The Senate

Standing Committee on Regulations and Ordinances

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

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

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the 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* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015.*

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

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 4 March 2016 and 21 April 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	**AD/RAD/47 Amdt 4 - Periodic Testing of ATC Transponders [F2016L00368]**
Purpose	Clarifies and updates regulatory references and repeals and replaces AD/RAD/47 Amdt 3 [F2016L00150]
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 instrument states:

> Requirement:
>
> 1. For all transponders, perform a system test in accordance with the requirements of United States of America 14 CFR (Federal Aviation Regulations) Part 43, Appendix F.

However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which United States of America 14 CFR (Federal Aviation Regulations) Part 43, Appendix F is 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 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.

Instrument	**ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 [F2016L00328]**
Purpose	Modifies various sections of the *Corporations Act 2001* in relation to requirements for disclosure documents
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)

Insufficient information regarding strict liability offences

The instrument modifies sections 723 and 724 of the *Corporations Act 2001*. In doing so, the instrument inserts three strict liability offences relating to minimum subscription and quotation conditions for disclosure documents under which securities or issues for sale may be offered.

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.

Instrument	**Australian Consumer Law Interim Ban on Hoverboards that do not meet Specific Safety Requirements [F2016L00357]**
Purpose	Prohibits the supply of hoverboards that do not meet certain specific safety requirements set out in International Electrotechnical Commission and Underwriters Laboratories Inc. standards
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 instrument requires that components of hoverboards meet certain requirements as specified in the following standards:

- *IEC 62133 Edition 2.0 2012-12 - Secondary Cells and Batteries containing Alkaline or other Non-acid Electrolytes - Safety Requirements for Portable Sealed Secondary Cells, and for Batteries made from them, for use in Portable Applications* (IEC 62133);
- *IEC 60335-1 Edition 5.1 2013-12 Household and similar Electrical Appliances - Safety - Part 1: General Requirements* (IEC 60335-1) or *AS/NZS 60335.1:2011 (incorporating amendment Nos 1, 2 and 3)*; and
- *UL 2272 – Outline of Investigation for Electrical Systems for Self-balancing Scooters* (UL 2272).

However, neither the text of the instrument nor the ES expressly states the manner in which these standards 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 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.

Access to extrinsic material

As noted above, the instrument sets out requirements that incorporate various parts of three standards.

The committee notes that the above referenced standards are available for sale for a fee. However, neither the instrument nor the ES provides information about whether the standards are otherwise freely and readily available.

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. In this respect, the committee recognises that the implementation of the instrument appears to occur in a specific regulatory environment; and that it may be unlikely that persons outside this regulatory sphere would require access to the standards incorporated by the instrument. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to have in place arrangements for users outside of the particular commercial or regulatory sector to access such material on a fee-free basis.

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

Instrument	**Broadcasting Services (International Broadcasting) Guidelines 2016 [F2016L00393]**
Purpose	Sets arrangements for proposed and operational international broadcasting services, matter in programs, and the conduct of international broadcasting licensees
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Broadcasting Services Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 definition of 'intellectual property rights' in section 1.5 of the instrument relies on 'Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967 concluded at Stockholm, to which Australia is a party.' The committee also notes that the ES to the instrument states:

> Documents incorporated in the Guidelines by reference
>
> …The Guidelines also refer to Article 2 of the Convention Establishing the World Intellectual Property Organisation [WIPO] [1972] ATS 15 (the Convention). The Convention can be found in the Australian Treaties Library collection at http://www.austlii.edu.au.

However, notwithstanding the above, as the definition of 'intellectual property rights' could be said to affect the operation of the instrument, the Convention appears to be incorporated and neither the text of the instrument nor the ES expressly state the manner in which it 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.

Instrument	**CASA 27/16 - Instructions — use of Global Navigation Satellite System (GNSS) [F2016L00475]**
Purpose	Contains instructions for the use of GNSS in certain flight navigation under the Instrument Flight Rules
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Regulations 1988
Department	Infrastructure and Transport
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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.

The committee notes that subsection 98(5D) of the *Civil Aviation Act 1988* operates to allow the instrument to incorporate non-legislative material as in force at a particular date or as in force from time to time.

Section 1 of Schedule 1 of the instrument defines key terms used in the instrument, including the following:

- ***NAT Doc 007*** means the ICAO document titled *Guidance concerning Air Navigation in and above the North Atlantic MNPS Airspace*, Edition 2011, or later edition, published on behalf of the North Atlantic Systems Planning Group (NAT SPG) by the European and North Atlantic Office of ICAO; and

- ***Type 1 LOA*** has the meaning given by CAO 20.91.

However, neither the text of the instrument nor the ES expressly state the manner in which the ICAO document titled *Guidance concerning Air Navigation in and above the North Atlantic MNPS Airspace* (ICAO document) and CAO 20.91 are incorporated.

Regarding ***Type 1 LOA***, the committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as the CAO 20.91) 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 paragraph 13(1)(a) of the *Legislation 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.

Regarding ***NAT Doc 007***, as the ICAO document is not a Commonwealth legislative instrument, the above construction does not apply. The manner of incorporation of this document is therefore unclear to the committee.

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

Instrument	**CASA EX50/16 - Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders [F2016L00373]**
Purpose	Exempts foreign aircraft air operator's certificate holders engaged in international air navigation in Australia from the requirement to have a drug and alcohol management plan
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)

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.

The instrument exempts foreign aircraft air operator's certificate (AOC) holders from the requirement to have a drug and alcohol management plan (DAMP) prescribed in Part 99 of Civil Aviation Safety Regulations 1998 (the regulations) provided that certain conditions are met. The committee also notes that the instrument extends, until 22 March 2019, the previous:

- three-year relief provided by CASA EX33/13 [F2013L00542];
- one-year relief provided by CASA EX 146/12 [F2012L01936];
- one-year relief provided by CASA EX 37/11 [2011L00463];
- one-year relief provided by CASA EX 12/10 [F2010L00379]; and
- one-year relief provided by CASA EX 09/09 [F2009L00847].

The ES for this instrument states:

> CASR Part 99 effectively came into operation with the implementation of DAMPs and preliminary testing [on 23 September 2008].
>
> At that time, CASA considered that it was not realistically possible for many of the foreign AOC holders, for whom Australian international operations are only a component of their broader international operations, to make a full conversion of their existing drug and alcohol control policies to CASR Part 99 DAMP requirements.

In light of the purpose and significant duration of the exemption, the committee notes its general preference 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 exemption continues to be 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	**CASA EX57/16 - Exemption — for seaplanes [F2016L00466]**
Purpose	Exempts the pilot in command of a seaplane that is landing on, or taking-off from, water from compliance with specific requirements in the Civil Aviation Regulations 1988
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)

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.

The instrument exempts a pilot in command of a seaplane from compliance with three requirements in regulation 166 of Civil Aviation Regulations 1988 (the regulations), provided certain conditions are met. The committee also notes that that the instrument extends, until 31 March 2019, the previous:

- three-year relief provided by CASA EX37/13 [F2013L00571];
- six-month relief provided by CASA EX49/10 [F2010L01534];
- eighteen-month relief provided by CASA EX01/09 [F2009L00105];
- three-year relief provided by CASA EX 61/05 [F2005L04295]; and
- three-year relief provided by CASA EX 09/2003 [F2005B00525].

The ES for this instrument states:

> …the exemption has been issued and reissued at least as far back as exemption EX61/05. It is required because there are some circumstances in

which strict adherence by the pilot in command of a seaplane to the rules the subject of the exemption may be inappropriate.

In light of the purpose and significant duration of the exemption, the committee notes its general preference 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 exemption continues to be used in favour of an amendment to the relevant provisions of the regulations.

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

Instrument	**Commonwealth Electoral (Logo Requirements) Determination 2016 [F2016L00376]**
Purpose	Specifies the technical requirements that must be complied with when making an application to include a party logo on the Register of Political Parties
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Commonwealth Electoral Act 1918*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

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

With reference to these requirements, the committee notes that the ES for the instrument 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 *Legislation Act 2003*.

Access to extrinsic material

The instrument requires that a logo in an application for the registration of an eligible political party must meet certain requirements, including that it be a PDF file that complies with International Standard ISO 32000-1:2008 as in force at the time the instrument commences.

The committee notes that this standard is published by and available for sale from the International Organization for Standardization for a fee. However, neither the instrument nor the ES provides information about whether the standard is otherwise freely and readily available.

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

Instrument	**Defence Determination 2016/8, Fieldallowance– amendment** **Defence Determination 2016/10, Additional recreation eave–amendment**[1]
Purpose	These instruments amend Defence Determination 2005/15 in relation to field allowances and additional recreation leave
Last day to disallow	15 sitting days after tabling (15 March 2016)
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

By virtue of former section 58B of the *Defence Act 1903* (Defence Act) and section 7 of the former *Legislative Instruments Act 2003*, these determinations are disallowable non-legislative instruments.[2] Section 58B of the Defence Act provided that paragraph 46AA(1)(a) of the *Acts Interpretation Act 1901* applied to these determinations such that the provisions of a determination made by the Defence Force

1 The committee notes that the issue raised also applies to Defence Determination 2016/16, Recruit instructors and ADF gap year - educational bonus – amendment [F2016L00543].

2 These provisions apply to these instruments as they were made before the commencement of the *Acts and Instruments (Framework Reform) Act 2015* on 5 March 2016. Following the commencement of this Act, Defence Determinations are now legislative instruments and are registered on the Federal Register of Legislation.

Remuneration Tribunal (DFRT) under section 58H of the Defence Act may be incorporated as in force at a particular time or as in force from time to time.

With reference to the above, the committee notes that the instruments substitute the following definitions into Defence Determination 2005/15:

> Field service: The same meaning as in DFRT Determination No. 11 of 2013, *ADF allowances*.
>
> Special service: Means service performed in either of the following circumstances.
>
> a. For the purposes of Division B.12 in DFRT Determination No. 11 of 2013, *ADF Allowances*.
>
> b. For the purposes of Division B.14 in DFRT Determination No. 11 of 2013, *ADF Allowances*.

However, neither the text of the instruments nor the ESs expressly states the manner in which DFRT Determination No. 11 of 2013, *ADF Allowances* (which were made by DFRT under section 58H of the Defence Act) is 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 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.

Instrument	**Defence Determination 2016/15, Dependants - amendment [F2016L00509]**[3]
Purpose	Amends Defence Determination 2005/15 to revise and restructure the definitions relating to a member's dependants and categorisation
Last day to disallow	15 sitting days after tabling (19 April 2016)
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Prior to 5 March 2016 determinations made under section 58B of the *Defence Act 1903* (Defence Act) were disallowable non-legislative instruments by virtue of former section 46B of the *Acts Interpretation Act 1901*. However, following the commencement of the *Legislation Act 2003*, determinations made under section 58B are now disallowable legislative instruments and therefore subject to the provisions of the *Legislation Act 2003,* including section 17.

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

With reference to these requirements, the committee notes that the ES for the instrument 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 *Legislation Act 2003.*

3 The committee notes that the issue raised also applies to a number of recent instruments: Defence Determination 2016/12, Post indexes – amendment [F2016L00427]; Defence Determination 2016/14, Hardship allowance – amendment [F2016L00487]; Defence Determination 2016/13, Deployment allowance – amendment [F2016L00488]; Defence Determination 2016/15, Dependants – amendment [F2016L00509]; and Defence Determination 2016/16, Recruit instructors and ADF gap year - educational bonus – amendment [F2016L00543].

Instrument	**Electoral and Referendum Regulation 2016 [F2016L00399]**
Purpose	Provides for an electronically assisted voting method for electors who are sight-impaired, provision of electoral roll information to prescribed Commonwealth agencies for specified purposes, and provision of electoral roll information to entities that have reporting obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Commonwealth Electoral Act 1918*; *Referendum (Machinery Provisions) Act 1984*
Department	Finance
Scrutiny principle	Standing Order 23(3)(b)

Insufficient information regarding strict liability offences

Sections 23 and 24 of the regulation set out strict liability offences relating to the handling and scrutiny of ballot papers. These offences each carry a penalty of 5 penalty units.

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 offences.

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

Instrument	**Export Control (Prescribed Goods—General) Amendment (Official Marks) Order 2016 [F2016L00432]**
Purpose	Updates provisions relating to official marks and seals for exports
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Export Control (Orders) Regulations 1982*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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.

The committee notes that subsection 25(5) of the *Export Control Act 1982* may operate to allow the Order to incorporate non-legislative material as in force at a particular date or as in force from time to time.

With reference to the above, the committee notes that the instrument requires that official marks comply with certain requirements, including at sections 13.10A and 13.11A of the instrument, those set out in ISO 17712:2013 *Freight containers – Mechanical seals* published by the International Organisation for Standardization. However, neither the text of the instrument nor the ES expressly states the manner in which ISO 17712:2013 is 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 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.

Access to extrinsic material

As noted above, the instrument sets out requirements that incorporate ISO 17712:2013.

The committee notes that the above referenced standard is available for sale for a fee. However, neither the instrument nor the ES provide information about whether the standards are otherwise freely and readily available.

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. In this respect, the committee recognises that the implementation of the instrument appears to occur in a specific regulatory

environment; and that it may be unlikely that persons outside this regulatory sphere would require access to the standards incorporated by the instrument. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to have in place arrangements for users outside of the particular commercial or regulatory sector to access such material on a fee-free basis.

The committee draws this matter to the minister's attention

Instrument	**Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Industry, Innovation and Science
Last day to disallow	15 sitting days after tabling (19 April 2016)
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—authority for expenditure

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

The instrument adds eight new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997. New table item 142 establishes legislative authority for the Commonwealth government to fund quantum computing research, and new table item 145 establishes legislative authority for the Commonwealth government to fund the provision of Prime Minister's Prizes.

The committee notes that, in *Williams No. 1*,[4] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[5] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework*

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

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

(Supplementary Powers) Act 1997 explicitly state, for each new program, the constitutional authority for the expenditure.

First, the committee notes that the objective of the 'Funding for quantum computing' initiative is to fund 'world leading quantum computing research to develop a silicon quantum integrated circuit'. The ES for the instrument identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution).

Therefore, the instrument appears to rely on the executive nationhood power (coupled with the express incidental power) as the relevant head of legislative power to authorise the making of this provision (and therefore the spending of public money under it). In this regard, the instrument states that '[t]his objective also has the effect it would have if it were limited to funding measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation'.

However it is unclear to the committee how the funding of the initiative may be regarded as an activity that is 'peculiarly adapted to the government of a nation' and as not able to otherwise be 'carried on for the benefit of the nation'.

The committee therefore seeks the minister's advice in relation to this matter.

Second, the committee notes that the objective of the 'Prime Minister's Prizes' initiative is to 'provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation'.

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

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

In relation to the social welfare power and its authorisation of the Commonwealth funding the provision of 'benefits to students', the committee understands that the word 'benefits' in section 51(xxiiiA) 'is used more precisely than as a general reference to (any and every kind of) advantage or good';[6] and that, for an initiative to provide 'benefits to students' the benefit should encompass 'material aid provided against the human wants which the student has by reason of being a student'.[7]

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6 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [46].

7 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [47].

However, it is unclear to the committee how the 'Prime Minister's Prizes' initiative may be regarded as providing 'benefits to students' within the scope of the social welfare power.

In relation to the external affairs power, the instrument states that the objective of the initiative 'also has the effect it would have if it were limited to providing support: (a) to provide benefits to students; or (b) by engaging in measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation'.

However it is unclear to the committee how the funding of the initiative may be regarded as an activity that is 'peculiarly adapted to the government of a nation' and as not able to otherwise be 'carried on for the benefit of the nation'.

The committee therefore seeks the minister's advice in relation to this matter.

Instrument	**Marriage Amendment Regulation 2016 (No. 1) [F2016L00303]**
Purpose	Amends the Marriage Regulations 1963 to update the definition of the Certificate IV in Celebrancy qualification
Last day to disallow	15 sitting days after tabling (16 March 2016)
Authorising legislation	*Marriage Act 1961*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

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

With reference to these requirements, the committee notes that the ES for the instrument states:

> The Office of Best Practice Regulation was consulted about the Regulation and advised that a Regulatory Impact Statement is not necessary, as the amendments are minor and machinery in nature.

The committee's guideline on addressing the consultation requirements under the *Legislation Act 2003* relevantly states:

> It is…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.

Noting that the ES for the instrument appears to address only the consultation requirements in relation to the RIS process, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003.*

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

Instrument	**Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/010 [F2016L00377][8]**
Purpose	Defines non-citizen persons as fast track applicants
Last day to disallow	Exempt
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a) and (d)

Background

This instrument defines a class of persons who are fast track applicants for the purpose of paragraph 5(1)(b) of the *Migration Act 1958* (the Migration Act). The committee understands the instrument to be exempt from disallowance by virtue of its inclusion in the table in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (the exemption regulation).[9]

The exemption regulation repealed and replaced the Legislative Instruments Regulations 2004, and provides for exemptions from aspects of the *Legislation Act 2003*, including its provisions relating to disallowance and sunsetting. The exemption regulation was required to implement some of the changes introduced by the *Acts and Instruments (Framework Reform) Act 2015*, which commenced on

8 The committee notes that the issue raised also applies to two recent exempt instruments: Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455]; and Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456].

9 The committee reported on the exemption regulation in *Delegated legislation monitor* No. 14 of 2015 (11 November 2015), pp 8–9.

5 March 2016 (and which saw the *Legislative Instruments Act 2003* renamed the *Legislation Act 2003*).

Sections 9 and 10 of the exemption regulation prescribe the particular instruments and classes of instrument that are not subject to disallowance under the *Legislation Act 2003*. In its report on the exemption regulation, the committee noted that the item-by-item description of section 10 in the ES to the regulation provided justifications for each exemption of particular instruments from disallowance, explaining why their particular nature or character required them to be the exempt from disallowance. However, no such justification was provided for item 20 of the table in section 10, which exempted from disallowance instruments (other than regulations) made under certain parts (including Part 1) of the Migration Act and Migration Regulations 1994.

The committee therefore sought information from the Attorney-General in relation to the justification for exempting instruments under item 20 of the table in section 10 from disallowance.

In response, the Attorney-General advised:

> It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.
>
> Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act.
>
> I am also concerned that if these instruments were subject to disallowance, the Government would be less agile in addressing issues relating to trends in global population movements.[10]

The Attorney-General also provided the committee with the following examples of the nature and purpose of instruments made under Part 1of the Migration Act:

- authorisation of officers for certain purposes;
- approved places of immigration detention; and
- appointment of ports.

10 *Delegated legislation monitor* No. 16 of 2015 (2 December 2015), pp 30–33 and Appendix 1.

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

Exemption of instrument from disallowance

As noted above, the purpose of the instrument is to define a class of persons as fast track applicants for the purposes of paragraph 5(1)(b) of the Migration Act.

Paragraph 6 of the ES to the instrument states:

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

However, as set out above, the instrument is made under Part 1 of the Migration Act, and the committee therefore understands it to be exempt from disallowance by virtue of section 10 of the exemption regulation.

With reference to the Attorney-General's previous advice about the nature of instruments made under Part 1 of the Migration Act, and the examples provided of the nature and purpose of such instruments, the committee notes that the instrument provides a substantive definition relating to classes of persons who are fast track applicants for the purposes of the Migration Act. In this respect, it is unclear to the committee that the instrument is properly characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify its exemption from disallowance (and thereby being effectively removed from the effective oversight of the Parliament).

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

Instrument	**Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016 [F2016L00295]**
Purpose	Amends the Migration Regulations 1994 to create a priority consideration of visa application service for specified kinds of visas and specified passport holders
Last day to disallow	15 sitting days after tabling (16 March 2016)
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulation creates a priority consideration of visa application service for certain visas and passport holders. Subsection 2.21N(1) of the regulation sets the fee for a request for priority consideration of a visa application at $1000. However, the ES does not explicitly state the basis on which the fee has been 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.

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

Instrument	**Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L00523]**
Purpose	Amends the Migration Regulations 1994 relating to Subclass 457 visas, provision of evidence of English language proficiency, special consideration for granting Subclass 202 visas and the international student visa framework
Last day to disallow	15 sitting days after tabling (19 April 2016)
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Item 23 repeals and substitutes item 1222 (Student (Temporary)(Class TU) in Part 2 of Schedule 1 of the Migration Regulations 1994 (the regulations). Subitem 122(2) sets out visa application charges as follows: $550 base application charge; $410 additional applicant charge for any other applicant who is at least 18; and $135 additional applicant charge for any other applicant who is less than 18.

While the committee notes that subparagraph 504(1)(a)(i) of the *Migration Act 1958* (the Act) provides that regulations may make provision for the charging and recovery of fees in respect of any matter under the Act or the regulations, neither the instrument nor the ES states the basis on which the relevant charges are 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.

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

Instrument	**National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Queensland) Rules 2016 [F2016L00342]**
Purpose	Outlines the phasing schedule for the preparation of participants' plans in the Queensland early transition sites of Charters Towers, Townsville and Palm Island
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 3.4 of the instrument contains the following definitions:

> ***Townsville*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).
>
> ***Charters Towers*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).
>
> ***2016 NDIS early transition area*** has the same meaning as in the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*
>
> ***Palm Island*** means the area specified as such under Schedule 1 of the *Local Government Regulation 2012* (Qld).

However, neither the text of the instrument nor the ES expressly states the manner in which the Local Government Regulation 2012 (Qld) or the National Disability Insurance Scheme (Becoming a Participant) Rules 2013 are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as the National Disability Insurance Scheme (Becoming a Participant) Rules 2013) can be taken to be references to versions of those instruments as in force

from time to time. However, this construction does not apply to the Local Government Regulation 2012 (Qld).

The committee further notes that subsection 209(2) of the *National Disability Insurance Scheme Act 2013* provides that, despite section 14 of the *Legislation Act 2003*, the National Disability Insurance Scheme Rules 'may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time'.

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 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.

Instrument	**National Measurement Guidelines 2016 [F2016L00538]**
Purpose	Govern the way in which Australian legal units of measurement may be combined to produce an Australian legal unit of measurement, and with prefixes to produce Australian legal units of measurement
Last day to disallow	15 sitting days after tabling (2 May 2016)
Authorising legislation	*National Measurement Act 1960*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)

No statement of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rulemaker to prepare a statement of compatibility in relation to an instrument to which section 42 (disallowance) of the *Legislation 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*.

Instrument	**PAYG Withholding Variation: Variation of amount to be withheld from Indigenous artists when an ABN is not provided [F2016L00358]**
Purpose	Provides that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives in a remote area and does not quote an Australian Business Number
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Taxation Administration Act 1953*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instrument repeals and replaces a previous PAYG Withholding Variation to continue to provide that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives or works in zone A (ordinary or special) and does not quote an Australian Business Number.

However, neither the instrument, nor the ES define zone A (ordinary or special). The committee notes the importance of the definition of zone A (ordinary or special) to understanding the instrument and is concerned about the ability of persons affected by the instrument to understand its operation.

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

Instrument	**Private Health Insurance (Prostheses) Rules 2016 (No. 1) [F2016L00268]** **Private Health Insurance (Prostheses) Rules 2016 (No. 2) [F2016L00381]**
Purpose	These instruments revoke and replace previous rules, add new prostheses to the schedule and remove billing codes
Last day to disallow	15 sitting days after tabling (15 March 2016; 18 April 2016)
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The ESs to the instruments state that the purpose of the instruments is:

> …to list the kinds of prostheses for which a benefit must be paid where the prosthesis is provided in the conditions and circumstances specified, and set out the minimum and, where applicable, maximum benefit payable.

However, the committee notes that Part A – Prostheses list to the first instrument appears not to list a minimum benefit in a number of cases. For example, Billing Code JJ687 on page 497 appears not to list a minimum benefit, but lists $515 as the maximum benefit; and Billing Code JJ688 on page 515 appears not to list a minimum benefit, but lists $1800 as the maximum benefit.

Similarly, in relation to Part A – Prostheses list to the second instrument, Billing Code JJ687 on page 499 appears not to list a minimum benefit, but lists $515 as the maximum benefit; and Billing Code JJ688 on page 619 appears not to list a minimum benefit, but lists $1800 as the maximum benefit.

It is unclear to the committee whether figures appearing in this way throughout the instruments are in fact intended to be the minimum benefits payable.

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

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 each instrument contains the following definitions:

> ***certified overnight Type C procedure*** has the same meaning as in rule 3 of the Private Health Insurance (Benefit Requirements) Rules.
>
> ***certified Type C procedure*** has the same meaning as in rule 3 of the Private Health Insurance (Benefit Requirements) Rules.

However, neither the text of the instruments nor the ESs expressly state the manner in which the Private Health Insurance (Benefit Requirements) Rules are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as the Private Health Insurance (Benefit Requirements) Rules) 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 paragraph 13(1)(a) of the *Legislation 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.

Instrument	**Public Governance, Performance and Accountability Amendment (CSC) Rule 2016 [F2016L00504]**
Purpose	Makes the Commonwealth Superannuation Corporation (CSC) subject to certain arrangements that applied to ComSuper when it performed the administrative services function in relation to the superannuation schemes administered by CSC
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Public Governance, Performance and Accountability Act 2013*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

The instrument inserts new subsection 28A(1) into the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) which modifies the operation of subsection 107(1) and section 110 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to enable the Finance Minister and the Commonwealth Superannuation Corporation (CSC) Board to sub-delegate certain powers, functions and duties concerning the recovery of debts due to the Commonwealth under the PGPA Act and the PGPA Rule. The ES to the instrument states:

> This is necessary given CSC's function to provide administrative services in relation to the superannuation schemes administered by the organisation. The relevant powers, functions or duties were performed by ComSuper when it previously undertook this administrative services function. Debts owed to CSC in its own right are not affected by the Amendment Rule and will be managed in the same manner as has been CSC's practice to date.

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 committee notes that the instrument does not limit the category of people to whom the minister's and CSC Board's powers under the instrument might be sub-delegated.

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

Instrument	**Remuneration Tribunal (Members' Fees and Allowances) Regulation 2016 [F2016L00396]**
Purpose	Sets members fees and allowances and replaces a previous regulation
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Remuneration Tribunal Act 1973*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

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

With reference to these requirements, the committee notes that the ES for the instrument 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 *Legislation Act 2003*.

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 *Legislation 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*.

Instrument	**Safety, Rehabilitation and Compensation (Rate of Interest Payable – s26(3)) Notice 2016 [F2016L00464]**
Purpose	Specifies the rate of interest payable on lump sum payments to claimants for injuries which result in permanent impairment (under the *Safety, Rehabilitation and Compensation Act 1988*) which are not paid within thirty days after assessment
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The *Safety, Rehabilitation and Compensation Act 1988* (the Act) establishes the Commonwealth workers' compensation and rehabilitation scheme for employees of the Commonwealth, Commonwealth authorities and licensed corporations. This instrument sets the rate of interest payable in respect of permanent impairment payments to a claimant under section 24 or 25 of the Act which are not made within thirty days after the date of assessment of the amount of permanent impairment.

Section 4 of the instrument states:

> The rate of interest payable under subsection 26(3) of the Act is specified to be the weighted average yield of 90 day bank-accepted bills, as published by the Reserve Bank of Australia, settled immediately prior to the last day of the thirty day settlement period.

However, it is unclear to the committee which specific published material or documents this section refers to, the manner in which this published material is incorporated and where it can be accessed. Neither the text of the instrument nor the ES provides any information in relation to these matters.

The committee notes the importance of the published material as a point of access to understanding the regulation and is concerned about the ability of anticipated users or persons affected by the instrument to understand its operation.

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

Instrument	**Work Health and Safety (Managing Electrical Risks in the Workplace) Code of Practice 2015 [F2016L00407]** **Work Health and Safety (Preventing Falls in Housing Construction) Code of Practice 2015 [F2016L00411]** **Work Health and Safety (Spray Painting and Powder Coating) Code of Practice 2015 [F2016L00412]** **Work Health and Safety (Labelling of Workplace Hazardous Chemicals) Code of Practice 2015 [F2016L00413]** **Work Health and Safety (How to Safely Remove Asbestos) Code of Practice 2015 [F2016L00418]** **Work Health and Safety (Managing Risks of Hazardous Chemicals in the Workplace) Code of Practice 2015 [F2016L00420]** **Work Health and Safety (Managing the Work Environment and Facilities) Code of Practice 2015 [F2016L00421]** **Work Health and Safety (How to Manage and Control Asbestos in the Workplace) Code of Practice 2015 [F2016L00423]** **Work Health and Safety (Preparation of Safety Data Sheets**

	for Hazardous Chemicals) Code of Practice 2015 [F2016L00424] **Work Health and Safety (Managing the Risk of Falls at Workplaces) Code of Practice 2015 [F2016L00425]** **Work Health and Safety (Managing Noise and Preventing Hearing Loss at Work) Code of Practice 2015 [F2016L00426]**
Purpose	These instruments remake Work Health and Safety Codes of Practice previously set out in compilations as separate instruments
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Work Health and Safety Act 2011*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 these instruments incorporate requirements set out in a number of Australian Standards and Australian/New Zealand Standards. However, neither the text of the instruments nor the shared ES expressly states the manner in which the standards are incorporated.

The committee further notes that Work Health and Safety (Labelling of Workplace Hazardous Chemicals) Code of Practice 2015 [F2016L00413], Work Health and Safety (Preparation of Safety Data Sheets for Hazardous Chemicals) Code of Practice 2015 [F2016L00424], and Work Health and Safety (Managing Risks of Hazardous Chemicals in the Workplace) Code of Practice 2015 [F2016L00420] incorporate requirements relating to the transport of hazardous chemicals that are contained in the Australian Dangerous Goods Code (ADG Code).

While these instruments define the ADG code as 'the Australian Code for the Transport of Dangerous Goods by Road and Rail, 7th edition, approved by the Australian Transport Council', neither the text of the instruments, nor the shared ES expressly states the matter in which the ADG Code is 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 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.

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.

Instrument	**Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134]**
Purpose	Revokes the Health Insurance (Section 19AB Exemptions) Guidelines 2015 and provides guidance for applying district of workforce shortage determinations
Last day to disallow	15 sitting days after tabling (25 February 2016)[11]
Authorising legislation	*Health Insurance Act 1973*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 3 of 2016

Sub-delegation

The committee commented as follows:

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.

11 Due to the recall of the Parliament on the week beginning 18 April 2016 the last day to give notice to disallow this instrument has moved forward since it was commented on in *Delegated legislation monitor* No. 3 of 2016 (2 March 2016).

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.

Minister's response

The Minister for Health advised:

> I note and understand the committee's expectations in relation to sub-delegation and that they should accord with the Senate Standing Committee for the Scrutiny of Bills' approach of ensuring that delegations are not provided to a relatively large class of persons, with little or no specificity as to their qualifications or attributes.
>
> I confirm that I have limited the powers delegated and the categories of people to whom these powers are delegated. For consistency my Department has replicated the delegations as provided in the *Health Insurance Act 1973* for the administration of s19AB when making the 2016 Guidelines. My Department will consider removing these provisions when the Guidelines are next remade.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that she has 'limited the powers delegated and the categories of people to whom these powers are delegated'; and undertaking to consider the removal of the sub-delegation provisions from the Guidelines when they are next remade.

However, the committee's preference for specific limits to be set on the delegations generally envisages that the necessary and intended limits on a delegation are defined on the face of legislation, rather than in administrative or policy guidelines or practices (as the committee assumes the minister's reference to limiting the delegation refers).

Similarly, the committee regards an undertaking to merely consider the removal of the provisions to properly limit the delegation to a necessary class of persons or officers as falling short of a specific limit on the delegation provided for on the face of the legislation.

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	**AD/B737/16 Amdt 4 - Engine Flameouts – Revised Operating Technique and Modifications [F2016L00389]**
Purpose	Clarifies and updates regulatory references and repeals and replaces AD/B737/16 [F2006B02863]
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 sections 1 and 2 of the instrument require compliance with FAA AD 93-05-05.

However, neither the text of the instrument nor the ES expressly states the manner in which this document, a foreign State of Design issued airworthiness directive, is incorporated.

The committee acknowledges that regulation 39.001 of the Civil Aviation Safety Regulations 1998 provides the following definition:

> ***foreign State of Design airworthiness directive***, for a kind of aircraft or aeronautical product for which Australia is not the State of Design, means a document, as in force from time to time, that:
>
> (a) is issued by the national aviation authority of the State of Design of the aircraft or aeronautical product; and
>
> (b) is of the same nature as an Australian airworthiness directive.

The committee understands this definition to apply in this case, such that FAA AD 93-05-05 is incorporated 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 regulation 39.001 of the Civil Aviation Safety Regulations 1998, 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.

Instrument	**Australian Small Business and Family Enterprise Ombudsman Rules 2016 [F2016L00293]**
Purpose	Prescribes the bodies to which the Australian Small Business and Family Enterprise Ombudsman may refer matters and disclose information, and the allowance to be paid to witnesses who appear at a hearing in accordance with a summons under the *Australian Small Business and Family Enterprise Ombudsman Act 2015*
Last day to disallow	15 sitting days after tabling (16 March 2016)
Authorising legislation	*Australian Small Business and Family Enterprise Ombudsman Act 2015*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

These rules were made on 1 March 2016 in reliance on section 96 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

Notwithstanding the fact that section 96 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* commenced on 11 March 2016, the rule was made on 1 March 2016; the rule was therefore made in reliance on an empowering provision that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES to the rule does not identify the relevance of subsection 4(2) to the operation of the instrument.

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

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

Instrument	**Broadcasting Services Clarification Notice 2016 [F2016L00366]**
Purpose	Consolidates and replaces two former instruments to provide certainty about the category of service into which certain broadcasting services fall under the *Broadcasting Services Act 1992*
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	*Broadcasting Services Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 sets out the following definition:

> ***ancillary communication service*** has the meaning given in Appendix 2 to the *Broadcasting Services (Technical Planning) Guidelines 2007*

However, neither the text of the instrument nor the ES expressly states the manner in which the Broadcasting Services (Technical Planning) Guidelines 2007 are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as the Broadcasting Services (Technical Planning) Guidelines 2007) 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 paragraph 13(1)(a) of the *Legislation 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.

Instrument	**CASA 37/16 - Direction - flight time limitations for helicopter mustering operations [F2016L00505]**
Purpose	Provides a uniform set of rules applicable to operators engaged in helicopter mustering
Last day to disallow	15 sitting days after tabling (18 April 2016)
Authorising legislation	Civil Aviation Regulations 1988
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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.

The committee notes that subsection 98(5D) of the *Civil Aviation Act 1988* operates to allow the instrument to incorporate non-legislative material as in force at a particular date or as in force from time to time.

Section 1 of Schedule 1 of the instrument defines key terms used in the instrument, including the following:

- ***flight crew member*** (or **FCM**) has the same meaning as in *Civil Aviation Order 48.1 Instrument 2013* (***CAO 48.1***); and
- ***flight time*** has the same meaning as in CAO 48.1.

However, neither the text of the instrument nor the ES expressly states the manner in which CAO 48.1 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as CAO 48.1) 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 paragraph 13(1)(a) of the *Legislation 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.

Instrument	**Greenhouse and Energy Minimum Standards (Exemption) Instrument 2016 [F2016L00533]**
Purpose	Exempts the model specified in the Schedule attached to the instrument from the requirements of section 6 of the Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012
Last day to disallow	15 sitting days after tabling (19 April 2016)
Authorising legislation	*Greenhouse and Energy Minimum Standards Act 2012*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislation Act 2003* allows for the incorporation of extrinsic material into instruments. Commonwealth 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 contains the following definition:

> ***Determination*** means the *Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012*.

However, neither the text of the instrument nor the ES expressly states the manner in which the *Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012* is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to external documents which are Commonwealth disallowable instruments (such as the *Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012*) 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 paragraph 13(1)(a) of the *Legislation 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.

Instrument	**Tests, Scores, Period, Level of Salary and Exemptions to Meet the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas Amendment Instrument 2016/026 [F2016L00537]**
Purpose	Amends IMMI 15/028 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirements for Subclass 457 (Temporary Work (Skilled)) Visas 2015
Last day to disallow	15 sitting days after tabling (19 April 2016)
Authorising legislation	*Migration Regulations 1994*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

> This Instrument is one of a number of measures that gives effect to a recommendation of the 2014 Independent Review into Integrity in the Subclass 457 Programme (the Integrity Review) to create streamlined processing within the existing 457 programme as a deregulatory measure. In formulating the recommendations, the 457 Integrity Review undertook extensive stakeholder consultations meeting with over 150 organisations and individuals and receiving nearly 200 submissions. While the Instrument does not substantially alter existing arrangements it will be beneficial to business as it eliminates duplication and 'red tape' in relation to English proficiency.

Noting that historical consultations can generally only be characterised as consultation in relation to an instrument where the specific effect or subject matter of the instrument was specifically addressed as part of that consultation, the committee understands the above-quoted passage to mean that consultation was not undertaken because it was considered to be unnecessary in this instance. In terms of complying with the *Legislation Act 2003*, the committee considers it would be useful for the ES to have specifically stated that consultation was considered unnecessary because the instrument essentially does not substantially alter existing arrangements and is beneficial in nature.

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	ASIC Corporations (Repeal) Instrument 2016/171 [F2016L00335]
	ASIC Corporations (Repeal) Instrument 2016/212 [F2016L00370]
	ASIC Corporations (Repeal) Instrument 2016/273 [F2016L00459]
	Business Services Wage Assessment Tool Payment Scheme Amendment Rules 2016 [F2016L00508]
	CASA 37/16 - Direction - flight time limitations for helicopter mustering operations [F2016L00505]
	Export Control (Prescribed Goods—General) Amendment (Official Marks) Order 2016 [F2016L00432]

Federal Circuit Court (Bankruptcy) Repeal Rules 2016 [F2016L00384]

Federal Court (Bankruptcy) Repeal Rules 2016 [F2016L00383]

Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 17) 2016 for Publishers [F2016L00227]

Logbooks for Fisheries Determination 2016 [F2016L00506]

Marriage (Celebrancy qualifications or skills) Amendment Determination 2016 (No. 1) [F2016L00382]

Marriage Act (Proclaimed Overseas Countries) Proclamation 2016 [F2016L00304]

My Health Records Amendment (Advance Care Planning Information and Professional Representatives) Rule 2016 [F2016L00499]

National Measurement Guidelines 2016 [F2016L00538]

PAYG Withholding Variation: Body corporates [F2016L00440]

PAYG Withholding Variation: Company Directors and Office Holders [F2016L00222]

PAYG Withholding Variation: Donations to deductible gift recipients [F2016L00439]

PAYG Withholding Variation: Insurance and Compensation [F2016L00433]

PAYG Withholding Variation: Labour Hire reimbursements and allowances [F2016L00436]

PAYG Withholding Variation: Performing Artists [F2016L00435]

PAYG Withholding Variation: Variation of amount to be withheld from Indigenous artists when an ABN is not provided [F2016L00358]

Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 1) [F2016L00352]

Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 1) [F2016L00353]

Private Health Insurance (Data Provision) Rules 2016 [F2016L00497]

Private Health Insurance (Health Insurance Business) Rules 2016 [F2016L00503]

	Private Health Insurance Legislation Amendment (Risk Equalisation Jurisdiction) Rules 2016 [F2016L00492] Private Health Insurance (Prostheses) Rules 2016 (No. 1) [F2016L00268] Private Health Insurance (Prostheses) Rules 2016 (No. 2) [F2016L00381] Remuneration Tribunal Determination 2016/02 - Remuneration and Allowances for Holders of Public Office and Principal Executive Office [F2016L00498] Safety, Rehabilitation and Compensation (Rate of Interest Payable – s26(3)) Notice 2016 [F2016L00464] Seas and Submerged Lands (Historic Bays) Proclamation 2016 [F2016L00301] Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2016 [F2016L00302] Social Security (Administration) (Excluded circumstances - Queensland Commission) Amendment Specification 2016 [F2016L00500] Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 1) 2016 [F2016L00493] Social Security (Special Circumstances - Family) Specification 2016 [F2016L00371] Social Security (Unsuitable Work) Determination 2016 [F2016L00336] Terrorism Insurance Act 2003 – Premiums Direction 2015 [F2016L00529] Therapeutic Goods (Foreign Countries) Determination 2016 [F2016L00494] Torres Strait Regional Authority Election Rules Amendment Instrument 2016 [F2016L00507] Vehicle Standard (Australian Design Rule 19/01 – Requirements for Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2007 Amendment 1 [F2016L00531] Vehicle Standard (Australian Design Rule 61/02 – Vehicle Marking) 2005 Amendment 2 [F2016L00385]
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.[12]

12 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	**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	15 sitting days after tabling (29 February 2016; 1 March 2016)[1]
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 4 of 2016

Incorporation of extrinsic material

The committee commented as follows:

Section 14 of the *Legislative Instruments Act 2003*[2] 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 Due to the recall of the Parliament on the week beginning 18 April 2016 the last day to give notice to disallow instruments commented on in this chapter has moved forward from the date listed in previous monitors.

2 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.

Minister's response

The Minister for the Environment advised:

> I can confirm that the intention in these instances is that references to definitions in instruments in force under the *South Australian Fisheries Management Act 2007* and the *Tasmanian Living Marine Resources Management Act 1995* are to be read as references to the instruments in force from time to time. This is also the case for other similar amendments to the List of Exempt Native Specimens where fisheries legislation is referenced.
>
> I appreciate that the Committee relies on explanatory statements to understand the incorporation of extrinsic materials. The Department of the Environment will ensure that when future amendments to the List of Exempt Native Specimens are made, additional material will be included in explanatory statements more clearly 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 instruments.

Instrument	**Australian Meat and Live-stock Industry (Beef Export to the USA – Quota Years 2016-2022) Order 2015 [F2015L02128]**
Purpose	Provides for the administration of a system of quotas for the export of beef, tariff free, to the USA
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	*Australian Meat and Live-stock Industry Act 1997*
Department	Agriculture and Water Resources
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).

With reference to the above, the committee notes that the definition of ***processed meat*** in section 6 of the instrument refers to the Harmonized Tariff Schedule of the United States, which is part of 19 USC Chapter 4 (the Tariff Act of 1930). However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the Harmonized Tariff Schedule of the United States 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.

Minister's response

The Minister for Agriculture and Water Resources advised:

The HTSUS assigns an eight digit code to each beef product that will receive preferential tariff treatment upon entry into the United States, as agreed under the Australia-United States Free Trade Agreement. It is the document by reference to which eligible quota goods are defined under the Order.

Section 6 of the Order makes reference to the HTSUS. The first reference, defines the meaning of processed meat by reference to the HTSUS, as this can differ across free trade agreements and these products are not quota eligible. The second reference, under the definition of quota beef defines which classes are included as quota products by listing the corresponding eight digit code.

For further explanation on what each code refers to, exporters will reference the HTSUS. Consistent with section 14 of the *Legislation Act 2003*, it is intended that references to the HTSUS be read as the 'Harmonized Tariff Schedule of the United States as in force at the commencement of the Order'.

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.

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	15 sitting days after tabling (3 March 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* No. 4 of 2016

Matter more appropriate for parliamentary enactment

The committee commented as follows:

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.

Minister's response

The Minister for Infrastructure and Transport advised:

> I have sought advice from the Civil Aviation Safety Authority (CASA) in relation to the Committee's concerns that exemption EX42/16 may be a matter more appropriate for parliamentary enactment.
>
> CASA advises that in February 2016, it provided instructions to the Office of Parliamentary Counsel seeking amendments to Part 99 of the Civil Aviation Safety Regulations 1998 (CASR) to address the areas currently covered by exemption EX42/16. I am also advised that CASA intends to consult the public and industry on the proposed amendments in May 2016. I am aware that it is the Committee's preference that exemptions are not used or do not continue for such time as to operate as de-facto amendments to legislation. Accordingly, I have requested of CASA that where an exemption is considered necessary, future explanatory statements contain greater information on why an exemption has been used in favour of an amendment.

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 assurance that future explanatory statements will contain greater information on why an exemption has been used in favour of an amendment.

Instrument	**CASA EX215/15 - Exemption — from the PIRC [F2015L02096]** **CASA EX214/15 - Exemption — from the spinning FAE [F2015L02097]** **CASA EX218/15 - Exemption - from the flight instructor rating flight test [F2015L02115]** **CASA EX219/15 - Exemption - Grade 3, 2 or 1 training endorsement flight test [F2016L00015]**
Purpose	These instruments exempt certain persons from various requirements under the Civil Aviation Safety Regulations 1998
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 2 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 ESs to these instruments state:

> By providing alternative compliance mechanisms for a holder or operator, an exemption of its nature is always beneficial and does not require statutory consultation. CASA has been communicating with FIR [Flight

> Instructor Rating] holders who may wish to take advantage of the exemptions.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In the committee's view, the general statement that exemptions of this nature are always beneficial and therefore do not require statutory consultation is insufficient to meet those requirements, particularly as there may be instances where consultation is regarded as necessary or convenient—for example, industry-wide consultation may be regarded as appropriate in relation to the development and implementation of proposed statutory exemptions. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ESs to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in each particular case.

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 ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Minister's response

The Minister for Infrastructure and Transport advised:

> I am advised that CASA will in future ensure that more information is provided with regard to its consultation processes, including where consultation has been deemed unnecessary or innappropriate…
>
> I am further advised that in response to the Committee's request, CASA will as a matter of urgency provide revised explanatory statements for the instruments concerned.

Committee's response

Noting that revised explanatory statements for the instruments addressing the committee's concerns were registered on the Federal Register of Legislation on 16 March 2016, the committee thanks the minister for his response and has concluded its examination of the instruments.

Instrument	**CASA EX222/15 - Exemption — from certain prerequisites for an ATPL flight test [F2016L00015]**
Purpose	Exempts applicants with less than a 100% pass in the aeronautical knowledge examination from certain eligibility requirements for the air transport pilot licence flight test
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 2 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 to the instrument states:

> By providing alternative compliance mechanisms for a holder or operator, an exemption of its nature is always beneficial and does not require statutory consultation.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In the committee's view, the general statement that exemptions of this nature are always beneficial and therefore do not require statutory consultation is insufficient to meet those requirements, particularly as there may be instances where consultation is regarded as necessary or convenient—for example, industry-wide consultation may be regarded as appropriate in relation to the development and implementation of proposed statutory exemptions. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

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 Infrastructure and Transport advised:

> I am advised that CASA will in future ensure that more information is provided with regard to its consultation processes, including where consultation has been deemed unnecessary or innappropriate…
>
> I am further advised that in response to the Committee's request, CASA will as a matter of urgency provide revised explanatory statements for the instruments concerned.

Committee's response

Noting that a revised explanatory statements for the instrument addressing the committee's concerns was registered on the Federal Register of Legislation on 16 March 2016, the committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Charter of the United Nations (Sanctions - Iran) Document List Amendment 2016 [F2016L00116]**
Purpose	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
Last day to disallow	15 sitting days after tabling (22 February 2016)
Authorising legislation	*Charter of the United Nations (Sanctions — Iran) Regulations 2008*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 3 of 2016

Unclear meaning of export and import sanctioned goods

The committee commented as follows:

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.

Minister's response

The Minister for Foreign Affairs advised:

> As noted by the Committee, this legislative instrument gives effect in Australia to obligations of the former United Nations 1737 (Iran) Sanctions Committee as required by United Nations Security Council Resolution 2231 (2015) (UNSCR 2231).
>
> As accepted by the Committee in respect of its reports of 11 November 2015, 2 December 2015 and 3 February 2016, Australia is under an international legal obligation to implement UN Resolution measures adopted under Chapter VII of the Chatter of the United Nations into its domestic law.
>
> The documents referred to in the Iran Documents List are referred to in UNSCR 2231 and detail nuclear and ballistic missile-related goods determined to be prohibited for export to Iran. The goods listed in these documents will be implemented into the definition of export sanctioned goods for the purposes of the *Charter of the United Nations (Sanctions-Iran) Regulations 2008.*
>
> All UN member states are obliged to implement this list of nuclear and ballistic missile-related goods into their domestic law. They provide a clear and internationally accepted reference point for those industries, persons or companies that trade in such goods and materials. The lists themselves are compiled by internationally recognised bodies including the Nuclear Suppliers Group and endorsed by the UN Security Council.

> The Australian Government has used the legislative instrument known as the Iran Documents List to incorporate documents that were listed by the UN Security Council Committee established pursuant to resolution 1737 (2006) and provide guidance on restricted exports to Iran since 2014 (*Charter of the United Nations (Sanctions - Iran) Document List 2014*)…
>
> In addition, should there be any discrepancy as to whether particular items are import or export sanctioned goods, the Department of Foreign Affairs and Trade provides to the public a free and authoritative service for the purposes of Australian sanction laws allowing a determination to be made on whether a good is an import or export sanctioned good.

Committee's response

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

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

Instrument	**Civil Aviation Legislation Amendment (Part 66) Regulation 2015 [F2015L01992]**
Purpose	Amends Part 66 of the Civil Aviation Safety Regulations 1998 to provide for a small aircraft maintenance engineer licence structure
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	*Civil Aviation Act 1988*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 1 of 2016

Drafting

The committee commented as follows:

This regulation amends Part 66 of the Civil Aviation Safety Regulations 1998 (CASR) to provide for a small aircraft maintenance engineer licence structure. Item 2 of Schedule 1 to this regulation substitutes a new subregulation 66.015(1) of CASR, which allows the Civil Aviation Safety Authority (CASA) to issue a 'Manual of Standards' for Part 66, prescribing matters 'required or permitted' or 'necessary or

convenient' for Part 66. Item 3 of Schedule 1 makes a further amendment that is consequential on the item 2 amendment. In explaining these amendments, the ES for the regulation states:

> **Item [2] Subregulation 66.015(1)**
>
> Item [2] repeals subregulation (1) and substitutes with a new subregulation (1) to comply with the Office of Parliamentary Counsel's (OPC) current policy for legal drafting used to prescribe matters that may be provided in a MOS instrument issued by CASA under subsection 98(5A) of the *Civil Aviation Act 1988*.
>
> **Item [3] Subregulation 66.015(2)**
>
> Item [3] omits "In particular, a" and substitutes it with "Without limiting subregulation (1), the Part 66" to comply with the OPC's most current style of legal drafting used to prescribe matters that may be provided in a MOS instrument issued by CASA under subsection 98(5A) of the *Civil Aviation Act 1988*.

However, neither the instrument nor the ES state what the 'current policy for legal drafting used to prescribe matters' refers to, or why compliance with the policy requires these amendments.

Scrutiny principle (d) of the committee's terms of reference requires that the committee seek to ensure that instruments do not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in the balance of what matters should be dealt with in primary as opposed to delegated legislation.[3]

The committee seeks further detail from the minister as to the OPC policy referred to in the ES for this regulation and as to why compliance with the policy requires these amendments.

Minister's response

The Minister for Infrastructure and Transport advised:

> The OPC has advised that the current policy for legal drafting or subordinate legislation is the OPC Drafting Direction 3.8, available on the OPC website at: www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf ?nw
>
> The Drafting Direction sets out the standard approach for providing for an instrument-making power in legislation. Paragraph 18 of the Drafting Direction specifically notes that this approach "may also be suitable in instruments which provide for other instruments".
>
> This is the case with the Civil Aviation Safety Regulations 1998 (CASR). The CASR are empowered to provide for other legislative instruments (see

3 See for example the committee's consideration of the implementation of a general instrument-making power, *Delegated Legislation Monitor*, No. 17 of 2014 (3 December 2014) pp 6–24.

subsections 98 (5), (5A) and (5BA) of the *Civil Aviation Act 1988*). The amendments at items 2 and 3 of the Part 66 amendments are designed to bring the instrument-making power in that Part into line with this approach. This approach has been adopted for all other Parts of the CASR that are under development and is also adopted across all other Commonwealth legislation.

Committee's response

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

However, the committee notes that, while Draft Drafting Direction 3.8 provides for the use of the instrument-making power in instruments in 'suitable' cases, it does not, as the ES to the instrument appeared to suggest, mandate that this approach is to be taken. The committee notes in this regard that the minister's advice that the approach in this case is consistent with the approach taken for all other parts of the CASR.

Instrument	**Complaints Principles 2015 [F2015L02125]**
Purpose	Describes a scheme for the management and resolution of complaints and other concerns about approved aged care services and the investigative functions of the Aged Care Complaints Commissioner in relation to such complaints
Last day to disallow	15 sitting days after protective notice (19 April 2016)
Authorising legislation	*Aged Care Act 1997; Aged Care Amendment (Independent Complaints Arrangements) Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 2 of 2016

Retrospective effect

The committee commented as follows:

The instrument replaces the existing Complaints Principles 2014 (old principles) and provides for the transfer of aged care complaints functions from the Secretary of the Department of Health to the Aged Care Complaints Commissioner. Part 8 of the instrument specifies application and transitional arrangements for the transfer of these functions, which provide that complaints and applications made under the old principles will be treated as if they were made under the new principles. The committee notes that, although the instrument is not strictly retrospective, the new principles prescribe different processes and timeframes that will be applied to previously lodged complaints or applications. As a consequence, it appears that a

complaint or application not yet completed at 1 January 2016 will be decided according to different processes and timeframes that did not apply at the time of the application.

The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the ES. However, the ES does not address the retrospective effect of this instrument.

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

Minister's response

The Minister for Health advised:

> The Complaints Principles 2015 (the principles) seek to preserve the same complaints handling processes that were in place prior to 1 January 2016. The only changes relate to the delegate of the decision (i.e. the Aged Care Complaints Commissioner instead of the Secretary of the Department) and the timeframes for reconsideration decisions.
>
> We note that Senate Standing Committee on Regulation and Ordinances commented on the changed timeframes for reconsideration decisions. The purpose of applying the new timeframes to complaints made prior to 1 January 2016 was to ensure consistency with the handling of complaints received after 1 January 2016.
>
> Under the Complaints Principles 2014, the Secretary had a total of 56 days from the date of receiving the application to decide whether to undertake a new resolution process (28 days) and to complete that process (28 days). Under the Complaints Principles 2015, the timeframe for the Aged Care Complaints Commissioner to complete a new resolution process has been extended to 90 days from the date of receiving the application. It is my view this change will not disadvantage any complainants as it allows for a more robust decision.
>
> The Complaints Principles 2015 therefore do not unduly trespass on personal rights and liberties, because complainants who made a complaint prior to 1 January 2016 can still expect to have their complaint handled in the same manner as they would have been prior to 1 January 2016.

Committee's response

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

Instrument	**Foreign Judgments Amendment (Miscellaneous) Regulation 2015 [F2015L01892]**
Purpose	Amends the Foreign Judgments Regulations 1992 to remove reference to New Zealand's courts and corrects the names of United Kingdom courts
Last day to disallow	15 sitting days after tabling (3 December 2015)
Authorising legislation	*Foreign Judgments Act 1991*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* Nos 1 and 2 of 2016

No statement of compatibility

The committee commented as follows:

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*.

Attorney-General's response

The Attorney-General advised:

> **Statement of compatibility with human rights**
>
> My department has prepared a statement of compatibility with human rights for inclusion in the Explanatory Statement to the Regulation. The revised Explanatory Statement it attached to this correspondence for your information.

Committee's response

The committee thanks the Attorney-General for his advice and has concluded its examination of this issue.

No description of 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 regulation states:

> The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003* (LIA). The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2. The committee's guideline on the requirement to address the question of consultation under the LIA also states:

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

The committee therefore considers that the ES for the instrument provides no information regarding consultation for the purposes of the LIA.

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*.

Attorney-General's response

The Attorney-General advised:

> **Consultation on amendments to the Regulation**
>
> Consultation was not undertaken on the amendments because they are very minor in nature and do not affect any rights or interests. Reference to New Zealand is removed from the Regulations since recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. The Regulation also corrects the names of the United Kingdom courts listed in the Schedule.

Committee's response

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

Instrument	**Marine Order 28 (Operations standards and procedures) 2015 [F2015L01947]**
Purpose	Gives effect to parts of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), the STCW Code and the International Convention for the Safety of Life at Sea (SOLAS) regarding vessel operations standards and procedures
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 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 various provisions of this instrument refer to other Marine Orders. However, neither the text of the instrument nor the ES expressly state the manner in which the Marine Orders referred to 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 Marine Orders) 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 Infrastructure and Transport advised:

> The Australian Maritime Safety Authority (AMSA) relies on paragraph 10(a) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) as applied by section 13(1)(a) of the *Legislative Instruments Act 2003* so that the cross-references in the Marine Orders to other Marine Orders are to those Orders as amended from time to time unless otherwise specified. Paragraph 10(a) of the Acts Interpretation Act provides that 'the reference (in the Order) shall be construed as a reference to that other (Order) as originally enacted and as amended from time to time.'
>
> The former Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, previously advised the Committee of this approach (see MC15-003693), which the Committee has acknowledged. However, the Committee has advised that its usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument.
>
> It is considered that this expectation is met for Marine Orders because where a Marine Order must be incorporated as at a point in time, the words 'as in force on...' are included after the title of the Order. Marine Orders are similar in status to regulations (see s 342(1) of the *Navigation Act 2012*). As with regulations, the words 'as in force from time to time' are not added after their name.
>
> This approach is consistent with a key aim of the Acts Interpretation Act, which is 'making Commonwealth legislation shorter, less complex and more consistent in operation' - see s1A of the Acts Interpretation Act.

Committee's response

The committee thanks the minister for his advice and has concluded its examination of this issue.

The committee notes the advice that, in determining whether a Marine Order is incoporated as in force from time to time or as at a particular date, ASMA includes the words 'as in force on…' after the title of the Order; and that, in the absence of such words, incorporated Marine Orders can be taken to be references to those Orders as in force from time to time.

In this regard, the committee reiterates that its 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 to necessarily consult extrinsic material.

Access to extrinsic material

The committee commented as follows:

Various provisions of the instrument refer to the International Convention on Certification and Watchkeeping for Seafarers (STCW) Convention and the STCW Code.

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 STCW Convention and STCW Code can be purchased from the International Marine Organisation for a fee. However, neither the instrument nor the ES provide information about whether the STCW Convention and STCW Code 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 Infrastructure and Transport advised:

> The Committee noted the information in Marine Order 28 that consolidated editions of the International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW) Convention and the STCW Code are available from the International Marine Organisation (IMO) for a fee. It commented that no information was provided in the Order or the explanatory statement about whether the STCW Convention and STCW Code are freely and readily available, and that it considers that a best-practice approach in such cases is for administering agencies to make available copies to users who fall outside of the particular commercial or regulatory sector.
>
> To clarify, this note was included because in practice, most ships to which this Order applies carry copies of these IMO consolidated editions of the STCW Convention and STCW Code. However, the STCW Convention and STCW Code are of treaty status and the original convention and any amendments in force are in the Australian Treaties Series accessible from the Australian Treaties Library on the Austlii website at www.austlii.edu.au.
>
> In response to the Committee's concerns, AMSA will ensure that its website identifies where the STCW Convention and STCW Code are freely available. A note pointing out where they are freely available will also be included in the Order when it is next amended.

Committee's response

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

Instrument	**Marine Order 74 (Masters and deck officers — yachts) 2015 [F2015L01895]** **Marine Order 76 (Seafarer certification amendment) 2015 [F2015L01896]**
Purpose	The orders set standards of competence and other conditions to be satisfied by a person to be qualified under the *Navigation Act 2012* to be a master or deck officer for regulated Australian vessels that are yachts
Last day to disallow	15 sitting days after tabling (3 December 2015)
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 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 various provisions of both orders refer to other Marine Orders; and various provisions of the first order and Schedule 2, item 1 of the second order refer to the International Convention on Certification and Watchkeeping for Seafarers (STCW) Convention and the STCW Code. However, while the ES for the first order seeks to incorporate the STCW Convention and STCW Code by reference, neither the text of the instruments nor the ESs expressly state the manner in which the documents referred to 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 Marine Orders, STCW Convention and STCW Code) 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 Infrastructure and Transport advised:

> The Australian Maritime Safety Authority (AMSA) relies on paragraph 10(a) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) as applied by section 13(1)(a) of the *Legislative Instruments Act 2003* so that the cross-references in the Marine Orders to other Marine Orders are to those Orders as amended from time to time unless otherwise specified. Paragraph 10(a) of the Acts Interpretation Act provides that 'the reference (in the Order) shall be construed as a reference to that other (Order) as originally enacted and as amended from time to time.'
>
> The former Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, previously advised the Committee of this approach (see MC15-003693), which the Committee has acknowledged. However, the Committee has advised that its usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument.
>
> It is considered that this expectation is met for Marine Orders because where a Marine Order must be incorporated as at a point in time, the words 'as in force on...' are included after the title of the Order. Marine Orders are similar in status to regulations (see s 342(1) of the *Navigation Act 2012*). As with regulations, the words 'as in force from time to time' are not added after their name.
>
> This approach is consistent with a key aim of the Acts Interpretation Act, which is 'making Commonwealth legislation shorter, less complex and more consistent in operation' – see s1A of the Acts Interpretation Act.
>
> The Committee also commented that some provisions of Marine Order 74 incorporate by reference the STCW Convention and the STCW Code, but that the Order does not expressly state the way in which they are incorporated. It was AMSA's intention to incorporate these documents the same way they are incorporated in other Marine Orders (see for example Marine Order 70 (Seafarer certification) 2013). Notes point out that the definition of STCW Convention in the *Navigation Act 2012* applies in the Order, together with the definition of STCW Code in Division 2 – Interpretation of Marine Orders of Marine Order 1 (Administration) 2013. The definitions themselves specify if the incorporated document is as in force from time to time or as at a particular time. However, AMSA will endeavour to state in future explanatory statements the manner in which these documents are incorporated.

Committee's response

The committee thanks the minister for his advice and has concluded its examination of this issue.

The committee also thanks the minister for his advice that future instruments will state how documents are incorporated.

Access to extrinsic material

The committee commented as follows:

Various provisions of the first order refer to the STCW Convention and the STCW Code; and the second order inserts a new note to subsection 2(1) that also refers to the STCW Convention and the STCW Code.

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 STCW Convention and STCW Code can be purchased from the International Marine Organisation for a fee. However, neither the instrument nor the ES provide information about whether the STCW Convention and STCW Code 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 Infrastructure and Transport advised:

> Finally, the Committee noted that neither Marine Order 74 nor its explanatory statement provided information about whether the STCW Convention and STCW Code were otherwise freely and readily available. It also noted that the second Order (Marine Order 76) inserts a new note referring to the STCW Convention and the STCW Code.
>
> To clarify, the inserted note replaces a similar note in Marine Order 71 (Masters and deck officers) 2014. The purpose of the note is the same as that of the similar note in Marine Order 28.

Like Marine Order 28, Marine Order 74 also includes a note pointing out that information is available on the Marine Orders page on AMSA's website regarding where copies of any referenced documents can be obtained. In response to the Committee's concerns, and as mentioned previously in relation to Marine Order 28, AMSA will ensure that this information mentions where the STCW Convention and Code are freely available.

It is anticipated that the seafarer certification Orders (the '70s series') will be amended later this year. AMSA will at that time include a note in Marine Order 74 referring to where the STCW Convention and the Code are freely available.

Committee's response

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

Instrument	**National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2015 (No. 13) (PB 121 of 2015) [F2015L02085]**
Purpose	Amends the National Health (Highly specialised drugs program) Special Arrangement 2010 (PB 116 of 2010) to make changes relating to the circumstances for the supply of Eculizumab
Last day to disallow	15 sitting days after tabling (2 February 2016)
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 2 of 2016

Drafting

The committee commented as follows:

Item 2 of the instrument (the first instrument) amended the entry for Eculizumab in Schedule 3 of the National Health (Highly specialised drugs program for hospitals) Special Arrangement 2010 (PB 116 of 2010) [F2016C00103] (the principal instrument). In the fourth column of the first and second amended table items in Schedule 3 to the principal instrument, one of the amended circumstances for the supply of Eculizumab is as follows:

> Patient must have received treatment with eculizumab for this condition prior to *1 December 201* [sic] (emphasis added).

The committee notes that a more recent instrument, the National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2016 (No. 1) (PB 5 of 2016) [F2016L00076] (the second instrument), appears to correct the incomplete year in the table item as amended, such that the relevant circumstance for the supply of Eculizumab now states:

> Patient must have received treatment with eculizumab for this condition prior to *1 December 2014* (emphasis added).

However, noting that the amendments made by the first instrument were in effect from 18 December 2015 to 1 February 2016, and that the apparent correction in the second instrument was not applied retrospectively, the committee seeks clarification that, for any relevant supplies during that period (if any), the table item was interpreted as applying to patients having received the relevant treatment prior to 1 December 2014 (and that no person was therefore disadvantaged by the apparent error in the first instrument).

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

Minister's response

The Minister for Health advised:

> This instrument amends Instrument No. PB 116 of 2010 (the principal instrument) and includes an amendment to the circumstances for the supply of Eculizumab. All circumstances for Eculizumab were included correctly in the information published in the 1 January 2016 and 1 February 2016 editions of the Pharmaceutical Benefits Schedule and on the PBS website as '*Patient must have received treatment with Eculizumab for this condition prior to 1 December 2014*'.
>
> Similarly, information provided over the same period to software providers for monthly updates of prescribing and dispensing software, and to Medicare Australia for approving the prescribing of authority prescriptions and processing payments of claims, included the correct circumstances.
>
> I can assure the Committee that between 1 December 2015, when all other amendments in PB 116 of 2010 commenced, and 18 December 2015, when PB 121 of 2015 commenced, no person would have been disadvantaged. There would have no adverse consequences for users of the Pharmaceutical Benefits Scheme during that period as administrative arrangements for access to and supply of Eculizumab would have continued to operate appropriately.
>
> The drafting errors in National Health (Highly Specialised Drugs Program) Special Arrangement Amendment Instrument 2015 (No. 13) (PB 121 of 2015) [F2015L02085] are regrettable. Procedures are in place within my Department to ensure that legislative instruments and supporting documents are prepared appropriately.

Committee's response

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

Instrument	**Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]**
Purpose	Provides for the custody and use of the records of the Royal Commission into Trade Union Governance and Corruption
Last day to disallow	15 sitting days after tabling (22 February 2016)
Authorising legislation	*Royal Commissions Act 1902*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 3 of 2016

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

The committee commented as follows:

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 offical 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.

Minister's response

The Assistant Minister for Finance advised:

> As part of his inquiry, the Letters Patent for the Royal Commission into Trade Union Governance and Corruption expressly commissioned Royal Commissioner John Dyson Heydon AC QC to inquire into any conduct which may amount to a breach of any law, regulation or professional standard by any officers of an employee association, in relation to that entity. Where the Commissioner obtained information or evidence that related or may have related to a contravention of a law, section 6P of the *Royal Commissions Act 1902* permitted him to communicate that information to a variety of recipients, including the Director of Public Prosecutions, police and an authority or person responsible for the administration or enforcement of a law.
>
> The Regulation continues that purpose by permitting the Secretary of the Department of the Prime Minister and Cabinet (the custodian), after the completion of the Royal Commission, to give or allow access to Commission records for the purposes of law enforcement or for advising a Minister on the administration of a law. The Secretary would only provide access to records upon request from a person or body authorised under the Regulation, namely the owner of a record, law enforcement bodies or a person or body responsible for advising a Minister on the administration of a law.
>
> When considering requests for access to the records for law enforcement purposes, the Regulations make no provision requiring the Secretary to obtain consent of affected persons. This is because the RC Act expressly authorises the custodian to give or allow access to Commission records to another person or body for law enforcement purposes without obtaining consent or providing an opportunity to make submissions to the owner of the records or any other person (see subsection 9(11). That provision in the RC Act recognises a public interest in law enforcement bodies having

access to information from a Royal Commission that may be relevant to a contravention of a law.

Further, the production of Commission records to persons or bodies, whether for law enforcement or advisory purposes, would not abrogate any obligation on a recipient when taking action in connection with law enforcement or the administration of a law (eg. any obligation to disclose records relating to that action). In addition, the RC Act provides protection for witnesses who have made statements or disclosures in the course of giving evidence to a Royal Commission, by preventing that evidence from being used against the witness in any civil or criminal proceedings (see section 7C).

Committee's response

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

The committee notes in particular the assistant minister's advice that subsection 9(11) of the RC Act (which provides for Royal Commission records to be dealt with without obtaining the consent of, giving notice to, giving an opportunity to make submissions to or taking into account submissions made by the owner of the records or any other person) recognises a public interest in law enforcement bodies having access to information from a Royal Commission that may be relevant to a contravention of a law.

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	15 sitting days after tabling (3 March 2016)
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 4 of 2016

No statement of compatibility

The committee commented as follows:

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

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 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*.

Attorney-General's response

The Attorney-General advised:

> The Committee has rightly identified that the Explanatory Statement to the Specification did not include a human rights compatibility statement, nor a statement detailing the consultation carried out in developing the Specification. I will issue an updated Explanatory Statement to rectify that oversight.
>
> The Specification delegates the functions of the Communications Access Coordinator to the person holding the position of First Assistant Secretary, National Security Division, in the Attorney-General's Department. It was unnecessary to consult outside of the Department on this instrument. Its effect is limited to the internal workings of the Department, and it was made to give effect to a recent restructure. It has long been the case that the functions of the Coordinator are delegated to officers at that level. The instrument itself has no impact on human rights, as it is does not affect the functions of the Coordinator, which are governed by the primary legislation.

Committee's response

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

The committee notes the Attorney-General's undertaking to issue an updated ES that includes a statement of compatibility and a description of consultation.

Instrument	**Therapeutic Goods Legislation Amendment (Charges Exemptions and Other Measures) Regulation 2016 [F2016L00109]**
Purpose	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
Last day to disallow	15 sitting days after tabling (22 February 2016)
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 3 of 2016

Unclear basis for determining fees

The committee commented as follows:

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 sights 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 sight 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.

Minister's response

The Minister for Rural Health advised:

> the Australian Government's overarching cost recovery policy is that, where appropriate, non-government recipients of specific government activities should be charged some or all of the costs of those activities.
>
> In the 1997-98 Budget, Budget Paper No. 2 Part II: Revenue Measures, it was stated that the Therapeutic Goods Administration (TGA) would fully recover all costs from industry from 1998-99. The TGA recovers the costs of its regulatory activities through fees and charges imposed on sponsors and manufacturers of therapeutic products.
>
> The *Therapeutic Goods Act 1989* (the Act) provides a legal authority for the TGA to charge for its regulatory activities within the scope of the Act. Applicable fees and charges are prescribed in regulations made under the Act and the *Therapeutic Goods (Charges) Act 1989* (the Charges Act).
>
> The characteristics of the activity determine the type of cost recovery charge used:
>
> - Cost recovery fees: fees charged when a good, service or regulation is provided directly to a specific individual or organisation,

- TGA fees are used to recover the cost of, usually pre-market, services performed and are scaled (using activity based costing models) to account for the level of effort required and undertaken to provide each service.

- Cost recovery levies: charges imposed when a good, service or regulation is provided to a group of individuals or organisations (e.g. an industry sector) rather than to a specific individual or organisation,

  - TGA annual charges are used to recover the cost of activities, usually post-market pharmacovigilance, monitoring and compliance activity, where they cannot reasonably be assigned to individual sponsors. These activities maintain the integrity of the regulated industry to the benefit of all sponsors and importantly, avoid the situation where assigning costs to individual sponsors would deter them from disclosing important public health information or adverse events.

TGA fees and charges were set on an activity basis, including the allocation of corporate and overhead costs, and are reviewed annually. Consultation is undertaken with industry representative bodies and, as required, adjustments applied. These usually comprise increases based on an indexation factor of the Wage Price Index (50 per cent) and Consumer Price Index (50 per cent). However in 2015-16 a lesser rate was applied based on known cost increases only.

In relation to the amendments at items 33 to 35 of F2016L00109, I have attached a table of amendments and a brief description of what they entail.

Committee's response

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

Instrument	**Veterans' Entitlements (Dispensed Price for Repatriation Pharmaceutical Benefits/Updating Incorporated Documents) Amendment Instrument 2015 [F2015L02130]** **Military Rehabilitation and Compensation (Dispensed Price for MRCA Pharmaceutical Benefits/Updating Incorporated Documents) Amendment Instrument 2015 [F2015L02137]**
Purpose	These instruments vary the Repatriation Pharmaceutical Benefits Scheme under the Veterans' Entitlements Act 1986 and the Military Rehabilitation and Compensation Act Pharmaceutical Benefits Scheme under the *Military Rehabilitation and Compensation Act 2004*; and include a new listing
Last day to disallow	15 sitting days after protective notice (19 April 2016)
Authorising legislation	*Veterans' Entitlements Act 1986; Military Rehabilitation and Compensation Act 2004*
Department	Veterans' Affairs
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).

With reference to the above, the committee notes that Schedule 1 of these instruments incorporates by reference a number of documents. In line with the committee's expectations, list A of Schedule 1 specifies the manner of incorporation of the documents in that list 'as they exist on 1 January 2016'. However, list B of Schedule 1 incorporates previous editions of three documents that also appear in list A. A note to the schedule states: 'paragraph 43 [of the Repatriation Pharmaceutical Benefits Scheme [F2016C00087]] provides that the later versions of certain documents in list A take precedence over earlier versions of the documents in List B.'

The ES to the instruments states:

> The documents listed in the new Schedule 1 inserted into the Schemes by the attached instruments are incorporated into the Schemes in the form in which those documents were on 1 January 2016 and not in the form in which they may exist from time to time.

The committee notes that the instrument and ES together make clear the intention that the documents in Schedule 1 are incorporated as in force on 1 January 2016, and thus meet the committee's expectation that instruments and ESs make clear the basis of incorporation to all anticipated users.

However, noting the apparent intention under list B of Schedule 1 to incorporate earlier versions of certain documents (in addition to incorporating those documents as at 1 January 2016), the committee seeks the minister's advice as to the reason for taking this approach in this instance.

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

Minister's response

The Minister for Veterans' Affairs advised:

> The committee's comments relate to variations made by the above instruments to the instruments known as the Repatriation Pharmaceutical Benefits Scheme (RPBS) and the MRCA Pharmaceutical Benefits Scheme ("principal instruments"). Relevantly, the variations replace Schedule 1 (Incorporated Documents) to each of the principal instruments. Schedule 1 lists the documents that are incorporated by reference into each of the principal instruments.
>
> The committee's query is directed to the issue of "Incorporation of extrinsic material". Specifically, the committee has directed its comments to list B of Schedule 1 and has noted the "apparent intention under list B of Schedule 1 to incorporate earlier versions of certain documents (in addition to incorporating those documents as at 1 January 2016)". The committee has sought my advice as to the reason for this approach.
>
> The documents referred to in "list B" are the previous editions of specialised medical reference material, namely the British Pharmacopoeia, the Pharmaceutical Codex and the Australian Pharmaceutical Formulary. The reason for incorporating both the current and previous editions of these documents in the principal instruments is that both the current and earlier editions of these medical reference materials are required for the effective administration of the RPBS and MRCA PBS Schemes.
>
> The earlier editions are often relevant where, for example, there is a clinically justifiable need to prescribe a certain compound, individualised medication regime, or formulation that is not a commercially available product and is no longer listed in the latest edition of the relevant pharmaceutical reference guide. The earlier editions are referred to in subparagraph 41(d) of the principal instruments in the context of describing documents that set the minimum acceptable standard for a pharmaceutical benefit.
>
> A significant number of these earlier editions are still used in the administration of the Schemes and it is not always possible to pinpoint an exact "as in force" date for each edition of each reference guide in list B. Arguably, as these earlier editions are fixed in time and do not change (but are replaced by subsequent editions as updates occur), a collective reference

to the previous editions, incorporated in the form in which they exist as at 1 January 2016, is both technically correct as well as practically expedient.

However, I am advised by my department that in light of the query raised by the committee, the schedule will be reviewed when next the principal instruments are amended with a view to clarifying the meaning of note at the end of the Schedule (about para 43 of the principal instruments) and the applicable "as-in-force date" for the material set out in list B.

Committee's response

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

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	15 sitting days after tabling (1 March 2016)
Authorising legislation	*A New Tax System (Wine Equalisation Tax) Act 1999*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 4 of 2016

Incorporation of extrinsic material

The committee commented as follows:

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.

Minister's response

The Assistant Treasurer advised:

> For the purpose of calculating the amount of wine equalisation tax producer rebate to which an eligible New Zealand producer of wine is entitled, one of the foreign currency conversion options available under the legislative instrument is the 'average yearly RBNZ rate', the meaning of which currently incorporates the *Reserve Bank of New Zealand Act*.
>
> The Committee has noted that neither the text of the legislative instrument or the explanatory statement expressly state the manner in which the *Reserve Bank of New Zealand Act* is incorporated.
>
> …The 'average yearly RBNZ rate' is published by the Commissioner of Taxation on the Australian Taxation Office's website. As claimants can freely and easily access the 'average yearly RBNZ rate' at www.ato.gov.au, it is not necessary for them to consult the extrinsic legislative material to understand the operation of the legislative instrument and use the 'average yearly RBNZ rate'.
>
> The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instrument and register a new determination and corresponding explanatory statement to address the Committee's concerns by removing reference to the *Reserve Bank of New Zealand Act* …by 1 August 2016.

Committee's response

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

The committee notes the Assistant Treasurer's undertaking that the Australian Taxation Office will repeal and remake the instrument to address the committee's concerns by removing reference to the *Reserve Bank of New Zealand Act* by 1 August 2016.

Appendix 1
Correspondence

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC16-007503

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

Dear Chair

Thank you for your correspondence of 3 March 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances regarding the Health Insurance (Section 19AB Exemptions) Guidelines 2016 [F2016L00134].

I note and understand the committee's expectations in relation to sub-delegation and that they should accord with the Senate Standing Committee for the Scrutiny of Bills' approach of ensuring that delegations are not provided to a relatively large class of persons, with little or no specificity as to their qualifications or attributes.

I confirm that I have limited the powers delegated and the categories of people to whom these powers are delegated. For consistency my Department has replicated the delegations as provided in the *Health Insurance Act 1973* for the administration of s19AB when making the 2016 Guidelines. My Department will consider removing these provisions when the Guidelines are next remade.

I also note the conventions for referencing extrinsic material in legislative instruments and the specific advice the committee has provided about the references to the *Health Insurance Regulations 1975* and the *Migration Regulations 1994*. I would point out that clause 5(5) indicates that "References to provisions in the *Migration Regulations 1994* are to the provisions in force and applied to the person at the time the person migrated to Australia."

Thank you for bringing this matter to my attention.

The Hon Sussan Ley MP

cc: regords.sen@aph.gov.au

. 4 APR 2016

The Hon Greg Hunt MP

Minister for the Environment

MC16-003988

- 4 APR 2016

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

Dear Senator John

I refer to the letter of 18 March 2016 from the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting my advice in relation to recent amendments to the List of Exempt Native Specimens. The amendments relate to the South Australian Lakes and Coorong Fishery and to the take of Australian salmon by the Richey Fishing Company in the Tasmanian Scalefish Fishery.

The Committee has advised that where an instrument incorporates extrinsic material by reference, there is an expectation that the manner of incorporation be clearly specified in the instrument. Similarly, the Committee expects that explanatory statements also clearly specify the manner of incorporation of extrinsic material.

I can confirm that the intention in these instances is that references to definitions in instruments in force under the South Australian *Fisheries Management Act 2007* and the Tasmanian *Living Marine Resources Management Act 1995* are to be read as references to the instruments in force from time to time. This is also the case for other similar amendments to the List of Exempt Native Specimens where fisheries legislation is referenced.

I appreciate that the Committee relies on explanatory statements to understand the incorporation of extrinsic materials. The Department of the Environment will ensure that when future amendments to the List of Exempt Native Specimens are made, additional material will be included in explanatory statements more clearly addressing the manner in which extrinsic material has been incorporated.

I trust this advice is of assistance to the Committee.

Yours sincerely

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

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC16-002770

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

Via email: regords.sen@aph.gov.au

Dear Senator Williams John,

Thank you for your correspondence of 29 February 2016 requesting further information on the Australian Meat & Live-stock Industry (Beef Export to the USA – Quota Years 2016-2022) Order 2015 (the Order) and how the Harmonized Tariff Schedule of the United States (HTSUS) is incorporated.

The HTSUS assigns an eight digit code to each beef product that will receive preferential tariff treatment upon entry into the United States, as agreed under the Australia-United States Free Trade Agreement. It is the document by reference to which eligible quota goods are defined under the Order.

Section 6 of the Order makes reference to the HTSUS. The first reference, defines the meaning of processed meat by reference to the HTSUS, as this can differ across free trade agreements and these products are not quota eligible. The second reference, under the definition of quota beef defines which classes are included as quota products by listing the corresponding eight digit code.

For further explanation on what each code refers to, exporters will reference the HTSUS. Consistent with section 14 of the *Legislation Act 2003*, it is intended that references to the HTSUS be read as the 'Harmonized Tariff Schedule of the United States as in force at the commencement of the Order'.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@agriculture.gov.au

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.

Thank you again for your correspondence.

Yours sincerely

Barnaby Joyce MP

16 MAR 2016

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001953

19 APR 2016

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

John

Dear Senator Williams

Thank you for your letter of 18 March 2016 regarding the Senate Standing Committee on Regulation and Ordinance's *Delegated Legislation Monitor* No. 4 and *CASA EX42/16 - Exemption – use of pre-hiring drug and alcohol tests [F2016L00219].*

I have sought advice from the Civil Aviation Safety Authority (CASA) in relation to the Committee's concerns that exemption EX42/16 may be a matter more appropriate for parliamentary enactment.

CASA advises that in February 2016, it provided instructions to the Office of Parliamentary Counsel seeking amendments to Part 99 of the Civil Aviation Safety Regulations 1998 (CASR) to address the areas currently covered by exemption EX42/16. I am also advised that CASA intends to consult the public and industry on the proposed amendments in May 2016.
I am aware that it is the Committee's preference that exemptions are not used or do not continue for such time as to operate as de-facto amendments to legislation. Accordingly, I have requested of CASA that where an exemption is considered necessary, future explanatory statements contain greater information on why an exemption has been used in favour of an amendment.

Thank you again for taking the time to write and inform me of the Committee's concerns on this matter.

DARREN CHESTER

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001517

16 MAR 2016

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

John

Dear Senator Williams

Thank you for your letter of 8 March 2016 regarding instruments listed in the Senate Standing Committee on Regulation and Ordinance's *Delegated Legislation Monitor* No 2 of 2016.

I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee regarding the adequacy of the explanatory material for each of the relevant instruments.

I am advised that CASA will in future ensure that more information is provided with regard to its consultation processes, including where consultation has been deemed unnecessary or innappropriate, and that CASA will also ensure that future explanatory statements include a reference to Subsection 33(3) of the *Acts Interpretation Act 1901* where appropriate.

I am further advised that in response to the Committee's request, CASA will as a matter of urgency provide revised explanatory statements for the instruments concerned.

Thank you again for taking the time to write and inform me of the Committee's concerns on this matter.

DARREN CHESTER

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

I write in response to the 3 March 2016 letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) which seeks my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions – Iran) Document List Amendment 2016.*

Charter of the United Nations (Sanctions – Iran) Document List Amendment 2016

As noted by the Committee, this legislative instrument gives effect in Australia to obligations of the former United Nations 1737 (Iran) Sanctions Committee as required by United Nations Security Council Resolution 2231 (2015) (UNSCR 2231).

As accepted by the Committee in respect of its reports of 11 November 2015, 2 December 2015 and 3 February 2016, Australia is under an international legal obligation to implement UN Resolution measures adopted under Chapter VII of the Charter of the United Nations into its domestic law.

The documents referred to in the Iran Documents List are referred to in UNSCR 2231 and detail nuclear and ballistic missile-related goods determined to be prohibited for export to Iran. The goods listed in these documents will be implemented into the definition of export sanctioned goods for the purposes of the *Charter of the United Nations (Sanctions-Iran) Regulations 2008.*

All UN member states are obliged to implement this list of nuclear and ballistic missile-related goods into their domestic law. They provide a clear and internationally accepted reference point for those industries, persons or companies that trade in such goods and materials. The lists themselves are compiled by internationally recognised bodies including the Nuclear Suppliers Group and endorsed by the UN Security Council.

The Australian Government has used the legislative instrument known as the Iran Documents List to incorporate documents that were listed by the UN Security Council Committee established pursuant to resolution 1737 (2006) and provide guidance on restricted exports to Iran since 2014 (*Charter of the United Nations (Sanctions – Iran) Document List 2014).*

This instrument was previously assessed by the Committee and no concerns were raised about the inclusion of the documents or goods referred to in the instrument.

In addition, should there be any discrepancy as to whether particular items are import or export sanctioned goods, the Department of Foreign Affairs and Trade provides to the public a free and authoritative service for the purposes of Australian sanction laws allowing a determination to be made on whether a good is an import or export sanctioned good.

I trust this information is of assistance.

Yours sincerely

19 APR 2016

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

17 MAR 2016

PDR ID: MC16-001005

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

Dear John Senator

I refer to the letter dated 4 February 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) seeking further information about *Civil Aviation Legislation Amendment (Part 66) Regulation 2015*, Marine Order 28 (Operations standards and procedures) 2015, Marine Order 74 (Masters and deck officers - yachts) 2015 and Marine Order 76 (Seafarer certification amendment) 2015. My response relates to the Committee's comments as outlined in the Delegated legislation monitor No.1 of 2016.

Civil Aviation Legislation Amendment (Part 66) Regulation 2015

The Committee noted that items 2 and 3 of Schedule 1 of the *Civil Aviation Legislation Amendment (Part 66) Regulation 2015* substitute and amend existing subregulations to comply with the Office of Parliamentary Counsel's (OPC) current policy for legal drafting. Further, that neither the instrument nor the explanatory statement state what the 'current policy for legal drafting used to prescribe matters' refers to, or why compliance with the policy requires these amendments. The Committee has sought advice about the OPC policy and why compliance with the policy requires the amendments.

The OPC has advised that the current policy for legal drafting of subordinate legislation is the OPC Drafting Direction 3.8, available on the OPC website at:
www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf?nw

The Drafting Direction sets out the standard approach for providing for an instrument-making power in legislation. Paragraph 18 of the Drafting Direction specifically notes that this approach "may also be suitable in instruments which provide for other instruments".

This is the case with the *Civil Aviation Safety Regulations 1998* (CASR). The CASR are empowered to provide for other legislative instruments (see subsections 98 (5), (5A) and (5BA) of the *Civil Aviation Act 1988*). The amendments at items 2 and 3 of the Part 66 amendments are designed to bring the instrument-making power in that Part into line with this approach. This approach has been adopted for all other Parts of the CASR that are under development and is also adopted across all other Commonwealth legislation.

Marine Orders

The Committee noted that Marine Order 28 and Marine Order 74 refer to other Marine Orders and that neither the instruments nor the explanatory statements for the Orders expressly state the manner in which those other Marine Orders are incorporated.

The Australian Maritime Safety Authority (AMSA) relies on paragraph 10(a) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) as applied by section 13(1)(a) of the *Legislative Instruments Act 2003* so that the cross-references in the Marine Orders to other Marine Orders are to those Orders as amended from time to time unless otherwise specified. Paragraph 10(a) of the Acts Interpretation Act provides that 'the reference (in the Order) shall be construed as a reference to that other (Order) as originally enacted and as amended from time to time.'

The former Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, previously advised the Committee of this approach (see MC15-003693), which the Committee has acknowledged. However, the Committee has advised that its usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument.

It is considered that this expectation is met for Marine Orders because where a Marine Order must be incorporated as at a point in time, the words 'as in force on ...' are included after the title of the Order. Marine Orders are similar in status to regulations (see s 342(1) of the *Navigation Act 2012*). As with regulations, the words 'as in force from time to time' are not added after their name.

This approach is consistent with a key aim of the Acts Interpretation Act, which is 'making Commonwealth legislation shorter, less complex and more consistent in operation' – see s1A of the Acts Interpretation Act.

The Committee noted the information in Marine Order 28 that consolidated editions of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) Convention and the STCW Code are available from the International Marine Organisation (IMO) for a fee. It commented that no information was provided in the Order or the explanatory statement about whether the STCW Convention and STCW Code are freely and readily available, and that it considers that a best-practice approach in such cases is for administering agencies to make available copies to users who fall outside of the particular commercial or regulatory sector.

To clarify, this note was included because in practice, most ships to which this Order applies carry copies of these IMO consolidated editions of the STCW Convention and STCW Code. However, the STCW Convention and STCW Code are of treaty status and the original convention and any amendments in force are in the Australian Treaties Series accessible from the Australian Treaties Library on the AustLII website at www.austlii.edu.au.

In response to the Committee's concerns, AMSA will ensure that its website identifies where the STCW Convention and STCW Code are freely available. A note pointing out where they are freely available will also be included in the Order when it is next amended.

The Committee also commented that some provisions of Marine Order 74 incorporate by reference the STCW Convention and the STCW Code, but that the Order does not expressly state the way in which they are incorporated. It was AMSA's intention to incorporate these documents the same way they are incorporated in other Marine Orders (see for example Marine Order 70 (Seafarer certification) 2013). Notes point out that the definition of STCW Convention in the *Navigation Act 2012* applies in the Order, together with the definition of STCW Code in Division 2 — Interpretation of Marine Orders of Marine Order 1 (Administration) 2013. The definitions themselves specify if the incorporated document is as in force from time to time or as at a particular time. However, AMSA will endeavour to state in future explanatory statements the manner in which these documents are incorporated.

Finally, the Committee noted that neither Marine Order 74 nor its explanatory statement provided information about whether the STCW Convention and STCW Code were otherwise freely and readily available. It also noted that the second Order (Marine Order 76) inserts a new note referring to the STCW Convention and the STCW Code.

To clarify, the inserted note replaces a similar note in Marine Order 71 (Masters and deck officers) 2014. The purpose of the note is the same as that of the similar note in Marine Order 28.

Like Marine Order 28, Marine Order 74 also includes a note pointing out that information is available on the Marine Orders page on AMSA's website regarding where copies of any referenced documents can be obtained. In response to the Committee's concerns, and as mentioned previously in relation to Marine Order 28, AMSA will ensure that this information mentions where the STCW Convention and Code are freely available.

It is anticipated that the seafarer certification Orders (the '70s series') will be amended later this year. AMSA will at that time include a note in Marine Order 74 referring to where the STCW Convention and the Code are freely available.

Thank you again for taking the time to write to me on this matter.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC16-005119

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

Dear ~~Chair~~ John

Thank you for your correspondence of 25 February 2016 regarding the Complaints Principles 2015 - Transfer of aged care complaints functions.

The Complaints Principles 2015 (the principles) seek to preserve the same complaints handling processes that were in place prior to 1 January 2016. The only changes relate to the delegate of the decision (i.e. the Aged Care Complaints Commissioner instead of the Secretary of the Department) and the timeframes for reconsideration decisions.

We note that Senate Standing Committee on Regulation and Ordinances commented on the changed timeframes for reconsideration decisions. The purpose of applying the new timeframes to complaints made prior to 1 January 2016 was to ensure consistency with the handling of complaints received after 1 January 2016.

Under the Complaints Principles 2014, the Secretary had a total of 56 days from the date of receiving the application to decide whether to undertake a new resolution process (28 days) and to complete that process (28 days). Under the Complaints Principles 2015, the timeframe for the Aged Care Complaints Commissioner to complete a new resolution process has been extended to 90 days from the date of receiving the application. It is my view this change will not disadvantage any complainants as it allows for a more robust decision.

The Complaints Principles 2015 therefore do not unduly trespass on personal rights and liberties, because complainants who made a complaint prior to 1 January 2016 can still expect to have their complaint handled in the same manner as they would have been prior to 1 January 2016.

Thank you for bringing this matter to my attention.

The Hon Sussan Ley MP
cc: regords.sen@aph.gov.au

18 APR 2016

ATTORNEY-GENERAL

CANBERRA

MC16-003405

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
PARLIAMENT HOUSE ACT 2600

18 MAR 2016

Dear Mr Powell

I refer to your letter of 25 February 2016 in which you brought to my attention comments contained in the Senate Regulations and Ordinances Committee *Delegated legislation Monitor No.2 of 2016.* In particular, the Committee requested further information in the Explanatory Statement to the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015* (The Regulation).

I provide the following information in response to the Committee's request.

Statement of compatibility with human rights
My department has prepared a statement of compatibility with human rights for inclusion in the Explanatory Statement to the Regulation. The revised Explanatory Statement it attached to this correspondence for your information.

Consultation on amendments to the Regulation
Consultation was not undertaken on the amendments because they are very minor in nature and do not affect any rights or interests. Reference to New Zealand is removed from the Regulations since recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. The Regulation also corrects the names of the United Kingdom courts listed in the Schedule.

Thank you again for writing on this matter.

Encl: revised *Explanatory Statement to the Foreign Judgments Amendment (Miscellaneous) Regulation 2015*

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

EXPLANATORY STATEMENT

Select Legislative Instrument No. 207, 2015

Issued by the authority of the Attorney-General

Foreign Judgments Act 1991

Foreign Judgments Amendment (Miscellaneous) Regulation 2015

The *Foreign Judgments Act 1991* (the Act) provides a streamlined procedure for the recognition and enforcement of certain judgments of courts prescribed in the *Foreign Judgments Regulations 1992* (the Regulations) based upon reciprocity of enforcement. Under the Act, a foreign judgment may be registered and then enforced as if it was a judgment of a local court. However, the Act only applies to judgments rendered by superior and specified inferior courts in countries nominated in the Regulations.

The Act provides that the legislation will be applied with respect to judgments of courts of a particular country, by regulations, where the Governor General is satisfied that substantial reciprocity of treatment will be given to the enforcement in that country of corresponding Australian judgments.

Section 16 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulation removes the reference to New Zealand from the Regulations since recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. In addition, the Regulation corrects the names of the United Kingdom courts listed in the Schedule as the names of the courts have changed.

Details of the Regulation are set out in the Attachment A.

Given the limited impact of these amendments, no consultation was required or undertaken.

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulation may be exercised.

A Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny Act) 2011* is set out in Attachment B.

The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commenced on the day after the instrument was registered.

Authority: Section 16 of the
Foreign Judgments Act 1991

ATTACHMENT A

Details of the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015*.

Section 2 – Commencement

This section provides for the Regulation to commence on the day after this instrument is registered.

Section 3 – Authority

This section provides that the *Foreign Judgments Amendment (Miscellaneous) Regulation 2015* is made under the *Foreign Judgments Act 1991*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item [1] – Subregulation 5(1)

Subregulation 5(1) is repealed.

Item [2] – Schedule (table item 1)

Schedule (table item 1) is repealed.

Item [3] – Schedule (cell at table item 27, column headed "Courts")

Cell at table item 27, column headed "Courts" in the Schedule is repealed and substituted with:

Supreme Court of the United Kingdom

Senior Courts of England and Wales

Court of Judicature of Northern Ireland

Court of Session

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Foreign Judgments Amendment (Miscellaneous) Regulation 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 *Foreign Judgments Act 1991* (the Act) provides a streamlined procedure for the recognition and enforcement of certain judgments of courts prescribed in the *Foreign Judgments Regulations 1992* (the Regulations) based upon reciprocity of enforcement. Under the Act, a foreign judgment may be registered and then enforced as if it was a judgment of a local court. However, the Act only applies to judgments rendered by superior and specified inferior courts in countries nominated in the Regulations.

Section 16 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulation removes the reference to New Zealand from the Regulations since recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. In addition, the Regulation corrects the names of the United Kingdom courts listed in the Schedule as the names of the courts have changed.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

George Brandis QC

Attorney-General

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC16-005070

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair John

Thank you for your correspondence of 25 February 2016 regarding National Health (Highly Specialised Drugs Program) Special Arrangement Amendment Instrument 2015 (No. 13) (PB 121 of 2015) [F2015L02085].

This instrument amends Instrument No. PB 116 of 2010 (the principal instrument) and includes an amendment to the circumstances for the supply of Eculizumab. All circumstances for Eculizumab were included correctly in the information published in the 1 January 2016 and 1 February 2016 editions of the Pharmaceutical Benefits Schedule and on the PBS website as '*Patient must have received treatment with Eculizumab for this condition prior to 1 December 2014*'.

Similarly, information provided over the same period to software providers for monthly updates of prescribing and dispensing software, and to Medicare Australia for approving the prescribing of authority prescriptions and processing payments of claims, included the correct circumstances.

I can assure the Committee that between 1 December 2015, when all other amendments in PB 116 of 2010 commenced, and 18 December 2015, when PB 121 of 2015 commenced, no person would have been disadvantaged. There would have no adverse consequences for users of the Pharmaceutical Benefits Scheme during that period as administrative arrangements for access to and supply of Eculizumab would have continued to operate appropriately.

The drafting errors in National Health (Highly Specialised Drugs Program) Special Arrangement Amendment Instrument 2015 (No. 13) (PB 121 of 2015) [F2015L02085] are regrettable. Procedures are in place within my Department to ensure that legislative instruments and supporting documents are prepared appropriately.

Thank you for bringing this matter to my attention. I trust this information is satisfactory to the Committee.

The Hon Sussan Ley MP

16 MAR 2016

THE HON DR PETER HENDY MP
ASSISTANT CABINET SECRETARY
ASSISTANT MINISTER FOR FINANCE

Reference: MC16-027609

Senator John Williams
Chair
The Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the Committee Secretary's letter dated 3 March 2016 regarding the Committee's request for advice on the Royal Commissions Amendment Regulation 2016 (No. 1).

In the Delegated Legislation Monitor (No. 3 of 2016), the Committee requests further information to consider whether the Regulation unduly trespasses on an individual's rights and liberties.

As part of his inquiry, the Letters Patent for the Royal Commission into Trade Union Governance and Corruption expressly commissioned Royal Commissioner John Dyson Heydon AC QC to inquire into any conduct which may amount to a breach of any law, regulation or professional standard by any officers of an employee association, in relation to that entity. Where the Commissioner obtained information or evidence that related or may have related to a contravention of a law, section 6P of the *Royal Commissions Act 1902* permitted him to communicate that information to a variety of recipients, including the Director of Public Prosecutions, police and an authority or person responsible for the administration or enforcement of a law.

The Regulation continues that purpose by permitting the Secretary of the Department of the Prime Minister and Cabinet (the custodian), after the completion of the Royal Commission, to give or allow access to Commission records for the purposes of law enforcement or for advising a Minister on the administration of a law. The Secretary would only provide access to records upon request from a person or body authorised under the Regulation, namely the owner of a record, law enforcement bodies or a person or body responsible for advising a Minister on the administration of a law.

When considering requests for access to the records for law enforcement purposes, the Regulations make no provision requiring the Secretary to obtain consent of affected persons. This is because the RC Act expressly authorises the custodian to give or allow access to Commission records to another person or body for law enforcement purposes without obtaining consent or providing an opportunity to make submissions to the owner of the records or any other person (see subsection 9(11). That provision in the RC Act recognises a public interest in law enforcement bodies having access to information from a Royal Commission that may be relevant to a contravention of a law.

Further, the production of Commission records to persons or bodies, whether for law enforcement or advisory purposes, would not abrogate any obligation on a recipient when taking action in connection with law enforcement or the administration of a law (eg. any obligation to disclose records relating to that action). In addition, the RC Act provides protection for witnesses who have made statements or disclosures in the course of giving evidence to a Royal Commission, by preventing that evidence from being used against the witness in any civil or criminal proceedings (see section 7C).

I trust that this information addresses your queries.

Yours sincerely

[redacted]

23 / 3 / 2016

ATTORNEY-GENERAL

CANBERRA

MC16-004163

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

27 APR 2016

Dear Senator Williams John

Thank you for your letter of 18 March 2016 concerning the Senate Standing Committee on Regulations and Ordinances' comments on the *Telecommunications (Interception and Access) (Communications Access Coordinator) Specification 2016*.

The Committee has rightly identified that the Explanatory Statement to the Specification did not include a human rights compatibility statement, nor a statement detailing the consultation carried out in developing the Specification. I will issue an updated Explanatory Statement to rectify that oversight.

The Specification delegates the functions of the Communications Access Coordinator to the person holding the position of First Assistant Secretary, National Security Division, in the Attorney-General's Department. It was unnecessary to consult outside of the Department on this instrument. Its effect is limited to the internal workings of the Department, and it was made to give effect to a recent restructure. It has long been the case that the functions of the Coordinator are delegated to officers at that level. The instrument itself has no impact on human rights, as it is does not affect the functions of the Coordinator, which are governed by the primary legislation.

The responsible adviser for this matter in my Office is David Mason who can be contacted on (02) 6277 7300.

Thank you again for writing on this matter.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Regional Communications
Minister for Rural Health
Deputy Leader of The Nationals

Ref No: MC16-006675

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

Dear Chair

Thank you for your correspondence of 3 March 2016 regarding the Therapeutic Goods Legislation Amendment (Charges Exemptions and Other Measures) Regulation 2016 [F2016L00109].

As you know, the Australian Government's overarching cost recovery policy is that, where appropriate, non-government recipients of specific government activities should be charged some or all of the costs of those activities.

In the 1997-98 Budget, Budget Paper No.2 Part II: Revenue Measures, it was stated that the Therapeutic Goods Administration (TGA) would fully recover all costs from industry from 1998-99. The TGA recovers the costs of its regulatory activities through fees and charges imposed on sponsors and manufacturers of therapeutic products.

The *Therapeutic Goods Act 1989* (the Act) provides a legal authority for the TGA to charge for its regulatory activities within the scope of the Act. Applicable fees and charges are prescribed in regulations made under the Act and the *Therapeutic Goods (Charges) Act 1989* (the Charges Act).

The characteristics of the activity determine the type of cost recovery charge used:

- Cost recovery fees: fees charged when a good, service or regulation is provided directly to a specific individual or organisation,
  - TGA fees are used to recover the cost of, usually pre-market, services performed and are scaled (using activity based costing models) to account for the level of effort required and undertaken to provide each service.
- Cost recovery levies: charges imposed when a good, service or regulation is provided to a group of individuals or organisations (e.g. an industry sector) rather than to a specific individual or organisation,

- TGA annual charges are used to recover the cost of activities, usually post-market pharmacovigilance, monitoring and compliance activity, where they cannot reasonably be assigned to individual sponsors. These activities maintain the integrity of the regulated industry to the benefit of all sponsors and importantly, avoid the situation where assigning costs to individual sponsors would deter them from disclosing important public health information or adverse events.

TGA fees and charges were set on an activity basis, including the allocation of corporate and overhead costs, and are reviewed annually. Consultation is undertaken with industry representative bodies and, as required, adjustments applied. These usually comprise increases based on an indexation factor of the Wage Price Index (50 per cent) and Consumer Price Index (50 per cent). However in 2015-16 a lesser rate was applied based on known cost increases only.

In relation to the amendments at items 33 to 35 of F2016L00109, I have attached a table of amendments and a brief description of what they entail.

Thank you for raising this matter.

Yours sincerely

FIONA NASH

Encl

18 MAR 2016

MC16- 006675 -Table of amendments (F2016L00109)

Item No	Fee before amendment	Fee after amendment	Description of amendment
Item 33 of Schedule 4	$335	$335	A fee of $335 is payable for notification of the intention to sponsor a clinical trial using a specified medicine. The fee is prescribed to cover the cost of processing the notification, and the subsequent notification of any additional trial site or sites, in the TGA's systems. For the avoidance of doubt the amendment provided clarity that a fee is payable for each notification of the sponsorship of a site for a clinical trial, and for each notification of an additional trial site or sites.
Item 34 of Schedule 4	$2,085	$2,085	The regulations prescribe a fee for testing a sample of, and providing advice in relation to, a prescription medicine before the listing of that medicine on the Pharmaceutical Benefits Schedule. The amendment makes it clear that this fee is now only payable when advice is provided at the request of the sponsor of the medicine, and therefore additional cost is incurred, and not when it is included in the initial approval decision letter.
Item 35 of Schedule 4	$320	$320	A fee of $320 is payable for notification of the intention to sponsor a clinical trial using a biological mentioned in Item 3 of Schedule 5A of the Therapeutic Goods Regulations 1990. The fee is prescribed to cover the cost of processing the notification, and the subsequent notification of any additional trial site or sites, in the TGA's systems. For the avoidance of doubt the amendment provided clarity that a fee is payable for each notification of the sponsorship of a site for a clinical trial, and for each notification of an additional trial site or sites.

The Hon Dan Tehan MP

Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Minister for Defence Materiel

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7820

{MC16-009991}

21 APR 2016

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Senator Williams Wacka,

Thank you for your letter of 25 February 2016 on behalf of the Standing Committee on Regulations and Ordinances about comments in the *Delegated legislation monitor* No. 2 of 2016. I apologise for the delay in responding.

The Committee has commented on the following two instruments that fall within my portfolio as Minister for Veterans' Affairs:

Veterans' Entitlements (Dispensed Price for Repatriation Pharmaceutical Benefits / Updating Incorporated Documents) Amendment Instrument 2015;

Military Rehabilitation and Compensation (Dispensed Price for MRCA Pharmaceutical Benefits / Updating Incorporated Documents) Amendment Instrument 2015.

The committee's comments relate to variations made by the above instruments to the instruments known as the Repatriation Pharmaceutical Benefits Scheme (RPBS) and the MRCA Pharmaceutical Benefits Scheme ("principal instruments"). Relevantly, the variations replace Schedule 1 (Incorporated Documents) to each of the principal instruments. Schedule 1 lists the documents that are incorporated by reference into each of the principal instruments.

The committee's query is directed to the issue of "Incorporation of extrinsic material". Specifically, the committee has directed its comments to list B of Schedule 1 and has noted the "apparent intention under list B of Schedule 1 to incorporate earlier versions of certain documents (in addition to incorporating those documents as at 1 January 2016)". The committee has sought my advice as to the reason for this approach.

The documents referred to in "list B" are the previous editions of specialised medical reference material, namely the British Pharmacopoeia, the Pharmaceutical Codex and the Australian Pharmaceutical Formulary. The reason for incorporating both the current and previous editions of these documents in the principal instruments is that both the current and earlier editions of these medical reference materials are required for the effective administration of the RPBS and MRCA PBS Schemes.

The earlier editions are often relevant where, for example, there is a clinically justifiable need to prescribe a certain compound, individualised medication regime, or formulation that is not a commercially available product and is no longer listed in the latest edition of the relevant pharmaceutical reference guide. The earlier editions are referred to in subparagraph 41(d) of the principal instruments in the context of describing documents that set the minimum acceptable standard for a pharmaceutical benefit.

A significant number of these earlier editions are still used in the administration of the Schemes and it is not always possible to pinpoint an exact "as in force" date for each edition of each reference guide in list B. Arguably, as these earlier editions are fixed in time and do not change (but are replaced by subsequent editions as updates occur), a collective reference to the previous editions, incorporated in the form in which they exist as at 1 January 2016, is both technically correct as well as practically expedient.

However, I am advised by my department that in light of the query raised by the committee, the schedule will be reviewed when next the principal instruments are amended with a view to clarifying the meaning of note at the end of the Schedule (about para 43 of the principal instruments) and the applicable "as-in-force date" for the material set out in list B.

I trust this information addresses the Committee's query.

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Ref: MS16-000039

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

Dear Senator Williams

The Senate Standing Committee on Regulations and Ordinances has requested advice about the issue identified in the *Delegated legislation monitor* No. 4 of 2016 concerning the *Wine Equalisation Tax New Zealand Producer Rebate Foreign Exchange Conversion Determination (No. 35) 2016* - [F2016L00197] for which I am the responsible minister.

For the purpose of calculating the amount of wine equalisation tax producer rebate to which an eligible New Zealand producer of wine is entitled, one of the foreign currency conversion options available under the legislative instrument is the 'average yearly RBNZ rate', the meaning of which currently incorporates the *Reserve Bank of New Zealand Act.*

The Committee has noted that neither the text of the legislative instrument or the explanatory statement expressly state the manner in which the *Reserve Bank of New Zealand Act* is incorporated.

The Committee further noted that the legislative instrument appears to rely on subsection 33(3) of the *Acts Interpretation Act 1901* and recommends that the explanatory statement identify the relevance of s33(3).

The 'average yearly RBNZ rate' is published by the Commissioner of Taxation on the Australian Taxation Office's website. As claimants can freely and easily access the 'average yearly RBNZ rate' at www.ato.gov.au, it is not necessary for them to consult the extrinsic legislative material to understand the operation of the legislative instrument and use the 'average yearly RBNZ rate'.

The Australian Taxation Office has advised me that they will repeal the above mentioned legislative instrument and register a new determination and corresponding explanatory statement to address the Committee's concerns by removing reference to the *Reserve Bank of New Zealand* Act and identifying the relevance of s33(3), by 1 August 2016.

Kelly O'Dwyer

Parliament House Canberra ACT 2600 Australia
Telephone: 02 6277 7360 Facsimile 02 6273 0434

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:

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