The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

The committee's 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 *Legislation Act 2003*.[1]

Publications

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

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

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

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislation Act 2003*.[3]

Acknowledgement

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

General information

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

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

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

Senator John Williams (Chair)

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

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

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

6 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2016*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 26 February 2016 and 3 March 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

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

Instrument	**Amendment of the List of Exempt Native Specimens - South Australia Lakes and Coorong Fishery (19/02/2016) [F2016L00137]** **Amendment of List of Exempt Native Specimens - Australian salmon taken by Richey Fishing Company in the Tasmanian Scalefish Fishery [F2016L00172]**
Purpose	Amends the List of Exempt Native Specimens (29/11/2001) to include product from the South Australia Lakes and Coorong Fishery and Australian salmon harvested by the Richey Fishing Company in Tasmanian coastal waters
Last day to disallow	28 June 2016; 29 June 2016
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003*[1] allows 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

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

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 instruments add the following entries to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) list of exempt native specimens:

- specimens that are or are derived from fish or invertebrates, other than specimens that belong to species listed under Part 13 of the EPBC Act, taken in the South Australian Lakes and Coorong Fishery, as defined in the Fisheries Management (Lakes and Coorong Fishery) Regulations 2009 and the Fisheries Management (General) Regulations 2007 in force under the *Fisheries Management Act 2007* (South Australia); and

- Australian salmon (*Arripis trutta*) taken by the Richey Fishing Company in the Tasmanian Scalefish Fishery as defined in the Tasmanian Fisheries (Scalefish) Rules 2015 in force under the Tasmanian *Living Marine Resources Management Act 1995*.

However, neither the text of the instruments nor the explanatory statements (ESs) expressly state the manner in which the Tasmanian *Living Marine Resources Management Act 1995* or the *Fisheries Management Act 2007* (South Australia) are incorporated.

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

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

Instrument	**CASA EX42/16 - Exemption — use of pre-hiring drug and alcohol tests [F2016L00219]**
Purpose	Permits organisations that are required to have a drug and alcohol management plan to use pre-hiring drug and alcohol tests to comply with the requirement to test newly-hired employees
Last day to disallow	23 August 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Matter more appropriate for parliamentary enactment

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

This instrument exempts drug and alcohol management plan (DAMP) organisations that are required to use pre-hiring drug and alcohol tests from having to repeat the drug and alcohol tests after applicants are formally appointed. The committee also notes that the instrument extends, until 28 June 2019, the previous three-year relief provided by CASA EX25/13 [F2013L00382], the previous two-year relief provided by CASA EX27/11 [F2011L00319] and the previous two-year relief provided by CASA 25/09 [F2009L01205]. The ES for the instrument states that the exemption is necessary because otherwise:

> …the drug and alcohol test conducted on a person who was still an applicant would have to be repeated after the applicant was formally appointed.

Given the duration and purpose of the exemption, it appears that the instrument may be addressing an unintended consequence of the operation of the DAMP provisions of the Civil Aviation Safety Regulations 1998 (the regulations). In such cases, the committee's general preference is that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation (in this case the regulations). However, no information is provided in the ES as to why the series of exemptions have been used in favour of an amendment to the relevant DAMP provisions of the regulations.

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

Instrument	**Telecommunications (Interception and Access) (Communications Access Co-ordinator) Specification 2016 [F2016L00217]**
Purpose	Specifies the person holding or acting in the position of First Assistant Secretary, National Security Law and Policy Division as the Communications Access Co-ordinator
Last day to disallow	23 August 2016
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

No statement of compatibility

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

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

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

No description of consultation

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

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

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

Instrument	**Wine Equalisation Tax New Zealand Producer Rebate Foreign Exchange Conversion Determination (No. 35) 2016 [F2016L00197]**
Purpose	Sets out the manner in which a component of the approved selling price of wine expressed in a currency other than Australian currency may be converted to Australian currency for the purposes of calculating the wine equalisation tax (WET) producer rebate by eligible New Zealand wine producers
Last day to disallow	29 June 2016
Authorising legislation	*A New Tax System (Wine Equalisation Tax) Act 1999*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

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 4 of the instrument defines the term 'Reserve Bank of New Zealand' as 'the body corporate continued in existence under the *Reserve Bank of New Zealand Act*'. However, neither the text of the instrument nor the ES expressly state the manner in which the *Reserve Bank of New Zealand Act* is incorporated.

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

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

Advice only

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulation 2016 [F2016L00166]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Social Services
Last day to disallow	29 June 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Addition of matter to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—Constitutional authority for expenditure

The instrument adds three new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities. New table item 10 establishes legislative authority for the Commonwealth government to fund the Remote Hearing and Vision for Children program, via a grant to the Royal Institute for Deaf and Blind Children. The program will provide children with hearing or vision impairment, and their families, in outer regional, rural and remote areas of Australia, with video-based access to information, guidance, support and skills development from qualified allied health and education professionals.

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

The committee notes that, in *Williams No. 1*,[2] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally

2 *Williams v Commonwealth* (2012) 248 CLR 156.

requires legislative authority. As a result of the High Court decision in *Williams No. 2*,[3] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the objective of the Remote Hearing and Vision for Children program is to:

> fund the delivery of specialist allied health and education services to children, aged 18 years or under, with hearing or vision impairment, and their families, in remote and regional locations in Australia:
>
> (a) as the provision of sickness benefits or benefits to students; or
>
> (b) using postal, telegraphic, telephonic and other like services; or
>
> (c) to meet Australia's obligations under:
>
> (i) the Convention on the Rights of the Child; or
>
> (ii) the Convention on the Rights of Persons with Disabilities; or
>
> (iii) the International Covenant on Economic, Social and Cultural Rights.

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

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the purpose of the item references the following powers of the Constitution:
>
> - the social welfare power (section 51(xxiiiA));
> - the communications power (section 51(v)); and
> - the external affairs power (section 51(xxix)).

Therefore, the instrument appears to rely on the social welfare power, the communications power and the external affairs power as the relevant heads of legislative power to authorise the expenditure in relation to the new making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In this respect, the committee's usual expectation where the external affairs power is relied on is that the specific articles of the international treaties which set out the relevant obligations are referenced and explained in either the instrument or the ES.

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

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3 *Williams v Commonwealth* (2014) 252 CLR 416.

Instrument	**Marine Order 52 (Yachts and training vessels) 2016 [F2016L00142]**
Purpose	Provides for the survey, maintenance and certification of yachts and training vessels and adopts the UK Large Commercial Yacht Code (the LY3 Code) as modified for Australia for regulated Australian vessels that are large yachts
Last day to disallow	28 June 2016
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)

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 4 of the instrument defines the term 'non-SOLAS certificate' as having the same meaning as in Marine Order 31 (Vessel surveys and certification) 2015. However, neither the text of the instrument nor the ES expressly state the manner in which Marine Order 31 (Vessel surveys and certification) 2015 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 references to external documents which are Commonwealth disallowable instruments (such as Marine Order 31 (Vessel surveys and certification) 2015) can be taken to be references to versions of those instruments as in force from time to time.

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

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

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

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

Instruments	CASA 21/16 - Instructions — RNP as primary means of navigation for NDB, VOR or DME overlay approaches (Skytraders A319 aircraft) [F2016L00173] Christmas Island Airport Facilities Determination (No. 1) 2016 [F2016L00190] Cocos (Keeling) Islands Airport Facilities Determination (No. 1) 2016 [F2016L00189] Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2016 [F2016L00144] Goods and Services Tax: Foreign Currency Conversion Determination (No. 30) 2016 [F2016L00180] Goods and Services Tax: Frequency of Fund-raising Events Determination (No. 31) 2016 [F2016L00192] Goods and Services Tax: Particular Attribution Rules Determination (No. 28) 2016 for Prepayments of Telephone Services [F2016L00178] Goods and Services Tax: Particular Attribution Rules Determination (No. 29) 2016 for Electricity Distribution Services [F2016L00179] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 08) 2016 for Commission Based Services provided to a member of the Stockbrokers Association of Australia [F2016L00201] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 09) 2016 on Loyalty Program Participation [F2016L00196] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 10) 2016 for Labour Services [F2016L00209] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 11) 2016 on Referrals [F2016L00210] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 12) 2016 for Construction Work [F2016L00212] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 13) 2016 for Workers Compensation Insurance provided by Coal Mines Insurance Pty Ltd [F2016L00215] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 14) 2016 for Selling Agent Services [F2016L00195]

	Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 15) 2016 for Prize Winning Events [F2016L00206] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 16) 2016 on Licences for Copyright Material [F2016L00208] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 18) 2016 for Friendly Societies [F2016L00211] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 19) 2016 for Vending Machine Operators [F2016L00214] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 20) 2016 for Labour Services relating to Primary Production Activities [F2016L00218] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 21) 2016 for Vehicle Dealers [F2016L00168] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 22) 2016 for Product Suppliers to Service Station Franchisees [F2016L00171] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 23) 2016 for Administrators of a Superannuation Scheme [F2016L00181] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 24) 2016 for Covered Legal Services Obligation [F2016L00184] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 25) 2016 for Refrigerant Processors [F2016L00187] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 26) 2016 for Electronic Pharmacy and Medical Centre Data [F2016L00188] Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 27) 2016 for Referrers, Spotters, Sub-intermediaries or Sub-agents for General Insurance [F2016L00220] Goods and Services Tax: Simplified Method to Apportion Input Tax Credits Determination (No. 32) 2016 for Caravan Park Operators [F2016L00193] Goods and Services Tax: Waiver of Tax Invoice Requirement Determination (No. 33) 2016- Choice Hotels Corporate Charge Card [F2016L00221]

	Private Health Insurance (Prudential Supervision) Amendment Rules 2016 (No. 1) [F2016L00207] Remuneration Tribunal Determination 2016/01 - Remuneration and Allowances for Holders of Public Office, Judicial and Related Offices and Principal Executive Office [F2016L00162] Telecommunications (Interception and Access) (Communications Access Co-ordinator) Specification 2016 [F2016L00217] Veterans' Entitlements Income (Exempt Lump Sum - Superannuation Co-contribution Amounts) Determination 2016 (No. R11/2016) [F2016L00139] Wine Equalisation Tax New Zealand Producer Rebate Claim Lodgment Determination (No. 34) 2016 [F2016L00198] Wine Equalisation Tax New Zealand Producer Rebate Foreign Exchange Conversion Determination (No. 35) 2016 [F2016L00197]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[4]

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

Chapter 2
Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	**Carbon Credits (Carbon Farming Initiative – High Efficiency Commercial Appliances) Methodology Determination 2015 [F2015L01839]**
Purpose	Prescribes rules for implementing offsets projects to avoid greenhouse gas emissions by installing high efficiency appliances in commercial operations
Last day to disallow	15 March 2016
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Access to extrinsic material

The committee commented as follows:

Section 5 of the determination defines key terms used in the determination. It defines the terms below as follows:

- ***annual coefficient of performance*** and ***annual energy efficiency ratio*** for air conditioners has the meaning given by *AS/NZS 3823.1.1:2012 Performance of electrical appliances – Airconditioners and heat pumps Part 2: Energy labelling and minimum energy performance standards (MEPS) requirements*; and
- ***sensible energy efficiency ratio***, for a close control air conditioner, has the meaning given by A*S/NZS 4965.1:2008 Performance of close control air conditioners. Part 1: Testing for rating*.

The ES to the determination expressly states the manner in which these documents are incorporated, such that in applying a definition that references an Australian/New Zealand Standard, the version of the standard for which the year is specified in the definition applies.

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

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

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

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

Minister's response

The Minister for the Environment advised:

> During the development of the Determination, technical consultants advised the Department of the Environment that it would be common practice for many businesses conducting activities under the Determination to have access to these standards. In addition, the definitions contained within the standards also apply when registering products under the *Greenhouse and Energy Minimum Standards (GEMS) Act 2012*. This will enable businesses to use the publically available GEMS Registry to determine whether a product meets the relevant Australian/ New Zealand Standard definitions rather than accessing the standards directly.
>
> Furthermore, the National Library of Australia and all state and territory libraries provide free access to these documents to the general public. This provides a means through which other interested parties may gain full access to these documents without purchasing them.

Committee's response

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

Instrument	**Christmas Island Marine Traffic and Harbour Facilities Determination 2015 [F2015L01591]** **Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 [F2015L01593]**
Purpose	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
Last day to disallow	10 May 2016
Authorising legislation	Utilities and Services Ordinance 1996
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* Nos 14 and 16 of 2015; 3 of 2016

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, 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

The minister advised:

> 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.

Minister's third response

The minister advised:

> Christmas Island and the Cocos (Keeling) Islands are remote locations with very small populations. Consequently there is a very low volume of freight to and from Christmas Island and Cocos (Keeling) Islands…
>
> Given these factors, the Australian Government does not collect associated port's fees and charges on a cost recovery basis. Rather, a derived price commensurate with other similar Western Australian ports is applied. The fees and charges are also set, bearing in mind what the market can bear.
>
> In 2014-15, the latest completed financial year, the contract sum for the provision of port management services was $1,943,995 for Christmas Island and $1,729,235 for Cocos (Keeling) Islands, excluding capital acquisition and replacement costs. The annual revenue collected through fees and charges over the same financial year was $1,296,144 for Christmas Island and $184,333 for Cocos (Keeling) Islands.

Committee's third response

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

Instrument	**Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 [F2015L01961]**
Purpose	Amends the Migration Regulations 1958 to introduce a range of measures to support the new provisions introduced by the *Migration Amendment (Charging for a Migration Outcome) Act 2015*
Last day to disallow	11 May 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Retrospective effect

The committee commented as follows:

The regulation makes various amendments to the Migration Regulations 1994 to support changes made to the *Migration Act 1958* by the *Migration Amendment (Charging for a Migration Outcome) Act 2015*. The ES states that the latter Act makes it unlawful for a person to ask for, receive, offer or provide a benefit in return for a migration outcome ('payment for visas' conduct) in relation to certain skilled visa programs.

Item 52 of Schedule 1 to the regulation inserts a new item into Schedule 13 to the Migration Regulations 1958 dealing with the application of the amendments made by the regulation. New paragraph 5101(4)(a) provides that the amendments made by various items of Schedule 1 to this regulation apply to an application for a visa made, but not finally determined, before the commencement of those items (i.e. 14 December 2015).

The committee notes that, although the instrument is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that a person whose application for a visa was made on or before 14 December 2015 is now subject to criteria for the grant of the visa that did not apply at the time of their application.

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to asses such cases against the requirement to ensure

that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee notes that the ES for the regulation does not address this issue.

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

Minister's response

The Minister for Immigration and Border Protection advised:

> This Regulation was made to support the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (the Amendment Act). This Act introduced a new sanctions regime in relation to asking for, receiving, offering or providing a benefit in return for a migration outcome (payment for visas conduct).
>
> The supporting Regulation introduced, among other things, new provisions under which visa applications may be refused in relation to payment for visas conduct. These new visa refusal avenues were made to apply to visa applications that had already been made before the changes commenced as well as to new applications.
>
> The Committee requests my advice about the application of these amendments to visa applications that had already been made before the changes commenced.
>
> Payment for visas conduct is considered unacceptable by the Australian Government as it undermines the integrity of the skilled work visa programmes, which are designed to address genuine skill shortages in the Australian labour market by making employees available from overseas. It is not acceptable for sponsors, nominators, employers or other third parties to make a personal gain from their position in a 'payment for visas' arrangement and the opportunity it may provide for the visa holder to become an Australian permanent resident.
>
> It is therefore entirely appropriate that the Amendment Regulation applies to all relevant applications decided after the Amendment Regulation came into effect. It would not be appropriate or in the public interest for visas to be granted where payment for visas conduct had occurred. The amendments do not unduly trespass on personal rights and liberties.
>
> Further, section 504 of the *Migration Act 1958* (the Migration Act) authorises the making of regulations that are necessary or convenient to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these amendments apply to all relevant applications decided on or after the commencement of the Amendment Regulation. It would be incongruous with the Migration Act's stated objective of regulating the entry and stay of non-citizens in Australia, in the national interest, if amendments directed to the achievement of this objective cannot be applied to existing applications that have not yet been decided at commencement time.

> Given the importance of preventing payment for visas conduct, it is appropriate to ensure these new safeguards apply to all visa applications decided after the commencement of the safeguards.

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

Instrument	**Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015 [F2015L02092]**
Purpose	Specifies that the definition of Queensland Commission in the *Social Security (Administration) Act 1999* includes, for certain purposes, the Family Responsibilities Commission
Last day to disallow	11 May 2016
Authorising legislation	*Social Security (Administration) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 2 of 2016

Drafting

The committee commented as follows:

Section 4 of this instrument states:

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

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

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

Minister's response

The Minister for Social Services advised:

> The 2012 instrument contained the sentence "This Specification ceases before 1 January 2014", which was ambiguous as to the date of ceasing.

> This ambiguity meant the 2012 instrument was not regarded as ceased and remained a current record on the Federal Register of Legislative Instruments. To ensure that this spent instrument would not remain a current record, the *Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015* revoked the 2012 instrument.

Committee's response

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

Instrument	**Variation to the National Environment Protection (Ambient Air Quality) Measure 2015 [F2016L00084]**
Purpose	Updates the National Environment Protection (Ambient Air Quality) Measure in relation to the standards for particles
Last day to disallow	20 June 2016
Authorising legislation	*National Environment Protection Council Act 1994*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 2 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).[1]

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

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

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

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

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

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

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

Minister's response

The Minister for the Environment advised:

> The instrument substitutes a new subsection 13(1), which references Australian Standard AS/NZS 3580.1.1:2007 (Methods for sampling and analysis of ambient air - Guide to siting air monitoring equipment), and a new Schedule 3 which references 15 other Australian Standards.
>
> The Committee has noted that where an instrument incorporates extrinsic material by reference, it's [sic] usual expectation is that the manner of incorporation is clearly specified in the instrument and, ideally, in the explanatory statement.
>
> The instrument lists the Australian Standards by name, including year. Any changes to the standards would result in a different standard with a different name and year. In listing the Australian Standards in this way it is clear that the instrument incorporates the standards as in force at a particular date.
>
> The explanatory statement also notes that the changes made to the Australian Standard methods in the new subsection 13(1) and new Schedule 3 are 'routine updates'. The necessary implication of this explanation is that it is necessary to update references to the standards in the instrument because the standards are as in force at the time the instrument is made and will only change if amended.
>
> As noted above, only state and territory governments have obligations placed upon them by the instrument. State and territory governments were consulted during the development of the instrument and all of Australia's environment ministers endorsed the instrument at our meeting in December 2015. Jurisdictions had similar obligations under the primary instrument before the variation. On this basis, I believe the manner of incorporation is clear.

Committee's response

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

Appendix 1
Correspondence

The Hon Greg Hunt MP

Minister for the Environment

MC16-002126

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

- 2 MAR 2016

Dear Senator John

I refer to a request from the Senate Standing Committee on Regulations and Ordinances Secretary conveyed to my office on 4 February 2016, seeking advice in relation to the incorporation of extrinsic material by reference under the *Carbon Credits (Carbon Farming Initiative—High Efficiency Commercial Appliances) Methodology Determination 2015* (the Determination).

In its *Delegated Legislation Monitor No. 1 of 2016* (the Monitor No. 1), the Committee notes that Section 5 of the Determination defines the terms *annual coefficiency of performance*, *annual energy efficiency ratio* and *sensible energy efficiency ratio* by reference to two Australian/ New Zealand Standards. The Committee also notes that these standards are available from SAI Global Limited for a fee, and therefore, is concerned that this may present an unreasonable barrier to access to these documents.

During the development of the Determination, technical consultants advised the Department of the Environment that it would be common practice for many businesses conducting activities under the Determination to have access to these standards. In addition, the definitions contained within the standards also apply when registering products under the *Greenhouse and Energy Minimum Standards (GEMS) Act 2012*. This will enable businesses to use the publically available GEMS Registry to determine whether a product meets the relevant Australain/ New Zealand Standard definitions rather than accessing the standards directly.

Furthermore, the National Library of Australia and all state and territory libraries provide free access to these documents to the general public. This provides a means through which other interested parties may gain full access to these documents without purchasing them.

I have copied this letter to the Committee Secretary, Mr Ivan Powell.

Yours sincerely

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7920 Greg.Hunt.MP@environment.gov.au

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Major Projects,
Territories and Local Government

PDR ID: MC16-001547

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Senator for New South Wales
Room S1.111
CANBERRA ACT 2600

Dear John Senator

Further Advice for the Senate Standing Committee on Regulations and Ordinances

I write in response to the letter dated 3 March 2016 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) concerning the content of the Explanatory Statement accompanying the Christmas Island Marine Traffic and Harbour Facilities Determination 2015 and the Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 (the Determinations).

I note that in the *Delegated legislation monitor No. 3 of 2016*, the Committee has requested that the Explanatory Statements accompanying the Determinations be amended to address the question of the specific basis upon which the Port charges at Christmas Island Port and Cocos (Keeling) Islands Port have been calculated.

Basis for Determining Fees
Christmas Island and the Cocos (Keeling) Islands are remote locations with very small populations. Consequently there is a very low volume of freight to and from Christmas Island and Cocos (Keeling) Islands. Vessel movements for 2014-15 are set out below for your information.

Vessels	Christmas Island 2014-15	Cocos (Keeling) Islands 2014-15
Bulk phosphate	68	
Bagged phosphate	17	
General Cargo	25	9
Tankers	9	3
Total	119	12

Given these factors, the Australian Government does not collect associated port's fees and charges on a cost recovery basis. Rather, a derived price commensurate with other similar Western Australian ports is applied. The fees and charges are also set, bearing in mind what the market can bear.

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In 2014-15, the latest completed financial year, the contract sum for the provision of port management services was $1,943,995 for Christmas Island and $1,729,235 for Cocos (Keeling) Islands, excluding capital acquisition and replacement costs. The annual revenue collected through fees and charges over the same financial year was $1,296,144 for Christmas Island and $184,333 for Cocos (Keeling) Islands.

In 2015 the Government's contractor for the provision of port management services to the Christmas Island and the Cocos (Keeling) Islands, Patrick Ports Pty Ltd undertook a review of the ports' fees and charges. The methodology compared fees and charges against five Western Australian ports with similar vessel and infrastructure charges namely, the Ports of Port Hedland; Karratha; Dampier; Albany; and Esperance. The review determined that the 2003 port fees and charges remained comparable. Examples of current comparable fees and charges are also provided below for your information.

	Christmas Island Port	Port of Dampier
20ft container - full	$70.00	$76.82
20ft container - empty	$10.00	$7.27
Port dues	$0.50 per Gross Tonne	$0.2969 per Gross Tonne

The contractor delivering the port management services is Patrick Stevedoring Pty Ltd, and the company is required to undertake annual reviews of port fees and charges and recommend and implement new charges following various Australian Government approvals. The next review is scheduled for 31 March 2016.

I have instructed the Department of Infrastructure and Regional Development to ensure that the Explanatory Statements that accompany the Determinations are amended to address the Committee's request in relation to the specific basis upon which the Port charges at the Christmas Island Port and the Cocos (Keeling) Islands Port have been calculated.

I have attached copies of the updated Explanatory Statements.

Yours sincerely

Paul Fletcher

15 / 3 /2016

Enc

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS16-000541

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

Dear Senator John,

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 4 February 2016 concerning *Delegated legislation monitor* No. 1 of 2016 in which the Committee requested a response regarding the *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015.*

The response in relation to this query is attached.

Thank you again for bringing this matter to my attention. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 03/03/16

ATTACHMENT

***Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* - [F2015L01961]**

The Committee has enquired about the *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Regulation).

This Regulation was made to support the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (the Amendment Act). This Act introduced a new sanctions regime in relation to asking for, receiving, offering or providing a benefit in return for a migration outcome (payment for visas conduct).

The supporting Regulation introduced, among other things, new provisions under which visa applications may be refused in relation to payment for visas conduct. These new visa refusal avenues were made to apply to visa applications that had already been made before the changes commenced as well as to new applications.

The Committee requests my advice about the application of these amendments to visa applications that had already been made before the changes commenced.

Payment for visas conduct is considered unacceptable by the Australian Government as it undermines the integrity of the skilled work visa programmes, which are designed to address genuine skill shortages in the Australian labour market by making employees available from overseas. It is not acceptable for sponsors, nominators, employers or other third parties to make a personal gain from their position in a 'payment for visas' arrangement and the opportunity it may provide for the visa holder to become an Australian permanent resident.

It is therefore entirely appropriate that the Amendment Regulation applies to all relevant applications decided after the Amendment Regulation came into effect. It would not be appropriate or in the public interest for visas to be granted where payment for visas conduct had occurred. The amendments do not unduly trespass on personal rights and liberties.

Further, section 504 of the *Migration Act 1958* (the Migration Act) authorises the making of regulations that are necessary or convenient to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these amendments apply to all relevant applications decided on or after the commencement of the Amendment Regulation. It would be incongruous with the Migration Act's stated objective of regulating the entry and stay of non-citizens in Australia, in the national interest, if amendments directed to the achievement of this objective cannot be applied to existing applications that have not yet been decided at commencement time.

Given the importance of preventing payment for visas conduct, it is appropriate to ensure these new safeguards apply to all visa applications decided after the commencement of the safeguards.

The Hon Christian Porter MP
Minister for Social Services

MS16-000327

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

Dear ~~Senator Williams~~ John

I write in response to the Committee's letter of 25 February 2016 requesting my advice in relation to the necessity of the *Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015* revoking the *Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2012* ('the 2012 instrument').

The 2012 instrument contained the sentence "This Specification ceases before 1 January 2014", which was ambiguous as to the date of ceasing. This ambiguity meant the 2012 instrument was not regarded as ceased and remained a current record on the Federal Register of Legislative Instruments. To ensure that this spent instrument would not remain a current record, the *Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2015* revoked the 2012 instrument.

I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Greg Hunt MP

Minister for the Environment

MC16-002856

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

15 MAR 2016

Dear Chair

I refer to the request dated 25 February 2016 from the Senate Standing Committee on Regulations and Ordinances (the Committee), contained in *Delegated legislation monitor* No. 2 of 2016, for my advice concerning the *Variation to the National Environment Protection (Ambient Air Quality) Measure 2015* [F2016L00084] (the instrument).

Access to extrinsic material

The Committee has correctly noted that the Australian Standards referenced in the instrument are published by and available for sale from SAI Global Limited for a fee. The Committee is concerned that neither the instrument nor the explanatory statement provides information about whether the standards are freely and readily available.

The *National Environment Protection (Ambient Air Quality) Measure 1998* (the primary instrument) provides a national framework for ambient air quality management in Australia and sets standards against which Australia's ambient (outdoor) air quality is assessed. It specifies annual monitoring (measurement) and reporting requirements against the standards, which the states and territories have responsibility for complying with.

The new subsection 13(1) substituted by the instrument provides that jurisdictions should site performance monitoring stations in accordance with Australian Standard AS/NZS 3580.1.1:2007. The new Schedule 3 in the instrument lists Australian Standards methods that jurisdictions may choose to use to measure ambient air pollutant concentrations for the purposes of monitoring and reporting.

The instrument does not place any requirement on businesses or the community to monitor ambient air quality, or to monitor ambient air quality according to the standards listed in the new subsection 13(1) or in the new Schedule 3. As only state and territory governments have obligations placed upon them by the instrument, the required fee to access the standards does not present an unreasonable barrier to access. State and territory governments had similar obligations under the primary instrument before the variation.

There are sectors, such as academic institutions and organisations providing specialist monitoring services, who are outside the regulatory context and have no obligations under the instrument but who use the referenced standards. I do not consider the required fee to present an unreasonable barrier to access for these sectors. As state and territory governments are responsible for monitoring and reporting on air quality in their jurisdictions, they also respond to enquiries about the technical details of measuring ambient air quality pollutants.

Incorporation of extrinsic material

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

The Committee has noted that where an instrument incorporates extrinsic material by reference, it's usual expectation is that the manner of incorporation is clearly specified in the instrument and, ideally, in the explanatory statement.

The instrument lists the Australian Standards by name, including year. Any changes to the standards would result in a different standard with a different name and year. In listing the Australian Standards in this way it is clear that the instrument incorporates the standards as in force at a particular date.

The explanatory statement also notes that the changes made to the Australian Standard methods in the new subsection 13(1) and new Schedule 3 are 'routine updates'. The necessary implication of this explanation is that it is necessary to update references to the standards in the instrument because the standards are as in force at the time the instrument is made and will only change if amended.

As noted above, only state and territory governments have obligations placed upon them by the instrument. State and territory governments were consulted during the development of the instrument and all of Australia's environment ministers endorsed the instrument at our meeting in December 2015. Jurisdictions had similar obligations under the primary instrument before the variation. On this basis, I believe the manner of incorporation is clear.

Thank you for bringing the Committee's concerns to my attention, I trust this information is of assistance.

Yours sincerely

Greg Hunt

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 *Legislation Act 2003* (the Act)[1] regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

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

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

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

Requirements of the *Legislation Act 2003*

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

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

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

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

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

Describing the nature of consultation

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

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

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

Explaining why consultation has not been undertaken

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

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

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning 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 15J of the Act.

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

Seeking further advice or information

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

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