The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Contents

Chapter 2 – Concluded matters

Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

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

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

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the

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

preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Guidelines on consultation and incorporation of documents**: includes the committee's guidelines on addressing the consultation requirements of the *Legislation Act 2003*[3] and its expectations in relation to instruments that incorporate material by reference.
- **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]

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

3 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.

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

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 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 25 November 2016 and 22 December 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/BEECH 300/8 Amdt 3 - Wing Attach Fittings, Bolts and Nuts [F2016L01906]**
Purpose	Clarifies the version of the Beechcraft Structural Inspection and Repair Manual that is to be complied with
Last day to disallow	9 May 2017
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

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 (i.e. without cost) 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 AD/BEECH 300/8 Amdt 3 - Wing Attach Fittings, Bolts and Nuts [F2016L01906] (the instrument) incorporates, as in force at 5 December 2016, sections of Beechcraft Structural Inspection and Repair Manual 98-39006 (manual). The ES to the instrument states that the manual may be obtained directly from Beechcraft via its website.

While the committee notes that the instrument has been made in response to previous concerns it raised with respect to access to the incorporated manual,[1] the committee remains concerned about this issue as it appears that the manual can only be obtained for a fee and the ES does not provide information about whether it can otherwise be accessed for free by persons interested in or affected by the instrument.

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

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

Instrument	**AD/GAS/1 Amdt 12 - Inspection, Test and Retirement [F2016L01941]**
Purpose	Repeals and replaces AD/GAS/1 Amdt 11 to specify what versions of incorporated documents must be used
Last day to disallow	9 May 2017
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

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

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents

1 See *Delegated legislation monitors* 8 and 9 of 2016.

are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates, as in force from time to time, AS 2030 and paragraph 10.2.2 of AS2337.1-2004. The ES for the instrument states:

> Australian Standard 2337.1-2004 (and other Australian Standards) are available for purchase from various suppliers, including SAI Global (from their website: https://www.saiglobal.com).

While the committee notes that the instrument has been made in response to previous concerns it raised with respect to access to incorporated documents,[2] the committee remains concerned about this issue, as it appears that AS 2030 and AS2337.1-2004 can only be obtained for a fee and the ES does not provide information about whether these standards can otherwise be accessed for free by persons interested in or affected by the instruments.

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

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

Instrument	**Airports Amendment (Airport Sites) Regulation 2016 [F2016L01810]**
Purpose	Amends the descriptions of airport sites in the Airports Regulations 1997 to reflect changes in State and Territory land title registers for all federal leased airports
Last day to disallow	28 March 2017
Authorising legislation	*Airports Act 1996*
Department	Infrastructure and Transport
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is

2 See *Delegated legislation monitors* 7 and 8 of 2016.

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 the following information:

> Section 161(1) of the Act [*Airports Act 1996*] provides as follows: 'If there is an airport lease relating to an airport site for an airport, the Governor General must not make any regulations varying the site unless the lessee has given written consent to the making of those regulations.' This consent, where required, has been obtained.

While the committee does not interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* 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 the committee's view, the general statement that, where required under enabling legislation, consent to the making of regulations has been obtained, is not sufficient to meet the requirement that the ES describe the nature of any consultation undertaken.

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

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

Instrument	**CASA EX166/16 - Exemption—use of radiocommunication system in firefighting operations (Victoria) [F2016L01793]**
Purpose	Exempts persons on board an aircraft performing firefighting services on behalf of the Victorian Government and the Country Fire Authority of Victoria from the requirement to be qualified to transmit on radio frequencies used for ensuring air navigation safety
Last day to disallow	27 March 2017
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

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

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

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

Instrument	**Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829]**
Purpose	Amends the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 to give effect to United Nations Security Council Resolution 2270 (2016)
Last day to disallow	30 March 2017
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)

Insufficient information regarding strict liability offences

Regulation 11B creates offences for engaging in sanctioned commercial activity. Strict liability applies to the elements of the offences that the sanctioned commercial activity is not an authorised commercial activity.

Regulation 11C creates offences relating to holding a bank account. Strict liability applies to the elements of the offences that the minister has directed the person, by written notice, to close the bank account.

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857] designates regulations 11B and 11C as UN sanction enforcement laws. This means that contravention of these regulations is punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units (currently $450 000).[3]

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

> The Regulation provides for strict liability in new Regulation 11B and new Regulation 11D. However, in effect this means that strict liability applies to the existence or otherwise of a permit or a notice from the Minister, respectively. It does not apply to any other elements of the offences. This

3 See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857], which designates certain regulations of the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829] as UN Sanction Enforcement Laws under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

is appropriate because either the permit (or notice) exists or it does not exist.

The committee notes that, as drafted, Regulation 11D does not appear to create a strict liability offence.

Given the 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.

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*,[4] 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 the above.

Instrument	**Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857]**
Purpose	Amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to reflect the making of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829]
Last day to disallow	9 May 2017
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857] (the amendment declaration) replaces Schedule 1 of Charter of the United Nations (UN Sanction Enforcement Law)

4 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 31 January 2017).

Declaration 2008 [F2016C00782] (the principal declaration) to specify provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to the *Charter of the United Nations Act 1945*.

The committee previously requested advice from the minister in relation to the apparent inclusion of repealed regulations in this Schedule.[5] The minister's response advised that these regulations should not appear in the principal declaration, and undertook to amend the declaration and its ES, as soon as practicable, to remove the references to the UN sanction enforcement laws which no longer exist.[6] However, the committee notes that the repealed regulations are included in the replacement Schedule 1.

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

Instrument	**Code for the Tendering and Performance of Building Work 2016 [F2016L01859]**
Purpose	Sets the Australian Government's standards of conduct for all building contractors or building industry participants that seek to be, or are, involved in Commonwealth funded building work
Last day to disallow	9 May 2017
Authorising legislation	*Building and Construction Industry (Improving Productivity) Act 2016*
Department	Employment
Scrutiny principle	Standing Order 23(3)(c)

Availability of merits review

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

With reference to the above, the committee notes that section 18 of the Code for the Tendering and Performance of Building Work 2016 [F2016L01859] (the code) provides for the imposition of exclusion sanctions on an entity that is covered by the

5 See *Delegated legislation monitors* 6 and 8 of 2016.

6 Regulation 11 of Charter of the United Nations (Sanctions — Côte d'Ivoire) Regulations 2008; and regulation 4N of Customs (Prohibited Imports) Regulations 1956 no longer exist.

code. Exclusion sanction is defined in subsection 3(3) as a period during which a building entity covered by the code is not permitted to tender for, or be awarded, Commonwealth funded building work.

If the ABC Commissioner (the commissioner) is satisfied that a code covered entity has failed to comply with the code, the commissioner may refer the matter to the minister with recommendations that a sanction should be imposed. If such a matter has been referred to the minister, the minister may impose an exclusion sanction on the entity, or issue a formal warning to the entity that a further failure may result in the imposition of an exclusion sanction.

While section 19 of the code requires the minister to provide written notification of their intention to impose an exclusion sanction, and provides for the entity to make a submission in relation to the proposed sanction, it does not appear that the minister's decision to impose an exclusion sanction is subject to merits review. The ES to the code does not provide information as to whether the decision to impose an exclusion sanction possesses characteristics that would justify the exclusion of such decisions from merits review.

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

Instrument	**Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01904]**
Purpose	Allows the Commonwealth to charge fees for performing functions relating to certain international travellers using gateway airports in a special processing area
Last day to disallow	9 May 2017
Authorising legislation	*Customs Act 1901*; *Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01904] (the regulation) allows the the Commonwealth to make an agreement with an international airport operator, international airline, and/or a ground handling operator relating to the amount and payment of fees for the provision of priority border clearance services.

With respect to the payment of fees for the provision of such services, the ES to the regulation states:

> New subregulation 5.41C(1) provides that if, at the request of a person, the Secretary of the Department of Immigration arranges for a statutory function to be performed in a special processing area for the performance of the function at a gateway airport, and in relation to one or more international travellers using the gateway airport, the person must pay the Commonwealth an agreed fee in respect of the performance of the statutory function and any other statutory functions in relation to those international travellers.
>
> A note clarifies that an agreed fee in respect of the performance of the statutory function and other statutory functions may be paid in anticipation of the performance of the function.

With respect to the agreements relating to the amount and payment of fees for the provision of such services, the ES to the regulation states:

> New subregulation 5.41C(2) provides that, on behalf of the Commonwealth, the Secretary of the Department of Immigration may make, with a person making a request described in subregulation 5.41C(1), an agreement relating to the amount and payment of a fee that is or will be payable under subregulation 5.41C(1).

The committee also notes that the regulation impact statement (RIS), attached to the ES, states:

> Fixed term contracts ensure that the Government can recover the cost of services it provides and that airport operators can reliably offer premium services to international travellers without impacting on existing traveller facilitation rates. This will allow airport operators to develop products which could be marketed to airlines to streamline and enhance their traveller experience during arrival in and departure from Australia.

However, notwithstanding the above discussion in the RIS about government being able to recover the cost of services it provides pursuant to the regulation, it is unclear to the committee whether the basis for the agreed fees will, in fact, reasonably reflect the cost of providing the service.

It is also unclear from the text of the regulation and its ES whether the agreed fees for the provision of priority border clearance services will be set by legislative instrument or otherwise made publically available.

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

Instrument	**Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796]**
Purpose	Extends export control legislation relevant to plant and plant products to Norfolk Island
Last day to disallow	27 March 2017
Authorising legislation	Export Control (Orders) Regulations 1982
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(b) and (a)

Insufficient justification of strict liability offences

Sections 9 and 13 of Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796] (the order) create strict liability offences of issuing a false certificate and altering a certificate without authorisation. The offences are subject to 50 and 20 penalty units, respectively (currently $9000 and $3600).

Given the 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 this case the ES provides no explanation of or justification for the framing of the offence.

The committee 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*,[7] 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 the above.

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.

7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 31 January 2017).

Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the definitions of phytosanitary certificate and re-export phytosanitary certificate incorporate the International Plant Protection Convention of the Food and Agriculture Organization of the United Nations (IPPC). However, neither the text of the order, nor the ES, states the manner in which the IPPC is incorporated.

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

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Attorney-General's Department
Last day to disallow	9 May 2017
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional 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 committee notes that, in *Williams No. 2*,[8] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying

8 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924] (the regulation) adds new item 186 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative authority for Commonwealth government spending for the Safer Communities Fund Program.

The committee notes that the objective of this program is:

> To address crime and antisocial behaviour, and to protect community centres, pre-schools, schools and places of worship that are at high risk of attack, harassment or violence as a result of racial or religious intolerance.

The ES for the regulation 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 communications power (section 51(v)); and
> - the external affairs power (section 51(xxix)).

The regulation thus appears to rely on the communications power and the external affairs powers as the relevant heads of legislative power to authorise the addition of item 186 to Schedule 1AB (and therefore the spending of public money under it).

In relation to the communications power, it is unclear to the committee how the funding of the Safer Communities Fund Program is sufficiently connected to the power to make laws with respect to postal, telegraphic, telephonic and other like services so as to be authorised by the communications power.

In relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.[9] The committee therefore expects that the specific articles of international treaties being relied on are referenced and explained in either the instrument or the ES. However, while the regulation states that it is giving effect to Australia's obligations under International Covenant on Civil and Political Rights, particularly Article 18, and the International Convention on the Elimination of All

9 *Victoria v Commonwealth* (1996) 187 CLR 416.

Forms of Racial Discrimination, it does not explain how the regulation is appropriately adapted to implement specific obligations under these articles.

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

Previously unauthorised expenditure

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

New table item 186 to Part 4 of Schedule 1AB appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund the Safer Communities Fund Program. In relation to the source of funding for the program the ES states:

> Funding for this item will come from Program 1.7: National Security and Criminal Justice, which is part of Outcome 1: A just and secure society through the maintenance and improvement of Australia's law and justice framework and its national security and emergency management system. Details will be set out in the *Portfolio Additional Estimates Statements 2016-17, Attorney-General's Portfolio*.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, this program would properly have been contained in an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921]** **Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925]**
Purpose	These regulations amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Infrastructure and Regional Development
Last day to disallow	9 May 2017
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional 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 committee notes that, in *Williams No. 2*,[10] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly states, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921] (the No. 1 regulation) and Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925] (the No. 2 regulation) add new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations)

10 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

which seek to establish legislative authority for spending in relation to these items. New table items 190 and 191 establish legislative authority for the Commonwealth government to fund the Regional Jobs and Investment Package and the Building Better Regions Fund.

The committee notes that the objective of the Regional Jobs and Investment Package is:

> To encourage investment, employment, productivity and innovation in regions affected by structural economic change and foster the capacity of such regions to participate in international and domestic trade, by providing grants for projects which support economic diversification, growth and employment in regions.

The committee also notes that the objective of the Building Better Regions Fund is:

> To support regional and remote communities by providing grants for infrastructure and community investment projects which create jobs and encourage economic growth in such communities.

The regulations provide that the objectives of the programs also have the effect they would have if they were limited to providing funding in relation to eleven purposes tied to a Constitutional head of power.

The ES for the No. 1 regulation identifies the constitutional basis for expenditure in relation to the Regional Jobs and Investment Package 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 interstate and international trade and commerce power (section 51(i));
> - the communications power (section 51(v));
> - the aliens power (section 51(xix));
> - the social welfare power (section 51(xxiiiA));
> - the immigration power (section 51(xxvii));
> - the race power (section 51(xxvi));
> - the power to grant financial assistance to States (section 96);
> - the external affairs power (section 51(xxix));
> - the railway construction and extension power (section 51(xxxiv)); and
> - the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)).

The ES for the No. 2 regulation identifies the constitutional basis for expenditure in relation to the Building Better Regions Fund in substantially the same manner, with the addition of the territories power (section 122).

The committee notes that the objectives of the programs, when read in conjunction with the constitutional authority set out in the regulations, appear to be drafted in a manner similar to 'severability provisions' in primary legislation. Severability provisions are designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power under the Constitution.

Severability provisions operate in conjunction with section 15A of the *Acts Interpretation Act 1901*, which provides that Acts shall be read and construed so as not to exceed the legislative power of the Commonwealth. Section 13(1)(a) of the *Legislation Act 2003* applies section 15A of the *Acts Interpretation Act 1901* to legislative instruments.

With respect to section 15A of the *Acts Interpretation Act 1901*, the committee notes that the Office of Parliamentary Counsel, Drafting Direction No. 3.1 on constitutional law issues, provides the following guidance for drafting severability provisions:

> Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.[11]

Noting that section 15A is subject to limitations, the committee's consideration of legislative instruments that appear to rely on the ability of a court to read down provisions must involve an assessment of the effectiveness of any severability or reading down provisions to enable a legislative instrument to operate within available heads of legislative power.

Drafting Direction No. 3.1 also provides the following example of one of the limitations of section 15A:

> …if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did

11 Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 2 February 2016), p. 9.

> not exhaust the purported operation of the operative provision in question.[12]

With reference to the committee's ability to effectively undertake its scrutiny of regulations adding items to Part 4 of Schedule 1AB to the FFSP Regulations, the committee notes its preference that an ES to a regulation includes a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulations supports the funding for the Regional Jobs and Investment Package and the Building Better Regions Fund, and the ESs to the regulations do not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the programs.

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

Previously unauthorised expenditure

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

New table items 190 and 191 to Part 4 of Schedule 1AB appear to authorise expenditure not previously authorised by legislation. These items establish legislative authority for the Commonwealth government to fund the Regional Jobs and Investment Package and the Building Better Regions Fund. In relation to the source of funding for the programs the ESs to each of the regulations state:

> Funding for this item will come from Program 3.1: Regional Development, which is part of Outcome 3: Strengthening the sustainability, capacity and diversity of regional economies including through facilitating local partnerships between all levels of government and local communities; and providing grants and financial assistance. Details will be set out in the *Portfolio Additional Estimates Statements 2016-17: Infrastructure and Regional Development Portfolio*.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, these programs would properly have been contained in an appropriation bill not for the ordinary annual services of

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12 Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 2 February 2016), p. 9.

government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

The committee draws the above to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016 [F2016L01922]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Social Services
Last day to disallow	9 May 2017
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Constitutional 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 committee notes that, in *Williams No. 2*,[13] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly states, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016 [F2016L01922] (the regulation) replaces table item 83 in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative

13 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

authority for spending in relation to the Commonwealth Financial Counselling and Financial Capability – Capability Building program.

The committee notes that the objective of the Commonwealth Financial Counselling and Financial Capability – Capability Building program is:

1. To provide funding for an entity to:
   (a) develop and provide online information and resources for financial counsellors, financial capability workers and consumers; and
   (b) provide the national 1800 financial counselling and financial capability Helpline telephone service (the Helpline), including the development of national standards and materials for the Helpline.
2. To provide funding for services to be provided by an entity directed at supporting:
   (a) attendance at national financial counselling and financial capability conferences by the following:
      i. financial counsellors and financial capability workers for the Helpline;
      ii. residents of a Territory; and
   (b) the presentation of sessions at national financial counselling and financial capability conferences that relate to any of the following:
      i. bankruptcy or insolvency;
      ii. invalid or old-age pensions within the meaning of paragraph 51 (xxiii) of the Constitution;
      iii. allowances, pensions, endowments, benefits or services to which paragraph 51(xxiiiA) of the Constitution applies;
      iv. immigrants or aliens;
      v. the Helpline;
      vi. online information or resources relevant to financial counselling or financial capability;
      vii. particular issues confronting the residents of Territories.
3. To provide funding for services to be provided by an entity directed at supporting the presentation of sessions at national financial counselling and financial capability conferences, to the extent that the presentation amounts to a measure designed to meet Australia's obligations under:
      i. the Convention on the Rights of the Child; or
      ii. the Convention on the Rights of Persons with Disabilities; or
      iii. the Convention on the Elimination of All Forms of Discrimination Against Women; or

iv. the International Covenant on Economic, Social and Cultural Rights.

4. To provide funding for services to be provided by an entity directed at supporting the following:

   (a) attendance at national financial counselling and financial capability conferences by the following:

      i. Indigenous persons;

      ii. persons who provide financial counselling and financial capability services predominantly to Indigenous persons;

      iii. the presentation of sessions at national financial counselling and financial capability conferences that relate to particular issues confronting Indigenous persons.

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

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the communications power (section 51(v));
> - the bankruptcy and insolvency power (section 51(xvii));
> - the social welfare power (section 51(xxiiiA));
> - the territories power (section 122);
> - the invalid and old age pensions power (section 51(xxiii));
> - the aliens power (section 51(xix));
> - the immigration power (section 51(xxvii));
> - the external affairs power (section 51(xxix)); and
> - the race power (section 51(xxvi)).

The committee notes that the objective of the Commonwealth Financial Counselling and Financial Capability – Capability Building program, when read in conjunction with the constitutional authority set out in the regulation, appears to be drafted in a manner similar to 'severability provisions' in primary legislation. Severability provisions are designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power under the Constitution.

Severability provisions operate in conjunction with section 15A of the *Acts Interpretation Act 1901*, which provides that Acts shall be read and construed so as not to exceed the legislative power of the Commonwealth. Section 13(1)(a) of the

Legislation Act 2003 applies section 15A of the *Acts Interpretation Act 1901* to legislative instruments.

With respect to section 15A of the *Acts Interpretation Act 1901*, the committee notes that the Office of Parliamentary Counsel, Drafting Direction No. 3.1 on constitutional law issues, provides the following guidance for drafting severability provisions:

> Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.[14]

Noting that section 15A is subject to limitations, the committee's consideration of legislative instruments that appear to rely on the ability of a court to read down provisions must involve an assessment of the effectiveness of any severability or reading down provisions to enable a legislative instrument to operate within available heads of legislative power.

Drafting Direction No. 3.1 also provides the following example of one of the limitations of section 15A:

> …if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did not exhaust the purported operation of the operative provision in question.[15]

With reference to the committee's ability to effectively undertake its scrutiny of regulations adding items to Part 4 of Schedule 1AB to the FFSP Regulations, the committee notes its preference that an ES to a regulation includes a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulation supports the funding for the Commonwealth Financial Counselling and Financial Capability – Capability Building program, and the

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14 Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 2 February 2016), p. 9.

15 Australian Government, Office of Parliamentary Counsel, Drafting Direction No. 3.1 Constitutional law issues, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 2 February 2016), p. 9.

ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

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

Instrument	**Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004]**
Purpose	Creates rules for the registration, discipline, and remuneration of personal insolvency practitioners
Last day to disallow	9 May 2017
Authorising legislation	*Bankruptcy Act 1966*
Department	Attorney-General
Scrutiny principle	Standing Order 23(3)(a), (c) and (d)

Sub-delegation

Section 50-20 of the Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004] (the bankruptcy rules) provides that the chair of a Part 2 committee must be the Inspector-General in Bankruptcy or the Inspector-General's delegate.[16] Under subection 11(4) of the *Bankruptcy Act 1966* (Bankruptcy Act), the Inspector-General may, by signed instrument, delegate to an authorised employee all or any of the powers and functions of the Inspector-General under that Act. Section 5 of the Bankruptcy Act defines 'authorised employee' as an APS employee whose duties include supporting the Inspector-General in the performance of his or her functions, or in the exercise of his or her powers, under that Act.

However, the committee notes that neither the instrument nor the ES provides information about whether a delegate who acts as the chair of a Part 2 committee is required to be at a certain APS level, such as a member of the senior executive service.

16 A Part 2 committee consists of three persons who make decisions as to whether a person will be registered as a practitioner, or have their registration taken away. A Part 2 committee will be formed at the point at which a matter is referred by the Inspector-General. The committee must consist of an industry representative, a representative of the regulator and an appointee of the Minister.

In addition, the committee is concerned that section 50-20 contains no requirement that the Inspector-General be satisfied that a delegate acting as Chair of a Part 2 committee is appropriately trained or qualified for the role.

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.

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

Time limit to have administrative decision reviewed

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. This scrutiny principle is relevant to the committee's consideration of legislation which sets time limits for applications to have administrative decisions reviewed.

Section 90-80 of the bankruptcy rules sets a 60-day time limit for making applications to the court in relation to an act, omission or decision of a trustee of a regulated debtor's estate. The committee notes that this 60-day time limit does not appear to be envisaged in the enabling legislation and the ES does not provide information as to why the 60-day limit is necessary and appropriate. Further, the ES does not provide information as to whether persons who may be affected by this provision will be provided with information that clearly specifies the consequences of failure to make an application within the specified time limit.

Section 90-80 also exempts applications to the court in relation to an act, omission or decision of a trustee of a regulated debtor's estate which are made by the Inspector-General. The ES states that this exemption from the time limit is required 'as the Inspector-General requires further flexibility in the enforcement and regulation of trustees'. The ES does not provide any further information as to why it is necessary and appropriate to exempt the Inspector-General from the 60-day time limit to make such an application.

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

Part 2 committee proceedings not bound by rules of evidence

The bankruptcy rules provide at section 50-55 that a Part 2 committee must observe natural justice and is not bound by any rules of evidence but may inform itself on any matter it sees fit.

The ES to the states:

> The requirement to observe natural justice brings with it an obligation for the committee to provide a practitioner with procedural fairness and that the decision must be made free from actual or apprehended bias. While it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to afford natural justice, there are a range of procedural factors which it is expected that a committee will ensure are present in considering a matter, such as:
>
> - adequate disclosure to the practitioner so effective representations may be made
> - reasonable opportunity (or real chance) to present the person's case to the decision-maker, and the requirement to consider the case or the representations, and
> - opportunity for a hearing where the practitioner can be legally represented, if they so wish.
>
> While not exhaustive of all circumstances which would represent a breach of natural justice, it will not be acceptable for a member of the committee to play multiple roles of accuser, witness or prosecutor and decision-maker. For that reason the delegate of the regulator would be expected to not have played a role in the investigation of the practitioner or the preparation of the case being considered.

The ES further provides:

> …committee proceedings will be inquisitorial proceedings where members are not restrained by judicial rules of evidence. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not.

The committee acknowledges that some Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal,[17] which also is not bound by the rules of evidence.[18] However, the committee is interested in exploring why it is appropriate for Part 2 committee proceedings not to be bound by the rules of evidence; why the duty for Part 2 committees to afford procedural fairness (as opposed to natural justice) is not specified in the legislative instrument; and whether consideration has

17 See, for example, new section 96-1 of the Insolvency Practice Schedule (Bankruptcy) which was inserted into the *Bankruptcy Act 1966* by the *Insolvency Law Reform Act 2016*.

18 *Administrative Appeals Tribunal Act 1975,* subsection 33(1).

been given to the development of practice directions or guidelines to provide more detail in relation to how Part 2 committee proceedings will be conducted.

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

Delegation of legislative power

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).

The committee notes that the bankruptcy rules are made under new section 105-1 of the Insolvency Practice Schedule (Bankruptcy) which was inserted into the *Bankruptcy Act 1966* by the *Insolvency Law Reform Act 2016*. The delegation of legislative power in this provision was referred to the committee's attention by the Senate Standing Committee for the Scrutiny of Bills.[19]

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

The committee draws the above to the attention of senators.

Instrument	**Insolvency Practice Rules (Corporations) 2016 [F2016L01989]**
Purpose	Creates rules for the registration, discipline and remuneration of corporate insolvency practitioners
Last day to disallow	9 May 2017
Authorising legislation	*Corporations Act 2001*
Department	Revenue and Financial Services
Scrutiny principle	Standing Order 23(3)(a) and (d)

Drafting

Section 75-270 of the Insolvency Practice Rules (Corporations) 2016 [F2016L01989] (the corporations rules) provides that strict compliance with the rules for convening

19 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2016*, pp 97-98.

and holding a meeting (convened by an external administrator under section 439A of the *Corporations Act 2001*) will not be required in order for such a meeting to be validly held: substantial compliance will be sufficient.

The commiteee notes that section 75-270 is identical to section 64ZF of the *Bankruptcy Act 1966*, which relates to meetings of creditors. However, the ES to the corporations rules provides no information about why this provision is necessary and appropriate with respect to meetings convened by an external administrator under section 439A of the *Corporations Act 2001*.

The committee is concerned that the inclusion of section 72-270 may indicate that the provisions for convening and holding a meeting in the corporations rules may have been drafted too broadly.

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

Part 2 committee proceedings not bound by rules of evidence

The corporation rules provide at section 50-55 that a Part 2 committee must observe natural justice and is not bound by any rules of evidence but may inform itself on any matter it sees fit.

The ES states:

> The requirement to observe natural justice brings with it an obligation for the committee to provide a practitioner with procedural fairness and that the decision must be made free from actual or apprehended bias. While it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to afford natural justice, there are a range of procedural factors which it is expected that a committee will ensure are present in considering a matter, such as:
>
> - adequate disclosure to the practitioner so effective representations may be made
> - reasonable opportunity (or real chance) to present the person's case to the decision-maker, and the requirement to consider the case or the representations, and
> - opportunity for a hearing where the practitioner can be legally represented, if they so wish.
>
> While not exhaustive of all circumstances which would represent a breach of natural justice, it will not be acceptable for a member of the committee to play multiple roles of accuser, witness or prosecutor and decision-maker. For that reason the delegate of the regulator would be expected to not have played a role in the investigation of the practitioner or the preparation of the case being considered.

The ES further provides:

> …committee proceedings will be inquisitorial proceedings where members are not restrained by judicial rules of evidence. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not.

The committee is interested in exploring why it is appropriate for Part 2 committee proceedings not to be bound by the rules of evidence; why the duty for Part 2 committees to afford procedural fairness (as opposed to natural justice) is not specified in the legislative instrument; and whether consideration has been given to the development of practice directions or guidelines to provide more detail in relation to how Part 2 committee proceedings will be conducted.

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

Delegation of legislative power

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).

The committee notes that the corporations rules are made under new section 105-1 of the Insolvency Practice Schedule (Corporations) which was inserted into the *Corporations Act 2001* by the *Insolvency Law Reform Act 2016*. The delegation of legislative power in this provision was referred to the committee's attention by the Senate Standing Committee for the Scrutiny of Bills.[20]

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

The committee draws the above to the attention of senators.

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20 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2016*, pp 97-98.

Instrument	**Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756]**
Purpose	Provides safety protections and navigation requirements for the Jervis Bay Territory similar to those applicable in NSW waters under the marine safety legislative regime established by the *New South Wales Marine Act 1998*
Last day to disallow	20 March 2017
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a), (b) and (d)

Matter more appropriate for parliamentary enactment

The Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the ordinance) creates a number of offences that carry terms of up to 20 months imprisonment or impose penalties of up to 100 penalty units (currently $18 000).[21]

The committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that regulations should not be authorised to impose fines exceeding 50 penalty units or create offences that are punishable by imprisonment. The Guide further notes:

> Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised.[22]

21 See Section 19: Offence of operating an unsafe vessel (Penalty: Imprisonment for 20 months or 100 penalty units, or both); Section 24: Offence of reckless or negligent operation of a vessel (Penalty: Imprisonment for 10 months or 50 penalty units, or both); Section 32: Offence of climbing etc. onto a vessel (Penalty: 100 penalty units); Section 36: Offence of interfering etc. with lightships and navigation aids (Penalty: 100 penalty units); Section 59: Offence of middle range prescribed concentration of alcohol (Penalty: Imprisonment for 6 months or 30 penalty units, or both); Section 60: Offence of high range prescribed concentration of alcohol (Penalty: Imprisonment for 10 months or 50 penalty units, or both); and Section 113: Offence of breaching a condition of an exemption (Penalty: 60 penalty units).

22 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016).

The ES to the ordinance, while acknowledging these statements in the Guide, states:

> The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT [Jervis Bay Territory] waters, to that already enjoyed by people in the adjoining NSW waters. It is desirable for a person to be subject to a comparable penalty for an offence committed in JBT waters as for the same offence committed a few kilometres away in NSW waters. Consequently, in some instances in the Ordinance, consistent with NSW legislation, penalties of greater than 50 penalty units or penalties involving terms of imprisonment are imposed.
>
> The scope of the Ordinance-making power in section 4F of the Acceptance Act is very broad (Ordinances may be made for the peace, order and good government of the Territory) and it may have been a Parliamentary intention that Ordinances be the primary vehicle of legislating for the JBT. Finally, other JBT Ordinances contain offence provisions, some with penalties including terms of imprisonment (see, for example, the Jervis Bay Territory Emergency Management Ordinance 2015, section 24).
>
> In each instance in the Ordinance, where a penalty involves a term of imprisonment or a penalty of greater than 50 penalty units, the description of the section in the Explanatory Statement notes the comparable provision in NSW legislation that the penalty is based. The Attorney-General's Department was consulted in relation to penalties during the development of the Ordinance.

The committee acknowledges that the ordinance-making power in the *Jervis Bay Territory Acceptance Act 1915* (Acceptance Act) is broad in scope. However, it does not consider that the information provided in the ES adequately justifies the imposition of terms of imprisonment in the absence of an express power to do so. In this regard, the committee notes advice received from the Office of Parliamentary Counsel in 2014 that:

> [t]he types of provisions…that should be included in regulations include provisions dealing with offences and powers of arrest, detention, entry, search or seizure. Such provisions are not authorised by a general rule-making power (*or a general regulation-making power*). If such provisions are required for an Act that includes only a general rule-making power, *it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[23] (emphasis added)

The committee further notes that, while other JBT ordinances contain offence provisions, the primary source of offence provisions for the JBT (and of laws for the

23 See, *Delegated legislation monitor* 6 of 2014, pp 18 and 69 (response received from the First Parliamentary Counsel in relation to Australian Jobs (Australian Industry Participation) Rule 2014).

JBT generally) appears to be laws of the Australian Capital Territory, by virtue of section 4A of the Acceptance Act. Noting that the Acceptance Act was enacted in 1915, the committee is interested in whether there is now a need for offences carrying terms of imprisonment to be created specifically for the JBT; and whether consideration should be given to amending the Acceptance Act to do so directly or to provide an express power to authorise the inclusion of such provisions in JBT ordinances.

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

Insufficient information regarding strict liability offences

The ordinance creates three strict liability offences:

- Subsection 87(6) creates a strict liability offence for failing: to show, or demonstrate to a police officer the operation of, machinery or equipment on a vessel; to give a police officer your name, residential address, date of birth or evidence of your identity; or, where a police officer boards a vessel, to stop or manoeuvre the vessel as required by the police officer;
- Subsection 105(4) creates a strict liability offence for failing to take reasonable steps to facilitate a police officer to board a vessel; and
- Section 113 creates a strict liability offence for breaching a condition of an exemption under sections 111 or 112 of the Ordinance.

The first two offences carry penalties of 50 penalty units (currently $9000), and the offence under section 113 carries a penalty of 60 penalty units (currently $10 800). Each of the offences allows a defence of honest and reasonable mistake of fact to be raised.

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

> Failing to assist the police by not demonstrating the operation of equipment, identifying oneself, or manoeuvring a vessel as directed, may hinder the police in their ability to enforce the Ordinance, and may compromise the safety of the person, the police officer or the public. For this reason, this offence has been prescribed as a strict liability offence…
>
> The offence applies if a person does not provide a safe and practicable way for police to board the vessel. If boarding of the vessel is not facilitated, police will be unable to carry out their duty to enforce compliance with the Ordinance, which is why the offence has been prescribed as a strict liability offence…
>
> Breaching a condition could compromise public safety, or the safety of individuals on a vessel, which is why this offence has been designated as a strict liability offence. People operating a vessel under a conditional

> exemption are placed on notice to avoid breaching any condition of that exemption.

Given the potential consequences of strict liability offence provisions for the defendant, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. While the ES establishes why offences are needed to protect public and individual safety and to enable police to enforce compliance with the ordinance, the ES does not provide sufficient detail to justify the framing of the offences as strict liability offences. In this respect, the committee notes the following guidance in relation to framing strict liability offences contained in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers* (the Guide):

> Application of strict or absolute liability to *all* physical elements of an offence is generally only considered appropriate where all of the following apply.
>
> - The offence is not punishable by imprisonment.
> - The offence is punishable by a fine of up to:
>   - 60 penalty units for an individual (300 for a body corporate) in the case of strict liability, or
>   - 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability.
> - The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.
> - There are legitimate grounds for penalising persons lacking fault; for example, because he or she will be placed on notice to guard against the possibility of any contravention. If imposing absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact.[24]

The committee considers that the ES has not justified how the framing of these offences as strict liability offences is likely to enhance the effectiveness of the enforcement regime under the ordinance in deterring certain conduct or is otherwise appropriate. Further, in respect of the offences under subsections 87(6) and 105(4), the ES has not demonstrated that there are legitimate grounds for penalising persons lacking fault.

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24 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016).

The committee draws the minister's attention to the discussion of strict liability offences in the Guide 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 the above.

Evidential burdens of proof on the defendant

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in the their individual capacities, this infringement on well-established and fundamental personal legal rights is justified.

Subsections 15(2); 28(2); 30(8); 41(2); 47(4); 71(1) and (2); 87(7); and 105(5) of the ordinance provide for a number of defences against liability to offences relating to operating a vessel without a current boat driving licence; contravening a safe loading requirement; keeping all parts of the body within a vessel while underway; unauthorised use of an emergency patrol signal; lifejacket requirements; failure to comply with a direction relating to the conduct of person; failure to comply with monitoring powers relating to vessels and premises; and non-complaince with the requirement to facilitate boarding.

Sections 108 and 110 also provide exemptions from liability to various offences in the ordinance for certain activities and for persons assisting Australian Defence Force or the naval, military or air forces of another country.

In relation to the above provisions the defendant will bear the evidential burden in relation to the matters to make out the defences and exemptions.[25]

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. The ES to the ordinance does not explicitly address the reversal of the evidential burden of proof.

The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the ES explicitly addresses relevant principles as set

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25 Subsection 13.3(3) of the *Criminal Code* provides: A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[26]

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

Legal burden of proof on the defendant

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in the their individual capacities, this infringement on well-established and fundamental personal legal rights is justified.

Section 56 of the ordinance makes it an offence for a person under the age of 18 to either operate a vessel in Territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant's breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This reverses the legal burden of proof applying to the section 56 offence.[27]

The ES to the ordinance provides that:

> [t]he religious or medicinal consumption of alcohol is likely to be exclusively within the knowledge of the defendant, and thus it would be unworkable if the prosecution bore the legal burden in relation to this.
>
> It is appropriate that the defendant bears the legal burden in relation to this defence because of the potentially significant risks to public safety posed by a person affected by alcohol who is in charge of a vessel.

The committee considers that the ES provides a justification for reversing the evidential burden of proof (i.e. that the matters are peculiarly in the knowledge of

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26 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016), pp 50-52.

27 Section 13.4 of the *Criminal Code* provides: A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly: (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or (b) requires the defendant to prove the matter; or (c) creates a presumption that the matter exists unless the contrary is proved.

the defendant). The committee also understands the justification for creating an offence to reduce the risks to public safety posed by people affected by alcohol in charge of vessels.

However, while the committee considers that it may be appropriate to require a defendant to *raise evidence* about matters relevant to the defence set out in section 63 (the evidential burden), the committee considers that the ES does not provide a justification for requiring the defendant to *positively prove* matters relevant to this defence (the legal burden).

The committee's consideration of the appropriateness of a provision which reverses the legal burden of proof is assisted if the ES explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[28]

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

Unclear definition

Section 92 of the ordinance provides that persons may assist police officers in exercising powers or functions or duties under Part 9. These include boarding a vessel, requiring a master of a vessel to answer questions, sampling, and securing or seizing things found using monitoring powers in relation to a vessel. 'Persons assisting police officers' is not defined outside of section 92. In this regard, the ES states:

> This section provides that persons may assist police officers in the execution of their duties, if it is necessary and reasonable. Someone who helps a police officer in the exercise of their functions and duties is called a 'person assisting' the police officer. Powers exercised, or functions or duties performed by persons assisting, in accordance with the directions of a police officer, are taken to have been exercised or performed by the police officer.

However, it appears unclear to the committee:

a) whether the class of persons who may assist police officers is limited in any way;

b) whether the exemptions for police officers that are provided for in sections 109 and 110 would also apply to 'persons assisting police officers';

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[28] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016), pp 50-52.

c) whether the conduct of 'persons assisting police officers' can be questioned in the same manner as the conduct of police officers; and

d) how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officer.

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

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 (i.e. without cost) 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 subparagraph 21(2)(b)(i) of the ordinance incorporates Australian Standard AS 1799.1-2009, as in force at the commencement of the ordinance. However, neither the text of the ordinance nor the ES indicates how AS 1799.1-2009 may be freely obtained.

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

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

Instrument	**Marine Order 32 (Cargo handling equipment) 2016 [F2016L01935]**
Purpose	Prescribes matters for machinery and equipment of a vessel that is used for loading or unloading including its inspection, testing, maintenance and operation
Last day to disallow	9 May 2017
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Subsection 13(4) of Schedule 3 to the order requires that 'material, design, manufacture, marking, testing and certification of flat synthetic-webbing slings must comply with the relevant Australian Standards or Appendix E of the ILO (International Labour Organization) Code'.

However, neither the order nor the ES states which relevant Australian Standards apply in this instance.

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

Instrument	**Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]** **Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]**
Purpose	Amends the Migration Regulations 1994 to introduce a new statutory review process; and amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the *Legislation Act 2003*
Last day to disallow	28 March 2017; 9 May 2017
Authorising legislation	*Migration Act 1958*; *Legislation Act 2003*
Department	Attorney-General's; Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Exemption from sunsetting

Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amends the Migration Regulations 1994 (Migration Regulations) to introduce a new statutory review process. The process requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations and to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

The ES to the review regulation states:

> The purpose of the review requirement is to ensure that the Migration Regulations are kept up to date and provisions are in force for so long as they are needed. In this way, the Regulation provides a rigorous integrity measure to ensure the Migration Regulations are examined, and determined fit for purpose, on a regular and ongoing basis. Specifically, this ensures that the Migration Regulations remain subject to ongoing monitoring for their impact and relevance, while also benefitting from appropriate deregulation, including the removal of unnecessary, confusing or outdated provisions.

Item 10 of the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption

regulation) amends the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt the Migration Regulations from the sunsetting scheme under the *Legislation Act 2003*.

The committee notes that pursuant to section 50 of the *Legislation Act 2003*, but for the exemption regulation, the Migration Regulations would have been required to be re-made due to sunsetting on or before 1 October 2018.

The ES for the amending regulation states:

> The Migration Regulations contain an alternative statutory review mechanism inserted by the Migration Amendment (Review of the Regulations) Regulation 2016, which requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations, including to:
>
> - commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
> - commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.
>
> For this reason, it is appropriate to provide an exemption from sunsetting for the Migration Regulations.

Neither the ES to the review regulation nor the exemption regulation provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.[29]

The committee is concerned that neither the ES to the review regulation nor the exemption regulation provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

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

29 Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (April 2014), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-april2014.doc (accessed 2 February 2016).

Instrument	**National Health (Listed drugs on F1 or F2) Amendment Determination 2016 (No. 11) (PB 104 of 2016) [F2016L01833]**
Purpose	Amends the National Health (Listed drugs on F1 or F2) Determination 2010 (No. PB 93 of 2010)
Last day to disallow	30 March 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

> The Amending Determination affects pharmaceutical companies with medicines listed on the PBS. Before drugs are listed and allocated to formularies, there are detailed consultations about the drug with the intended responsible person, and a recommendation is received from the Pharmaceutical Benefits Advisory Committee (PBAC). Any PBAC recommendation is made following receipt of submissions by affected pharmaceutical companies. Two-thirds of the PBAC membership is from the following interests or professions: consumers, health economists, practising community pharmacists, general practitioners, clinical pharmacologists and medical specialists.

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

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

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

Instrument	**National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2016 (No 3) (PB 102 of 2016) [F2016L01930]**
Purpose	Amends the National Health (Paraplegic and Quadriplegic Program) Special Arrangement 2010 (PB 118 of 2010)
Last day to disallow	9 May 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)

Retrospective commencement

The instrument commenced retrospectively on 1 December 2016. The ES to the instrument states that amendments made by the instrument reflect changes made to the National Health (Listing of Pharmaceutical Benefits) Instrument 2012, which commenced on the same day.

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the ES to the instrument provides no information about the effect of the retrospective commencement on individuals.

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

Instrument	**Part 21 Manual of Standards Instrument 2016 [F2016L00915]**
Purpose	Prescribes standards for classes of light sport aircraft and for articles for use on civil aircraft; and requirements for special certificates of airworthiness and persons carrying out approved design activities for approved design organisations
Last day to disallow	21 November 2016
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated documents

The committee previously received advice from the Minister for Infrastructure and Transport that the Civil Aviation and Safety Authority expected to amend the ES to this instrument to provide a further description of incorporated documents and indicate where they could be obtained.[30] A replacement ES has been registered and received by the committee.

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 (i.e. without cost) 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 section 1.10 of the instrument incorporates, as in force from time to time, various international airworthiness requirements, certification specifications and standards. However the replacement ES to the instrument states that the 'cost of obtaining a standard is a matter for the manufacturer who elects to use the standard'.

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and

30 *Delegated legislation monitors* 6 and 8 of 2016.

international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[31] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

While the committee notes that the replacement ES has been made in response to previous concerns it raised with respect to access to incorporated documents, the committee remains concerned about this issue, as it appears that the standards can only be obtained for a fee, and the replacement ES does not provide information about whether such standards can otherwise be accessed for free by persons interested in or affected by the instrument.

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

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

Instrument	**Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016 [F2016L01970]**
Purpose	Sets out the procedures to be applied in allocating spectrum licences in the residual 700 MHz band and fixes the access charges payable by persons who are allocated such licences
Last day to disallow	9 May 2017
Authorising legislation	*Radiocommunications Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

Section 23 of the determination requires the Australian Communications and Media Authority (ACMA) to appoint an 'auction manager' to manage the auction of spectrum licences in the residual 700 MHz Band. Section 91 of the determination

31 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, Access to Australian Standards Adopted in Delegated Legislation (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

enables the auction manager to delegate any of their functions and powers under the determination.

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 there is no apparent limit on the category of people to whom the auction manager's functions and powers can be delegated; and the ES does not provide a justification for the broad delegation of the auction manager's functions and powers under the determination.

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

Instrument	**Student Identifiers (Exemptions) Amendment Instrument 2016 [F2016L02003]**
Purpose	Extends an exemption allowing registered training organisations to issue vocational educational and training qualifications or statements of attainment to individuals without a student identifier
Last day to disallow	9 May 2017
Authorising legislation	*Student Identifiers Act 2014*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(d)

Matter more appropriate for parliamentary enactment

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

This instrument extends a current exemption for a further year to 1 January 2018 for registered training organisations who deliver vocational educational and training

(VET) courses that last one day or less to issue VET qualifications, or VET statements of attainment, to individuals without a student identifier.

The ES for the instrument states:

> Subsection 53(1) of the Act [*Student Identifiers Act 2014*] specifies that a registered training organisation must not issue a VET qualification or a VET statement of attainment to an individual unless the individual has been assigned a student identifier. Subsection 53(2) of the Act specifies that subsection 53(1) does not apply to an issue specified by the Minister under subsection 53(3).
>
> Subsection 6(4) of the Principal Instrument [Student Identifiers Regulation 2014] contains an exemption to this requirement that allows registered training organisations who deliver VET courses that last one day or less, to issue a VET qualification or VET statement of attainment to individuals who are unable to obtain a student identifier before the completion of the VET course. This exemption is limited in duration and was due to expire on 1 January 2016.
>
> Registered training organisations caught by the exemption requested that the exemption be extended. The *Student Identifiers (Exemptions) Amendment Instrument 2015 (No. 2)* extended this exemption for a year to 1 January 2017.

Given the unchanged purpose of the exemption, it appears that the instrument may be addressing an unintended consequence of the operation of the provisions of the *Student Identifiers Act 2014* concerning the issuance of VET qualifications.

The committee generally prefers 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 *Student Identifiers Act 2014*). However, no information is provided in the ES as to why the exemption has been re-made rather than seeking to amend the relevant VET qualifications provisions of the *Student Identifiers Act 2014*.

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

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 2.

Instrument	**Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776]**
Purpose	Specifies matters relating to nominations, approvals and variation to approvals for standard business sponsors and temporary activity sponsors
Last day to disallow	21 March 2017
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 of 2016

The committee commented as follows:

No statement of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights, and must be included in the ES for the instrument.

With reference to this requirement, the committee notes that the ES for this instrument includes a statement of compatibility for a different instrument, the Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (temporary activity visas regulation). While noting that the amendments in this instrument are consequential to the measures in the temporary activity visas regulation, the committee considers that a statement of compatibility that relies solely on an assessment of measures in related legislation is insufficient to satisfy the requirements of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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*.

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

Minister's response

The Minister for Immigration and Border protection advised:

> In relation to IMMI 16/107, IMMI 16/108 and IMMI 16/118, the Committee requested advice about the statement of compatibility that was prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* and provided in the Explanatory Statement for these instruments. As the Committee noted, these instruments are consequential to the Regulations and, accordingly, one statement of compatibility was prepared for the Regulations and the resulting legislative instruments made under the Regulations.
>
> As per the Committee's request, replacement Explanatory Statements, attaching new Statements of Compatibility, have been prepared and are attached. These replacement Explanatory Statements will be included on the Federal Register of Legislation.

Committee response

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

The committee commented as follows:

Unclear basis for determining fees

Schedule 1 items 10 and 13 of the instrument set two new fees of $420 and $170 relating to sponsorship and nomination for temporary activities visas. 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 a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Minister's response

The Minister for Immigration and Border protection advised:

> The instrument IMMI 16/107 sets two new fees of $420 and $170 relating to sponsorship and nomination for temporary activity visas. In addition to the above, the Committee has requested that the Explanatory Statement

> makes clear the specific basis on which the fees have been calculated. The replacement Explanatory Statement for IMMI 16/107, specifying the basis on which the fees have been calculated, is attached.

The replacement ES states:

> The fees that are set by the Instrument IMMI [2016/107], specifically the fee applicable to an application to be approved as a Temporary Activity Sponsor ($420) and a Training Visa Nomination ($170), remain the same as the fees that were applicable to the products that they replaced. These price points ensure uniformity with similar visa products.
>
> In the case of the Temporary Activity Sponsorship, the price point represents better value than the products it replaces as the validity period for sponsorship has been extended from three to five years, and once approved a sponsor will be eligible to sponsor multiple activities and visa types within the Temporary Activity visa framework. This removes the need for many organisations to become multiple classes of sponsor.

Committee response

The committee thanks the minister for his response.

The committee notes that the replacement ES explains that the fees set by the instrument are the same as those that were applicable to the products that they replaced, and that the price point represents better value. However, the replacement ES does not address the question of the specific basis on which the fees have been calculated; for example, whether the fees are calculated on the basis of cost recovery, or on another basis.

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

Instrument	**Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743]**
Purpose	Amends the Migration Regulations 1994 in relation to the temporary activity visas framework and the visa application charge for the Subclass 888 (Business Innovation and Investment (Permanent)) visa
Last day to disallow	20 March 2017
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 10 of 2016

Retrospective in effect

The committee commented as follows:

The Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (the regulation) amends the Migration Regulations 1994 to repeal five classes of temporary activity visas,[32] and create two new visas to replace them.[33]

Part 6 of Schedule 1 of the regulation deals with the application of the amendments made by the regulation. New paragraph 6002(1)(d) provides that the amendments made by Parts 5 and 6 of Schedule 1 to the regulation apply to a nomination made in an application for a visa made, but not yet finally determined, before the commencement of the regulation (19 November 2016).

The ES explains that an effect of this paragraph is that:

> …no new nominations for applicants for Subclasses 401, 402 (Occupational Trainee stream) and 420 visas can be made, including by legacy sponsors and including for applications made before 19 November 2016, as those provisions have been repealed.

The ES also notes that an application for these visas cannot validly be made without a nomination in place at the time of making the application, and therefore the amendments will not affect the majority of visa applicants. However,

32 Subclass 401 (Temporary Work (Long Stay Activity)) visa; Subclass 402 (Training and Research) visa; Subclass 416 (Special Program) visa; Subclass 420 (Temporary Work (Entertainment)) visa; and Subclass 488 (Superyacht Crew) visa.

33 Subclass 407 (Training) visa and Subclass 408 (Temporary Activity) visa.

notwithstanding this, the ES acknowledges that there may be cases where an applicant's nomination could expire between the visa application being made and a visa decision being made, or where an applicant may change their sponsor and wish to provide a new nomination. The ES makes clear that in those cases, the applicant will not be able to provide a new nomination for the purposes of a visa grant. In this respect, the ES states:

> Given the small number impacted, it would have been inefficient to continue to support the operation of the repealed nomination provisions after 19 November 2016 in a context where all paper-based applications are being replaced by online applications and where the new visa scheme for Subclass 408 no longer requires nominations. However, the Department will consider alternative arrangements for applicants who are adversely affected.

The committee is concerned that while the ES acknowledges that some applicants who applied for the repealed visa classes before 19 November 2016 will be adversely affected, it only goes so far as to say that the Department will 'consider alternative arrangements' for these applicants. Without knowing what these alternative arrangements are, it is difficult for the committee to assess whether the regulation will have a retrospective effect that will unduly trespasses on personal rights and liberties (scrutiny principle 23(3)(b)).

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

Minister's response

The Minister for Immigration and Border Protection advised:

> As outlined in the Explanatory Statement, my Department expects that there may be a small number of visa applicants who will be adversely impacted by the legislative changes. There is a possibility that some applicants will no longer be eligible for the repealed visa e.g. because of the expiry of a nomination which cannot be renewed) and who will also not be eligible to apply for, or be granted, the equivalent new visa. Alternative arrangements for any applicants who are adversely affected will be considered on a case by case basis, depending on the specific circumstances.
>
> I have a range of powers to intervene to remedy situations of unfairness. For example, section 351 of the *Migration Act 1958* (the Act) would allow me to grant one of the temporary activity visas to a non-citizen in a situation where the Administrative Appeals Tribunal had affirmed a refusal decision in relation to a repealed visa and I think it is in the public interest to do so. My practice is to consider intervention in circumstances not anticipated by relevant legislation; where there are clearly unintended consequences of legislation; or where the application of relevant legislation leads to unfair or unreasonable results.

Committee response

The committee thanks the minister for his response.

The committee's request for advice in relation to this instrument arose from concerns that the regulation may have a retrospective effect that will unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)), as the ES provided only that the Department of Immigration and Border Protection would 'consider alternative arrangements' for those applicants who applied for a repealed visa class before 19 November 2016 and were adversely affected by the changes made by the regulation.

The committee notes the minister's advice that where the application of relevant legislation leads to unfair or unreasonable results the minister's practice is to consider intervention to remedy the situation.

The committee also notes the minister's advice that there may be a small number of visa applicants who will be adversely impacted by this regulation and that alternative arrangements for such applicants will be considered on a case by case basis, depending on the specific circumstances.

However, the committee remains concerned that the minister's response does not provide details of what specific 'alternative arrangements' will apply to applicants that are adversely affected by the regulation, nor an assurance that the minister will intervene to remedy such a situation should it arise.

The committee reiterates its previous comments that without knowledge of what the specific 'alternative arrangements' are, it is difficult for the committee to assess whether the regulation will have a retrospective effect that will unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)).

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

Advice only

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

Instrument	**Aged Care (Subsidy, Fees and Payments) Amendment (Viability Supplement) Determination 2016 [F2016L01984]** **Subsidy Amendment (Viability Supplement) Principles 2016 [F2016L01985]** **Aged Care (Transitional Provisions) Amendment (Viability Supplement) Principles 2016 [F2016L01993]** **Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Viability Supplement) Determination 2016 [F2016L01994]**
Purpose	The instruments make various amendments to principal instruments in relation to the viability supplement for residential care, home care and flexible care
Last day to disallow	9 May 2017
Authorising legislation	*Aged Care Act 1997*, and *Aged Care (Transitional Provisions) Act 1997*
Department	Health
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 ESs for these instruments state:

> Consultation occurred through the Aged Care Financing Authority's report *Financial Issues Affecting Rural and Remote Provider*, which

> identified greater cost pressures in rural and remote areas and noted that the geographical classification system of the viability supplement in aged care was out-dated and may not be best targeting funding. There were a total of 36 submissions received. Submissions were received from a mix of providers, including not-for-profit, government organisations, regional alliances and peak representative groups.
>
> To support the Budget announcement a fact sheet 'Changes to the Viability Supplement' was published on 4 May 2016 providing detail on the Budget measure. Provider peak bodies such as Aged and Community Services Australia, Catholic Health Australia and Leading Age Services Australia made public statements that the changes were welcome.

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 consultation description refers to consultation undertaken in preparing a report by the Aged Care Financing Authority, and a subsequent budget announcement, rather than providing information specific to the individual instruments. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ESs to have explicitly stated that further consultation for these instruments was considered unnecessary (or inappropriate) due to the nature of the consultation that had already taken place.

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

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

Instrument	**Amendment to the lists of threatened species, threatened ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (196) (24/11/2016) [F2016L01875]**
Purpose	Amends the list of threatened species referred to in section 178 of the *Environment Protection and Biodiversity Conservation Act 1999*
Last day to disallow	9 May 2017
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The committee's usual expectation is that an instrument or its ES identify the provision of the enabling legislation which authorises the making of the instrument.

The committee notes that this instrument is identified as being made under 'section 184(1)(a)(c)' of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)(EPBC): a section that does not exist. The committee understands this to be a typographical error and notes that the the instrument is made under subsections 184(a) and 184(c) of the EPBC.

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

Instrument	**Civil Aviation Legislation Amendment (Part 132) Regulation 2016 [F2016L01655]**
Purpose	Makes amendments to the Civil Aviation Regulations 1988 and the Civil Aviation Safety Regulations 1998 primarily to transfer the regulations governing operations in limited category aircraft to a new Part 132
Last day to disallow	13 February 2017
Authorising legislation	*Civil Aviation Act 1988*; *Transport Safety Investigation Act 2003*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Background

The committee notes that numerous provisions in the Civil Aviation Safety Regulations 1998 (CASR) allow Manuals of Standards (MOSs) to prescribe airworthiness standards, including methods for approvals relating to modifications and repairs for special classes of aircraft and the minimum qualifications, experience and knowledge standards for individuals who carry out such approvals.

Under subsection 98(5AA) of the *Civil Aviation Act 1988* (the Act), where a MOS relates to a class of aircraft it is subject to disallowance. However, under subsection 98(5AB), where a MOS relates to a particular aircraft it is not subject to disallowance (and thereby not subject to the oversight of the Parliament).

Parliamentary oversight of Part 132 Manuals of Standards

The Civil Aviation Legislation Amendment (Part 132) Regulation 2016 [F2016L01655] (the regulation) transfers provisions governing operations in limited category aircraft from the Civil Aviation Regulations 1988 (CAR) to the CASR in a new Part 132.

New regulation 132.040 provides that for subsection 98(5A) of the Act, the Civil Aviation Safety Authority (CASA) may issue a MOS for Part 132. New regulation 132.185 provides for individuals to be authorised to approve modifications and repairs, certificates of airworthiness and give advice about modifications, repairs and damage for limited category aircraft.[34] New subregulation 132.185(2) provides that such authorisations may only be issued to individuals who have qualifications and experience as prescribed by the Part 132 MOS.

34 Limited category aircrafts include ex-military aircraft (warbirds), replica warbird aircraft and certain historic aircraft.

The committee understands that, pursuant to subsection 98(5AA) of the Act, a Part 132 MOS that prescribes relevant qualifications and experience for the authorisation of persons to give approvals, certificates and advice relevant to a class of limited category aircraft will always be subject to disallowance.[35] However, the committee notes that, pursuant to subsection 98(5AB) of the Act, a Part 132 MOS that prescribes relevant qualifications and experience for the authorisation of persons to give approvals, certificates and advice relevant to a particular limited category aircraft will not be subject to disallowance (and thereby not subject to the oversight of the Parliament).

The committee draws the above to the attention of senators.

Instrument	**Customs Amendment (2017 Harmonized System) Regulation 2016 [F2016L01932]** **Customs Tariff Amendment (2017 Harmonized System) Regulation 2016 [F2016L01936]**
Purpose	These regulations amend the Customs Regulation 2015 to give effect to the World Customs Organisation's fifth review of the International Convention on the Harmonized Commodity Description and Coding System
Last day to disallow	9 May 2017
Authorising legislation	*Customs Act 1901*
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)).

35 The committee notes that Part 132 Manual of Standards Instrument 2016 [F2016L01762], which was made on 11 November 2016 and registered on 15 November 2016, is a disallowable legislative instrument.

With reference to these requirements, the committee notes that the ESs for these regulations state:

> During the Harmonized System review process, consultations were undertaken with local industry groups that might be affected by the changes. In addition, bodies directly involved in international trade (such as the Customs Brokers and Forwarders Council of Australia; the Export Council of Australia and the Australian Federation of International Forwarders) have been kept abreast of changes to the Harmonized System and will be supported by the Department of Immigration and Border Protection during implementation of the classification amendments.

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, it appears that consultation (within the general meaning of public consultation or consultation with relevant stakeholders) was considered unnecessary due to the fact that consultations were undertaken during the 'Harmonized System review process'. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ESs to have explicitly stated that further consultation for these instruments was considered unnecessary (or inappropriate) for this reason.

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

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

Instrument	**Higher Education Support (Australian Institute of Professional Education) Higher Education Provider Approval Revocation 2016 [F2016L01877]**
Purpose	Revokes Higher Education Provider Approval No. 3 of 2014
Last day to disallow	9 May 2017
Authorising legislation	*Higher Education Support Act 2003*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)

Consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in

relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the regulation provides the following information:

> On 11 November 2016 a delegate of the Minister gave AIPE notice in writing of an intention to revoke AIPE as a higher education provider on the basis that it did not meet the quality and accountability requirements or conditions. AIPE was placed under voluntary administration on 13 October 2016. The notice was issued in accordance with clause 22-15 of the Act [*Higher Education Support Act 2003*] and invited AIPE to make written submissions within 28 days concerning why its approval should not be revoked.

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*. Noting that the ES for the instrument appears to address only the notification requirements relating to the revocation of higher education approvals under the *Higher Education Support Act 2003*, it appears that consultation (within the general meaning of public consultation or consultation with relevant stakeholders) was considered unnecessary. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that consultation for these instruments was considered unnecessary (or inappropriate).

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

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

Instrument	**Insolvency Law Reform (Transitional Provisions) Regulation 2016 [F2016L01898]**
Purpose	Amends the Insolvency Law Reform Act 2016 to delay commencement of certain aspects of the Insolvency Practice Schedule (Bankruptcy) until 1 September 2017
Last day to disallow	9 May 2017
Authorising legislation	*Insolvency Law Reform Act 2016*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Delegation of legislative power – Henry VIII clause

The committee notes that this regulation is made under item 178 of Schedule 1 to the *Insolvency Law Reform Act 2016*. This provision was identified as a 'Henry VIII' clause and referred to the committee's attention by the Senate Standing Committee for the Scrutiny of Bills.[36]

Henry VIII clauses enable delegated legislation to override the operation of legislation which has been passed by the Parliament. In this regard, the committee's concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

The committee notes that this regulation delays the commencement of certain aspects of the *Insolvency Law Reform Act 2016* until 1 September 2017. The ES explains that the government agreed to this partial delay as a result of industry feedback to allow for the development and dissemination of insolvency firm software used by the majority of the industry.

The committee draws the above to the attention of senators.

36 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2016*, pp 89-100.

Instrument	**National Health (Supplies of out-patient medication) Determination 2016 (PB 107 of 2016) [F2016L01952]**
Purpose	Revokes and resets the outpatient medication co-payment rates that apply from 1 January 2017
Last day to disallow	9 May 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

> Historically, the Department of Health has consulted with the State and Territory Health Departments through the Highly Specialised Drugs Working Party (HSDWP). The HSDWP was a working party of the Australian Health Ministers' Advisory Council (AHMAC) and was made up of representatives from each State and Territory Health Department and the Australian Government. This Working Party has now been discontinued as a second tier committee of the Hospitals Principal Committee on recommendations endorsed by AHMAC.
>
> Through the HSDWP, the State and Territory Health Departments agreed to the value of out-patient medication being 80% of the general co-payment each year.

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, it appears that consultation (within the general meaning of public consultation or consultation with relevant stakeholders) was considered unnecessary due to the fact that, through the HSDWP, the State and Territory Health Departments agreed to the value of out-patient medication. In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the

committee's preferred approach would be for the ES to have explicitly stated that consultation for the instrument was considered unnecessary (or inappropriate) for this reason.

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

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

Instrument	**National Health (Weighted average disclosed price – April 2017 reduction day) Determination 2016 [F2016L01963]**
Purpose	Brings into effect reductions to the approved ex-manufacturer price of certain Pharmaceutical Benefits Scheme medicines that were calculated as a result of price disclosure
Last day to disallow	9 May 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

> Pharmaceutical companies were consulted in relation to the introduction of price disclosure requirements during the policy development for introduction of price disclosure in 2007, during implementation phases, and during the development and implementation of the further PBS reforms of 2010, pricing changes in 2012, simplified price disclosure amendments in 2014 and measures announced in the 2015 PBS Access and Sustainability Package. Consultation occurred through meetings with peak industry bodies. Further information on price disclosure was also disseminated through peak industry bodies, during meetings with the Price Disclosure Working Group and directly to companies through information sessions conducted in March 2011, June 2012, and March 2016, and

> distribution of associated educational material at the time of amendments.
>
> Pharmaceutical companies with a listed or delisted brand subject to the price disclosure requirements for the 2017 April Cycle disclosed information relevant to this determination directly to Australian Healthcare Associates Pty Ltd (AHA), known as the Price Disclosure Data Administrator (PDDA). AHA is prescribed in sub-regulation 37T(6) as the person to whom, in accordance with paragraph 99ADC(1)(a), a responsible person is to provide price disclosure information. The PDDA provided responsible persons with an opportunity to check that the information disclosed to the PDDA was translated correctly to PDDA data files. This was done prior to that data being used to apply the method set out in the Regulations to arrive at the WADP for listed brands.

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

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

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

Instrument	**Radiocommunications (Emergency Locating Devices) Class Licence 2016 [F2016L01399]**
Purpose	Authorises the operation of a range of emergency locating devices that are categorised as satellite distress or emergency position indiciating radio beacons, or locating aids
Last day to disallow	24 November 2016
Authorising legislation	*Radiocommunications Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

The committee previously accepted an undertaking by the Minister for Communications to amend the ES to the licence to specify the manner in which the Radio Regulations Articles are incorporated into the licence, and to provide a description of where documents that are incorporated into the licence can be freely obtained.[37] A revised ES has been registered and received by the committee.

However, while the revised ES includes information about where the documents incorporated into the licence can be freely accessed, it does not include the information contained in the minister's response about the manner in which the Radio Regulations Articles are incorporated (that is, that they are incorporated as in force from time to time).

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

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

37 See *Delegated legislation monitors* 7 and 8 of 2016.

Instrument	**Remuneration Tribunal Determination 2016/17 - Judicial and Related Offices – Remuneration and Allowances [F2016L01889]**
Purpose	Supersedes and revokes the Remuneration Tribunal Determination 2015/18 - Judicial and Related Offices - Remuneration and Allowances
Last day to disallow	9 May 2017
Authorising legislation	*Remuneration Tribunal Act 1973*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable 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.

Varuious remuneration tribunal determinations, which are Commonwealth disallowable legislative instruments, are incorporated into Remuneration Tribunal Determination 2016/17 - Judicial and Related Offices – Remuneration and Allowances [F2016L01889] (determination 2016/17).

The committee notes that Part 6 of the determination 2016/17 identifies that Remuneration Tribunal Derminations 2015/07 and 2015/08 are incorporated 'as amended'. However, with respect to Remuneration Tribunal Determination 2015/05 the manner of incorporation is not identified. The committee understands Remuneration Tribunal Determination 2015/05 to be incorporated as in force from time to time, as 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.

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

Instrument	**Veterans' Affairs Treatment Principles (Short-term Restorative Care) Amendment Instrument 2016 [F2016L01869]**
Purpose	Provides for the funding of the co-payment of the costs of short-term restorative care provided to former prisoners of war and recipients of the Victoria Cross
Last day to disallow	9 May 2017
Authorising legislation	*Australian Participants in British Nuclear Tests (Treatment) Act 2006*; *Military Rehabilitation and Compensation Act 2004*; *Veterans' Entitlements Act 1986*
Department	Veterans' Affairs
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 Subsidy Principles 2014 (Subsidy Principles), which are a Commonwealth disallowable legislative instrument, are incorporated into various provisions of this instrument.

The committee notes that parapraph 10.13.1(a) of Schedule 1 and paragraph 10.10.1(a) of Schedule 2 identify that the Subsidy Principles are incorporated as in force from time to time. However, in other instances the manner of incorporation of the Subsidy Principles is not identified. The committee understands the Subsidy Principles to be incorporated as in force from time to time in each instance, as 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.

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

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

Instruments	Higher Education Support (Maximum Payments for Indigenous Student Assistance Grants) Determination 2016 [F2016L02000] Insolvency Law Reform (Transitional Provisions) Regulation 2016 [F2016L01898] Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004] Insolvency Practice Rules (Corporations) 2016 [F2016L01989] Social Security (Administration) (Indigenous Student Assistance Scholarships – Protected Information) Instrument 2016 [F2016L01954] Social Security (Indigenous Student Assistance Scholarships – Disqualifying Scholarships) Instrument 2016 [F2016L01953] Social Security (Indigenous Student Assistance Scholarships - Excluded Amounts) Instrument 2016 [F2016L01955]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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

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

The committee draws the above to the attention of ministers.

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	Aged Care (Subsidy, Fees and Payments) Amendment (Viability Supplement) Determination 2016 [F2016L01984]
	Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Viability Supplement) Determination 2016 [F2016L01994]
	ASIC Corporations (Amendment) Instrument 2016/1158 [F2016L01945]
	ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 [F2016L01991]
	ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 [F2016L01943]
	ASIC Corporations (Recognised Accountants: Exempt Services) Instrument 2016/1151 [F2016L01866]
	ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176 [F2016L01992]
	Export Charges (Imposition—Customs) Amendment (Norfolk Island Plants) Regulation 2016 [F2016L01822]
	Export Charges (Imposition—General) Amendment (Norfolk Island Plants) Regulation 2016 [F2016L01825]
	Export Control (Fees) Amendment (Norfolk Island Plants) Order 2016 [F2016L01797]
	Fisheries Levy (Torres Strait Prawn Fishery) Regulation 2016 [F2016L01802]
	Fishing Levy Regulation 2016 [F2016L01803]
	Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004]
	Insolvency Practice Rules (Corporations) 2016 [F2016L01989]
	Narcotic Drugs (Licence Charges) Regulation 2016 [F2016L01893]
	National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Northern Territory) Rules 2016 [F2016L01966]
	Primary Industries (Customs) Charges Amendment (Melons) Regulation 2016 [F2016L01821]
	Primary Industries (Excise) Levies Amendment (Melons) Regulation 2016 [F2016L01819]

	Subsidy Amendment (Viability Supplement) Principles 2016 [F2016L01985] Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2016 [F2016L01871]
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 the above to the attention of ministers.

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

Instruments	ASIC Corporations (Amendment) Instrument 2016/1158 [F2016L01945]
	ASIC Corporations (Amendment) Instrument 2016/1173 [F2016L01956]
	ASIC Corporations (Repeal) Instrument 2016/1157 [F2016L01944]
	ASIC Corporations (Repeal) Instrument 2016/1209 [F2016L01947]
	Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 3) [F2016L01862]
	Business Services Wage Assessment Tool Payment Scheme Amendment Rules (No. 2) 2016 [F2016L01965]
	CASA 129/16 - Direction — number of cabin attendants (Tiger Airways) [F2016L01971]
	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857]
	Civil Aviation Order 20.18 Amendment Instrument 2016 (No. 2) [F2016L01961]
	Classification Amendment (Budget Savings Measures No. 1) Principles 2016 [F2016L01887]
	Currency (Royal Australian Mint) Amendment Determination (No. 2) 2016 [F2016L01899]
	Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2016 [F2016L01960]
	Export Control (Fees) Amendment (Norfolk Island Plants) Order 2016 [F2016L01797]
	Farm Household Support (Non-farm Assets) Amendment Rule 2016 [F2016L01975]
	National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016 (No. 3) [F2016L01972]
	National Health (Supplies of out-patient medication) Determination 2016 (PB 107 of 2016) [F2016L01952]
	National Health (Weighted average disclosed price – April 2017 reduction day) Determination 2016 [F2016L01963]
	Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 8) [F2016L01846]
	Private Health Insurance (Benefit Requirements) Amendment Rules 2016 (No. 9) [F2016L01967]
	Radiocommunications (Duration of Community Television

	Transmitter Licences Determination (No. 1) of 2008 (Amendment No. 1 of 2016) [F2016L01928] Remuneration Tribunal Determination 2016/12: Remuneration and Allowances for Holders of Public Office [F2016L01826] Remuneration Tribunal Determination 2016/14: Specified Statutory Offices - Remuneration and Allowances [F2016L01881] Remuneration Tribunal Determination 2016/15: Principal Executive Office - Classification Structure and Terms and Conditions [F2016L01882] Remuneration Tribunal Determination 2016/17 - Judicial and Related Offies – Remuneration and Allowances [F2016L01889] Remuneration Tribunal Determination 2016/18: Remuneration and Allowances for Holders of Part-Time Public Office [F2016L01879] Remuneration Tribunal Determination 2016/19: Remuneration and Allowances for Holders of Full-Time Public Office [F2016L01880] Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858]
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.[38]

The committee draws the above to the attention of ministers.

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

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

Instrument	**Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016 [F2016L00619]**
Purpose	Establishes by-laws pursuant to the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* to conserve biodiversity and control activities on Aboriginal Land in the Jervis Bay Territory
Last day to disallow	9 November 2016
Authorising legislation	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitors* 6 and 8 of 2016

Availability of merits review

The committee commented as follows:

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

With reference to the above, the committee notes that section 71 of the instrument provides for consideration and review of administrative decisions made by the Wreck Bay Aboriginal Community Council (the council) under Part 7 of the instrument. Subsection 71(7) states:

> The Council's decision following a reconsideration of the initial decision is final.

However, the explanatory statement (ES) does not provide information as to whether decisions made under Part 7 of the instrument possess characteristics that would justify the exclusion of such decisions from merits review.

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

Minister's first response

The Minister for Indigenous Affairs advised:

> In response to the Committee's comments, the exclusion of external merits review for decisions by the Wreck Bay Aboriginal Community Council (WBACC) under section 71 of the *Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016* (the By-Laws) is justified in the context of the purpose of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Act) and the By-laws.
>
> The Act creates WBACC to hold and exercise the Council's powers as owner of Aboriginal Land in the Jervis Bay Territory for the benefit of the local Indigenous community. In accordance with section 52A of the Act, the By-Laws regulate and manage the use of Aboriginal Land, including providing WBACC with the power to issue certain permits to individuals authorising certain activities that would otherwise be prohibited. External merits review of the Council's decisions in relation to permits would be inconsistent with Council's role as owner of the land in the Jervis Bay Territory.
>
> To address the concerns of the Committee, my Department is consulting with WBACC with a view to lodging a replacement Explanatory Statement in accordance with the process set out in paragraph 15G(4)(b) of the *Legislation Act 2003.* This Explanatory Statement will include a statement setting out the reasons why external merits review is not justified.

Committee's first response

The committee thanks the minister for his response.

The committee also thanks the minister for his advice that the Department of the Prime Minister and Cabinet is consulting with the council with a view to lodging a replacement ES that addresses the committee's concerns.

The committee notes the minister's advice that external merits review of the council's decisions in relation to permits would be inconsistent with the council's role as owner of the land in the Jervis Bay Territory. The committee also notes that section 71(6)(b) of the instrument requires the Council to give to a person who requests reconsideration of an initial decision notice of the result of the reconsideration and of the grounds for the result.

However, in the absence of further information about:

- the characteristics of decisions made under Part 7 of the instrument; and
- how the council's role as owner of the land in the Jervis Bay Territory is inconsistent with merits review of the council's decisions

it remains unclear to the committee whether the exclusion of merits review in this instance is justified.

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

Minister's second response

The Minister for Indigenous Affairs advised:

> The characteristics of decisions made under Part 7 of the By-laws
>
> Part 7 is concerned with decisions by the Wreck Bay Aboriginal Community Council (WBACC) to allow activities on Aboriginal Land within the Jervis Bay Territory (excluding the Booderee National Park) that would otherwise be prohibited. The Aboriginal Land in question is an area of 403 hectares adjacent to Booderee National Park (which covers an area of 6,379 hectares).
>
> Part 7 of the instrument enables WBACC to grant four basic types of permits:
>
> 1. Permits for Protected Species
>
> Part 3 of the instrument provides that a person must not do anything which could damage a protected species or which involves the taking, trading, keeping or moving of protected species unless the person has a permit from WBACC under Part 7.
>
> 2. Permits for General Offences
>
> Division 5.2 of the instrument creates a series of general offences for activities that may damage Aboriginal Land, heritage or the environment. Offences include the dumping of waste, use of firearms, taking animals or plants onto bushland, use of the burial ground, camping, fishing and lighting fires. A person who does any of these things commits an offence under the instrument unless they have a permit from WBACC under Part 7.
>
> 3. Permits under a Management Plan
>
> Section 19 of the instrument enables WBACC to issue permits for activities if the Management Plan for the Aboriginal Land provides that an activity may be done in accordance with a permit.
>
> 4. Permits for Water Usage
>
> Subsection 87(1) of the instrument provides that a person occupying premises on Aboriginal Land that are connected to WBACC's water supply

system must only use the water for domestic purposes, unless they have a permit from WBACC under Part 7.

How the Council's role as owner of the land in the Jervis Bay Territory is inconsistent with merits review of the Council's decisions

As stated above, the Aboriginal Land in question is an area of 403 hectares adjacent to the Booderee National Park which covers an area of 6,379 hectares. An extract from the WBACC Vision Statement provides as follows:

> *Wreck Bay Aboriginal Community Council seeks to be a respected equal and valued part of a culturally diverse Australian society. By controlling and managing its own lands and waters, the Community aims to become self-sufficient and able to freely determine its future and lifestyle. The Community desires to do this by protecting its interests and values while preserving for future generations, its unique identity, heritage and culture.*
>
> *To achieve this vision Wreck Bay Aboriginal Community Council's goals are:*
>
> *…*
>
> *Sole management of its freehold land and waters, allowing for Community responsibility, empowerment and self-determination.*

The By-laws are made pursuant to s 52A of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*. The purpose of the Act is to grant land in the Jervis Bay Territory to the Wreck Bay Aboriginal Community. Once granted the land in question is Aboriginal Land and is vested in WBACC, which can then exercise its powers as owner of the land. These powers include the ability to make by-laws with respect to activities to be permitted on Aboriginal Land.

These legislative measures enable WBACC to determine and develop priorities and strategies for their land and to manage their affairs in accordance with their Indigenous decision-making processes. External merits review of the Council's decisions in relation to permits would be inconsistent with respecting the role of WBACC as owner of the land.

Committee's second response

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

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	*Veterans' Entitlements Act 1986*
Department	Veterans' Affairs
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 9 of 2016

Access to incorporated documents

The committee commented as follows:

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 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.[1] 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.

Minister's response

The Minister for Veterans' Affairs advised:

> I am advised by the Authority that the replacement definition of 'ICD-10-AM code' inserted into clause 9 of each Instrument by the relevant amending Instrument, references (but does not incorporate) The International Statistical Classification of Diseases and Related Health Problems, ISBN 978 1 76007 020 5 (ICD-10-AM Ninth Edition). The referencing to this document (in varying editions) has been undertaken by the Authority since the determination of its initial legislative instrument in 1994.
>
> The Authority agrees that the form of words cited by the Committee in Delegated legislation monitor 9 of 2016, now generally utilised in subsections 7(3) and (4) of the Authority's Statements of Principles, lead to a clearer understanding of the status of the referenced document. The Authority will consistently use this form of words in all future Statements of Principles.
>
> In regard to the Committee's concern that ICD-10-AM Ninth Edition may not be freely available, observing that a fee of $500 appeared to be a necessary fee for access to the publication, I can advise that the

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

publication can be freely accessed via the website of the World Health Organisation at www.who.int/classifications/icd/en/.

Committee response

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

The committee also thanks the minister for his advice that future Repatriation Medical Authority Statements of Principles will consistently use the same form of words to indicate the status of referenced documents.

Instrument	**Defence and Strategic Goods List Amendment Instrument 2016 [F2016L01727]**
Purpose	Aligns the Defence and Strategic Goods List with changes to the international control lists for the non-proliferation and export control regimes to which Australia is a member
Last day to disallow	20 March 2017
Authorising legislation	*Customs Act 1901*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 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 the instrument incorporates:

- ITU Radio Regulations in its definition of 'allocated by the ITU' in Schedule 1, section 4.2;

- ISO 230-2:2014 in its definition of 'Undirectional positioning repeatability' in Schedule 1, section 4.2; and
- ISO 492 Tolerance Class 4 in Schedule 1, sections 2A001 and 2A101.

However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the ITU Radio Regulations, ISO 230-2:2014, and ISO 492 Tolerance Class 4 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 the instrument incorporates the ITU Radio Regulations, ISO 230-2:2014 and ISO 492 Tolerance Class 4. However, neither the text of the instrument nor the ES provides a description of these documents or indicates how they may 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.

Minister's response

The Minister for Defence advised:

The references in the Amendment Instrument to the technical documents ITU Radio Regulations, ISO 230-2:2014 and ISO 492 that the Committee has identified, reflect internationally agreed descriptions of export controlled goods or technology.

The term ITU Radio Regulations refers to a document published by the International Telecommunications Union (ITU), a specialised agency of the United Nations.

The ITU Radio Regulations are available in the public domain free-of-charge on the ITU website at www.itu.int/pub/R-REG-RR-2012.

The ITU Radio Regulations include internationally recognised allocations for the use of different bands of the radio frequency spectrum. The Regulations are used by the Wassenaar Arrangement, of which Australia is a member, to define an export control exemption for certain radio equipment which is designed for a frequency band that the ITU has allocated for radio-communication services only.

The terms ISO 230-2:2014 and ISO 492 refer to documents published by the International Standards Organisation (ISO), a network of national standards bodies, of which Australia is a member. ISO 230-2:2014 is the internationally recognised standard used for the determination of accuracy and repeatability of positioning of numerically controlled axes. This standard is used by the Wassenaar Arrangement to define export control parameters for machine tools usable in the development of military weapons and systems.

ISO 492 is the internationally recognised standard used for geometrical product specifications and tolerance values of radial rolling bearings. This standard is used by the Wassenaar Arrangement and the Missile Technology Control Regime, of which Australia is also a member, to define export control parameters for bearings that are usable as high-precision components for missile and rocket engines. The phrase 'Tolerance Class 4' refers to a specific section of the standard.

Copies of these ISO publications are held by the National Library of Australia and are available free-of-charge to members of the public for loan. They are also available for purchase through the ISO website at www.iso.org.

I note the Committee's expectation that explanatory statements specify the manner in which documents are incorporated. With regards to the aforementioned ITU Radio Regulations and ISO standards, the intention is for these documents to be incorporated as in force at the time of the commencement of the instrument.

The instrument and accompanying explanatory statement will include information reflecting the above advice the next time the instrument is amended.

Committee's response

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

In concluding, the committee notes the minister's advice that the ISOs incorporated in the instrument are held by the National Library of Australia and are available free-of-charge to members of the public for loan.

The committee also thanks the minister for her advice that the next time the instrument is amended it will include information about the manner in which documents are incorporated and how they may be freely obtained.

Instrument	**Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016 [F2016L01728]**
Purpose	These rules amend the Federal Court Rules 2011 to make changes consequential to the enactment of the Federal Court (Criminal Proceedings) Rules 2016
Last day to disallow	20 March 2017
Authorising legislation	*Federal Court of Australia Act 1976*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 of 2016

No description of consultation

The committee commented as follows:

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

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

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

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

Minister's response

The Attorney-General advised:

> The Federal Court has noted comments by the Committee in relation to the Explanatory Statement for the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016* and will issue a Supplementary Explanatory Statement setting out details of consultation undertaken in developing those Rules.

Committee 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 provide a replacement ES which will set out details of consultation undertaken in developing the instrument.

Instrument	**Intellectual Property Legislation Amendment (Single Economic Market and Other Measures) Regulation 2016 [F2016L01754]**
Purpose	Prescribes matters to implement a Trans-Tasman patent attorney regime between Australia and New Zealand
Last day to disallow	20 March 2017
Authorising legislation	*Designs Act 2003*; *Intellectual Property Laws Amendment Act 2015*; *Patents Act 1990*; *Plant Breeder's Rights Act 1994*; *Trade Marks Act 1995*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 of 2016

Incorporation of documents

The committee commented as follows:

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

With reference to the above, the committee notes that the regulation appears to incorporate various New Zealand Acts, including:

- *Designs Act 1953* of New Zealand;
- *Patents Act 1953* of New Zealand;
- *Patents Act 2013* of New Zealand;
- *Plant Variety Rights Act 1987* of New Zealand;
- *Trade Marks Act 2002* of New Zealand; and
- *Companies Act 1993* of New Zealand.

However, neither the text of the regulation nor the ES expressly states the manner in which these New Zealand Acts are incorporated. In contrast, the committee notes that the Interpretation Act 1999 of New Zealand and Education Act 1989 of New

Zealand are incorporated into the definitions of *New Zealand* and *NZQF* in the regulation as in force at the commencement of the relevant definitions.[2]

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.

Minister's response

The Minister for Industry, Innovation and Science advised:

> In relation to the incorporation by reference of certain New Zealand Acts, as the Committee notes, documents that are not Acts or disallowable legislative instruments may not be incorporated as in force from time to time unless authorised by the enabling legislation. Since the legislation enabling the Regulation lacks any authorisation to incorporate Acts of the New Zealand Parliament as in force from time to time, I consider that it is implicit that the New Zealand Acts are incorporated as in force at the commencement of the instrument.
>
> Nonetheless, I accept the Committee's concern that this could be made clearer. The Explanatory Statement for this instrument will be amended to clearly specify that these Acts of the New Zealand Parliament are incorporated in the Regulation as in force from its commencement.

Committee response

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

The committee also thanks the minister for his advice that the ES for the regulation will be amended to specify that the New Zealand Acts are incorporated as in force at the commencement of the regulation.

Sub-delegation

The committee also commented as follows:

2 See Schedule 1, items 3 and 13.

Item 4 of Schedule 6 amends item 3 of Schedule 3 to the Trade Marks Regulations 1995 to correctly refer to customs legislation for Norfolk Island. One effect of the amendment is to allow 'any officer of Customs' to determine who is the designated owner of goods under section 133A of the *Trade Marks Act 1995*, which could previously only be determined by the Comptroller-General of Customs.

The *Trade Marks Act 1995* defines an 'officer of Customs' as an officer within the meaning of the *Customs Act 1901*, which provides a very broad definition of the term.[3]

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 ES provides the following justification for the broad sub-delegation of the Comptroller-General's power to determine the designated owner of goods under section 133A of the *Trade Marks Act 1995*:

> Currently, item 3 of Schedule 3 allows only the Comptroller-General of Customs to make those determinations; this is unnecessarily restrictive, as it may be impractical for the Comptroller-General to personally make all determinations.

However, the ES provides no justification for the need to sub-delegate the Comptroller-General's power to determine the designated owner of goods under section 133A of the *Trade Marks Act 1995* to an 'officer of Customs'.

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

Minister's response

The Minister for Industry, Innovation and Science advised:

> Chapter 13 of the *Trade Marks Act 1995* (Trade Marks Act) sets out provisions empowering Customs to seize infringing goods at the border. Section 133A of the Trade Marks Act directly empowers an officer of Customs (within the meaning of subsection 4(1) of the *Customs Act 1901*) to determine who is the designated owner of imported goods, if this is otherwise unknown.

3 See *Customs Act 1901*, section 4.

From its commencement in 1996, the Trade Marks Act has extended to the territory of Norfolk Island. However, at that time Norfolk Island had its own Customs administration under the *Customs Act 1913* (NI). To allow for this, Chapter 13 of the Trade Marks Act was modified in its application to Norfolk Island so that the local Customs administration on Norfolk Island could exercise the powers and functions in that chapter (Trade Marks Acts s144(a); Trade Marks Regulations 1995, Regulation 13.7 and Schedule 3).

With effect from 1 July 2016, the *Customs Act 1913* (NI) was repealed, and the *Customs Act 1901* (Cth) was applied to Norfolk Island. Consequently, the Department of Immigration and Border Protection (DIBP) now administers customs arrangements for Norfolk Island. Due to these administrative changes, the amendment made by item 4 of Schedule 6 to the Regulation restores the ordinary scope of the power under section 133A of the Trade Marks Act in its application to Norfolk Island. That is, it mirrors the existing power exercised by Customs officers in Australia.

I understand that a small number of DIBP staff are posted to Norfolk Island to operate the customs service for the territory, and these staff are not senior executive staff and may not be holders of nominated offices. I therefore consider it appropriate that any DIBP staff on Norfolk Island who are officers of Customs should be able to exercise the power. It would be impracticable to limit the exercise of the power to the Comptroller-General in Canberra.

Nevertheless, I accept that the Explanatory Statement might have more clearly expressed the intended effect of item 4 of Schedule 6 to the Regulation. The Explanatory Statement for this instrument will be amended to clearly explain the effect of that item.

Thank you for the opportunity to provide advice on the above matters. I trust that the above information, and assurance that the Explanatory Statement will be amended, will address the concerns raised by the Committee.

Committee response

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

The committee also thanks the minister for his advice that the ES for the regulation will be amended to include a justification for the sub-delegation of the Comptroller-General's power to determine the designated owner of goods under section 133A of the *Trade Marks Act 1995* to an 'officer of Customs'.

Instruments	**Migration Regulations 1994 - Specification of Criteria for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa 2016/108 - IMMI 16/108 [F2016L01777]** **Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2016/118 [F2016L01787]**
Purpose	The instruments specify sponsor and occupational training for Subclass 407 (Training) visa and occupations in relation to the nominated occupational training in applications made for this type of visa
Last day to disallow	21 March 2017
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 of 2016

No statement of compatibility

The committee commented as follows:

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights, and must be included in the ES for the instrument.

With reference to this requirement, the committee notes that the ESs for these instruments include a statement of compatibility for a different instrument, the Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (temporary activity visas regulation). While noting that these instruments are consequential to the measures in the temporary activity visas regulation, the committee considers that statements of compatibility that rely solely on an assessment of measures in related legislation are insufficient to satisfy the requirements of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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 *Human Rights (Parliamentary Scrutiny) Act 2011*.

Minister's response

The Minister for Immigration and Border protection advised:

> As the Committee noted, these instruments are consequential to the Regulations and, accordingly, one statement of compatibility was prepared for the Regulations and the resulting legislative instruments made under the Regulations.
>
> As per the Committee's request, replacement Explanatory Statements, attaching new Statements of Compatibility, have been prepared and are attached. These replacement Explanatory Statements will be included on the Federal Register of Legislation.

Committee response

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

The committee notes that the replacement ES for each instrument attaches a statement of compatibility which includes an assessment of whether the relevant instrument is compatible with human rights.

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 *Narcotic Drugs Act 1967*
Last day to disallow	13 February 2017
Authorising legislation	*Narcotic Drugs Act 1967*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 9 of 2016

Unclear meaning of 'connections and associations'

The committee commented as follows:

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)'.[4]

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 'connections and associations' must be disclosed, and whether failure to provide sufficiently detailed information may result in an application being denied.[5] 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.

Former minister's response

The former Minister for Health and Aged Care advised:

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

5 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).

Illegal cultivation of cannabis plants, trafficking of drugs (including cannabis) and illegal manufacture of drugs are serious criminal offences and attract very high level penalties and long periods of imprisonment.

Due to limited sources of lawfully manufactured medicinal cannabis products in Australia until now, some patients or their families have been sourcing cannabis products from illicit sources. Cultivation of cannabis plants and production of cannabis and cannabis resins carry a particularly high risk of diversion because the product can be readily be used in its raw state and is likely to be attractive to organised crime seeking to hide illegal activities under cover of a Commonwealth licence. Persons who have been unlawfully cultivating and supplying cannabis products may decide to continue to pursue these activities under the guise of a Commonwealth cannabis licence under the *Narcotic Drugs Act 1967* (the Act).

The fit and proper person requirement under the Act is designed to address and manage the risks that unsuitable persons may be granted a licence. This requirement also applies to a manufacture licence.

In making decisions to grant a licence (medicinal cannabis licence, cannabis research licence and a manufacture licence) under the Act, the Secretary must be satisfied that the applicant for the licence is sufficiently responsible to undertake the activities such as cultivation of cannabis plants, production of cannabis or cannabis resins, or manufacture of narcotic drugs, that will be authorised by the licence as there is a potential for illegal activity to be undertaken should the person or body corporate cultivating, producing or manufacturing be inclined or manipulated to do so by persons who can exert influence on the person. The influence is not limited to those exerted by business associates. The persons of influence extend to relatives and other persons that may affect the applicant's reputation, character, honesty or professional integrity (refer to paragraphs 5(3)(d) to (e), 5(4)(f) to (g), 11(3)(d) to (e), 11(4)(f) to (g), 35(3)(d) to (e), and 35(4)(f) to (g) of the *Narcotic Drugs Regulation 2016*). Relatives are defined in the Act as including a spouse, parent, step-parent, child, step-child, adopted child or step-sibling of the person.

Sections 8A and 8B of the Act sets out the matters that the Secretary may have regard to when determining if an applicant or licence holder or any business associate of the applicant or licence holder is a fit and proper person. Section 8A concerns individuals as applicants or licence holder, and section 8A concerns bodies corporate as applicants or licence holder.

Sections 8A and 8B lists a wide range of matters that may be taken into account in making judgment about the applicant or the business associate of the applicant or licence holder. The matters include criminal convictions, imposition of civil penalties, any history as a regulated entity under any relevant legislation, the person's business experience, financial circumstances and background, the person's connections and associations (including relatives) and whether the person is of 'good repute' taking into account their character, honesty and professional integrity.

As stated above, the person's connections and associations are one of the matters that the Secretary may have regard to in determining whether the person is a fit and proper person.

This matter is included to ensure that persons who have links directly or indirectly to criminal elements or could be in a position to be unduly influenced by criminal elements are not permitted to participate in the licit narcotic drug system.

Examples of associations or connections that may affect adversely the applicant, licence holder, directors' or officers' honesty and personal and professional integrity are those persons who have links to criminal or outlawed organisations, person with criminal history, or persons with history of illicit drug use. However, these connections or associations will only need to be identified if that person has influence on the relevant person on the way they make decisions in relation to the cannabis licence, access and control of cannabis or other drugs, and supply of cannabis or other drugs.

To assist applicants to fill in the application forms, the guidance document for completing downloadable application provides guidance and explanations on how to fill in the required information in the application form. This document can be accessed at: www.odc.gov.au/publications/guidance-completing-downloadable-licence-applications#annexc.

The Guidance document provides that information is required to identify on whether the applicant, directors and officers of the body corporate have connections and associations with any person or party that may have the ability to adversely affect their honesty, professional decision making or personal integrity. The types of connections or associations to persons with which they are involved include 'cohorts', 'cronies', 'mates', 'special interest group' or 'clubs'.

The Guidance document provides examples of association that the Office of Drug Control may seek further information about are between the applicant/licence holder, officers and/or directors and any person:

- with links to criminal or outlawed organisations
- with criminal history or served a custodial sentence
- who has civil penalty imposed.

The persons that need to be identified also include any family member who has known links to criminal outlawed organisations or business associates who has been convicted of a crime.

I agree that applicants for a licence under the Act must be given sufficient information and guidance to ensure that persons who apply for a licence would be able to determine with sufficient precision what connections and associations must be disclosed for the purposes of obtaining a licence. This would also be useful for law enforcement agencies that will be consulted by the Secretary for information in relation to the applicant,

directors and officers of the business operation. My Department proposes to revise the Guideline document on Fit and Proper Persons and Suitable Staff to reflect the information set out in the Guidance document for completing downloadable licence applications. In addition, my Department proposes to revise both Guidance documents to ensure that they are more informative to allow the applicant determine with sufficient precision what connections and associations must be disclosed in an application for a licence.

Committee response

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

The committee also thanks the former minister for her advice that the Department of Health proposes to revise relevant Guidance documents to ensure that they are more informative to allow an applicant determine with sufficient precision what connections and associations must be disclosed in an application for a licence.

Instrument	**Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596]**
Purpose	Amends the Private Health Insurance (Prostheses) Rules 2016 (No. 4) by changing listings in Part A and B of the Schedule
Last day to disallow	1 December 2016
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitors* 8 and 10 of 2016

Drafting

The committee commented as follows:

Schedule 1, item 1 of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596] (the amendment instrument) amends the minimum benefit for billing code BS120 in Part A of Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L00381] (the principal instrument) to correct an error. The amendment instrument increases the minimum benefit for billing code BS120 in Part A from $168 to $336. The minimum benefit represents the amount that is

required to be paid for the provision of certain prostheses under private health insurance policies covering hospital treatment, where relevant conditions are met.

However, the committee notes that the minimum benefit of $168 for billing code BS120, which relates to intraoperative accessories in Part A of the principal instrument, was in effect from 8 September to 6 October 2016, and that the correction in the amendment instrument to specify a minimum benefit of $336 is not applied retrospectively.

The committee therefore seeks clarification as to whether the correct minimum benefit was applied for the supply of the relevant listed prosthesis during that period (if any). The committee seeks to ensure that no person was disadvantaged by the apparent error in the principal instrument.

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

Minister's first response

The Minister for Health and Aged Care advised:

> The minimum benefit of $168 for billing code BS120, which relates to intraoperative accessories in Part A of the principal instrument, was in effect from 8 September to 6 October 2016. The correction in the amendment instrument to specify a minimum benefit of $336 was not applied retrospectively. The device sponsor has advised my Department that the device was used 12 times during this period at a benefit of $168 each. Making these amendments retrospectively would have imposed a retrospective liability on private health insurers.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that applying the correction to the minimum benefit retrospectively would have imposed a retrospective liability on private health insurers.

However, the committee is concerned about any possible detrimental effect on individuals that may arise if an incorrect benefit was provided between 8 September and 6 October 2016. The committee therefore seeks clarification as to whether any individual was disadvantaged by the apparent error in the principal instrument in any of the 12 instances in which the relevant listed prosthesis was provided during that period.

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

Former minister's second response

The former Minister for Health and Aged Care further advised:

> The device sponsor of billing code BS120, Boston Scientific, has confirmed that the 12 devices in question were charged to hospitals at $168. Hospitals would then have been able to claim 100 per cent of the purchase price back from private health insurers, as the purchase price matched the incorrect benefit for period 8 September 2016 to 6 October 2016. As such, no individual patients or hospitals were disadvantaged by the error in the principle instrument.
>
> Boston Scientific advised that the amount they normally charge to hospitals for BS120 is $336 (the correct benefit). Boston Scientific was disadvantaged by $2,016 for the 12 devices charged at $168. Boston Scientific's Australian revenue is approximately $200 million per annum.
>
> Boston Scientific was pleased with the response from my Department to rectify the error quickly and efficiently, which helped minimise the impact.

Committee's second response

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

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	*Proceeds of Crime Act 2002*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 9 of 2016

No description of consultation

The committee commented as follows:

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

With reference to these requirements, the committee notes that the ES for 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.

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

Minister's response

The Minister for Justice advised:

> The Australian Federal Police (AFP) and state and territory justice agencies were consulted on the amendments in Schedule 1 of the Regulation on appointing approved examiners and updating references to state and territory legislation.
>
> The AFP and the Australian Financial Security Authority (AFSA) were consulted on the amendments in Schedule·2 of the Regulation. Both the AFP and AFSA were aware of the increasing complexity in managing the Confiscated Assets Account and supported the proposed increase in the annual management fee and remuneration rate of the Official Trustee in this Schedule.
>
> My department has revised the Explanatory Statement of the Regulation to include this information as per your suggestions. The revised Explanatory Statement is attached to this correspondence for your information.

Committee response

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

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	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 9 of 2016

Unclear basis for determining fees

The committee commented as follows:

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.

Former minister's response

The former Minister for Health and Aged Care advised:

> In relation to the basis on which the two fees introduced by the Therapeutic Goods Amendment (Advisory Committees and Other Measures) Regulation 2016 were calculated, in each case these fees reflect the work involved in processing requests of this nature.
>
> In relation to the fee of $1530, for providing advice that a registered over the counter (OTC) medicine is equivalent to a medicine that is listed on the Pharmaceutical Benefit Scheme (PBS) where the request does not contain clinical data, this fee reflects the Therapeutic Goods

Administration's (TGA) costs which includes direct staff time of around eight hours (on average), and the relative allocation of support and corporate costs.

In relation to the fee of $7860, for providing advice that a registered OTC medicine is equivalent to a medicine that is listed on the PBS where the request contains clinical data or a justification as to why such data is not needed (such justifications are usually accompanied by physico-chemical data and/or pharmacokinetic data, and in some cases, clinical data in the form of literature reports), this fee reflects TGA's costs which includes direct staff time of around 40 hours (on average), and the relative allocation of support and corporate costs.

The Committee's comments on explaining the basis for fees in explanatory statements is appreciated and the explanatory statement for this regulation will be updated accordingly as soon as possible.

Committee response

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

The committee also thanks the former minister for her advice that the ES will be updated to explain the basis on which the fees in the instrument are calculated.

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	*Aviation Transport Security Act 2004*; *Maritime Transport and Offshore Facilities Security Act 2003*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 9 of 2016

Insufficient information regarding strict liability offences

The committee commented as follows:

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.[6] 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.

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,*[7] as providing useful

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6 See new regulation 6.08LCA.

7 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).

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.

Minister's response

The Minister for Infrastructure and Transport advised:

> I can advise that the new Regulation introduced the requirement for issuing bodies to report any change to contact details because it is crucial for the Department, as the regulator, to have the most up-to-date contact and company information of the authorised issuing bodies. The aviation and maritime regulations prescribe multiple circumstances when the Secretary must immediately contact an issuing body, including for security-sensitive purposes.
>
> For example, if an Australian Security Intelligence Organisation security assessment of a person is qualified, and the Secretary is satisfied that the holding of an aviation security identification card (ASIC) or an maritime security identification card (MSIC) would constitute a threat to aviation or maritime security, the Secretary must give an issuing body a written direction not to issue an ASIC or an MSIC to the person.
>
> As ASICs and MSICs are security identification cards that allow a holder to remain unmonitored within certain areas or zones of security-controlled airports or security-regulated ports, the Secretary must be able to contact the issuing body in circumstances where an ASIC or an MSIC should be suspended or cancelled for security reasons.
>
> I can also advise that the new Regulation introduced a strict liability offence for failure to report a change of name by an MSIC holder or applicant because the background check that is required for the issue of a card is name based. There was no change in the aviation regulations, as this requirement existed previously for all ASIC holders and applicants. The maritime regulations also contained the offence for failure to report a change of name in cases where an MSIC was issued for more than two years. The new Regulation expanded the existing offence to all MSIC applicants and holders, harmonising the requirement across the ASIC and MSIC schemes.
>
> The Department's notification processes for issuing bodies, MSIC holders or MSIC applicants are as follows:
>
> - if an issuing body fails to report a change to their contact details to the Secretary of my Department, the Secretary will notify the issuing body, in writing, that they have committed an offence; and
> - if an MSIC holder or applicant fails to notify their issuing body within the time period permitted about a change of name, the

issuing body or the Secretary of the Department will notify the MSIC holder or applicant, in writing, that they have committed an offence. Please note an issuing body's MSIC plan may prescribe additional ways of notifying MSIC holders or applicants.

The Department has developed various communication materials for issuing bodies, ASIC and MSIC holders and applicants. Communication products include: brochures, wallet cards, posters, electronic newsletters, and factsheets (available at the Department's website). These products specify the consequences of failing to comply with the notification requirements.

The Department has also consulted industry on these amendments since 2012. Since 2014, regular consultations occurred through industry-government forums including Aviation Security Advisory Forums, Regional Industry Consultative Meetings, Maritime Industry Security Consultative Forums, Airport Security Committees, Cargo Working Groups and Issuing Body Forums.

Throughout 2016, the Department has conducted face-to-face meetings to discuss the new Regulation (including introduction of the above-mentioned offences) with 40 (out of 62) issuing bodies. The draft Regulation was released to all issuing bodies twice (in 2014 and 2016) for consultation.

Committee response

The committee thanks the minister for his response.

The committee's request for advice in relation to this regulation arose from concerns that an issuing body, MSIC holder or applicant could incur a penalty for failing to comply with the notification requirements, whether or not they have a guilty intent, and that no information was provided about how issuing bodies, MSIC holders or applicants would be made aware of the consequences of such a failure or notified of their non-compliance.

The committee notes the minister's advice that the Department of Infrastructure and Regional Development (the department) has developed communication materials for issuing bodies, MSIC holders and applicants and that these materials specify the consequences of failing to comply with the notification requirements.

The committee also notes the minister's advice about the department's notification processes where an issuing body, MSIC holder or applicant fails to comply with the notification requirements.

While the above processes form part of the department's administrative framework for ASICs and MSICs, the committee remains concerned that there is currently no general legislative requirement:

- to inform an issuing body, MSIC holder or applicant of the consequences of failing to comply to with the notification requirements; or

- to notify an issuing body, MSIC holder or applicant that they have incurred a penalty for failing to comply with the notification requirements.

The committee has concluded its examination of the instrument. However, in light of the committee's concerns regarding the absence of legislative requirements to provide guidance and inform those affected about compliance with notification requirements, the committee draws this matter to the attention of senators.

Instrument	**Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01746]**
Purpose	Amends Trans-Tasman Proceedings Regulation 2012 to reflect changes to New Zealand's financial markets laws and give effect to the Trans-Tasman patent attorney regime between Australia and New Zealand
Last day to disallow	20 March 2017
Authorising legislation	*Trans-Tasman Proceedings Act 2010*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 10 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 the regulation appears to incorporate various New Zealand Acts, including:

- *Auditor Regulation Act 2011* (NZ);
- *Financial Advisers Act 2008* (NZ);

- *Financial Markets Conduct Act 2013* (NZ);
- *Financial Reporting Act 2013* (NZ); and
- *Food Act 2014* (NZ).

However, neither the text of the regulation nor the ES expressly states the manner in which these New Zealand Acts 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.

Drafting

The regulation was registered on the Federal Register of Legislation on 11 November 2016. Section 2 of the regulation provides that Schedule 1, items 4 to 7 are to commence the day after registration, that is, on 12 November 2016.

However, with reference to section 2, the ES states that Schedule 1, items 4 to 7 will commence on 1 December 2016.

While the committee understands that Schedule 1, items 4 to 7 of the regulation commenced on 12 November 2016, the committee notes that ESs should be drafted with sufficient care to avoid potential confusion for anticipated users of instruments caused by discrepancies between the text of an instrument and its ES.

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

Minister's response

The Attorney-General advised:

> The Office of Parliamentary Counsel has advised that paragraph 14(1)(b) of the *Legislation Act 2003* would operate to ensure that the New Zealand Acts prescribed by the Regulation are incorporated as in force or existing at the time of commencement of the Regulation.
>
> The department notes that the wording of this Regulation is consistent with the Trans-Tasman Proceedings Regulation 2012. However, the department accepts the Committee's feedback that instruments and their accompanying Explanatory Statements should clearly state the manner in

which documents are incorporated. The department will ensure future instruments and Explanatory Statements state any relevant method of incorporation.

The department also notes the Committee's observation that the Explanatory Statement to the Regulation contains inconsistent descriptions regarding the commencement of Schedule 1, items 4 to 7 of the Regulation. The department has drafted an updated Explanatory Statement that rectifies this inconsistency (enclosed).

Committee response

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

The committee also thanks the Attorney-General for his advice that future instruments and ESs will state the manner in which documents are incorporated.

The committee notes that a replacement ES that rectifies the inconsistencies regarding the commencement of the instrument has been registered and received by the committee.

The committee considers that it would have been preferable for the replacement ES to have also stated the manner of incorporation of the New Zealand Acts, that is, as in force at the commencement of the regulation.

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	*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*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 9 of 2016

The committee commented in relation to two matters as follows:

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 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.

Minister's response

The Minister for Revenue and Financial Services advised:

> I have asked Treasury to lodge a revised Explanatory Statement on the Federal Register of Legislation that includes information about how to access the Determination to address this concern (please see the proposed revisions in the attachment).
>
> In the Report, the Committee also expressed concern about the amount of information provided in the Explanatory Statement to the Regulation in relation to consultation. I am advised that Treasury will ensure that future explanatory statements provide more details about consultation processes.

Committee response

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

In concluding this matter, the committee notes that a replacement ES has been registered and received by the committee, and, as amended, it includes information on how the incorporated document can be freely accessed.

The committee also thanks the minister for his advice that Treasury will provide more details in ESs about consultation undertaken in relation to instruments.

Senator John Williams (Chair)

Appendix 1

Guidelines

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 supporting 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.

Guideline on incorporation

Purpose

This guideline provides information on the committee's expectations in relation to legislative instruments that incorporate, by reference, Acts, legislative instruments or other external documents, without reproducing the relevant text of the incorporated material in the instrument.

Where an instrument incorporates material by reference, the committee expects the instrument and/or its explanatory statement (ES) to:

1. specify the manner in which the Act, legislative instrument, or other document is incorporated;
2. identify the legislative authority for the manner of incorporation specified;
3. contain a description of the incorporated document; and
4. include information as to where the incorporated document can be readily and freely accessed.

These expectations reflect the fact that incorporated material becomes a part of the law.

The guideline includes brief background information, an outline of the legislative requirements and guidance about the committee's expectations in relation to ESs.

Manner of incorporation

Instruments may incorporate, by reference, Acts, legislative instruments and other documents as they exist at different times (for example, as in force from time to time, as in force at a particular date or as in force at the commencement of the instrument). However, the manner in which material is incorporated must be authorised by legislation.

Legislative framework

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Commonwealth Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Authorising or other legislation may also provide that other documents can be incorporated into instruments as in force from time to time. However, in the absence of such legislation, other documents may only be incorporated as at the commencement of the legislative instrument (see subsection 14(2) of the *Legislation Act 2003*).

Committee's expectations

The committee expects instruments (and ideally their accompanying ESs) to clearly specify:

- the manner in which Acts, legislative instruments and other documents are incorporated (that is, either as in force from time to time or as in force at a particular time); and
- the legislative authority for the manner of incorporation.

This enables a person 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.

Below are some examples of reasons provided in ESs for the incorporation of different types of documents that the committee has previously accepted:

- **Commonwealth Acts and disallowable legislative instruments**

  Section 10 of the *Acts Interpretation Act 1901* (as applied by section 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.

- **State and Territory Acts**

  Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory Acts can be taken to be references to versions of those Acts as in force from time to time.

- **Other documents (for example, Commonwealth instruments that are exempt from disallowance, Australian and international Standards)**

  A section of the authorising (or other) legislation is identified that operates to allow these documents to be incorporated as in force from time to time.

Description of, and access to, incorporated documents

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely (i.e. without cost) access its terms. This principle is supported by provisions in the *Legislation Act 2003*.

Legislative framework

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.

Committee's expectations

The committee expects ESs to:

- contain a description of incorporated documents; and
- include information about where incorporated documents can be readily and freely accessed (for example, at a particular website).

In this regard, the committee's expectations accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to provisions of bills that authorise material to be incorporated by reference, particularly where the material is not likely to be readily and freely available to the public.

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[2] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with the appropriate justification, the committee has previously accepted:

- copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;
- the relevant extracts from the incorporated documents are set out in full in the instrument or ES; or

2 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3 (accessed 10 January 2017).

- copies of incorporated documents will be made available free of charge to people affected by, or interested in, the instrument on request to the administering agency.

Appendix 2

Correspondence

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MS16-003689

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

Dear Senator WACKA

Thank you for your letter of 10 November 2016 seeking a further response in relation to the issues identified in *Delegated legislation monitor 8 of 2016*, concerning the following instrument for which I have portfolio responsibility.

Aboriginal Land Grant (Jervis Bay Territory) By-laws 2016 (F2016L00619)

The characteristics of decisions made under Part 7 of the By-laws

Part 7 is concerned with decisions by the Wreck Bay Aboriginal Community Council (WBACC) to allow activities on Aboriginal Land within the Jervis Bay Territory (excluding the Booderee National Park) that would otherwise be prohibited. The Aboriginal Land in question is an area of 403 hectares adjacent to Booderee National Park (which covers an area of 6,379 hectares).

Part 7 of the instrument enables WBACC to grant four basic types of permits:

1. Permits for Protected Species

Part 3 of the instrument provides that a person must not do anything which could damage a protected species or which involves the taking, trading, keeping or moving of protected species unless the person has a permit from WBACC under Part 7.

2. Permits for General Offences

Division 5.2 of the instrument creates a series of general offences for activities that may damage Aboriginal Land, heritage or the environment. Offences include the dumping of waste, use of firearms, taking animals or plants onto bushland, use of the burial ground, camping, fishing and lighting fires. A person who does any of these things commits an offence under the instrument unless they have a permit from WBACC under Part 7.

3. Permits under a Management Plan

Section 19 of the instrument enables WBACC to issue permits for activities if the Management Plan for the Aboriginal Land provides that an activity may be done in accordance with a permit.

4. Permits for Water Usage

Subsection 87(1) of the instrument provides that a person occupying premises on Aboriginal Land that are connected to WBACC's water supply system must only use the water for domestic purposes, unless they have a permit from WBACC under Part 7.

How the Council's role as owner of the land in the Jervis Bay Territory is inconsistent with merits review of the Council's decisions

As stated above, the Aboriginal Land in question is an area of 403 hectares adjacent to the Booderee National Park which covers an area of 6,379 hectares. An extract from the WBACC Vision Statement provides as follows:

> *Wreck Bay Aboriginal Community Council seeks to be a respected equal and valued part of a culturally diverse Australian society. By controlling and managing its own lands and waters, the Community aims to become self-sufficient and able to freely determine its future and lifestyle. The Community desires to do this by protecting its interests and values while preserving for future generations, its unique identity, heritage and culture.*
>
> *To achieve this vision Wreck Bay Aboriginal Community Council's goals are:*
>
> ...
>
> *Sole management of its freehold land and waters, allowing for Community responsibility, empowerment and self-determination.*

The By-laws are made pursuant to s 52A of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*. The purpose of the Act is to grant land in the Jervis Bay Territory to the Wreck Bay Aboriginal Community. Once granted the land in question is Aboriginal Land and is vested in WBACC, which can then exercise its powers as owner of the land. These powers include the ability to make by-laws with respect to activities to be permitted on Aboriginal Land.

These legislative measures enable WBACC to determine and develop priorities and strategies for their land and to manage their affairs in accordance with their Indigenous decision-making processes. External merits review of the Council's decisions in relation to permits would be inconsistent with respecting the role of WBACC as owner of the land.

Yours sincerely

NIGEL SCULLION

8 / 12 / 2016

The Hon Dan Tehan MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for Cyber Security
Minister Assisting the Prime Minister for the Centenary of ANZAC

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7820

0 5 DEC 2016

MC16 - 003407

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

Dear Senator Wacka,

I refer to correspondence of 24 November 2016 from the Committee Secretary, Standing Committee on Regulations and Ordinances concerning Instrument Nos. 101 and 102 of 2016, Amendment Statements of Principles concerning panic disorder (the Instruments). The Instruments were determined by the Repatriation Medical Authority, in accordance with the provisions of subsections 196B(2) and 196B(3) respectively, and 196B(8), of the *Veterans' Entitlements Act 1986* (VEA).

The Authority is an independent statutory body, comprised of eminent medical practitioners and medical scientists. It has responsibility for determining Statements of Principles (SOPs) which detail the factors which must exist to cause a particular kind of disease, injury or death. The SOPs are binding on decision makers at all levels, in determining claims for pensions and benefits under the VEA and the *Military Rehabilitation and Compensation Act 2004*.

I am advised by the Authority that the replacement definition of 'ICD-10-AM code' inserted into clause 9 of each Instrument by the relevant amending Instrument, references (but does not incorporate) The International Statistical Classification of Diseases and Related Health Problems, ISBN 978 1 76007 020 5 (ICD-10-AM Ninth Edition). The referencing to this document (in varying editions) has been undertaken by the Authority since the determination of its initial legislative instrument in 1994.

The Authority agrees that the form of words cited by the Committee in *Delegated legislation monitor* 9 of 2016, now generally utilised in subsections 7(3) and (4) of the Authority's Statements of Principles, lead to a clearer understanding of the status of the referenced document. The Authority will consistently use this form of words in all future Statements of Principles.

In regard to the Committee's concern that ICD-10-AM Ninth Edition may not be freely available, observing that a fee of $500 appeared to be a necessary fee for access to the publication, I can advise that the publication can be freely accessed via the website of the World Health Organisation at www.who.int/classifications/icd/en/.

Thank you for bringing this matter to my attention.

Yours sincerely

DAN TEHAN

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC17-000083

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

Dear Chair John

Thank you for the Committee's letter of 1 December 2016, drawing my attention to the Committee's Delegated Legislation Monitor No. 10 of 2016 and seeking my response to issues identified in the Monitor, regarding the Defence and Strategic Goods List Amendment Instrument 2016 [F2016L01727].

The Defence and Strategic Goods List (DSGL) is made under paragraph 112(2A)(aa) of the *Customs Act 1901* which sets out the military and dual-use goods and technologies that are subject to export control regulation in Australia. The DSGL reflects the controls on sensitive military and dual-use goods that have been agreed by the four major international export control regimes, of which Australia is a member. The DSGL is amended from time to time to ensure that it reflects internationally agreed controls and best practice.

The references in the Amendment Instrument to the technical documents ITU Radio Regulations, ISO 230-2:2014 and ISO 492 that the Committee has identified, reflect internationally agreed descriptions of export controlled goods or technology. The term ITU Radio Regulations refers to a document published by the International Telecommunications Union (ITU), a specialised agency of the United Nations. The ITU Radio Regulations are available in the public domain free-of-charge on the ITU website at www.itu.int/pub/R-REG-RR-2012.

The ITU Radio Regulations include internationally recognised allocations for the use of different bands of the radio frequency spectrum. The Regulations are used by the Wassenaar Arrangement, of which Australia is a member, to define an export control exemption for certain radio equipment which is designed for a frequency band that the ITU has allocated for radio-communication services only.

The terms ISO 230-2:2014 and ISO 492 refer to documents published by the International Standards Organisation (ISO), a network of national standards bodies, of which Australia is a member. ISO 230-2:2014 is the internationally recognised standard used for the determination of accuracy and repeatability of positioning of numerically controlled axes. This standard is used by the Wassenaar Arrangement to define export control parameters for machine tools usable in the development of military weapons and systems.

ISO 492 is the internationally recognised standard used for geometrical product specifications and tolerance values of radial rolling bearings. This standard is used by the Wassenaar Arrangement and the Missile Technology Control Regime, of which Australia is also a member, to define export control parameters for bearings that are usable as high-precision components for missile and rocket engines. The phrase 'Tolerance Class 4' refers to a specific section of the standard.

Copies of these ISO publications are held by the National Library of Australia and are available free-of-charge to members of the public for loan. They are also available for purchase through the ISO website at www.iso.org.

I note the Committee's expectation that explanatory statements specify the manner in which documents are incorporated. With regards to the aforementioned ITU Radio Regulations and ISO standards, the intention is for these documents to be incorporated as in force at the time of the commencement of the instrument.

The instrument and accompanying explanatory statement will include information reflecting the above advice the next time the instrument is amended.

I appreciate the Committee's concern regarding incorporation and access of documents.

Yours sincerely

MARISE PAYNE

07 FEB 2017

ATTORNEY-GENERAL

CANBERRA

MC16-144051

21 DEC 2016

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600
<regords.sen@aph.gov.au>

Dear Chair John

I refer to the letter I recently received from Ms Toni Dawes, Committee Secretary of the Senate Standing Committee on Regulations and Ordinances, dated 1 December 2016.

This letter brought to my attention comments contained in the Senate Regulations and Ordinances Committee's *Delegated legislation monitor* 10 of 2016. In particular, I note that the Committee requested my advice in relation to the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016* and the *Trans-Tasman Proceedings Amendment (2016 Measures No.1) Regulation 2016*.

I provide the below information in response to the Committee's requests.

Explanatory Statement to the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016*

The Federal Court has noted comments by the Committee in relation to the Explanatory Statement for the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016* and will issue a Supplementary Explanatory Statement setting out details of consultation undertaken in developing those Rules.

Trans-Tasman Proceedings Amendment (2016 Measures No.1) Regulation 2016

The Office of Parliamentary Counsel has advised that paragraph 14(1)(b) of the *Legislation Act 2003* would operate to ensure that the New Zealand Acts prescribed by the Regulation are incorporated as in force or existing at the time of commencement of the Regulation.

The department notes that the wording of this Regulation is consistent with the *Trans-Tasman Proceedings Regulation 2012*. However, the department accepts the Committee's feedback that instruments and their accompanying Explanatory Statements should clearly state the manner in which documents are incorporated. The department will ensure future instruments and Explanatory Statements state any relevant method of incorporation.

The department also notes the Committee's observation that the Explanatory Statement to the Regulation contains inconsistent descriptions regarding the commencement of Schedule 1, items 4 to 7 of the Regulation. The department has drafted an updated Explanatory Statement that rectifies this inconsistency (enclosed).

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: revised Explanatory Statement to the *Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016*

EXPLANATORY STATEMENT

Trans-Tasman Proceedings Amendment (2016 Measure No. 1) Regulation 2016

Issued by the authority of the Attorney-General

Trans-Tasman Proceedings Act 2010

Trans-Tasman Proceedings Regulation 2012

The *Trans-Tasman Proceedings Act 2010* (the Act) gives effect to the 2008 *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*. The purpose of the Act is to reduce the costs associated with litigation, improve efficiency and minimise barriers to enforcing judgments and regulatory sanctions between Australia and New Zealand.

Section 110 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Trans-Tasman Proceedings Regulation 2012* (the Principal Regulation) prescribes various matters relating to the operation of the Act.

The purpose of the *Trans-Tasman Proceedings Amendment (2016 Measure No. 1) Regulation 2016* (the Amending Regulation) is to amend the Principal Regulation to:

- reflect changes to New Zealand's financial markets laws; and
- give effect to a 2013 Arrangement relating to Trans-Tasman Regulations of Patent Attorneys between Australia and New Zealand.

The Amending Regulation allows for the enforcement of a broader range of New Zealand criminal fines under regulation 15, by including five additional New Zealand laws in the Trans-Tasman scheme. The Amending Regulation also prescribes the Trans-Tasman IP Attorneys Disciplinary Tribunal (Commonwealth) (the Disciplinary Tribunal) under the Act. This amendment ensures that a summons of the President of the Disciplinary Tribunal can be served in New Zealand as a subpoena. The Amending Regulation also prescribes the Disciplinary Tribunal to allow persons in New Zealand to appear remotely before the Tribunal, pursuant to the relevant provisions of the Act.

The Office of Best Practice Regulation was consulted and advised that a Regulation Impact Statement was not required. The New Zealand Ministry of Business, Innovation & Employment was consulted on the amendments to regulation 15 and was supportive of these amendments. IP Australia was consulted on, and was supportive of, the remaining amendments related to the Disciplinary Tribunal. Given the minor nature of the amendments, no further consultation was necessary.

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

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

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Amending Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amending Regulation commences in two parts. The amendments relating to the Disciplinary Tribunal commence immediately after the commencement of Schedule 4 to the *Intellectual Property Laws Amendment Act 2015*. The amendments relating to regulation 15 commenced on the day after the instrument was registered.

ATTACHMENT A

Details of the Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016*.

Section 2 – Commencement

This section provides that Schedule 1, items 1 to 3 of the legislative instrument will commence immediately after the commencement of Schedule 4 to the *Intellectual Property Laws Amendment Act 2015*. This section also provides that Schedule 1, items 4 to 7 of the legislative instrument commenced on the day after the instrument is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Trans-Tasman Proceedings Act 2010*.

Section 4 – Schedules

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

Schedule 1 - Amendments

Trans-Tasman Proceedings Regulation 2012

Item [1] – Subregulation 9(2)

Amends the subregulation to include the Trans-Tasman IP Attorneys Disciplinary Tribunal (Commonwealth) as a tribunal that can issue subpoenas that are capable of being served in New Zealand under the Act.

Items [2] and [3] – Paragraph 12(aa) and Subregulation 13(2)

Include the Trans-Tasman IP Attorneys Disciplinary Tribunal as a tribunal that can accept remote appearances from New Zealand under the Act.

Items [4] to [7] – Subparagraphs 15(1)(a)(i), 15(1)(a)(iv), 15(1)(a)(v) and 15(1)(a)(vii)

Include the *Auditor Regulation Act 2011* (NZ), the *Financial Advisers Act 2008* (NZ), the *Financial Markets Conduct Act 2013* (NZ), the *Financial Reporting Act 2013* (NZ), and the *Food Act 2014* (NZ) as Acts which impose 'regulatory regime criminal fines' which can be enforced in Australia under the Act.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016

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 *Trans-Tasman Proceedings Act 2010* (the Act) provides a procedural framework for managing litigation with a trans-Tasman element.

Section 110 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Trans-Tasman Proceedings Regulation 2012* (the Principal Regulation) prescribes various matters relating to the operation of the Act. The *Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016* (the Amending Regulation) makes minor, technical amendments to the Principal Regulation.

The Amending Regulation allows the enforcement of a broader range of New Zealand criminal fines in Australia under regulation 15, by including five additional New Zealand laws in the Trans-Tasman scheme.

The Amending Regulation also prescribes the Trans-Tasman IP Attorneys Disciplinary Tribunal (Commonwealth) (the Disciplinary Tribunal) under the Act. This amendment ensures that a summons of the President of the Disciplinary Tribunal can be served in New Zealand as a subpoena. The Amending Regulation also prescribes the Disciplinary Tribunal to allow persons in New Zealand to appear remotely before the Tribunal, pursuant to relevant provisions of the Act. These amendments were designed to assist in the administrative handling of disciplinary matters which might arise under the 2013 Arrangement relating to Trans-Tasman Regulations of Patent Attorneys between Australia and New Zealand.

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 PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-000092

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

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances (the Committee) for requesting my advice in Delegated Legislation Monitor No. 10 of 2016 in relation to the following legislative instruments:

- *Migration Amendment (Temporary Activity Visas) Regulation 2016* [F2016L01743] (the Regulations);
- Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776] (IMMI 16/107);
- Specification for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa 2016/108 [F2016L01777] (IMMI 16/108); and
- Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2016/118 [F2016L01787] (IMMI 16/118).

In relation to the Regulations, the Committee expressed concern about applicants who, before 19 November 2016, applied for visa classes that were repealed by the Regulations. The Committee requested advice about alternative arrangements for these applicants and the effect of retrospectivity in relation to these applicants.

As outlined in the Explanatory Statement, my Department expects that there may be a small number of visa applicants who will be adversely impacted by the legislative changes. There is a possibility that some applicants will no longer be eligible for the repealed visa (e.g. because of the expiry of a nomination which cannot be renewed) and who will also not be eligible to apply for, or be granted, the equivalent new visa. Alternative arrangements for any applicants who are adversely affected will be considered on a case by case basis, depending on the specific circumstances.

I have a range of powers to intervene to remedy situations of unfairness. For example, section 351 of the *Migration Act 1958* (the Act) would allow me to grant one of the temporary activity visas to a non-citizen in a situation where the Administrative Appeals Tribunal had affirmed a refusal decision in relation to a repealed visa and I think it is in the public interest to do so. My practice is to consider intervention in circumstances not anticipated by relevant legislation; where there are clearly unintended consequences of legislation; or where the application of relevant legislation leads to unfair or unreasonable results.

In relation to IMMI 16/107, IMMI 16/108 and IMMI 16/118, the Committee requested advice about the statement of compatibility that was prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* and provided in the Explanatory Statement for these instruments. As the Committee noted, these instruments are consequential to the Regulations and, accordingly, one statement of compatibility was prepared for the Regulations and the resulting legislative instruments made under the Regulations.

As per the Committee's request, replacement Explanatory Statements, attaching new Statements of Compatibility, have been prepared and are **attached**. These replacement Explanatory Statements will be included on the Federal Register of Legislation.

The instrument IMMI 16/107 sets two new fees of $420 and $170 relating to sponsorship and nomination for temporary activity visas. In addition to the above, the Committee has requested that the Explanatory Statement makes clear the specific basis on which the fees have been calculated. The replacement Explanatory Statement for IMMI 16/107, specifying the basis on which the fees have been calculated, is **attached**.

Thank you for bringing these matters to my attention.

Yours sincerely

PETER DUTTON 19/01/17

EXPLANATORY STATEMENT

Migration Regulations 1994

FORMS, FEES, CIRCUMSTANCES AND DIFFERENT WAY OF MAKING AN APPLICATION AMENDMENT INSTRUMENT 2016/107

(Regulations 2.61, 2.66, 2.73 and 2.73A, and subitem 1223A(1))

1. The Instrument amends the instrument Forms, Fees, Circumstances and Different Way of Making an Application, IMMI 13/063. The Instrument is made under subregulations 2.07(5), 2.61(3A), 2.61(3B), 2.66(3), 2.66(4), 2.66(5), 2.73(3), 2.73(5), 2.73(9) and 2.73A(2) and 2.73A(3), and paragraphs 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1)(bc) of the *Migration Regulations 1994* (the Regulations).

2. The Instrument operates to specify matters relating to nominations, approvals and variation to approvals for standard business sponsors and temporary activity sponsors.

3. The purpose of the Instrument is to specify the process:

    a. for making an application for approval as a temporary activity sponsor, and the process for making an application to vary the terms of approval as a temporary activity sponsor; and

    b. for nomination for a Subclass 407 (Training) visa;

    as a consequence of the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

4. To clarify the amendments the Instrument inserts headings to distinguish the new content from the existing provisions relating to standard business sponsors, Subclass 457 (Temporary Work (Skilled)) nominations and applications for a Temporary Business Entry (Class UC) visa.

5. The fees that are set by the Instrument IMMI, specifically the fee applicable to an application to be approved as a Temporary Activity Sponsor ($420) and a Training Visa Nomination ($170), remain the same as the fees that were applicable to the products that they replaced. These price points ensure uniformity with similar visa products.

6. In the case of the Temporary Activity Sponsorship, the price point represents better value than the products it replaces as the validity period for sponsorship has been extended from three to five years, and once approved a sponsor will be eligible to sponsor multiple activities and visa types within the Temporary Activity visa framework. This removes the need for many organisations to become multiple classes of sponsor.

7. Extensive consultation was undertaken for the development of the new visa framework for temporary activity visas that is given effect by the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

8. The Department of Immigration and Border Protection (the Department) consulted extensively in developing the new visa framework. In September 2014, the Department issued a discussion paper and received 68 submissions. The submissions were considered in the formulation of a proposed framework that was released for consultation in December 2014. Responses were received from 71 industry stakeholders. In April 2015, the Department again sought stakeholder views by conducting a survey and received 1177 responses. The responses were considered by the Department in formulating the final framework.

9. Adjacent to this review, the Department and the Ministry for the Arts undertook a joint review of the Entertainment (subclass 420) visa and released a discussion paper on 12 January 2015, which provided an overview of a range of deregulation opportunities and proposed changes to longstanding VAC concessions. Sixty-three key stakeholders, including unions, entertainment bodies, current sponsors, relevant government agencies and migration agents were advised of the review. The department met with a number of stakeholders to discuss their comments about the range of deregulation opportunities raised in the paper. Most recently, public information sessions on the temporary activity visas were conducted in Perth, Melbourne, Brisbane and Sydney from 23 to 30 September 2016.

10. The Office of Best Practice Regulation (OBPR) has been consulted (OBPR Reference: 19898). OBPR advised that a Regulatory Impact Statement is not required for this instrument.

11. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided at **Attachment A** to this Explanatory Statement.

12. The Instrument commences immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Fees, Circumstances and Different Way of Making an Application Amendment Instrument IMMI 2016/107

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

This Legislative Instrument specifies the process for making an application for approval as a temporary activity sponsor, and the process for making an application to vary the terms of approval, as a temporary activity sponsor. The Legislative Instrument also sets out the process for nominations for a Subclass 407 (Training) visa. This includes the associated sponsorship and nomination fees and enables internet based application forms to be used, as well as paper-based application forms.

The fees set by the Legislative Instrument, specifically the fee applicable to an application to be approved as a Temporary Activity Sponsor ($420) and a Training Visa Nomination ($170), remain the same as the fees that were applicable to the products that they replaced. These price points ensure uniformity with similar visa products.
For the Temporary Activity Sponsorship, the price point represents better value than the products it replaced, as the validity period for sponsorship has been extended from three to five years. In addition, once approved, a sponsor will be eligible to sponsor multiple activities and visa types within the Temporary Activity visa framework. This removes the need for many organisations to become multiple classes of sponsor.

Human rights implications

This Legislative Instrument has been considered against each of the seven core international human rights treaties. To the extent that the Legislative Instrument applies to persons within Australia's territory and jurisdiction, the legislative instrument positively engages the right to work as provided for in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by making these temporary work visas more accessible for applicants and sponsors.

Conclusion

This Legislative Instrument is compatible with human rights because it positively engages and supports the right in Article 6 of the ICESCR.

The Hon. Peter Dutton MP, Minister for Immigration and Border Protection

EXPLANATORY STATEMENT

Migration Regulations 1994

CRITERIA FOR APPROVAL OF NOMINATION AND OCCUPATIONAL TRAINING FOR THE PURPOSES OF SUBCLASS 407 (TRAINING) VISA 2016/108

(Subregulation 2.72A(12))

1. Instrument IMMI 16/108 is made under paragraphs 2.72A(12)(c), and 2.72A(12)(d) of the *Migration Regulations 1994* (the Regulations).

2. The purpose of the Instrument is to specify sponsor and occupational training for Subclass 407 (Training) visa, which is a new visa subclass prescribed by the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

3. The operation of the Instrument is to specify sponsors and occupational training that will be provided in circumstances outlined in the Instrument for the purposes of paragraphs 2.72A(12)(c) and 2.72A(12)(d) of the Regulations and Subclass 407 (Training) visa.

4. Extensive consultation was undertaken for the development of the new visa framework for temporary activity visas that is given effect by the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

5. The Department of Immigration and Border Protection (the Department) consulted extensively in developing the new visa framework. In September 2014, the Department issued a discussion paper and received 68 submissions. The submissions were considered in the formulation of a proposed framework that was released for consultation in December 2014. Responses were received from 71 industry stakeholders. In April 2015, the Department again sought stakeholder views by conducting a survey and received 1177 responses. The responses were considered by the Department in formulating the final framework.

6. Adjacent to this review, the Department and the Ministry for the Arts undertook a joint review of the Entertainment (subclass 420) visa and released a discussion paper on 12 January 2015, which provided an overview of a range of deregulation opportunities and

proposed changes to longstanding VAC concessions. Sixty-three key stakeholders, including unions, entertainment bodies, current sponsors, relevant government agencies and migration agents were advised of the review. The department met with a number of stakeholders to discuss their comments about the range of deregulation opportunities raised in the paper. Most recently, public information sessions on the temporary activity visas were conducted in Perth, Melbourne, Brisbane and Sydney from 23 to 30 September 2016.

7. The Office of Best Practice Regulation (OBPR) has been consulted (OBPR Reference: 19898). OBPR advised that a Regulatory Impact Statement is not required for this instrument.

8. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided at **Attachment A** to this Explanatory Statement.

9. The Instrument commences immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

Statement of Compatibility with Human Rights

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

Criteria for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa IMMI 2016/108

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 Australian Government recently simplified and streamlined temporary work visas. The new Subclass 407 (Training) visa replaced the Subclass 402 (Training and Research) visa. This new visa subclass is for applicants who enter Australia to undertake occupational training for up to two years. The new visa and related sponsor requirements are similar to the repealed Subclass 402 (Training and Research) visa.

Applicants for the Subclass 407 (Training) visa must be sponsored by an organisation that is either an approved sponsor, or has applied to be a sponsor for the purposes on this visa. The Legislative Instrument specifies the types of acceptable sponsors. The Legislative Instrument establishes a new class of 'temporary activities sponsor' for the Subclass 407 (Training) visa. The Legislative Instrument also specifies circumstances where the occupational training or professional development can be provided by an entity other than the trainee's sponsor. In general, for the Subclass 407 (Training) visa, training and professional development must be carried out directly by the sponsor unless exempted in the Instrument.

The application fee for a Subclass 407 (Training) visa has been reduced (from $380 to $275) compared to the visa that it replaced.

Human rights implications

This Legislative Instrument has been considered against each of the seven core international human rights treaties. To the extent that the Legislative Instrument applies to persons within Australia's territory and jurisdiction, the Legislative Instrument positively engages the rights in Articles 6 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It does this by allowing visa holders to access occupational training programmes that support their professional development in their chosen occupation as well providing educational opportunities.

The improved sponsorship requirements set out in the Legislative Instrument also positively engage Article 7 of ICESCR by protecting trainees against exploitation by unscrupulous providers and therefore seeking to safeguard visa holders' by ensuring they have access to fair conditions of work.

Conclusion

This Legislative Instrument is compatible with human rights because it positively engages and supports the rights set out in Articles 6, 7 and 13 of the ICESCR. .

The Hon. Peter Dutton, Minister for Immigration and Border Protection

EXPLANATORY STATEMENT

Migration Regulations 1994

SPECIFICATION OF OCCUPATIONS, A PERSON OR BODY, A COUNTRY OR COUNTRIES AMENDMENT INSTRUMENT 2016/118

(paragraph 2.72B(3)(b))

13. Amendment Instrument IMMI 16/118 is made under paragraph 2.72B(3)(b) of the *Migration Regulations 1994* (the Regulations).

14. Under subsection 33(3) of the *Acts Interpretation Act 1901*, which states where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, 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.

15. Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2016/118 makes amendments to IMMI 16/059 – Specification of Occupations, a Person or Body, a Country or Countries 2016/059.

16. The purpose of the Instrument is to specify the occupations and their corresponding 6-digit code in relation to the nominated occupational training in applications made on or after 19 November 2016 for a Subclass 407 Training visa. The Subclass 407 (Training) visa forms part of the Department of Immigration and Border Protection's project to streamline temporary activity visas. This project is given effect by the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

17. Extensive consultation was undertaken for the development of the new visa framework for temporary activity visas that is given effect by the *Migration Amendment (Temporary Activity Visas) Regulation 2016.*

18. The Department of Immigration and Border Protection (the Department) consulted extensively in developing the new visa framework. In September 2014, the Department issued a discussion paper and received 68 submissions. The submissions were

considered in the formulation of a proposed framework that was released for consultation in December 2014. Responses were received from 71 industry stakeholders. In April 2015, the Department again sought stakeholder views by conducting a survey and received 1177 responses. The responses were considered by the Department in formulating the final framework.

19. Adjacent to this review, the Department and the Ministry for the Arts undertook a joint review of the Entertainment (subclass 420) visa and released a discussion paper on 12 January 2015, which provided an overview of a range of deregulation opportunities and proposed changes to longstanding VAC concessions. Sixty-three key stakeholders, including unions, entertainment bodies, current sponsors, relevant government agencies and migration agents were advised of the review. The department met with a number of stakeholders to discuss their comments about the range of deregulation opportunities raised in the paper. Most recently, public information sessions on the temporary activity visas were conducted in Perth, Melbourne, Brisbane and Sydney from 23 to 30 September 2016.

20. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 19898)

21. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided at **Attachment A** to this Explanatory Statement.

22. The Instrument commences immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*.

Statement of Compatibility with Human Rights

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

Occupations, a Person or Body, a Country or Countries Amendment for the Purposes of Subclass 407 (Training) Visa Instrument IMMI 2016/118

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 Australian Government recently simplified and streamlined temporary work visas. The new Subclass 407 (Training) visa replaced the Subclass 402 (Training and Research) visa. This new visa subclass is for applicants who enter Australia to undertake occupational training for up to two years. The new visa and its requirements are similar to the repealed Subclass 402 (Training and Research) visa.

The purpose of the Legislative Instrument is to specify the skilled occupations and their 6-digit codes to which the occupational training must relate in order for a person to be nominated for a Subclass 407 (Training) visa according to paragraph 2.72B(3)(b) of the *Migration Regulations 1994* (Cth) (Migration Regulations). Specifically, for the purposes of paragraph 2.72B(3)(b) of the Migration Regulations, the occupations and their corresponding 6-digit codes are listed in Columns A and B of Schedule 1. Columns A and B of Schedule 2 to the Legislative Instrument, pertain to the nominated occupational training in relation to an application made on after 19 November 2016 for a Subclass 407 (Training) visa.

The application fee for a Subclass 407 (Training) visa has been reduced (from $380 to $275) compared to the visa that it replaced.

Human rights implications

This Legislative Instrument has been considered against each of the seven core international human rights treaties. To the extent that the Legislative Instrument applies to persons within Australia's territory and jurisdiction, the Legislative Instrument positively engages the rights in Articles 6 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It does this by allowing visa holders to access occupational training programmes that support their professional development in their chosen occupation as well providing educational opportunities.

Conclusion

This Legislative Instrument is compatible with human rights as it positively engages and supports the rights set out in Articles 6 and 13 of the ICESCR.

The Hon. Peter Dutton, Minister for Immigration and Border Protection

SENATOR THE HON ARTHUR SINODINOS AO
MINISTER FOR INDUSTRY, INNOVATION AND SCIENCE

MC17-000464

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

Dear Senator

I refer to the request for advice from the Senate Standing Committee on Regulations and Ordinances in the *Delegated legislation monitor 10* of 2016 concerning the *Intellectual Property Legislation Amendment (Single Economic Market and Other Measures) Regulation 2016* (the Regulation). As the new Minister for Industry, Innovation and Science, I apologise for the delay in responding.

Incorporation of documents

In relation to the incorporation by reference of certain New Zealand Acts, as the Committee notes, documents that are not Acts or disallowable legislative instruments may not be incorporated as in force from time to time unless authorised by the enabling legislation. Since the legislation enabling the Regulation lacks any authorisation to incorporate Acts of the New Zealand Parliament as in force from time to time, I consider that it is implicit that the New Zealand Acts are incorporated as in force at the commencement of the instrument.

Nonetheless, I accept the Committee's concern that this could be made clearer. The Explanatory Statement for this instrument will be amended to clearly specify that these Acts of the New Zealand Parliament are incorporated in the Regulation as in force from its commencement.

Sub-delegation

Chapter 13 of the *Trade Marks Act 1995* (Trade Marks Act) sets out provisions empowering Customs to seize infringing goods at the border. Section 133A of the Trade Marks Act directly empowers an officer of Customs (within the meaning of subsection 4(1) of the *Customs Act 1901*) to determine who is the designated owner of imported goods, if this is otherwise unknown.

From its commencement in 1996, the Trade Marks Act has extended to the territory of Norfolk Island. However, at that time Norfolk Island had its own Customs administration under the *Customs Act 1913* (NI). To allow for this, Chapter 13 of the Trade Marks Act was modified in its application to Norfolk Island so that the local Customs administration on Norfolk Island could exercise the powers and functions in that chapter (Trade Marks Act s 144(a); *Trade Marks Regulations 1995* Regulation 13.7 and Schedule 3).

With effect from 1 July 2016, the *Customs Act 1913* (NI) was repealed, and the *Customs Act 1901* (Cth) was applied to Norfolk Island. Consequently, the Department of Immigration and Border Protection (DIBP) now administers customs arrangements for Norfolk Island. Due to these administrative changes, the amendment made by item 4 of Schedule 6 to the Regulation restores the ordinary scope of the power under section 133A of the Trade Marks Act in its application to Norfolk Island. That is, it mirrors the existing power exercised by Customs officers in Australia.

I understand that a small number of DIBP staff are posted to Norfolk Island to operate the customs service for the territory, and these staff are not senior executive staff and may not be holders of nominated offices. I therefore consider it appropriate that any DIBP staff on Norfolk Island who are officers of Customs should be able to exercise the power. It would be impracticable to limit the exercise of the power to the Comptroller-General in Canberra.

Nevertheless, I accept that the Explanatory Statement might have more clearly expressed the intended effect of item 4 of Schedule 6 to the Regulation. The Explanatory Statement for this instrument will be amended to clearly explain the effect of that item.

Thank you for the opportunity to provide advice on the above matters. I trust that the above information, and assurance that the Explanatory Statement will be amended, will address the concerns raised by the Committee.

Yours sincerely

ARTHUR SINODINOS AO

28 / 1 / 2017

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

Ref No: MC16-033942

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

Dear Chair

I refer to correspondence from the Committee Secretary, Ms Toni Dawes, of 1 December 2016, regarding Senate Standing Committee on Regulations and Ordinances - Private Health Insurance (Prostheses) Amendment Rules 2016 (No.3).

The device sponsor of billing code BS120, Boston Scientific, has confirmed that the 12 devices in question were charged to hospitals at $168. Hospitals would then have been able to claim 100 per cent of the purchase price back from private health insurers, as the purchase price matched the incorrect benefit for period 8 September 2016 to 6 October 2016. As such, no individual patients or hospitals were disadvantaged by the error in the principle instrument.

Boston Scientific advised that the amount they normally charge to hospitals for BS120 is $336 (the correct benefit). Boston Scientific was disadvantaged by $2,016 for the 12 devices charged at $168. Boston Scientific's Australian revenue is approximately $200 million per annum.

Boston Scientific was pleased with the response from my Department to rectify the error quickly and efficiently, which helped minimise the impact.

Thank you for bringing this matter to my attention.

Yours sincerely

The Hon Sussan Ley MP

19 DEC 2016

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MC16-143387

2 DEC 2016

Chair
Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House Canberra
regords.sen@aph.gov.au

Dear Ms Dawes

I refer to your letter of 24 November 2016 in which you brought to my attention comments contained in the Senate Regulations and Ordinances Committee *Delegated legislation Monitor No.9 of 2016.* In particular, the Committee requested further information in the Explanatory Statement to the *Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016* (the Regulation).

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

Consultation on amendments to the Regulation
The Australian Federal Police (AFP) and state and territory justice agencies were consulted on the amendments in Schedule 1 of the Regulation on appointing approved examiners and updating references to state and territory legislation.

The AFP and the Australian Financial Security Authority (AFSA) were consulted on the amendments in Schedule 2 of the Regulation. Both the AFP and AFSA were aware of the increasing complexity in managing the Confiscated Assets Account and supported the proposed increase in the annual management fee and remuneration rate of the Official Trustee in this Schedule.

My department has revised the Explanatory Statement of the Regulation to include this information as per your suggestions. The revised Explanatory Statement is attached to this correspondence for your information.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: revised *Explanatory Statement to the Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016*

EXPLANATORY STATEMENT

Issued by the Minister for Justice

Proceeds of Crime Act 2002

Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016

The *Proceeds of Crime Act 2002* (the POC Act) establishes a scheme to trace, investigate, restrain and confiscate proceeds of crime and provides the means for returning the benefits of those confiscated funds to the community, among other things.

Sections 183, 288, 297 and 338 of the Act provides that the Governor-General may make regulations prescribing persons or offices that the Minister may appoint as approved examiners, remuneration for the exercise of powers and performance of functions or duties by the Official Trustee in Bankruptcy and for payment of an annual management fee, and 'corresponding laws' for the purposes of the Act.

The *Proceeds of Crime Regulations 2002* (the Principal Regulations) provides that the Minister may appoint particular classes of person as approved examiners provided their names are kept on a register maintained by the Minister, and specifies the rate of remuneration and the annual management fee amount for the Official Trustee.

The purpose of the *Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016* (the proposed Regulation) is to amend the Principal Regulations to reflect recent changes to the POC Act under the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* and corresponding state and territory legislation.

In particular, the proposed Regulation will amend the POC Regulations to:

- remove the requirement that the Minister keep a register for the purposes of section 183 of the POC Act, and
- update references to state and territory proceeds of crime-related orders, specifying that a number of proceeds of crime orders under the *Criminal Property Forfeiture Act* (NT) and the *Confiscation Act 1997* (Vic) are 'corresponding laws' for the purposes of the POC Act.

The proposed Regulation also increases the rate of remuneration and the annual management fee for the Official Trustee. The increase in the Official Trustee's rate of remuneration would align with the Official Trustee's rate of remuneration in bankruptcy. The increase to the annual management fee would reflect the increased complexity and workload in the Official Trustee's management of the Confiscated Assets Account.

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 A.

Details of the proposed Regulation are set out in Attachment B.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The proposed Regulation is an instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulation has been informed by consultation with the Australian Federal Police (AFP), the Australian Financial Security Authority (AFSA) and with state and territory justice departments.

The following agencies were consulted in developing the amendments on appointing approved examiners and updating references to state and territory legislation in Schedule 1 of the proposed Regulation:

- the AFP
- the Attorney-General's Department (SA)
- the Department of the Attorney-General and Justice (NT)
- the Department of Justice and the Attorney-General (Qld)
- the Department of Justice (Tas)
- the Department of Justice and Regulation (Vic)
- the Department of Justice (NSW)
- the Department of the Attorney-General (WA), and
- the Department of Justice and Community Safety (ACT).

During this consultation, the Department of Justice and Regulation (Vic) and the Department of the Attorney-General and Justice (NT) agreed that proceeds of crime orders under the *Confiscation Act 1997* (Vic) and the *Criminal Property Forfeiture Act* (NT) should be referred to as 'corresponding laws' for the purposes of the POC Act under Schedule 1.

The AFP and AFSA were consulted on the amendments in Schedule 2 of the proposed Regulation. These stakeholders were aware of the increasing complexity in managing the Confiscated Assets Account and supported the proposed increase in the annual management fee and remuneration rate of the Official Trustee in this Schedule.

The proposed Regulation commences on the day after the instrument was registered on the Federal Register of Legislation.

Authority: Section 328 of the *Proceeds of Crime Act 2002*

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016

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

This legislative instrument amends the *Proceeds of Crime Regulations 2002* (the POC Regulations) to:

- reflect changes to the process in the *Proceeds of Crime Act 2002* (the POC Act) for appointment of approved proceeds of crime examiners under the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*
- update references to state and territory proceeds of crime-related orders to assist in ensuring recognition and enforcement of orders across Australian jurisdictions, and
- increase the annual fee for administering the Confiscated Assets Account (CAA) and the rate of remuneration for the Official Trustee.

The POC Act establishes a comprehensive scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth law, and also enables confiscated funds to be given back to the community to help prevent and reduce the harmful effects of crime. Under the POC Act, proceeds of crime authorities (the AFP or the Commonwealth Director of Public Prosecutions) are able, among other things, to seek court orders to deprive persons of the proceeds of, instruments of and benefit derived from serious and indictable offences against the laws of the Commonwealth.

Section 328 of the POC Act allows the Governor-General to make regulations to prescribe matters necessary for giving effect to the Act.

The proposed amendments are technical amendments to the POC Regulations that aim to ensure the continued efficient operation of the proceeds of crime regime.

Appointment of approved examiners

Part 3-1 of the POC Act provides that a responsible authority may apply to an 'approved examiner' to issue an examination notice for the examination of a person. The responsible authority is the proceeds of crime authority that makes the application.

A POC Act examination is an information-gathering tool which enables law enforcement authorities to effectively trace proceeds of crime. Under Division 1 of Part 3-1 of the POC Act, approved examiners undertake coercive examinations for the purposes of gathering information with respect to:

- restraining orders (under sections 180 and 180E of the POC Act)

- applications for exclusion from forfeiture orders (under section 180A)
- applications for compensation (under section 180B)
- applications to transfer forfeited property (under section 180C)
- the enforcement of confiscation orders (under section 180D), and
- the quashing of convictions (under section 181).

The powers of an approved examiner are set out in Part 3-1 of the POC Act. These powers include the power to summon a person to appear before an examination and evidence-gathering powers, including the power to compel a person to answer questions and produce documents.

The *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* amended the process for appointing proceeds of crime examiners, to increase probity and integrity. The 2015 amendments introduced additional qualification requirements which an approved examiner must possess, as a precondition for appointment. The current process for appointment is now set out in subsection 183(5) of the POC Act, which provides that an approved examiner is a person appointed by the Minister for Justice:

- who holds an office specified in the POC Regulations (paragraph 183(5)(a)), or
- is enrolled for five years as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a state or territory, and has indicated their willingness to be appointed (paragraph 183 (5)(b)).

Subregulation 12(1) of the POC Regulations currently provides that 'for the purposes of paragraph 183(4) of the Act, the class of people specified is the class that includes (a) a person subregulation 12(2) applies to, and (b) whose name is kept on a register kept by the Minister for the purposes of section 183 of the Act'.

This legislative instrument makes two changes to subregulation 12(1) of the POC Regulations.

Firstly, the existing requirement in subregulation 12(1)(b) that the Minister keep a register of names of persons that are approved examiners for the purposes of section 183 of the POC Act is being repealed. This change follows a review of the existing register which identified inaccuracies and redundancies. As a result a new administrative process for listing approved examiners has been developed. This process includes a key role for the Attorney-General's Department Register of Authorised Persons for Warrants and Other Functions (RAPWOF). The RAPWOF was established in 2014, and holds information about federal judges and Administrative Appeals Tribunal (AAT) members authorised by the Attorney-General or the Minister for Justice to undertake a range of personal functions under Commonwealth legislation, including the POC Act. As an online system accessible by key agencies, the RAPWOF facilitates greater monitoring of content and making it a more reliable vehicle to maintain a list of approved examiners. Removing the specific legislative requirement in subregulation 12(1)(b) to maintain a separate register will accordingly reduce duplication in processes while maintaining an up-to-date and accessible source of information for law enforcement.

Secondly, this legislative instrument will make a minor technical amendment to remove a redundant reference to subsection 183(4) of the POC Act from subregulation 12(1) and replace it with the relevant reference to new subsection 183(5) of the POC Act. This amendment is consequential to the amendments made by the POC Act to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*.

Updating list of state and territory laws

In addition to the Commonwealth POC Act, each state and territory has laws governing the proceeds of crime schemes for their respective jurisdictions. To assist effective coordination between the Commonwealth's proceed of crime scheme and state and territory schemes, the POC Act establishes a mechanism for the recognition and enforcement of POC orders made under state and territory laws. The POC Act provides that the POC Regulations may prescribe state and territory laws to be 'corresponding laws'. The Act also provides for orders made under these state and territory laws to be listed in the POC Regulations. These orders, which are similar to the type of orders made available under the POC Act, are listed in the POC Regulations as either:

- interstate forfeiture orders (Regulation 5)
- interstate pecuniary penalty orders (Regulation 6), or
- interstate restraining orders (Regulation 7).

Prescribing relevant state or territory laws and orders ensures that:

- where a court makes an order in a Commonwealth proceeding, that the court must take into account the effect of any interstate proceeds of crime orders that have already been made (sections 303 and 309), and
- where interstate forfeiture or restraining orders apply to property in a non-governing territory, they may be registered in that territory's Supreme Court and enforced as if they had been made under the POC Act (section 307).

The state and territory orders listed as 'interstate forfeiture orders', 'interstate pecuniary penalty orders' and 'interstate restraining orders' was last updated in 2014. Since that time new proceeds of crime orders and confiscation orders have been introduced in the states and territories. For example, Victoria enacted a 'serious drug offender' scheme and an 'unexplained wealth' scheme in 2014. Restraining and forfeiture orders made available under these schemes are not currently listed in the POC Regulations, and cannot therefore be recognised and enforced under the POC Act.

This legislative instrument updates the list of laws and orders in the POC Regulations to include references to confiscation orders recently introduced by Victoria and the Northern Territory. This update does not affect the making of any order under the POC Act nor does the instrument change the conduct of any proceeding under the Act.

Payments from the Confiscated Assets Account

Paragraph 297(1)(f) of the POC Act provides that paying the annual management fee of the Official Trustee of the Confiscated Assets Account is one of the purposes of this Account.

This legislative instrument increases the annual management fee under Regulation 17 of the POC Regulations from $22,000 to $272,500 (indexed annually). This change is necessary as the annual management fee has remained unchanged since 2004 and the balance and complexity of the assets held in the account have increased significantly since this fee was last updated.

This legislative instrument also increases the rate of remuneration of the Official Trustee under Regulation 15 to align with the current remuneration rate in bankruptcy matters, as the current rate of remuneration was not amended when the bankruptcy rate was increased in 2013.

Human rights implications

This legislative instrument engages the following rights:

- the right to a fair hearing under Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), and
- the right to privacy under Article 17 of the ICCPR.

Right to a fair hearing

Article 14 of the ICCPR provides two separate sets of obligations. Article 14, subsection (1) provides for the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law', both in the cases of a 'criminal charge' and the determination of one's rights and obligations in 'a suit at law'. Article 14, subsections (2) to (7) then provide the minimum guarantees which apply to criminal proceedings only

Examinations under the POC Act are information gathering procedures that relate to civil proceedings that affect a person's property rights. Neither an examination or subsequent civil proceeding under the POC Act involve determinations being made of a person's guilt or innocence or the conferral of criminal liability. As such, the POC Act scheme engages the fair trial rights provided for in Article 14(1) but not the guarantees conferred by Article 14, subsections (2) to (7).

Examiners play a role in the process under the POC Act, which must, from the time action commences against an individual under the POC Act, constitute a 'fair' hearing for the purposes of Article 14(1) of the ICCPR. The POC Act includes safeguards that ensure that a person's procedural rights are protected with respect to an examination and these safeguards are not affected by this Regulation. These safeguards include entitling the person subject to an examination notice to be accompanied by a lawyer (section 188), and entitling that lawyer to participate in, and be consulted during the examination (subsection 189(1)). The Regulation will not vary the circumstances in which an examination may take place, or change the scope or range of the powers provided to an examiner when undertaking an examination under the POC Act. Courts will retain their current discretion under the POC Act to refuse to allow an examination take place.

The fair trial rights provided for in Article 14(1) include the privilege against self-incrimination.

During an examination, an approved examiner may request that answers be given or documents be produced with respect to certain specified matters. Under section 180 of

the POC Act these matters may relate to the affairs of a person whose property is, or a person who has or claims an interest in property that is subject of the restraining order (or that person's defacto or spouse), or a person who is a suspect in relation to the restraining order (or that person's defacto or spouse). A person that fails to comply with these requests may be subject to criminal penalty under section 196 of the POC Act.

The POC Act includes reasonable and appropriate safeguards to protect the person's privilege against self-incrimination. The POC Act provides reasonable and appropriate exclusions from the obligation to allow for disclosure of incriminating information in certain circumstances. Information obtained by approved examiners using coercive powers is subject to derivative use immunity in most circumstances. This immunity ensures that a disclosure made by a person who gave an answer or produced a document in an examination is not admissible in evidence against the person in a civil or criminal proceeding. Section 198 of the POC Act provides that this immunity does not apply in certain limited circumstances. These include proceedings for giving false or misleading information, and proceedings on an application under the POC Act, or proceedings ancillary to an application under the POC Act. These exceptions are reasonable and appropriate.

The POC Act also sets clear parameters around the circumstances in which information obtained by approved examiners using coercive powers can be shared. Commonwealth proceeds of crime authorities will only be able to disclose information to appropriate foreign authorities or to state and territory authorities for the purpose of identifying, locating, tracing, investigating or confiscating proceeds or instruments of crime. Disclosures to foreign authorities will only be made where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian proceeds of crime law.

This legislative instrument does not change either the scope or safeguards attached to fair hearing rights, including the privilege against self-incrimination. Thus, the proposed amendment does not limit or promote human rights with respect to a 'fair hearing'.

Right to privacy

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. This includes the right to protection from interferences with a person's territory, property and personal information. Accordingly, lawful interferences with a person's privacy will be permitted provided they are not arbitrary.

As noted above, examinations under the POC Act are information gathering procedures.

The answers or documents required of a person subject to examination will usually divulge personal information, as it will relate to 'the affairs' of a relevant person. Thus, the obtaining of personal information under the POC Act may constitute interferences with a person's privacy. Lawful interferences with a person's privacy will be allowed by Article 17 of the ICCPR, provided that they are not arbitrary.

This legislative instrument does not change either the scope or safeguards attached to the use and disclosure of information gathered by examiners. The proposed amendment does not alter the conditions under which a person may be subject to examination; the type of information that may be required by examiners under the POC Act; the use of that information; or any of the safeguards attached to its use or disclosure. To the extent that

examinations under the POC Act currently engage with privacy rights provided for in Article 17, limitations of these rights are necessary to achieve, and reasonable in achieving the aim of disrupting criminal activity and combating serious and organised crime.

Conclusion

This legislative instrument is compatible with human rights because, to the extent that it may limit human rights through its application, as part of the broader existing scheme those limitations are reasonable, necessary and proportionate.

ATTACHMENT B

Details of the Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016*.

Section 2 – Commencement

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

Section 3 – Authority

This section provides that the instrument is made under the POC Act.

Section 4 – Schedules

This section provides that the Principal Regulation specified in a Schedule to the Regulation 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

Proceeds of Crime Regulations 2002

Item [1] – Regulation 5

Includes declarations that property has been automatically forfeited under a serious drug offender order or an unexplained wealth forfeiture order under the *Confiscation Act 1997* (Vic) as 'corresponding laws' for the purposes of the POC Act.

Item [2] and [3] – Regulation 7

Includes unexplained wealth restraining orders under the *Confiscation Act 1997* (Vic) and interim restraining orders under the *Criminal Property Forfeiture Act* (NT) as 'corresponding laws' for the purposes of the POC Act.

Item [4] – Regulation 12

Removes the requirement that the Minister keep a register for the purposes of section 183 of the POC Act and clarifies the persons and offices that can be appointed as approved examiners under this section as: presidential members of the Administrative Appeals Tribunal (AAT), non-presidential members of the AAT enrolled as a legal practitioner for at least 5 years, and persons who have held the office of judge or magistrate and have stated, in writing, willingness to be an approved examiner.

Schedule 2 – Amendments

Proceeds of Crime Regulations 2002

Item [1] – Regulation 15

Increases the rate of remuneration for the Official Trustee in Bankruptcy from $50 per 15 minute period to $62.50 per 15 minute period. This increase aligns the Official Trustee's remuneration rate under the Principal Regulation with the Official Trustee's remuneration rate in bankruptcy.

Items [2] and [3] – Regulation 17

Removes references to the previous annual management fee and increases the annual management fee to $272,500 for the 2016 calendar year and each later calendar year. This increase to the annual management fee reflects the increased complexity and workload in the Official Trustee's management of the Confiscated Assets Account.

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

Ref No: MC16-033386

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

1 DEC 2016

Dear ~~Chair~~ John

Thank you for your correspondence of 24 November 2016 regarding the Senate Standing Committee on Regulations and Ordinances - Narcotic Drugs Regulation 2016 [F2016L01613] and Therapeutic Goods Amendment (Advisory Committees and Other Measures) Regulation 2016 [F2016L01614].

Therapeutic Goods Amendment (Advisory Committees and Other Measures) Regulation 2016 [F2016L01614].

In relation to the basis on which the two fees introduced by the *Therapeutic Goods Amendment (Advisory Committees and Other Measures) Regulation 2016* were calculated, in each case these fees reflect the work involved in processing requests of this nature.

In relation to the fee of $1530, for providing advice that a registered over the counter (OTC) medicine is equivalent to a medicine that is listed on the Pharmaceutical Benefit Scheme (PBS) where the request does not contain clinical data, this fee reflects the Therapeutic Goods Administration's (TGA) costs which includes direct staff time of around eight hours (on average), and the relative allocation of support and corporate costs.

In relation to the fee of $7860, for providing advice that a registered OTC medicine is equivalent to a medicine that is listed on the PBS where the request contains clinical data or a justification as to why such data is not needed (such justifications are usually accompanied by physico-chemical data and/or pharmacokinetic data, and in some cases, clinical data in the form of literature reports), this fee reflects TGA's costs which includes direct staff time of around 40 hours (on average), and the relative allocation of support and corporate costs.

The Committee's comments on explaining the basis for fees in explanatory statements is appreciated and the explanatory statement for this regulation will be updated accordingly as soon as possible.

Narcotic Drugs Regulation 2016 [F2016L01613]

The Committee noted that the neither the regulation nor the Explanatory Statement expressly defines the terms 'connections' or associations and that the requirements appear unclear as to what type of 'connections and associations' must be disclosed and whether failure to provide sufficiently detailed information may result in an application being denied.

The Committee is 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 a permit.

The Committee requested my advice in relation to this matter. Illegal cultivation of cannabis plants, trafficking of drugs (including cannabis) and illegal manufacture of drugs are serious criminal offences and attract very high level penalties and long periods of imprisonment. Due to limited sources of lawfully manufactured medicinal cannabis products in Australia until now, some patients or their families have been sourcing cannabis products from illicit sources. Cultivation of cannabis plants and production of cannabis and cannabis resins carry a particularly high risk of diversion because the product can be readily be used in its raw state and is likely to be attractive to organised crime seeking to hide illegal activities under cover of a Commonwealth licence. Persons who have been unlawfully cultivating and supplying cannabis products may decide to continue to pursue these activities under the guise of a Commonwealth cannabis licence under the *Narcotic Drugs Act 1967* (the Act).

The fit and proper person requirement under the Act is designed to address and manage the risks that unsuitable persons may be granted a licence. This requirement also applies to a manufacture licence.

In making decisions to grant a licence (medicinal cannabis licence, cannabis research licence and a manufacture licence) under the Act, the Secretary must be satisfied that the applicant for the licence is sufficiently responsible to undertake the activities such as cultivation of cannabis plants, production of cannabis or cannabis resins, or manufacture of narcotic drugs, that will be authorised by the licence as there is a potential for illegal activity to be undertaken should the person or body corporate cultivating, producing or manufacturing be inclined or manipulated to do so by persons who can exert influence on the person. The influence is not limited to those exerted by business associates. The persons of influence extend to relatives and other persons that may affect the applicant's reputation, character, honesty or professional integrity (refer to paragraphs 5(3)(d) to (e), 5(4)(f) to (g), 11(3)(d) to (e), 11(4)(f) to (g), 35(3)(d) to (e), and 35(4)(f) to (g) of the *Narcotic Drugs Regulation 2016*). Relatives are defined in the Act as including a spouse, parent, step-parent, child, step-child, adopted child or step-sibling of the person.

Sections 8A and 8B of the Act sets out the matters that the Secretary may have regard to when determining if an applicant or licence holder or any business associate of the applicant or licence holder is a fit and proper person. Section 8A concerns individuals as applicants or licence holder, and section 8A concerns bodies corporate as applicants or licence holder.

Sections 8A and 8B lists a wide range of matters that may be taken into account in making judgment about the applicant or the business associate of the applicant or licence holder. The matters include criminal convictions, imposition of civil penalties, any history as a regulated entity under any relevant legislation, the person's business experience, financial circumstances and background, the person's connections and associations (including relatives) and whether the person is of 'good repute' taking into account their character, honesty and professional integrity.

As stated above, the person's connections and associations are one of the matters that the Secretary may have regard to in determining whether the person is a fit and proper person. This matter is included to ensure that persons who have links directly or indirectly to criminal elements or could be in a position to be unduly influenced by criminal elements are not permitted to participate in the licit narcotic drug system.

Examples of associations or connections that may affect adversely the applicant, licence holder, directors' or officers' honesty and personal and professional integrity are those persons who have links to criminal or outlawed organisations, person with criminal history, or persons with history of illicit drug use. However, these connections or associations will only need to be identified if that person has influence on the relevant person on the way they make decisions in relation to the cannabis licence, access and control of cannabis or other drugs, and supply of cannabis or other drugs.

To assist applicants to fill in the application forms, the guidance document for completing downloadable application provides guidance and explanations on how to fill in the required information in the application form. This document can be accessed at www.odc.gov.au/publications/guidance-completing-downloadable-licence-applications#annexc.

The Guidance document provides that information is required to identify on whether the applicant, directors and officers of the body corporate have connections and associations with any person or party that may have the ability to adversely affect their honesty, professional decision making or personal integrity. The types of connections or associations to persons with which they are involved include 'cohorts', 'cronies', 'mates', 'special interest group' or 'clubs'.

The Guidance document provides examples of association that the Office of Drug Control may seek further information about are between the applicant/licence holder, officers and/or directors and any person:

- with links to criminal or outlawed organisations
- with criminal history or served a custodial sentence
- who has civil penalty imposed.

The persons that need to be identified also include any family member who has known links to criminal outlawed organisations or business associates who has been convicted of a crime.

I agree that applicants for a licence under the Act must be given sufficient information and guidance to ensure that persons who apply for a licence would be able to determine with sufficient precision what connections and associations must be disclosed for the purposes of obtaining a licence. This would also be useful for law enforcement agencies that will be consulted by the Secretary for information in relation to the applicant, directors and officers of the business operation. My Department proposes to revise the Guideline document on Fit and Proper Persons and Suitable Staff to reflect the information set out in the Guidance document for completing downloadable licence applications. In addition, my Department proposes to revise both Guidance documents to ensure that they are more informative to allow the applicant determine with sufficient precision what connections and associations must be disclosed in an application for a licence.

Yours sincerely

The Hon Sussan Ley MP

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

PDR ID: MC16-005903

06 DEC 2016

Chair
Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House, Canberra

Dear Chair

Thank you for your letter of 24 November 2016 regarding the Senate Regulations and Ordinances Committee's report, *Delegated legislation monitor* 9 of 2016. I note that the Committee has requested a response in relation to issues identified with the Transport Security Legislation Amendment (Identity Security) Regulation 2016.

I can advise that the new Regulation introduced the requirement for issuing bodies to report any change to contact details because it is crucial for the Department, as the regulator, to have the most up-to-date contact and company information of the authorised issuing bodies. The aviation and maritime regulations prescribe multiple circumstances when the Secretary must immediately contact an issuing body, including for security-sensitive purposes.

For example, if an Australian Security Intelligence Organisation security assessment of a person is qualified, and the Secretary is satisfied that the holding of an aviation security identification card (ASIC) or an maritime security identification card (MSIC) would constitute a threat to aviation or maritime security, the Secretary must give an issuing body a written direction not to issue an ASIC or an MSIC to the person.

As ASICs and MSICs are security identification cards that allow a holder to remain unmonitored within certain areas or zones of security-controlled airports or security-regulated ports, the Secretary must be able to contact the issuing body in circumstances where an ASIC or an MSIC should be suspended or cancelled for security reasons.

I can also advise that the new Regulation introduced a strict liability offence for failure to report a change of name by an MSIC holder or applicant because the background check that is required for the issue of a card is name based. There was no change in the aviation regulations, as this requirement existed previously for all ASIC holders and

applicants. The maritime regulations also contained the offence for failure to report a change of name in cases where an MSIC was issued for more than two years. The new Regulation expanded the existing offence to all MSIC applicants and holders, harmonising the requirement across the ASIC and MSIC schemes.

The Department's notification processes for issuing bodies, MSIC holders or MSIC applicants are as follows:

- if an issuing body fails to report a change to their contact details to the Secretary of my Department, the Secretary will notify the issuing body, in writing, that they have committed an offence; and

- if an MSIC holder or applicant fails to notify their issuing body within the time period permitted about a change of name, the issuing body or the Secretary of the Department will notify the MSIC holder or applicant, in writing, that they have committed an offence. Please note an issuing body's MSIC plan may prescribe additional ways of notifying MSIC holders or applicants.

The Department has developed various communication materials for issuing bodies, ASIC and MSIC holders and applicants. Communication products include: brochures, wallet cards, posters, electronic newsletters, and factsheets (available at the Department's website). These products specify the consequences of failing to comply with the notification requirements.

The Department has also consulted industry on these amendments since 2012. Since 2014, regular consultations occurred through industry-government forums including Aviation Security Advisory Forums, Regional Industry Consultative Meetings, Maritime Industry Security Consultative Forums, Airport Security Committees, Cargo Working Groups and Issuing Body Forums.

Throughout 2016, the Department has conducted face-to-face meetings to discuss the new Regulation (including introduction of the above-mentioned offences) with 40 (out of 62) issuing bodies. The draft Regulation was released to all issuing bodies twice (in 2014 and 2016) for consultation.

I hope this information is of assistance to the Committee.

Yours sincerely

DARREN CHESTER

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

6 DEC 2016

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

Dear Senator John

Thank you for the letter provided to my office on your behalf on 24 November 2016, regarding comments made in the Senate Standing Committee on Regulations and Ordinances *Delegated legislation monitor* 9 of 2016 (the Report) in relation to *Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016* (the Regulation).

In the Report, the Committee expressed concern that the Explanatory Statement to the Regulation did not provide information about how to locate the 'Natural Disaster Relief and Recovery Determination Version 2.0 determined by the Minister for Justice on 29 October 2015' (the Determination) that was incorporated into the Regulation by reference.

I have asked Treasury to lodge a revised Explanatory Statement on the Federal Register of Legislation that includes information about how to access the Determination to address this concern (please see the proposed revisions in the attachment).

In the Report, the Committee also expressed concern about the amount of information provided in the Explanatory Statement to the Regulation in relation to consultation. I am advised that Treasury will ensure that future explanatory statements provide more details about consultation processes.

Thank you again for bringing these matters to my attention. I hope this information is of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

enc.

Parliament House, Canberra ACT 2600, Australia
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EXPLANATORY STATEMENT

Issued by authority of the Minister for Revenue and Financial Services

A New Tax System (Goods and Services Tax) Act 1999
Income Tax Assessment Act 1997
Taxation Administration Act 1953
Banking Act 1959

Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016

Section 177-15 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), section 909-1 of the *Income Tax Assessment Act 1997* (ITAA 1997), section 18 of the *Taxation Administration Act 1953* (TAA) and section 71 of the *Banking Act 1959* (Banking Act) provide that the Governor-General may make regulations prescribing matters required or permitted by the Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Acts.

Schedule 1 to the *Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016* (the Regulation) amends the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST Regulations) to add the statutory insurance scheme legislated under the *Building and Construction Commission Act 1991 (Qld)* (Queensland Home Warranty Scheme) to the list of statutory compensation schemes.

The purpose of Schedule 1 to the Regulation is to recognise the Queensland Home Warranty Scheme as a statutory compensation scheme to ensure that insurance premiums and settlements under the scheme are subject to the special rules that apply to insurance premiums and settlements under Division 78 of the GST Act.

Schedule 1 to the Regulation gives effect to this by amending Schedule 10 of the GST Regulations to add the Queensland Home Warranty Scheme to the list of statutory compensation schemes.

Schedule 2 to the Regulation updates the information requirements for farm management deposits (FMDs) as a result of recent changes to the taxation law concerning FMDs. To give effect to this, the Regulation prescribes the types of natural disaster relief and recovery arrangements that enable FMDs to be withdrawn within 12 months without affecting the income tax deduction for deposits.

The purpose of Schedule 2 to the Regulation is to revise and remake regulations for FMDs previously contained in the *Income Tax (Farm Management Deposits) Regulations 1998* (FMD Regulations 1998) prior to their sunsetting in 2019, to give effect to recent changes to the law concerning FMDs and make a consequential change to the *Banking Regulations 1966*.

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

Details of the Regulation are set out in the Attachment.

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

The GST Act, ITAA 1997, TAA and Banking Act do not specify any condition that must be met before the power to make the Regulation may be exercised.

Schedule 1 to the Regulation commences on the later of the day after registration on the Federal Register of Legislation and the day on which the Queensland Home Warranty Scheme becomes a statutory compensation scheme.

Schedule 2 to the Regulation commences the day after its registration on the Federal Register of Legislation.

Attachment

Details of the Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016* (the Regulation).

Section 2 – Commencement

This section provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

Schedule 1 to the Regulation commences on the later of the day after the Regulation is registered and the commencement of section 36 of Part 2 of the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014.* It does not commence at all if section 36 of the aforementioned Act does not commence.

Schedule 2 to the Regulation commences the day after registration of the Regulation on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulation is made under the *A New Tax System (Goods and Services Tax) Act 1999*, the *Income Tax Assessment Act 1997,* the *Taxation Administration Act 1953* and the *Banking Act 1959.*

Section 4 – Schedule

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 time in a Schedule to this instrument has effect according to its terms.

Schedule 1 - QLD home warranty scheme

The Regulation amends Schedule 10 of the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST Regulations) to add the statutory insurance scheme legislated under the *Building and Construction Commission Act 1991 (Qld)* (Queensland Home Warranty Scheme) to the list of statutory compensation schemes to ensure the special rules that apply to insurance policies and to payments or supplies made in settlement of a claim under those policies apply to it.

The Queensland Home Warranty Scheme currently insures residential building work undertaken in Queensland.

The Queensland *Building and Construction Commission Act 1991,* governing the Queensland Home Warranty Scheme, has been amended (with the amendments to take effect upon proclamation). The amendments will have the effect of including the existing insurance arrangements (that are on the same or similar terms and conditions) in legislation by including them in the *Queensland Building and Construction Commission Regulations 2003*. Under the existing insurance arrangements the terms and conditions are included in insurance policy contracts.

Once these changes come into effect, the Queensland Home Warranty Scheme will be considered to be a statutory compensation scheme for GST purposes. This will occur at the later of the registration of the Regulation and when the amendments to the *Queensland Building and Construction Commission Act 1991* giving effect to the changes to the scheme are proclaimed.

Division 78-E of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) ensures that the special rules that apply to insurance policies and to payments or supplies made in settlement of a claim apply to statutory compensation schemes if they are prescribed in the GST Regulations. Regulation 78-105.01 of the GST Regulations enables statutory compensation schemes to be prescribed in Schedule 10 of the GST Regulations. This ensures that prescribed statutory compensation schemes are treated consistently with other insurance products.

Schedule 1 to the Regulation ensures that the special rules for insurance contained in Division 78 of the GST Act apply to the Queensland Home Warranty Scheme by including it in Schedule 10 of the GST Regulations.

Schedule 1 to the Regulation commences at the later of the time at which the Queensland Home Warranty Scheme becomes a statutory compensation scheme and the day after registration of the Regulation. This ensures that Division 78 of the GST Act continues to apply to new insurance policies and to payments or supplies made in settlement of a claim under policies for the Scheme.

Schedule 2 - Farm management deposits

The purpose of Schedule 2 to the Regulation is to revise and remake regulations for farm management deposits (FMDs) previously contained in the *Income Tax (Farm Management Deposits) Regulations 1998* (FMD Regulations 1998) prior to their sunsetting in 2019. It repeals the FMD Regulations 1998 and moves the provisions previously contained in the regulations into the *Income Tax Assessment Regulations 1997* (ITAR 1997) and to the *Taxation Administration Regulations 1976* (TAR 1976).

Schedule 2 to the Regulation also makes consequential changes to the existing information requirements as a result of recent changes to the taxation law by the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Act) concerning FMDs.

The Act extended the natural disaster circumstances in which primary producers can withdraw an amount held in an FMD within 12 months of deposit in the income year following deposit, without affecting the income tax treatment of the FMD in the earlier income year. The natural disaster circumstances are extended to include severe drought.

The Act amended the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Taxation Administration Act 1953* (TAA) to enable FMDs to be used to offset loans or other debts relating to the FMD owner's primary production business. The Act also amended the TAA to impose an administrative penalty in circumstances where an FMD is applied to reduce interest on a non-qualifying loan such as a non-primary production business or private loan.

As a result of the changes to FMD arrangements in the Act, consequential changes are also made by Schedule 2 to the Regulation to ensure that FMD depositors are fully informed when making deposits. Accordingly, the regulation requires FMD providers

to inform depositors of FMDs that, although FMDs can be used to offset loans, a 200 per cent administrative penalty may apply if an FMD is offset against a non-primary production business loan. Schedule 2 to the Regulation also ensures that the information provided to FMD depositors includes an explanation of potential eligibility to withdraw an FMD amount within 12 months in severe drought situations. Schedule 2 to the Regulation also updates the information provided to depositors concerning the security of money held in FMDs by requiring information about the Financial Claims Scheme to be provided to depositors. 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. Both the current and prior versions of the determination are available on Emergency Management Australia's DisasterAssist website at www.disasterassist.gov.au/Pages/related-links/Natural-Disaster-Relief-and-Recovery-Arrangements.asp.

Schedule 2 to the Regulation remakes the FMD Regulations 1998, to reflect these changes to the taxation law concerning FMDs and also to consolidate the regulations and to update the regulations to reflect current drafting practices. Minor changes are also made to the text of the explanation of the information that must be provided to depositors and also provided by FMD providers to the Agriculture Secretary. These changes clarify and streamline the explanation of these information requirements. Schedule 2 to the Regulation remakes the FMD regulations under the ITAA 1997 and the TAA, achieving correspondence between the relevant sections of the ITAA 1997 and the relevant sections of the ITAR 1997. Schedule 2 to the Regulation also updates an out-of-date reference to 'the Secretary of the Department of Agriculture, Fisheries and Forestry' and make a consequential change to the *Banking Regulations 1966* to update a cross-reference from the FMD Regulations 1998 to the ITAR 1997.

Statement of Compatibility with Human Rights

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

Treasury Laws Amendment (2016 Measures No. 3) Regulation 2016

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 Regulation:

- in Schedule 1 recognises the Queensland Home Warranty Scheme as a statutory compensation scheme to ensure that insurance premiums and settlements under the scheme are subject to the special rules that apply to insurance premiums and settlements under Division 78 of the *A New Tax System (Goods and Services Tax) Act 1999*.

- in Schedule 2 revises and remakes regulations for farm management deposits previously contained in the *Income Tax (Farm Management Deposits) Regulations 1998*) prior to their sunsetting in 2019. The regulations are relocated to the *Income Tax Assessment Regulations 1997* and to the *Taxation Administration Regulations 1976*. Consequential changes are also made to the existing information requirements as a result of recent changes to the taxation law made by Schedule 3 to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* and to correct a cross-reference in the *Banking Regulations 1966*.

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.