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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's 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

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 Consultation:** includes the committee's guideline on addressing the consultation requirements of the *Legislation Act 2003*.³
- **Appendix 2 Correspondence:** contains the correspondence relevant to the matters raised in Chapters 1 and 2.

Acknowledgement

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

General information

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

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

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

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 14 October 2016 and 3 November 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).¹

Response required

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

Instrument	Amendment Statement of Principles concerning panic disorder No. 101 of 2016 [F2016L01681] Amendment Statement of Principles concerning panic disorder No. 102 of 2016 [F2016L01668]
Purpose	The instruments amend the Statements of Principles concerning panic disorder, determined by the Repatriation Medical Authority
Last day to disallow	13 February 2017
Authorising legislation	<i>Veterans' Entitlements Act 1986</i>
Department	Veterans' Affairs
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny

¹ The committee has deferred its consideration of Civil Aviation Legislation Amendment (Part 132) Regulation 2016 [F2016L01655].

of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instruments update the definition of 'ICD-10-AM code' for the purposes of paragraph 3(c) of Statements of Principles concerning panic disorder No. 68 of 2009 [F2016C00975] and No. 69 of 2009 [F2009C00976] (the 2009 amended Statements of Principles) as follows:

"ICD-10-AM code" means a number assigned to a particular kind of injury or disease in The International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, Australian Modification (ICD-10-AM), Ninth Edition, effective date of 1 July 2015, copyrighted by the Independent Hospital Pricing Authority, ISBN 978 1 76007 020 5.

The committee notes that more recent Statements of Principles make clear that the content of ICD-10-AM code is referenced, rather than incorporated, into the relevant instruments.² However, it is unclear to the committee whether ICD-10-AM code is referenced or incorporated into the 2009 amended Statements of Principles.

As ICD-10-AM, Ninth Edition, copyrighted by the Independent Hospital Pricing Authority, appears to be only available for a fee of \$500, if it is incorporated into the 2009 amended Statements of Principles, the committee will be concerned about how ICD-10-AM may be otherwise freely available. The committee notes that the ESs to the instruments state:

A list of references relating to the above condition is available to any person or organisation referred to in subsection 196E(1)(a) to (c) of the VEA [*Veterans' Entitlements Act 1986*].

However, in addition to access for persons eligible to make a claim for a pension or compensation, or an organisation representing such persons, the committee is interested in the broader issue of access for other parties who might be otherwise interested in the law.

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

2 See, for example, Statement of Principles concerning animal envenomation (Reasonable Hypothesis) (No. 81 of 2016) [F2016L01663], subsection 7(3).

Instrument	Narcotic Drugs Regulation 2016 [F2016L01613]
Purpose	Sets up the regulatory framework for the licensing of the cultivation of cannabis and the production of cannabis and cannabis resins for medicinal and scientific purposes, and the manufacture of drugs under the <i>Narcotic Drugs Act 1967</i>
Last day to disallow	13 February 2017
Authorising legislation	<i>Narcotic Drugs Act 1967</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(b)

Unclear meaning of 'connections and associations'

The regulation implements part of the regulatory framework for licensing the cultivation, production and manufacture of medicinal cannabis under the *Narcotic Drugs Act 1967* (the Act), including specifying information and documentation that must be provided by an applicant when applying for a licence under the Act.

The Act sets out the matters to be taken into account by the Secretary of the Department of Health in determining whether or not an applicant for a licence is a 'fit and proper person'. In respect of natural persons, the Act provides that the Secretary may consider 'the connections and associations of the person (including but not limited to the person's relatives)'.³

Section 5 of the regulation specifies what information must be included in an application for a medicinal cannabis licence or permit. For natural persons, paragraph 5(3)(d) requires an application to include the following information:

details of the connections and associations that the applicant has with other persons (including but not limited to the applicant's relatives) that may affect the applicant's reputation, character, honesty or professional or personal integrity.

The ES to the regulation states that this information is to include 'details of the connections and associations the applicant has with other persons (including but may not be limited to the applicant's relatives)'.

However, neither the regulation nor the ES expressly defines the terms 'connections' or 'associations'. In particular, the requirements appear unclear as to what type of

³ See *Narcotic Drugs Act 1967* section 8A(d).

'connections and associations' must be disclosed, and whether failure to provide sufficiently detailed information may result in an application being denied.⁴ The committee is therefore concerned that persons who apply for a medicinal cannabis licence or permit may not be able to determine with sufficient precision what connections and associations must be disclosed for the purposes of obtaining a licence or permit.

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

Instrument	Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016 [F2016L01617]
Purpose	Amends the process for appointment of approved proceeds of crime examiners, updates references to state and territory proceeds of crime-related orders, and increases remuneration and the 'annual management fee' for the Official Trustee
Last day to disallow	13 February 2017
Authorising legislation	<i>Proceeds of Crime Act 2002</i>
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 regulation provides no information regarding consultation.

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

4 The committee also notes that the Department of Health, Office of Drug Control has issued *Guideline: Fit and Proper Persons and Suitable Staff* (version 1.0, October 2016), <https://www.odc.gov.au/sites/default/files/guideline-fit-and-proper-persons-and-suitable-staff.pdf> (accessed 23 November 2016). It advises that information about an applicant's 'connections and associations' is used to assess non-business relationships and to identify persons who may have an effect on the applicant and who may inappropriately influence the operations of a cannabis licence (p. 7, 11).

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	Therapeutic Goods Amendment (Advisory Committees and Other Measures) Regulation 2016 [F2016L01614]
Purpose	Amends the Therapeutic Goods Regulations 1990 to rationalise the current nine advisory committees in Divisions 1A-1EB of Part 6 of those regulations to five advisory committees
Last day to disallow	13 February 2017
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Item 9 of Schedule 2 to the regulation sets fees for providing advice in relation to a registered over-the-counter medicine at the request of the sponsor of the medicine for the purpose of listing the medicine as a pharmaceutical benefit. If the request does not contain clinical data the fee is \$1530, and if the request contains clinical data or a justification as to why such data is not needed, the fee is \$7860. However, the ES does not explicitly state the basis on which the fees have 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	Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]
Purpose	Introduces role-specific identification cards for aviation and maritime transport security purposes and updates procedures for regulating existing aviation and maritime transport security identification cards
Last day to disallow	13 February 2017
Authorising legislation	<i>Aviation Transport Security Act 2004; Maritime Transport and Offshore Facilities Security Act 2003</i>
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(b)

Insufficient information regarding strict liability offences

The regulation creates strict liability offences for bodies who issue aviation and maritime security identification cards (issuing bodies). The strict liability offences apply where an issuing body becomes aware of a change in its contact details (including names, addresses and telephone numbers) or ABN, ACN or ARBN, and fails to notify the Secretary of the Department of Infrastructure and Regional Development of the change within five working days. The offences carry a penalty of 20 penalty units (currently \$3600).

With respect to these offences, the ES to the regulation states:

It is important for the Secretary of the Department as a regulator to have these details up to date for various reasons, ranging from the ability of the Secretary of the Department to urgently communicate that an ASIC [aviation security identification card or MSIC (maritime security identification card)] holder constitutes a threat to aviation security, to the legislative complications that change in a corporate structure of an issuing body may cause.

The regulation also creates a strict liability offence for a person who holds or has applied for an MSIC and fails to notify their issuing body of a change of name within 30 days.⁵ This offence carries a penalty of 5 penalty units (currently \$900). With respect to this offence, the ES to the regulation states:

As an ASIC [sic] is a security identification card, it should be issued to the correct legal name of a person to meet the security outcome.

⁵ See new regulation 6.08LCA.

However, given the limiting nature and potential consequences of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. The committee notes that in respect of the above offences the ES provides only a brief justification for the framing of the offences and does not provide advice as to whether issuing bodies or MSIC holders or applicants have been provided with information that clearly specifies the consequences of a failure to comply with the notification requirements. Further, the ES does not provide information as to the notification process that will be followed to inform an issuing body or MSIC holder or applicant that they have committed an offence.

The committee also draws the minister's attention to the discussion of strict liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers*,⁶ as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

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

Instrument	Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016 [F2016L01625]
Purpose	Recognises the Queensland Home Warranty Scheme as a statutory compensation scheme and remakes the Farm Management Deposit Regulations
Last day to disallow	13 February 2017
Authorising legislation	<i>A New Tax System (Goods and Services Tax) Act 1999; Banking Act 1959; Income Tax Assessment Act 1936; Income Tax Assessment Act 1997; Taxation Administration Act 1953</i>
Department	Treasury
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

⁶ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf> (accessed 16 November 2016).

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 regulation states:

Consultation on Schedule 1 to the Regulation was undertaken with affected states and territories. Public consultation was undertaken on Schedule 2 to the Regulation.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the committee considers that the ES for the regulation, while stating that consultation occurred in relation to the making of the regulation, does not describe the nature of the consultation undertaken (such as, for example, the manner and purpose of the consultation, the parties to the consultation; and the issues raised in, and outcomes of, the consultation).

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

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

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that new regulation 393-15, inserted by item 2 of the regulation, incorporates the 'Natural Disaster Relief and Recovery Determination Version 2.0 determined by the Minister for Justice on 29 October 2015' (NDRR determination). The committee understands the NDRR determination to be incorporated as at the commencement of the regulation. With reference to the NDRR determination, the ES states:

Schedule 2 to the Regulation updates a reference to the Natural Disaster Relief and Recovery Arrangements (NDRRA) concerning repayment in the event of a natural disaster to refer to the most recent NDRRA 2012 determination, version 2 of 29 October 2015.

However, neither the text of the regulation nor the ES indicates how the NDRR determination can be freely obtained.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of where an incorporated document may be accessed fails to satisfy the requirements of the *Legislation Act 2003*.

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.

Multiple instruments that appear to rely on section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*)

Instruments	Amendment of List of Exempt Native Specimens - Freshwater and Marine Animals (12/10/2016) [F2016L01612] Narcotic Drugs Regulation 2016 [F2016L01613] Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

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

The instruments identified above incorporate Commonwealth disallowable legislative instruments. However, neither the text of the instruments nor their accompanying ESs state the manner in which they 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 Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time) of external documents, including other legislative instruments. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee 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 persons interested in or affected by an instrument, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated.

The committee draws this matter to the attention of ministers.

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

Instruments	<p>CASA 115/16 - Instructions — V.F.R. flights conducted by CGG Aviation (Australia) Pty Ltd [F2016L01662]</p> <p>Health Insurance (Optical Coherence Tomography) Determination 2016 [F2016L01691]</p> <p>Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649]</p> <p>Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 7) [F2016L01665]</p> <p>Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01627]</p> <p>Therapeutic Goods (Repeal of Listing Notices) Notice 2016 [F2016L01635]</p> <p>Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2016 – 2017 Amendment No. 2 [F2016L01643]</p> <p>Woomera Prohibited Area Rule 2014 Determination of an Exclusion Period for the Green Zone for Financial Year 2016-2017 Amendment No. 2 [F2016L01644]</p>
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.⁷

⁷ 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 following the receipt of additional information from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

Instrument	AD/A320/21 Amdt 1 - Main Landing Gear Wheel Axle [F2016L01470] AD/BEECH 300/8 Amdt 2 - Wing Attach Fittings, Bolts and Nuts [F2016L01472]
Purpose	These instruments correct a typographical error and amend life limits for parts to correspond with those contained in the aircraft manufacturer's documentation
Last day to disallow	1 December 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> 8 of 2016

The committee commented in relation to two matters as follows:

Incorporation of documents

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

With reference to the above the committee notes that:

- AD/A320/21 Amdt 1 - Main Landing Gear Wheel Axle [F2016L01470] (Amdt 1 instrument) incorporates French Direction Générale de l'Aviation Civile (DGAC) AD 90-096-010 (B), dated 2 May 1990 (DGAC); and
- AD/BEECH 300/8 Amdt 2 - Wing Attach Fittings, Bolts and Nuts [F2016L01472] (Amdt 2 instrument) incorporates Beechcraft Structural

Inspection and Repair Manual 98-39006, Section 57-18-01, Chart 201 (Model 300) or Section 57-18-02, Chart 201 (B300/B300C) (BSIR).

However, neither the text of Amdt 1 and 2 instruments nor their explanatory statements (ESs) expressly state the manner in which DGAC and BSIR are incorporated.

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

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

Access to documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that Amdt 1 instrument incorporates DGAC; and Amdt 2 instrument incorporates BSIR. However, neither the text of the instruments nor the ESs provide a description of these documents or indicates how they may be freely obtained.

The committee requests 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 regarding incorporation of documents into these instruments, and the need to include a description of such documents and how they can be obtained, in the explanatory statements.

CASA has advised that both of the instruments cited above will be remade to address these issues.

Committee response

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

In concluding this matter, the committee notes the minister's advice that CASA will remake the instruments to include information on how documents are incorporated into the instruments and how they can be obtained.

Instrument	Consular Fees Amendment (Fees and Indexation) Regulation 2016 [F2016L01379]
Purpose	Amends the Consular Fees Regulations 1990 to increase the consular fees and index them annually in line with the Consumer Price Index
Last day to disallow	24 November 2016
Authorising legislation	<i>Consular Fees Act 1955</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a) and (b)
Previously reported in	<i>Delegated legislation monitor 7 of 2016</i>

Unclear basis for determining fees

The committee commented as follows:

The regulation amends the Consular Fees Regulations 1990 to increase consular fees and index them annually in line with the Consumer Price Index (CPI).

The ES to the regulation states:

Notarial fees have not increased since the current regulations came into effect on 1 July 2000. The new fee structure simplifies the current fee structure to facilitate a move to online payment options in the future and better align with notarial fees charged by commercial providers...The new fees also account for inflation (with annual increases based on the latest annual CPI published by the Australian Bureau of Statistics).

The committee's usual expectation in cases where instruments of delegated legislation carry financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

With reference to this expectation, the committee notes that, while the ES for the regulation states that the new fees account for inflation, it provides no indication as to the basis on which the fee has been calculated for the purposes of the making of the regulation.

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

Minister's response

Mr Murray Hansen, Chief of Staff, Minister for Foreign Affairs, advised:

The basis for the increase in notarial fees was a recommendation from the Functional and Efficiency Review of the Foreign Affairs and Trade Portfolio completed in November 2015. The subsequent fee increase reflected inflation in Australia since July 2000 (approximately 155 per cent). The fee increase was also benchmarked against commercial providers, costs for delivering notarial services and the approximately 40 per cent increase in demand since 2010–11. Further, to help simplify the administration of notarial services, fees for similar notarial acts have been set at the same level, reflecting the comparable effort required. The new fee structure compares favourably to recommended notarial fees for Australian state public notaries.

Committee response

The committee notes that Mr Murray Hansen, Chief of Staff, Minister for Foreign Affairs, provided a response to the committee's request for the advice of the minister in relation to this matter.

Noting the additional information provided outlining the basis on which the consular fees in the regulation have been calculated, the committee has concluded its examination of this issue.

However, the committee wishes to remind the Minister for Foreign Affairs of its longstanding practice and expectation that the responsible minister (not ministerial or departmental employees) respond to concerns raised by the committee.

Retrospective commencement

The committee commented as follows:

Item 6 of the regulation inserts a transitional provision into the Consular Fees Regulations 1990 to provide that that the increased fees will apply to consular acts performed on or after 1 January 2017, even if an application or request relating to the consular act was made before that day.

The committee notes that, although the commencement of the regulation is not retrospective, it prescribes fees for the future based on antecedent facts (that is, the existence of an earlier request or application). As a consequence, it appears that a person who makes an application or request for a consular service prior to the commencement of the regulation on 1 January 2017 may be required to pay a higher fee than that which applied at the time that they made the request or application. In this regard, the committee notes that the Australian Government, Department of Foreign Affairs and Trade website sets out the current fees for consular acts. However, it does not appear to alert people to the increased fees that will apply from 1 January 2017, other than to state:

Please note that fees are reviewed from time to time and may vary to the above table when you present your application. A full listing of fees is available in the *Consular Fees Regulations 1990*.¹

The committee's usual approach in cases such as this is to regard the instrument 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 23(3)(b)). The committee notes that the ES for the regulation does not address this issue.

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

Minister's response

Mr Murray Hansen, Chief of Staff, Minister for Foreign Affairs, advised:

The Committee also sought assurance that the retrospective effect at item 6 of the regulation would not unduly trespass on personal rights and liberties, noting that the current website does not alert people to the increased fees that will apply from 1 January. The Department confirms that its implementation plan includes notification of stakeholders of the planned increase in fees, immediately following the conclusion of the disallowal period on 24 November. Notification will be via a departmental media release and by means of notices on DFAT [Department of Foreign Affairs and Trade] websites, including those of overseas missions and Smartraveller.

Committee response

The committee notes that Mr Murray Hansen, Chief of Staff, Minister for Foreign Affairs, provided a response to the committee's request for the advice of the minister in relation to this matter.

Noting the additional information that stakeholders will be notified of the planned increase in fees immediately following the conclusion of the disallowance period on 24 November 2016, the committee has concluded its examination of the instrument.

However, the committee wishes to remind the Minister for Foreign Affairs of its longstanding practice and expectation that the responsible minister (not ministerial or departmental employees) respond to concerns raised by the committee.

Senator John Williams (Chair)

1 Australian Government, Department of Foreign Affairs and Trade, *Notarial services and document legalisation overseas*, <http://smartraveller.gov.au/services/legalising-documents/pages/overseas.aspx> (accessed 11 October 2016).

Appendix 1

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.

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

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

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

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

Describing the nature of consultation

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

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

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

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as

requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

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

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

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

Seeking further advice or information

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

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Senate Regulations and Ordinances Committee
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Appendix 2

Correspondence



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

PDR ID: MC16-005665

21 NOV 2016

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


Dear Senator Williams

Thank you for your letter of 10 November 2016 regarding the Senate Standing Committee on Regulation and Ordinance's *Delegated Legislation Monitor No. 8 of 2016* and the Airworthiness Directives *AD/A320/21 Amdt1 – Main Landing Gear Wheel Axle [F2016L01470]* and *AD/BEECH 300/8 Amdt2 – Wing Attach Fitting, Bolts and Nuts [F2016L01472]*.

I have sought advice from the Civil Aviation Safety Authority (CASA) in relation to the Committee's concerns regarding incorporation of documents into these instruments, and the need to include a description of such documents and how they can be obtained, in the explanatory statements.

CASA has advised that both of the instruments cited above will be remade to address these issues.

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

Yours sincerely

DARREN CHESTER



OFFICE OF THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

regords.sen@aph.gov.au

Dear Senator

Thank you for the Committee's letter of 13 October 2016 seeking clarification of issues identified in the monitor, regarding the Consular Fees Amendment (Fees and Indexation) Regulation 2016.

The basis for the increase in notarial fees was a recommendation from the Functional and Efficiency Review of the Foreign Affairs and Trade Portfolio completed in November 2015. The subsequent fee increase reflected inflation in Australia since July 2000 (approximately 155 per cent). The fee increase was also benchmarked against commercial providers, costs for delivering notarial services and the approximately 40 per cent increase in demand since 2010-11. Further, to help simplify the administration of notarial services, fees for similar notarial acts have been set at the same level, reflecting the comparable effort required. The new fee structure compares favourably to recommended notarial fees for Australian state public notaries.

The Committee also sought assurance that the retrospective effect at item 6 of the regulation would not unduly trespass on personal rights and liberties, noting that the current website does not alert people to the increased fees that will apply from 1 January. The Department confirms that its implementation plan includes notification of stakeholders of the planned increase in fees, immediately following the conclusion of the disallowal period on 24 November. Notification will be via a departmental media release and by means of notices on DFAT websites, including those of overseas missions and Smartraveller.

I trust this information is of assistance.

Yours sincerely

Murray Hansen
Chief of Staff

11 NOV 2016