further consultation was not considered necessary as this Determination maintains existing Port charges and only makes minor amendments to Port conditions to those set in the 2003 Determination.

### Basis for Determining Charges

The Government's objective is to align, as far as practical, conditions and standards in the Indian Ocean Territories, which includes Christmas Island, with those in comparable communities in the rest of Australia. Reliable transport services are vital to the viability of the Indian Ocean Territories communities. The cost and effectiveness of transport services are major factors in business activity in the Indian Ocean Territories. Shipping is the major freight link to the Territories with food, consumer goods, fuel, plant and machinery all being freighted to Christmas Island.

A review was undertaken in the 2014/2015 financial year and compared existing Christmas Island Port fees and charges to comparable fees and charges payable in Western Australian ports. The ports compared were:

- Port of Port Hedland
- Port of Karratha
- Port of Dampier
- Port of Albany; and the
- Port of Esperance.

The review concluded that Christmas Island Port fees and charges were comparable to the Western Australian ports outlined above.

### *Wharfage*

Wharfage is charged out against a vessel depending on the commodity.

### *Inwards Cargo:-*

Containerised cargo is charged out by unit per TEU\*/FEU\*\*

Break bulk cargo is charged out by metric tonne or revenue tonne; whichever is the greater

Bulk fuel is charged out by kilolitre

\* TEU = 20' Equivalent Unit \*\* FEU = 40' Equivalent Unit

### *Outwards Cargo:-*

Bagged phosphate is charged out by metric tonne

Containerised cargo is charged out by unit per TEU/FEU

Empty containers are charged out by unit per TEU/FEU

Bunkering is charged out by kilolitre

### *Mooring*

Mooring relates to mooring fees levied against private vessels moored at Australian Government-owned yacht moorings off the island.

### *Berth Hire*

The berth hire is the hourly levy charged against a moored vessel from the period between the attachment of the first mooring line and the commencement of unmooring.

### *Port Dues*

The Port dues are levies charged against each vessel based on the vessel's Gross Tonnage.

### *Equipment Hire*

Hire charges are levied against stevedoring and standby mooring licence holders for operations in support of commercial shipping activities. Charges are based on hourly usage by engine hour.

## **Statement of Compatibility with Human Rights**

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

### **Christmas Island Marine Traffic and Harbour Facilities Determination (No. 1) 2015**

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

#### **Overview of the Legislative Instrument**

The purpose of this Determination is to set out the Port charges and the conditions for cargo movement on the Christmas Island Port.

#### **Human Rights Implications**

This Determination does not engage any human rights, and it is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Barry Wayne Haase, Administrator of Christmas Island**

## EXPLANATORY STATEMENT

Issued by the authority of the Administrator of the Territory of Cocos (Keeling) Islands

### **Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015**

#### Authority

The Administrator of the Territory of Cocos (Keeling) Islands has made this Determination in accordance with the power granted to him under section 4 of the *Utilities and Services Ordinance 1996 (CKI)*.

This Determination is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

#### Purpose and Operation

The purpose of this Determination is to set out the Port charges at the Cocos (Keeling) Islands Port. The operation provides for the continued collection of mooring fees from private vessels moored at Australian Government-owned Cocos (Keeling) Islands yacht moorings.

#### Impact on Port users

There will be no impact on Port users as this Determination provides the legal authority to continue the practice of collecting mooring fees.

#### Consultation

The Department of Infrastructure and Regional Development consulted with the Cocos (Keeling) Islands Port operations contractor, Patrick Stevedoring Pty Ltd, and the Office of Best Practice Regulation in the Department of Prime Minister and Cabinet.

Patrick Stevedoring Pty Ltd advised that best practice would be to maintain the current mooring fees, namely, in line with those set on Christmas Island. Yacht mooring fees on Christmas Island have been maintained at the same level since 2003.

Further consultation was not considered necessary as the Determination only provides for the continuation of the practice of collecting charges on Cocos (Keeling) Islands.

#### Basis for Determining Charges

The Government's objective is to align as far as practical conditions and standards in the Indian Ocean Territories, which includes Cocos (Keeling) Islands, with those in comparable communities in Australia. Reliable transport services are vital to the viability of the Indian Ocean Territories communities. The cost and effectiveness of transport services are major factors in business activity in the Indian Ocean Territories.

A review of Port charges and fees was undertaken in the 2014/2015 financial year. The review compared existing Cocos (Keeling) Islands Port fees and charges to comparable fees and charges payable in Western Australian ports. The ports compared were:

- Port of Port Hedland
- Port of Karratha
- Port of Dampier
- Port of Albany; and the
- Port of Esperance.

The only relevant Cocos (Keeling) Island Port fees and charges related to moorings fees. This is because freight vessels do not moor within Port boundaries, bunker vessels are moored and discharged using private infrastructure and Cocos (Keeling) Islands have no exportable bulk commodities.

Given this, the review found that the yacht moorings were comparable to the Western Australian ports outlined above.

## **Statement of Compatibility with Human Rights**

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

### **Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination (No. 1) 2015**

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

#### **Overview of the Legislative Instrument**

The purpose of this Determination is to set out the Port charges for Cocos (Keeling) Islands Port.

#### **Human Rights Implications**

This Determination does not engage any human rights, and it is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Barry Wayne Haase, Administrator of Cocos (Keeling) Islands**





The Hon. Barnaby Joyce MP

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Minister for Agriculture and Water Resources  
Federal Member for New England

Ref: MC16-000972

23 FEB 2016

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

Dear Chair

*Wacha,*

Thank you for your correspondence of 4 February 2016 requesting advice on instruments within my portfolio responsibility that have been identified in the *Delegated legislation monitor* No. 1 of 2016.

For ease of reference, responses to each of the committee's issues are addressed in the enclosed documents.

Thank you again for your letter.

Yours sincerely

Barnaby Joyce MP

Enc.

## Index to responses

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**Agricultural and Veterinary Chemicals Legislation Amendment (Simplified Formulation Variations and Other Measures) Regulation 2015 [F2015L02042]**

Unclear basis for determining fees

The fees set out in the amended Schedule 7 of the Administration Regulations and the fee payable for the renewal of the registration of a chemical product were calculated in accordance with the cost recovery arrangements of the Australian Pesticides and Veterinary Medicines Authority. These fees were set in *Agricultural and Veterinary Chemicals Legislation Amendment (2013 Measures No. 2) Regulation 2013*. This instrument was in part informed by a cost recovery impact statement.

The fees set out Item 7 of Schedule 1 and Item 5 of Schedule 2 continue to be the fees for each application or the annual renewal of the registration of a chemical product determined in the 2013 instrument.

The modular fees that apply to applications under new regulation 19AEB of the Principal Code Regulations are calculated in accordance with regulation 70A, consistent with other modular fee applications items in Schedule 6 of the Principal Code Regulations.

**Export Charges (Imposition—General) Regulation 2015 [F2015L01873]**

**Export Charges (Imposition—Customs) Regulation 2015 [[F2015L01876]**

Access to extrinsic material

The Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption (AS 4696:2007), referenced in the *Export Charges (Imposition—General) Regulation 2015* and *Export Charges (Imposition—Customs) Regulation 2015* can be purchased or downloaded free of charge from the CSIRO website at <http://www.publish.csiro.au/pid/5553.htm>.

I have asked my department to ensure that the accessibility of extrinsic material is taken into account when working with the Office of Parliamentary Counsel to develop regulations and when drafting explanatory statements.

## **Farm Household Support Minister's Amendment Rule 2015 [F2015L01948]**

### Consultation

The Farm Household Support Minister's (Amendment) Rule 2015 (Minister's Amendment Rule) is an instrument that gives effect, in terms announced in the Agricultural Competitiveness White Paper, to a decision to alter an entitlement under the Farm Household Allowance programme.

The additional case management and \$1,000 activity supplement under the Farm Household Allowance (FHA) measure of the Agricultural Competitiveness White Paper is beneficial to FHA recipients and is a decision of government. The development of a white paper on the competitiveness of the agricultural sector was an election commitment by the Australian Government in the Coalition's Policy for a Competitive Agricultural Sector.

The White Paper process stimulated considerable public interest in the future of the sector. In the preparation of the White Paper, the views of the Australian public were considered through calls for public submissions on an issues paper and then a Green Paper. Throughout the issues and Green Paper consultation processes, more than 1,000 submissions were received and over 1,100 people were engaged in rural, regional and metropolitan areas in all States and Territories. Consultation involved farmers, industry associations, researchers, finance sector representatives, supply chain participants, and State and Territory governments through written submissions, roundtable meetings and one-on-one discussions.

Section 18 of the *Legislative Instruments Act 2003* provides for circumstances where further consultation is unnecessary or inappropriate if appropriate consultation had already been undertaken by someone other than the rule-maker.

I have instructed my department to amend the Explanatory Statement in accordance with the requirements of the *Legislative Instruments Act 2003* and in line with my advice above, prior to the disallowance period ending on 11 May 2016.

## **Fisheries Management Amendment (Fees) Regulation 2015 [F2015L01856]**

### Imposition of fees

Following the introduction of electronic log books, the Australian Fisheries Management Authority (AFMA) introduced a fee for service for processing paper logbooks on 1 July 2014. Prior to this, charges related to processing paper logs were charged through the levy base.

Logbooks contain information about how much fish is caught, where and when it was caught and the type and amount of fishing gear used to catch it. This information is analysed to determine the status of fish stocks and work out how much catch is sustainable.

In mid-2015, AFMA undertook a post-implementation review of the fees imposed following twelve months of fees for service being in place. The review identified that the existing cost AFMA was charging for paper log book data entry was not sufficient to cover full costs for this activity. Following consultation with the Commonwealth Fisheries Association, the fee for service on the entry of paper based logbooks was increased to cover the full cost incurred by AFMA.

Although the fee for service arrangements for paper log books potentially creates an incentive to use electronic systems, this was not the primary purpose of the increase in fees. Rather, the increase in fees was required to recover the full cost incurred by AFMA in processing the logbooks, and is consistent with AFMA's cost recovery policy.

**Primary Industries Levies and Charges Collection Amendment (Sweet Potatoes and Honey) Regulation 2015 [F2015L02041]**

Insufficient information regarding strict liability offences

I note that the committee generally requires a detailed justification for the inclusion of strict liability offences in delegated legislation.

Section 30 of the *Primary Industries Levies and Charges Collection Act 1991* specifically provides that regulations made under that Act may prescribe account and record keeping requirements and establish offences, punishable on conviction by a fine not exceeding 10 penalty units for a failure to comply with requirement of the regulations. It is appropriate for the record keeping requirements, and associated offence provisions, to be detailed in the *Primary Industries Levies and Charges Collection Regulations 1991*. Consistent with the other record keeping offences in the *Primary Industries Levies and Charges Collection Regulations 1991*, the offence is a strict liability offence. If necessary, I can instruct the department to include this justification in the explanatory statement.

**Primary Industries (Excise) Levies Amendment (Sweet Potatoes, Chestnuts and Olives) Regulation 2015 [F2015L02039]**

**Primary Industries (Customs) Charges Amendment (Sweet Potatoes and Chestnuts) Regulation 2015 [F2015L02040]**

Unclear basis for determining fees

I note that the committee generally requires the specific basis on which an individual levy/charge imposed by delegated legislation has been calculated to be made clear in the relevant Explanatory Statement.

The rate of the levy/charge on sweet potatoes was determined on the basis of a proposal to the government from the Australian Sweet Potato Growers Inc (ASPG).

ASPG proposed to introduce a marketing levy on sweet potatoes of 1 per cent of the amount paid for sweet potatoes at the first point of sale to fund the implementation of the industry's strategic marketing plan. ASPG also proposed that no change be made to the rate of the research and development (R&D; 0.485 per cent of amount paid at first point of sale), Plant Health Australia (PHA; 0.0150 per cent of amount paid at first point of sale) and Emergency Plant Pest Response components (EPPR; 0 per cent of the amount paid at first point of sale) of the levy/charge already paid on sweet potatoes as a leviable/chargeable vegetable under Part 17 of Schedule 15 [Vegetables] of the *Primary Industries (Excise) Levies Regulations 1999* and Part 17 of Schedule 10 of the *Primary Industries (Customs) Charges Regulation 2000*.

Therefore, the introduction of a marketing levy/charge of 1 per cent on sweet potatoes was the only substantive change introduced by the regulations. The R&D, PHA and EPPR levy/charge components were already established on sweet potatoes when formerly defined as a vegetable.

I note that the relevant Explanatory Statements do refer to sweet potatoes as already being a leviable/chargeable vegetable for the purposes of R&D, PHA and EPPR, but the rates of those pre-existing levies/charges on sweet potatoes are not stated. If necessary, I can instruct the department to include these rates in the explanatory statements.

**Quarantine Charges (Imposition–Customs) Amendment (Cost Recovery) Regulation 2015 [F2015L01864]**

Incorporation of extrinsic material

Consistent with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the *Legislative Instruments Act 2003*, the intention is for references to the *Quarantine Proclamation 1998* to be read as the '*Quarantine Proclamation 1998* as in force from time to time'. Therefore, should the places appointed as quarantine stations by the *Quarantine Proclamation 1998* change, the updated places appointed as quarantine stations would also apply for the purposes of the definition of quarantine station in the *Quarantine Charges (Imposition-Customs) Amendment (Cost Recovery) Regulation 2015*.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

**Southern Squid Jig Fishery Total Allowable Effort Determination 2015 [F2015L01945]**Incorporation of extrinsic material

Consistent with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the *Legislative Instruments Act 2003*, the intention is for references to the Southern Squid Jig Fishery Management Plan 2005 to be read as the 'Southern Squid Jig Fishery Management Plan 2005 *as in force from time to time*'. Therefore, should the definitions in the Management Plan change, the updated definitions would also apply to the Determination.

I am aware that the Committee places considerable reliance on explanatory statements to understand legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

## Appendix 2

### Guideline on consultation

#### Purpose

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

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

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

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

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

#### Requirements of the *Legislative Instruments Act 2003*

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

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

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

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

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

### **Describing the nature of consultation**

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

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

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

### **Explaining why consultation has not been undertaken**

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

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

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

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

### **Seeking further advice or information**

Further information is available through the committee's website at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances) or by contacting the committee secretariat at:

Committee Secretary  
Senate Regulations and Ordinances Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Phone: +61 2 6277 3066  
Fax: +61 2 6277 5881  
Email: [RegOrds.Sen@aph.gov.au](mailto:RegOrds.Sen@aph.gov.au)

