The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

The committee's 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 *Odgers' Australian Senate Practice*, 14th Edition (2016), 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 7 April 2017 and 11 May 2017 (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	**Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1) [F2017L00451]**
Purpose	Clarifies the basis on which the AUSTRAC CEO can suspend a remittance dealer's registration and exempts licensed trustees from complying with specified provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* when they provide certain designated services
Authorising legislation	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 definition of people smuggling in subparagraph 59.11(5)(c)(ii) of Schedule 1 incorporates the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol). However, neither the instrument nor the explanatory statement (ES) expressly states the manner in which the Protocol is 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 a particular 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'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.

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 (i.e. without cost) 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 Protocol. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

While the committee notes that the Protocol is available for free online from some international organisations' websites[1], neither the instrument nor the ES states where it can be accessed.

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1 United Nations Treaty Collection, *Treaty Series*, https://treaties.un.org (accessed 1 June 2017) and EU External Action Service, *Treaties Office Database*, http://ec.europa.eu/world/agreements (accessed 1 June 2017).

Where an incorporated document is available for free online, the committee considers a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

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

Instrument	**Civil Aviation Order 95.10 Instrument 2017 [F2017L00480]**
Purpose	Exempts operators of low-momentum ultralight aeroplanes from particular requirements of the Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998
Authorising legislation	Civil Aviation Regulations 1988; Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 subsection 6.1(c) of the Civil Aviation Order 95.10 Instrument 2017 [F2017L00480] (the order) provides that an aeroplane to which the order applies must be flown in specified classes of airspace; and that the definition of those classes of airspace in the note to subsection 6.1(c) incorporates the Australian Airspace Policy Statement.[2] However, neither the order

2 The committee understands that the Australian Airspace Policy Statement 2015 [F2015L01133] is a legislative instrument that is not subject to disallowance.

nor the ES expressly states the manner in which the Australian Airspace Policy Statement is 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 a particular 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'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	**Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516]** **Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452]** **Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518]**
Purpose	Specifies construction, design, performance and labelling requirements for babies' dummies; Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear; and Extends the interim ban on certain decorative alcohol fuelled devices by a period of 30 days from 16 May 2017
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Disallowance	15 sitting days after tabling [F2017L00452] (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017 [F2017L00516]; [F2017L00518] (tabled Senate 13 June 2017) Notice of motion to disallow must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Background

Subsection 44(1) of the *Legislation Act 2003* (LA) provides:

> Section 42 [disallowance of legislative instruments] does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the *Corporations Act 2001*):
>
> (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
>
> (b) authorises the instrument to be made by the body or for the purposes of the body or scheme;
>
> unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

The explanatory memorandum to the *Legislative Instruments Act 2003*[3] explains:

> Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.

In 2010 the *Trade Practices Act 1974* was amended to be named the *Competition and Consumer Act 2010* (CCA) and to establish the Australian Consumer Law (ACL). The amendments were made pursuant to the agreements of the Council of Australian Governments (COAG) made on July and October 2008, to create a single national consumer law for Australia, including a national product safety law, and the *Intergovernmental Agreement for the Australian Consumer Law*, signed by COAG in July 2009.

The ACL therefore appears to facilitate the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States.

Sections 104 and 105 of the ACL authorise safety standards to be made; and section 109 authorises interim bans to be made for the purposes of the ACL scheme. Section 131E of the CCA provides that instruments made under these sections of the

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*.

ACL are to be made by legislative instrument. Neither the ACL, CCA or another Act appear to otherwise have the effect that legislative instruments made under these sections are disallowable. Therefore, it appears that by virtue of paragraph 44(1)(a) of the LA such legislative instruments would be exempt from disallowance.

Classification of legislative instruments as subject to disallowance

The Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516] (the dummy standard) is made under section 104 of the ACL. The purpose of the dummy standard is to ensure babies' dummies and dummy chains have safety features that reduce the risk of injury.

The Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) is made under section 105 of the ACL. The purpose of the nightwear standard is to reduce the risk of child death and injury associated with nightwear catching fire.

The Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518] (the interim devices ban) is made under section 109 of the ACL. The purpose of the interim devices ban is to minimise the risk of injury to persons due to uncontrolled fire while refuelling, lighting or being in close proximity to an alcohol fuelled device.

As set out above, the dummy standard and the nightwear standard are made under sections 104 and 105 of the ACL; and the interim device ban is made under section 109. Therefore, as these standards appear to facilitate the operation of an intergovernmental scheme, are not regulations and do not appear to be disallowable under the CCA, ACL or another Act, the committee understands that these instruments may be exempt from disallowance in accordance with subsection 44(1) of the LA.

However, the ESs to the dummy standard, the nightwear standard and the interim devices ban state the following in relation to each instrument:

> This legislative instrument is subject to disallowance under Chapter 3, Part 2 of the *Legislation Act 2003*.

It is therefore unclear to the committee whether these standards have been properly described as subject to disallowance.

The committee is also interested to understand more about the apparent inconsistent approach to the classification of instruments made under the ACL. For example, the committee notes that the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474] (the egg standard) also seems to be covered by the operation of section 44(1) of the LA, but it is classified as

exempt from disallowance (and thereby removed from the effective oversight of the Parliament).[4]

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

Instrument	**Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471]**
Purpose	Adjusts entitlements of divorced or separated spouses, or of separated de facto couples (except in Western Australia), under certain orders or agreements splitting particular kinds of future superannuation benefits made in property settlements under the *Family Law Act 1975*
Authorising legislation	Family Law (Superannuation) Regulations 2001
Department	Attorney-General's
Disallowance	Exempt (tabled Senate 9 May 2017)
Scrutiny principle	Standing Order 23(3)(a)

Background

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)[5] exempts particular instruments from disallowance, including, by virtue of table item 3 in section 9, instruments (other than regulations) relating to superannuation.

The ES to the exemption regulation provides the following justification for the exemption:

> This exemption exists because exposure of superannuation instruments to disallowance would cause commercial uncertainty, as well as uncertainty for superannuation fund members and providers. These instruments are

4 The egg standard is made under section 134 of the ACL which authorises information standards to be made for the purposes of the ACL scheme. As the egg standard is not a regulation and does not appear to be disallowable under the CCA, ACL or another Act, it appears to be exempt from disallowance.

5 The exemption regulation replaced the former Legislative Instruments Regulations 2004, and was part of a suite of changes to the regime governing legislative instruments implemented by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*).

intended to have enduring operation and are not suitable for the disallowance process.

Classification of legislative instrument as exempt from disallowance

The Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471] (the determination) adjusts entitlements of divorced or separated spouses, or of separated de facto couples (except in Western Australia), under certain orders or agreements splitting particular kinds of future superannuation benefits made in property settlements under the *Family Law Act 1975*.

As set out above, by virtue of table item 3 in section 9 of the exemption regulation, the committee understands the determination to be exempt from disallowance, as it is an instrument (other than a regulation) which relates to superannuation.

However, the committee notes that the statement of compatibility to the determination refers to the determination as a 'Disallowable Legislative Instrument'.

The committee seeks to confirm whether the determination has been properly classified as exempt from disallowance (and thereby removed from the effective oversight of the Parliament).

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

Instrument	**Fish Receiver Permits Declaration 2017 [F2017L00400]**
Purpose	Identifies Commonwealth managed fisheries that must utilise a licenced 'Fish Receiver' to acquit and verify the amount of each relevant species of fish caught and landed by operators holding fishing concessions in particular fisheries
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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 this declaration 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*.

Instrument	**Inspector of Transport Security Regulations 2017 [F2017L00510]**
Purpose	Identifies the international obligations that the Inspector of Transport Security must comply with; sets the form of the identity card that must be issued to persons exercising the Inspector's delegated search powers; prescribes the criteria that a person must satisfy to be delegated powers under the *Inspector Transport Security Act 2006*; and details the fee for attendance at a coronial inquiry and the due date for payment
Authorising legislation	*Inspector of Transport Security Act 2006*
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 11 May 2017) Notice of motion to disallow must be given by 4 September 2017
Scrutiny principle	Standing Order 23(3)(a)

Manner of incorporation

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 section 7 of the Inspector of Transport Security Regulations 2017 [F2017L00510] (the regulation) appears to incorporate paragraphs 5.12 and 6.2 of Annex 13 to the Convention on International Civil Aviation (Annex 13). However neither the regulation nor the ES state the manner in which Annex 13 is 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 at a particular 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'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.

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 (i.e. without cost) 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 note to section 7 of the regulation states:

> The Convention is in Australian Treaty Series 1957 No. 5 ([1957] ATS 5) and could in 2017 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au).

However, the committee notes that the text of Annex 13 does not appear to be available at this location and the ES does not contain any further information about where Annex 13 can be freely accessed.

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.

Description of consultation

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

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

> The *Legislation Act 2003* states that consultation on legislative instruments is not required when the instrument is minor or machinery in nature or does not substantially alter existing arrangements. Remaking the 2007 Regulations in this case will not require consultation as they provide for the continuation of the current practice (which affect the Inspector of Transport Security and not external bodies).

Whilst the committee accepts that this description explains why no consultation was undertaken in relation to the regulation, the committee notes that the provisions concerning consultation requirements in the *Legislation Act 2003* were amended with the passage of the *Acts and Instruments (Framework Reform) Act 2015* and no longer reflect the statement included in the ES for this instrument.

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

Instrument	**Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00437]**
Purpose	Amends the Migration Regulations 1994 in relation to fomer holders of Norfolk Island entry permits, protection visas and registered migration agents
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Classification of 'instrument in writing'

Schedule 4 of the Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017 (the regulation) inserts new regulation 9M into the Migration Agents Regulations 1998 providing:

> Application for approval as CPD [continuing professional development] provider
>
> (1) A person may apply to the Minister for approval as a CPD provider.
>
> (2) The application must be:
>
> (a) in the form approved in writing by the Minister; and

(b) accompanied by the fee specified by the Minister in an instrument in writing for the purposes of this paragraph.

(3) A fee specified in an instrument made under paragraph (2)(b) may be nil.

The ES to the regulation states:

> New regulation 9M provides that a person (which includes an incorporated body) may apply to the Minister for approval as a CPD provider. The application must be made in the form approved by the Minister, and must be accompanied by the fee specified by the Minister in a legislative instrument.

The committee understands that legislative instruments made under the Migration Agents Regulations 1998 are subject to disallowance. However, the committee requests the minister's general advice as to whether there are any exceptions to this; and in relation to this specific matter, the committee seeks confirmation that an 'instrument in writing' made under new regulation 9M which specifies the relevant fee will be a disallowable legislative instrument.

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

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. In this respect, the committee also seeks to ensure that affected individuals are given adequate notice of administrative decisions and are provided with reasons for a decision.

With reference to the above, the committee notes that Schedule 4 of the regulation inserts new regulation 9T into the Migration Agents Regulations 1998, which allows the minister to cancel a person's approval as a CPD provider by written notice.

However, the committee notes that neither the regulation nor the ES:

- sets any requirements for the content of the written notice of cancellation, for example, that the notice set out the reasons for making the decision to cancel a person's approval as a CPD provider; or
- provides information as to whether a person who receives a notice of cancellation can request a reconsideration of the intitial decision on its merits (i.e. that the decision is subject to merits review), or how such a person may be notified of avenues for complaint or review.

With reference to the committee's scrutiny principle 23(3)(c), if the decision to cancel an approval as a CPD provider is not subject to merits review, the committee would expect the ES to the regulation to provide a justification for the exclusion of the decision from merits review.

The committee draws the minister's attention to the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?* as providing useful guidance for justifying the exclusion of merits review.[6]

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

Sub-delegation

Schedule 4 of the regulation inserts new regulation 9U into the Migration Agents Regulations 1998, which provides that the Minister for Immigration and Border Protection (the minister) may delegate to an Australian Public Service (APS) employee in the Department of Immigration and Border Protection any or all of the minister's functions under new Part 3C (Approval of CPD providers), other than the power to make, vary or revoke a legislative instrument. This includes the power to cancel a person's approval as a CPD provider under new regulation 9T.

The ES provides the following description of the sub-delegation of the minister's powers under new regulation 9U:

> Powers of the Migration Agents Registration Authority are currently delegated by the Minister, acting under section 320 of the Migration Act, to employees in the Office of the Migration Agents Registration Authority within the Department of Immigration and Border Protection. The power under new regulation 9U for the Minister to delegate the Minister's powers under new Part 3C to any APS employee will allow delegation of these powers to the same employees and will provide flexibility if administrative arrangements in the future require powers relating to migration agents to be exercised by employees in other areas of the Department.

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

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6 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx (accessed 6 June 2017).

confined to the holders of nominated offices or to members of the senior executive service.

However, the committee notes that neither the regulation nor the ES provides information about whether a delegate who exercises the powers of the minister under new Part 3C is required to be at a certain APS level, such as a member of the senior executive service.

In addition, the committee is concerned that new regulation 9U contains no requirement that the minister be satisfied that an APS employee to whom the minister's powers under Part 3C are delegated is appropriately trained or qualified for the role.

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

Instrument	**Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504]**
Purpose	Revokes and remakes the Private Health Insurance (Health Insurance Business) Rules 2016 to update the kinds of statistical information to be provided by hospitals to insurers and by private hospitals to the Department of Health
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Section 17 of the Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] (the rules) provides that certain insurance is not health insurance business if it covers prescribed matters or persons. Subsection 17(2) provides:

> Despite subrule (1), during the period from the commencement of these Rules until 1 July 2008, the business referred to in that subrule is health insurance business if it is conducted by a private health insurer.

However, as the rules commence on 1 July 2017, it is unclear to the committee whether subsection 17(2) contains a drafting error, or whether the inclusion of the subsection in the rules is unnecessary, as it is no longer operational.

The committee notes that this provision has remained in the Private Health Insurance (Health Insurance Business) Rules since 2007.

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

Instrument	**Small Pelagic Fishery (Closures) Direction Revocation 2017 [F2017L00514]**
Purpose	Revokes the Small Pelagic Fishery (Closures) Direction No. 1 2015
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 13 June 2017) Notice of motion to disallow must be given by 5 September 2017
Scrutiny principle	Standing Order 23(3)(a)

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 the Small Pelagic Fishery (Closures) Direction Revocation 2017 [F2017L00514] (the instrument) states:

> AFMA assesses under section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011 that this legislative instrument is compatible with human rights. AFMA's Statement of Compatibility is attached to this explanatory statement.

However, the statement of compatibility has not been attached to the ES for the instrument.

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

Instrument	**Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450]**
Purpose	Specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to applications for skilled migration under the Migration Regulations 1994
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Disallowance	Exempt (tabled Senate 9 May 2017)
Scrutiny principle	Standing Order 23(3)(a)

Background

The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (exemption regulation)[7] exempts particular instruments from disallowance, including by virtue of table item 20 in section 10, instruments made under Schedules 1 and 2 of the Migration Regulations 1994 (Migration Regulations).

In its previous comments on the exemption regulation, the committee noted that the descriptions in the ES of table items in section 10 generally provided justifications for the exemption of particular instruments from disallowance, explaining why their particular nature or character required the exemption.[8]

However, no such justification was provided for table item 20. Accordingly, the committee sought a response from the Attorney-General in relation to this question.

In response, the Attorney-General advised:

> It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty

7 The exemption regulation replaced the former Legislative Instruments Regulations 2004, and was part of a suite of changes to the regime governing legislative instruments implemented by the *Acts and Instruments (Framework Reform) Act 2015* (including changing the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*).

8 See *Delegated legislation monitor* 14 of 2015 (11 November 2015), pp 8–9.

> for the rights and obligations of individuals with regard to visa and migration status.
>
> Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act...[9]

The Attorney-General also provided the following examples of the nature and purpose of instruments commonly made under Schedules 1 and 2 of the Migration Regulations:

- Form required to make a valid visa application;
- The manner and place for lodging applications;[10] and
- Specify members of industry associations in relation to certain streams.[11]

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

Classification of legislative instrument as exempt from disallowance

The Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] (the instrument) is made under Schedules 1 and 2 of the Migration Regulations. It specifies skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration.

As set out above, the committee generally understands instruments made under Schedules 1 and 2 of the Migration Regulations to be exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation.

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9 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), pp 30–33 and Appendix 1.

10 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1.

11 See *Delegated legislation monitor* 16 of 2015 (2 December 2015), p. 33 and Appendix 1.

However, paragraph 16 of the ES to this instrument states:

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

The committee requests the minister's general advice as to whether all instruments made under Schedules 1 and 2 of the Migration Regulations are exempt from disallowance by virtue of table item 20 in section 10 of the exemption regulation, or whether there are any exceptions to this. In particular, with reference to the Attorney-General's previous advice about the nature of instruments made under Schedules 1 and 2 of the Migration Regulations, and the examples provided of the nature and purpose of such instruments, it is unclear to the committee that the current instrument (which specifes skilled occupations, Australian and New Zealand Standard Classification of Occupations codes and assessing authorities relevant to assessment of applications for skilled migration) is properly characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify its exemption from disallowance (and thereby removal from the effective oversight of the Parliament).

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	**Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387]**
Purpose	Prescribes a new mandatory Sugar Code of Conduct which regulates the conduct of growers, mill owners and marketers in relation to the supply of cane or the on-supply of sugar
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Consultation

The committee previously 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 Competition and Consumer (Industry Code—Sugar) Regulations 2017 [F2017L00387] (the sugar code) 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 further notes that the Prime Minister granted an exemption from the regulation impact statement (RIS) requirements for the sugar code 'because urgent and unforseen events arose requiring a decision before a RIS could be prepared.'[12] The ES to the sugar code states:

> The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.
>
> To ensure the Sugar Code of Conduct (the Code) operates efficiently and effectively as intended, the Regulations also require a review of the Code to take place within 18 months after its commencement.

The committee's guideline on consultation states:

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

The committee 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 Treasurer advised:

> With regards to consultation, unfortunately due to the events that warranted the Government's intervention in the raw sugar export industry, it was not reasonably practical for the Government to consult on the regulation. The Government started developing the regulations in February as a contingency should commercial negotiations fail; however consulting at that time was not appropriate as it would have undermined those negotiations. When it became clear that a commercial outcome was no longer a reasonable possibility, the Government considered the benefits of acting quickly to provide certainty for the industry outweighed the benefits of taking further time to consult before making the regulation.

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12 Australian Government, Department of Prime Minister and Cabinet, *Prime Minister's exemption – Sugar Industry Code*, 5th April 2017, http://ris.pmc.gov.au/2017/04/05/prime-minister%E2%80%99s-exemption-%E2%80%93-sugar-industry-code (accessed 5 May 2017).

Committee's response

The committee thanks the Treasurer for his response.

The committee notes the Treasurer's advice that consultation was not undertaken for the sugar code.

However, the committee's concern with consultation is to ensure that an ES is technically compliant with the requirements of the *Legislation Act 2003*, and thus in accordance with statute (scrutiny principle 23(3)(a)). The committee considers that an ES that does not contain a description of consultation (including in appropriate instances a description stating that consultation was not considered necessary) falls short of these requirements.

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

The committee previously commented in relation to two matters as follows:

Manner of incorporation

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 subsection 16(2) of the sugar code incorporates the Resolution Institute Arbitration Rules 2016 (RIA Rules). However, neither the text of the sugar code nor the ES states the manner in which the RIA Rules 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'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.

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 (i.e. without cost) 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 sugar code incorporates the RIA Rules. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

In this instance, the committee notes that the RIA Rules are available for free online.[13] Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

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

Minister's response

The Treasurer advised:

> In compliance with section 14 of the *Legislation Act 2003*, the Resolution Institute Arbitration Rules 2016 (RIA Rules) are incorporated as in force at the time of commencement. The rules are not a disallowable instrument and the *Competition and Consumer Act 2010* does not alter the operation of section 14. As the Committee has noted, the RIA Rules are freely available online at https://www.resolution.institute/documents/item/1844.

13 Resolution Institute, *Current Arbitration Rules*, https://www.resolution.institute/dispute-resolution/arbitration-rules (accessed 4 May 2017).

Committee's response

The committee thanks the Treasurer for his response and has concluded its examination of the above.

Instrument	**Legal Services Directions 2017 [F2017L00369]**
Purpose	Repeals and remakes Legal Services Directions 2005 [F2006L00320] which sunsetted on 1 April 2017
Authorising legislation	*Judiciary Act 1903*
Department	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a) and (d)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Manner of incorporation

The committee previously 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 sections 1 and 3 of Appendix F to the directions incorporate the Legal Services Multi-use List (LSMUL). However, neither the text of the directions nor the ES expressly states the manner in which the LSMUL is 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'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.

Minister's response

The Attorney-General advised:

> Paragraphs 1 and 3 of Appendix F to the 2017 Directions incorporate LSMUL. The Committee has commented that neither the text of the 2017 Directions nor the Explanatory Statement expressly state the manner in which the LSMUL is incorporated into the 2017 Directions.
>
> The 2017 Directions incorporate the LSMUL as in force from time to time.

Committee's response

The committee thanks the Attorney-General for his response.

The committee notes the Attorney-General's advice that the LMSUL is incorporated as in force from time. However, pursuant to section 14 of the *Legislation Act 2003* the committee understands that, as the LMSUL is not a Commonwealth disallowable legislative instrument, it may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*.

The committee requests the further advice of the Attorney-General in relation to the above.

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to seek to ensure that an instrument does not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in scrutinising whether matters are being appropriately dealt with as primary or delegated legislation. In this regard, the committee notes the following guidance from the Legislation Handbook:

> While it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation, the following are examples of matters generally implemented only through Acts of Parliament…provisions imposing obligations on individuals or organisations to…desist from

> activities (e.g. to prohibit an activity and impose sanctions for engaging in an activity).

With reference to the above, the committee notes that paragraph 14 in Part 3 of Schedule 1 and section 5 of Appendix G of the directions enables the Attorney-General to impose sanctions for non-compliance with the directions. A note to paragraph 14 in Part 3 of Schedule 1 of the directions provides:

> Examples demonstrating the range of sanctions and the manner in which OLSC [The Office of Legal Services Commissioner] approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that this guidance material does not appear to be available on the OLSC website and the ES provides no further information in relation to the range of sanctions that may be imposed by the Attorney-General for non-compliance with the directions.

With respect to section 5 of Appendix G, the ES to the Directions states:

> This provision ensures that the Attorney-General may continue to impose sanctions for non-compliance with the 2005 Directions after those Directions are repealed.

However, neither the directions nor the ES appear to:

- set any limitations or provide any guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; nor
- justify the need for the Attorney-General to be granted such broadly defined sanction powers; nor
- explain the reasons for enabling the Attorney-General to impose sanctions for non-compliance with the Directions in delegated as opposed to primary legislation.

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

Minister's response

The Attorney-General advised:

> Paragraph 14 of Part 3 of Schedule 1 of the 2017 Directions states, '[t]he Attorney-General may impose sanctions for non-compliance with the Directions.' The note to this paragraph states, '[e]xamples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.'
>
> The Committee has commented that neither the 2017 Directions nor the Explanatory Statement set any limitations or provide any guidance as to

> what sanctions could be imposed, justification of the need for such a broadly defined power, and the reasons for this power to be in the 2017 Directions rather than in primary legislation.
>
> Section 55ZG of the *Judiciary Act 1903* states, '[c]ompliance with a Legal Services Direction is not enforceable except by, or on the application of, the Attorney-General.' Compliance with the 2017 Directions (per paragraph 14) derives its legislative basis from section 55ZG of the *Judiciary Act 1903*.
>
> The OLSC website contains guidance material regarding its approach to compliance with the 2017 Directions in a document entitled the 'Compliance Framework'. It is available at https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-20Compliance%20Framework.pdf

Committee's response

The committee thanks the Attorney-General for his response.

The committee acknowledges the Attorney-General's advice that compliance with the directions derives its legislative basis from section 55ZG of *Judiciary Act 1903*.

The committee also acknowledges that the note to paragraph 14 of Part 3 of Schedule 1 of the directions, which provides that the Attorney-General may impose sanctions for non-compliance with the Directions, states:

> Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.

However, the committee notes that the guidance material referred to by the Attorney-General does not provide information about the range of sanctions that may be imposed.

The committee therefore remains concerned that neither the Compliance Framework nor the Attorney-General's response:

- provides guidance as to what sanctions could be imposed by the Attorney-General for non-compliance; or
- justifies the need for the Attorney-General to be granted such broadly defined sanction powers.

The committee requests the further advice of the Attorney-General in relation to the above.

Instrument	**Seacare Authority Code of Practice Approval 2017 [F2017L00326]**
Purpose	Provides guidance on ways to meet occupational health and safety standards and manage commonly understood hazards and control measures for managing health and safety risks at work on vessels
Authorising legislation	*Occupational Health and Safety (Maritime Industry) Act 1993*
Department	Employment
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

The committee previously commented in relation to two matters as follows:

Manner of incorporation

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.

The code incorporates the Australian OffShore Support Vessel Code of Safe Working Practice (the AOSC code) and the Code of Safe Working Practice for Australian Seafarers (the COSW code). With reference to the above, the committee notes that the code sets out the full text of both the AOSC and COSW codes which in turn incorporate various Australian and international standards. However, neither the text of the code nor the ES expressly states the manner in which the Australian and international standards 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'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.

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 (i.e. without cost) 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 code incorporates various Australian and international standards. However, the ES does not contain a description of these documents, nor indicate how the documents may be 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.

Minister's response

The Minister for Employment advised:

> The Instrument reapproves the Seacare Authority Code of Practice 1/2000, as made by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority). The Code was reapproved in its current form for an interim period to enable the Seacare Authority to complete its review of the Code.
>
> The Code itself incorporates two codes developed by the private sector and adopted by the Seacare Authority in 2000. These are set out in full in the instrument I approved. The Department of Employment was aware that there were references to standards and other guidance material in the Code. However, as made clear in the explanatory statement, no amendment was made to the Code when I reapproved it for an interim period pending completion of the Seacare Authority's review.
>
> Your committee considers that the text of the Code should state the manner in which documents are incorporated. To now include in the text a

new description of how matters referred to are incorporated would have been an amendment of the Code.

Access to referenced documents is expressly dealt with in the *Occupational Health and Safety (Maritime Industry) Act 1993*. Subsection 109(7) of the OHS(MI) Act provides that the Australian Maritime Safety Authority (as the Inspectorate under the OHS(MI) Act) will ensure that all incorporated material is available for inspection at its offices, which are located in 19 major ports around Australia (see www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp).

Industry participants have had 17 years to locate and become familiar with the relevant referenced material but, if required, the maritime industry is able to obtain referenced material directly from the AMSA.

Failure to comply with any provision of a code approved by me cannot make a person liable for any civil or criminal proceedings (see subsection 109(8) of the OHS(MI) Act). The Code merely provides practical guidance to operators on how to meet their duties under the OHS(MI)Act (see subsection 109(1) of the OHS(MI) Act). The Code provides a benchmark against which maritime industry participants and the Inspectorate can assess compliance and operates alongside other guidance material.

I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawing his attention to the need for the replacement code to meet modern drafting standards.

Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.

Committee's response

The committee thanks the minister for her response.

The committee also thanks the minister for her advice that all incorporated material is available for inspection at AMSA offices, which are located in 19 major ports around Australia.

The committee notes that this information would have been useful in the ES.

The committee acknowledges the minister's advice that the code provides practical guidance to operators on how to meet their duties under the *Occupational Health and Safety (Maritime Industry) Act 1993*, and notes the advice that:

- no changes will be made to the code itself before it is replaced; and
- a request has been made for a replacement code of practice that meets modern drafting standards to be made as soon as reasonably practicable.

However, the committee remains concerned that in this interim period, maritime industry participants, particularly any new participants and other persons interested in the code, will not know the manner in which the Australian and international standards are incorporated.

While the committee notes that no changes will be made to the code before it is replaced, the committee requests that the minister provide information about the manner in which the Australian and international standards are incorporated into the code, so that during the interim period before the replacement code is made, maritime industry participants and other persons interested in the code will know the manner in which these documents are incorporated.

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

The committee also notes the minister's advice that the code was reapproved for an interim period pending completion of the Seacare Authority's review. In the committee's view this may undermine the effectiveness of the sunsetting mechanism.

The committee notes that the process to review instruments, and to act in response to review recommendations, can be lengthy, and the committee expects agencies to plan for sunsetting well in advance of an instrument's sunset date.[14]

The committee draws this matter to the attention of ministers, instrument-makers and senators.

14 Attorney-General's Department, *Guide to managing sunsetting of legislative instrument*, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf (accessed 13 June 2017).

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis.

Instrument	**AD/A320/36 Amdt 3 - Passenger Door Lower Connection Link Bushes [F2017L00410]** **AD/IAI-W/15 Amdt 1 - Structural Inspection Program [F2017L00395]**
Purpose	Clarifies the applicability of the airworthiness directive 93-207-048(B)R1 affecting Airbus A320 series aeroplanes issued by French Direction Générale de l'Aviation Civile in 1994; Repeals and replaces AD/IAI-W/15 to allow compliance with the Civil Aviation Authority of Israel issued AD 91-01 affecting Israeli Aircarft Industries Westwind series aeroplanes in 1991
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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 available (i.e. without cost) 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/A320/36 Amdt 3 - Passenger Door Lower Connection Link Bushes [F2017L00410] (AD/A320/36) incorporates Airbus Service Bulletins SB A320-52-1027 and A320−52-1047 as in force from time to time, and Airbus All Operators Telex 52-04 Revision 1 dated 12 October 1993 as in force at the commencement of AD/A320/36; and
- AD/IAI-W/15 Amdt 1 - Structural Inspection Program [F2017L00395] (AD/IAI-W/15) incorporates the Inspection Requirements of Israel Aircraft Industries (IAI) Structural Inspection Program, as in force from time to time.

The ES to AD/A320/36 states:

> The Airbus Service Bulletins and the Airbus All operators telex referred to in the AD can be obtained from Airbus, however, any Australian airline or operator which operates the A320 aircraft are provided with these documents by Airbus by subscription.

The ES to AD/IAI-W/15 states:

> The IAI Structural Inspection Program can be obtained from IAI for a fee. Operators of the aircraft would have a subscription with IAI for maintenance documents such as the program.

The committee acknowledges that anticipated users of AD/A320/36 and AD/IAI-W/15 would be in possession of the incorporated documents. However, in addition to access for operators of the relevant aircraft in Australia, 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.[15] 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.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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15 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 6 June 2017).

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

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

Instrument	**Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452]**
Purpose	Prescribes requirements for the supply of children's nightwear and limited daywear and paper patterns for children's nightwear
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)

Access to incorporated document

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 (i.e. without cost) 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 Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] (the nightwear standard) incorporates Australian/New Zealand Standard AS/NZS 1249:2014 *Children's nightwear and limited daywear having reduced fire hazard*, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force immediately before the commencement of the nightwear standard.

The note to the definition of 'Australian Standard' in the nightwear standard, as well as the ES, state:

> The Australian Standard could in 2017 be purchased from SAI Global's website (https://www.saiglobal.com). The Australian Competition and Consumer Commission [ACCC] can make a copy of the standard available for viewing at one of its offices, subject to licensing conditions.

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.[16] 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.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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

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

16 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 6 June 2017).

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 2) Regulations 2017 [F2017L00442]** **Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2017 [F2017L00439]**
Purpose	Amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Agriculture and Water Resources and the Department of Veterans' Affairs
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(d)

Parliamentary scrutiny – ordinary annual services of the government

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).

Under the provisions of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), executive spending may be authorised by specifying schemes in regulations made under that Act. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters *not* involving the ordinary annual

services of the government.[17] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.[18]

The agriculture regulation referred to above seeks to establish legislative authority for Commonwealth government spending on grants to support Casino Beef Week (for $1 million over four years from 2016-17).[19]

The veterans' affairs regulation referred to above seeks to establish legislative authority for Commonwealth government funding to assist in the establishment of the Centenary of ANZAC Centre and to support the centre to provide a mental health practitioner support service; and a mental health treatment research centre (for $6 million over four years from 2016-17).[20]

It appears to the committee that Casino Beef Week and the Centenary of ANZAC Centre are new policies not previously authorised by special legislation; and that the initial appropriation in relation to these new policies may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2016-2017 (which is not subject to amendment by the Senate).

The committee draws the above to the attention of the minister, the Senate and the relevant Senate committees.

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17 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017*, pp 1-5.

18 See *Delegated legislation monitor* 5 of 2014, pp 16–18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

19 Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 2) Regulations 2017 [F2017L00442] adds new table item 15 to Part 3 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations).

20 Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2017 [F2017L00439] adds new table item 16 to Part 3 of Schedule 1AB to the FF(SP) Regulations.

Instrument	**Remuneration Tribunal Determination 2017/03: Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2017L00416]**
Purpose	Sets remuneration and allowances for various full-time, part-time and judicial office holders
Authorising legislation	*Remuneration Tribunal Act 1973*
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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)).

The committee notes that the ES is generally helpful in providing information about the manner in which the Remuneration Tribunal may consult in relation to its decisions, and the submissions which informed particular decisions set out in this determination. However, the ES does not explicitly address consultation in relation to clauses concerning the following bodies:

- Aboriginal Hostels Limited;
- Professional Standards Board for Patent and Trade Marks Attorneys and Patent and Trade Marks Attorney Disciplinary Tribunal;
- Australian Organ and Tissue Donation and Transplantation Authority Advisory Council; and
- Companies Auditors Disciplinary Board.

The committee understands the explanations given in the ES at paragraphs 10–12 and 17 to mean that no consultation was undertaken in relation to the amendments concerning the above bodies. However, 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 on the

relevant amendments was considered unnecessary or inappropriate, if this is the case, and the reason(s) why.

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	**Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407]**
Purpose	Specifies the kinds of therapeutic goods information, relating to laboratory testing, that may be released to the public under subsection 61(5C) of the *Therapeutic Goods Act 1989*
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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 Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407] (the specification) states:

> **Consultation**
>
> A regulation impact statement was not required in relation to the development of this Specification, as the matter of specifying kinds of therapeutic goods information under subsection 61(5D) of the Act is the subject of a standing exemption (OBPR ID 15070).
>
> However, the [Therapeutic Goods Administration] TGA has undertaken communication and education activities to inform the public and relevant

> stakeholders regarding its intention to publish information about its laboratory testing activities, and the outcomes of those activities, on the TGA website. This includes correspondence with members of the TGA-Industry Consultative Committee, a statement released on the TGA website, and presentations at the Regulatory and Technical Consultative Forum and the TGA Consultative Committee meeting.

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 explains that communication and education activities have been undertaken to inform the public and relevant stakeholders. However, it does not provide information about whether consultation was or was not undertaken in relation to the specification. 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 specification was considered unnecessary or inappropriate, if this is the case, and the reason(s) why.

The committee further notes that the requirements regarding the preparation of a regulation impact statement (RIS) are separate to the requirements of the *Legislation Act 2003* in relation to consultation. As set out in the committee's guideline on consultation:

> This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee'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	**Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457]**
Purpose	Permits the ingredients described in the determination, subject to the requirements described in the determination for an ingredient, to be contained in medicines or to be listed on the Australian Register of Therapeutic Goods
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
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 available (i.e. without cost) 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 Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457] (the determination) incorporates:

- British Pharmacopoeia (BP);
- European Pharmacopoeia (EP);
- United States Pharmacopeia – National Formulary (USP-NF); and
- Food Chemicals Codex (FCC) published by the United States Pharmacopeial Convention.

While the committee notes that the ES is generally helpful in providing information about where documents incorporated in the determination can be obtained, in relation to the above documents, the ES states:

> A fee is required for access to these documents. It is anticipated that a sponsor of a medicine included in the Australian Register of Therapeutic Goods and other interested persons in the medicines industry using this instrument would be in possession of these standards in order to manufacture the medicine or use the ingredients. Further, versions of these documents are available through a number of libraries allowing public access.

The committee acknowledges that anticipated users and other interested persons in the medicines industry using this determination would be in possession of the incorporated documents. However, in addition to access for members of the medicines industry, 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. In this respect, the committee notes the advice in the ES that the incorporated documents are available through a number of libraries allowing public access.

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.[21] 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.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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

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

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21 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 6 June 2017).

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	Fair Work (Registered Organisations) Amendment Regulations 2017 [F2017L00470] Fish Receiver Permits Declaration 2017 [F2017L00400] Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination 2017 for Defined Commission and/or Fee Based Services in the Financial Industry [F2017L00419] Parliamentary Entitlements (Supplement of Capped Entitlements) Determination 2017 (No. 1) [F2017L00496] Therapeutic Goods Information (Laboratory Testing) Specification 2017 [F2017L00407]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

The instruments identified above incorporate by reference Commonwealth disallowable legislative instruments. This means that they incorporate the content of other disallowable legislative instruments without reproducing the relevant text.

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

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, neither the text of the instruments identified above, nor their accompanying ESs explain the relevance of these provisions to their operation.

The committee considers that, in the interests of promoting the clarity and intelligibility of delegated legislation, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated; and/or clearly identify the relevance of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) to their operation. 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's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

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 Class Rule Waiver [CW 17/0370] [F2017L00494] Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516] Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452] Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 1/2017 [F2017L00491] Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Estonia and Pakistan) Determination 2017 [F2017L00507] Employer Reimbursement Rules 2017 [F2017L00415] Fish Receiver Permits Declaration 2017 [F2017L00400] Health Insurance (Epicutaneous patch testing) Revocation Determination 2017 [F2017L00433] Logbooks for Fisheries Determination 2017 [F2017L00446] Parliamentary Entitlements (Supplement of Capped Entitlements) Determination 2017 (No.1) [F2017L00496] Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 3) [F2017L00461] Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 3) [F2017L00484] Remuneration Tribunal Determination 2017/03: Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2017L00416]

	Therapeutic Goods (Manufacturing Principles) Amendment Determination 2017 (No. 1) [F2017L00509] Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2017 [F2017L00457]
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.[22]

The committee draws the above to the attention of ministers.

22 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.

For the purposes of disallowance the sitting of the Senate on 31 March 2017 has been counted as a sitting day.[1]

Instrument	**Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 [F2017L00333]**
Purpose	Prescribes the township of Gunyangara in the Northern Territory in relation to the Arnhem Land Aboriginal Land Trust and prescribes a further function to the Executive Director of Township Leasing
Authorising legislation	*Aboriginal Land Rights (Northern Territory) Act 1976*
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Manner of incorporation

The committee previously 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.

1 For guidance regarding the interpretation of the expression 'sitting day' in section 42 of the *Legislation Act 2003*, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15, pp 446–447.

The Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 [F2017L00333] (the regulations) insert new regulation 6AA to the Aboriginal Land Rights (Northern Territory) Regulations 2007, which provides for a parcel of land to be prescribed as a single township in relation to the Arnhem Land Aboriginal Land Trust. With reference to the above, the committee notes that the definition of the parcel of land in new regulation 6AA incorporates Survey Plan S2016/039. However, neither the text of the regulations nor the explanatory statement (ES) expressly states the manner in which Survey Plan S2016/039 is 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'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.

Minister's response

The Minister for Indigenous Affairs advised:

> Section 14(1)(b) of the *Legislation Act 2003* (Cth) (Legislation Act) provides (relevantly) that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.
>
> The Regulations and the Explanatory Statement incorporate the extrinsic writing of the Survey Plan. Section 14(2) of the Legislation Act provides that, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by incorporating any matter contained in other writing as in force or existing from time to time.
>
> Accordingly, the Regulations can only incorporate the Survey Plan as it exists at the time the Regulations commence. Section 14(2) of the Legislation Act precludes the Regulations incorporating the Survey Plan as in force or existing from time to time.
>
> In addition, the Survey Plan as incorporated into the Regulations cannot, in effect, change. Under s 50(2) of the *Licenced Surveyors Act* (NT) (Surveyors Act), once a survey plan has been lodged with and approved by the Surveyor-General, that survey plan is to be accepted as correct in all questions relating to the boundaries delineated in the plan. The Survey Plan was approved by the Surveyor-General on 25 August 2016.

> Given the Survey Plan has been lodged and approved, it cannot be changed (although there is limited scope for errors or omissions made in the Survey Plan to be corrected under s 51(1) of the Surveyors Act). Any change to the boundaries delineated in the Survey Plan would require the preparation of a new plan, and that new plan could only be incorporated into the Regulations through an amendment to the Regulations.

Committee's response

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

The committee notes that this information would have been useful in the ES.

Access to incorporated documents

The committee previously commented as follows:

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 (i.e. without cost) 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 regulations incorporate Survey Plan S2016/039. However, the ES does not contain a description of this document, or indicate how the document may be 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.

Minister's response

The Minister for Indigenous Affairs advised:

> Paragraph 15J(2)(c) of the Legislation Act requires the 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 Regulations and the Explanatory Statement provide that the Survey Plan is lodged with the Northern Territory Surveyor-General in Darwin. Once a survey plan has been lodged with the Surveyor-General it becomes

> freely available to the public and can be obtained from the Northern Territory Land Information System website via the NT Atlas.
>
> To further address the concerns of the Committee, I have approved a replacement Explanatory Statement with the Survey Plan attached, which will be lodged on the Federal Register of Legislation in accordance with the process set out in section 15G(4)(b) of the *Legislation Act 2003*. I have attached the replacement Explanatory Statement for your reference.

The replacement ES states:

> A copy of Survey Plan S2016/039, which prescribes the township of Gunyangara, is provided in Attachment 2. Survey Plan S2016/039 can also be obtained from the Northern Territory Land Information System website via the NT Atlas.

Committee's response

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

The committee also notes the minister's undertaking to register the replacement ES provided to the committee, which addresses the committee's concerns regarding access to incorporated documents.

Instrument	**Amendment of List of Exempt Native Specimens – Multiple fisheries, March 2017 [F2017L00256]**
Purpose	Amends the List of Exempt Native Specimens Instrument 2001 by deleting and including products sourced in multiple Australian fisheries
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2017) Notice of motion to disallow must be given by 20 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

The committee previously commented in relation to two matters as follows:

Manner of incorporation

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 Schedule 2 of the Amendment of List of Exempt Native Specimens – Multiple fisheries, March 2017 [F2017L00256] (the instrument), which defines specimens that are derived from certain fisheries, incorporates various State regulations. However, neither the instrument nor the ES states the manner in which the State regulations 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'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.

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 (i.e. without cost) 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 various State regulations. While the committee undertsands the State regulations to be freely available, the ES does not indicate where each of the State regulations may be 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.

Minister's response

The Minister for the Environment and Energy advised:

> The amendments relate to the take of specimens of fish or invertebrates in fifteen commercial fisheries as defined in the management regimes for Commonwealth, Western Australian, New South Wales, Northern Territory, and South Australian managed fisheries.
>
> The Committee has advised that where an instrument incorporates non Commonwealth Acts and disallowable instruments by reference, there is an expectation that the manner of incorporation, and where this information can be found, is clearly specified in the explanatory statement. A revised explanatory statement is enclosed and will be registered on the Federal Register of Legislation.
>
> I can confirm that the intention in the instrument Amendment of List of Exempt Native Specimens - Multiple fisheries March 2017 is to reference definitions in force from time to time under the respective management regimes.

The updated ES states:

> Non Commonwealth Acts and disallowable instruments that are incorporated by reference in this instrument are to be incorporated as in force from time to time. All State and Territory legislation incorporated by reference in this instrument can be freely accessed on the relevant State legislation websites:
>
> - New South Wales legislation at www.legislation.nsw.gov.au (as of May 2017)
> - Northern Territory legislation at www.legislation.nt.gov.au (as of May 2017)
> - South Australian legislation at www.legislation.sa.gov.au (as of May 2017)
> - Western Australian legislation at www.slp.wa.gov.au (as of May 2017)

Committee's response

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

The committee notes the minister's undertaking to register the updated ES provided to the committee, which addresses the committee's concerns regarding the manner in which the State regulations are incorporated and where they can be freely accessed.

Instrument	**Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 [F2017L00302]**
Purpose	Prescribes a mandatory Horticulture Code of Conduct which regulates trade in horticulture produce between growers and traders and provides a dispute resolution procedure for disputes arising under the code or a horticulture produce agreement
Authorising legislation	*Competition and Consumer Act 2010*
Department	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2017) Notice of motion to disallow must be given by 9 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Sub-delegation/authorisation

The committee previously commented as follows:

Clause 39 of the Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 [F2017L00302] (the horticulture code) provides for the Minister for Agriculture and Water Resources (the minister) to appoint a mediation adviser who must compile and maintain a list of persons who are to be mediators for the purposes of resolving disputes arising under the horticulture code or hotriculture produce agreements.

Clause 40 of the horticulture code provides for the mediation adviser to appoint a mediator to a dispute who then decides how the mediation is to be carried out.

Neither the horticulture code nor the ES appears to limit in any way who the minister may appoint as a mediation adviser, or who the mediation adviser may appoint as a mediator.

The committee is concerned that the horticulture code contains no requirement that the minister be satsified that a person appointed to the role of mediaton adviser is appropriately trained or qualified for the role, nor that a mediation adviser be satisfied that a person appointed to the role of mediator be appropriately trained or qualified for the role.

The ES provides no justification as to why it is appropriate for there to be no apparent limit on the category of people who can be appointed as a mediation adviser or mediator under the horticulture code.

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> Regarding clause 39, I note the committee's concern that the code contains no requirement that I be satisfied that a person appointed to the role of mediation adviser is appropriately trained or qualified for the role. The mediation advisor appointed under the code is also contracted by the Commonwealth to serve as the mediation advisor under both the Competition and Consumer (Industry Codes-Franchising) Regulation 2014 and the Competition and Consumer (Industry Codes-Oil) Regulations 2017.
>
> A request for tender (RFT) to procure the mediation advisor service was developed by the Treasury, in consultation with my Department and the Department of the Environment and Energy. The RFT outlined the requirements for the role, including the required experience and qualifications. Applicants were evaluated in line with the RFT giving specific consideration to each code, including the Horticulture Code. Once a preferred bidder was identified through the tender process each department provided a recommendation to myself, the Minister for Small Business and the Minister for the Environment and Energy. My colleagues and I have accepted our departments' recommendation.
>
> Regarding clause 40, in appointing the current mediation adviser specific expectations were included in the contract for the separate codes of conduct. These included the requirements for the appointment of mediators by the mediation adviser. The requirements included having appropriate industry knowledge and qualifications. These requirements are monitored by my department to ensure compliance with the contractual requirements.

Committee's response

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

The committee notes that this information would have been useful in the ES.

The committee notes the minister's advice about the Department of Agriculture and Water Resource's (the department) processes for procuring the mediation adviser service; and that the requirements for the appointment of a mediation adviser and mediator included a need for appropriate experience and qualifications. While these processes form part of the department's administrative framework for the relevant appointments, the committee's preference is that a requirement for relevant experience and qualifications for the appointments be contained in legislation.

The committee previously commented in relation to two matters as follows:

Manner of incorporation

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 subclause 16(i) of the horticulture code incorporates the FreshSpecs Produce Specifications which are defined in clause 5 as 'product specifications published by Fresh Markets Australia'. However, neither the text of the horticulture code nor the ES states the manner in which the FreshSpecs Produce Specifications 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'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.

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 (i.e. without cost) 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 horticulture code incorporates the FreshSpecs Produce Specifications. However, the ES does not contain a description of this document, or indicate how it can be obtained.

The committee notes that clause 5 of the horticulture code states that the FreshSpecs Produce Specifications are published by Fresh Markets Australia. However, while the committee notes that the FreshSpecs Produce Secifications are available for free online,[2] neither the horticulture code nor the ES states exactly where they can be accessed. Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

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

Minister's response

The Minister for Agriculture and Water Resources advised:

> Regarding the manner in which the FreshSpecs Produce Specifications are incorporated, the intent of subclause 16(i) of the code is to ensure that a product specification is agreed, not that the FreshSpecs Produce Specifications are used in all circumstances. The parties to a horticulture produce agreement are free to choose whichever produce specifications they wish. As the committee's letter notes, because no contrary intention appears in the code, section 14(2) of the *Legislation Act 2003* applies and the specifications are incorporated as existing at the time when the code commenced.
>
> I note the committee's expectations regarding access to the incorporated document. The FreshSpecs Produce Specifications are widely known within the industry and are publically available for free on the Fresh Markets Australia website. The explanatory statement refers to the Fresh Markets Australia website, but does not provide the specific web address. This was done intentionally as Fresh Markets Australia may amend the exact web address in the future.

Committee's response

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

The committee also appreciates the minister's advice regarding the provision of a specific web address that is liable to change, and suggests that where appropriate a generic website address be provided, from which a user could navigate to the webpage on which the document is located.

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2 The Australian Chamber of Fruit & Vegetable Industries Limited, Fresh Markets Australia, *FreshSpecs Produce Specifications*, http://freshmarkets.com.au/fresh-specs/ (accessed 5 May 2017).

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Agriculture and Water Resources
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a) and (c)
Previously reported in	*Delegated legislation monitor* 4 of 2017

Constitutional authority for expenditure

The committee previously commented as follows:

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*,[3] 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 state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217] (the regulation) adds new item 197 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 Leadership in Agricultural Industries Fund.

The committee notes that the objective of this program is:

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

> To provide grants to build the capacity of national agricultural representative organisations to engage with, and represent, their stakeholders in relation to matters of Commonwealth policy responsibility.
>
> This objective also has the effect that it would have if it were limited to providing grants:
>
> (a) in the exercise of the executive power of the Commonwealth; or
>
> (b) as a measure that is peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation; or
>
> (c) incidental to the execution of the legislative powers vested in the Commonwealth; or
>
> (d) in connection with interstate or overseas trade and commerce; or
>
> (e) in connection with taxation imposed by a law of the Commonwealth; or
>
> (f) in connection with quarantine.

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 constitutional powers:
>
> - the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix));
> - the trade and commerce power (section 51(i));
> - the taxation power (section 51(ii)); and
> - the quarantine power (section 51(ix)).

The regulation thus appears to rely on the Commonwealth executive power and the express incidental power; the trade and commerce power; the taxation power; and the quarantine power as the relevant heads of legislative power to authorise the addition of item 197 to Part 4 of Schedule 1AB to the FFSP Regulations (and therefore the spending of public money under it).

However, it is unclear to the committee how each of the consitutional heads of power relied on specifically supports the Leadership in Agricultural Industries Fund.

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 include a clear and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

The ES to the regulation does not provide a clear and explicit statement to explain the link between each of the constitutional heads of power relied on and the provision of grants to national agricultural representative organisations to engage

with, and represent, their stakeholders in relation to matters of Commonwealth policy responsibility.

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

Minister's response

The Minister for Finance, on behalf of the Minister for Agriculture and Water Resources, advised:

> Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix))
>
> Section 61 of the Constitution, together with section 51(xxxix), supports grants with respect to matters incidental to the executive power of the Commonwealth, including measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation.
>
> This program is designed to ensure that national agricultural industry representative bodies are better able to provide policy advice to their members, the Australian community, the government and their stakeholders. This includes making representations to the Commonwealth about matters of Commonwealth legislative interest affecting their industry and being better able to communicate to their membership and the Australian community who are affected by Commonwealth laws and programs, particularly but not exclusively relating to biosecurity, trade and market access. Ensuring engagement of national agricultural organisations, through fostering their leadership, will enhance the capacity of the Commonwealth to ensure the understanding of and fostering of compliance with its laws and regulations by the organisations' members and stakeholders. Further, the funding of these organisations, at a national level, will engage these organisations and their leaders in the legislative initiatives and other policy developments of importance to the national agricultural sector for the benefit of the nation.
>
> Trade and commerce power (section 51(i))
>
> Section 51(i) of the Constitution empowers the Parliament to make laws with respect to 'trade and commerce with other countries, and among the States'.
>
> Generally speaking, grants can also be given to support activities that are incidental to the execution of Commonwealth laws made in reliance on the trade and commerce power. Developing the leadership capacity of national agricultural organisations will also build the capacity of those organisations' leaders to engage with, understand and be involved in the development of Commonwealth laws and policies relating to the export and interstate trade of agricultural outputs.

Taxation power (section 51(ii))

Section 51(ii) of the Constitution empowers the Commonwealth to make laws with respect to 'taxation; but not so as to discriminate between States or parts of States.'

Grants can be provided in connection with taxation imposed by a Commonwealth law. Grants made under this program are intended to build the capacity of national agricultural organisations, including those who have statutorily mandated consultative roles in the setting of taxes and levies under primary industries legislation.

Quarantine power (section 51(ix))

Section 51(ix) of the Constitution empowers the Parliament to make laws with respect to quarantine.

Grants can be provided in connection with quarantine. Funding under this program will assist national agricultural organisations to develop the capability of their current and future leaders so they are better able to contribute to key policy issues facing the agricultural sector, including the management of biosecurity risks and the measures needed to prevent the introduction and spread of pests that cause disease or that infest animals or plants and the impact that those pests can have on the agricultural sector, its stakeholders and the wider community.

Committee's response

The committee thanks the ministers for their response and has concluded its examination of the above.

The committee notes that this information would have been useful in the ES.

Merits review

The committee previously commented as follows:

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

The regulation adds new item 197 to Part 4 of Schedule 1AB to the FFSP Regulations establishing legislative authority for spending activities in relation to the Leadership in Agricultural Industries Fund. While the ES is generally helpful in providing information about the proposed administration of the Leadership in Agricultural Industries Fund, the committee notes that the program will not be subject to merits review. The ES states:

> There will be no independent merits review for grant decisions. The decisions of the Deputy Prime Minister and Minister for Agriculture and

> Water Resources will be final in all matters, including the approval of grants and grant amounts.

In order to assess whether a program in Part 4 of Schedule 1AB possesses characteristics justifying the exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to Part 4 of Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review. In this instance, the ES does not provide information to justify the exclusion of merits review.

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

Minister's response

The Minister for Finance, on behalf of the Minister for Agriculture and Water Resources, advised:

> Merits review
>
> The program has a two-tiered merits assessment process: individual merit assessment by assessment panel members and then a merit discussion at the assessment panel moderation meeting. The program involves the allocation of finite resources (up to $500,000 grants funded from a $5 million fund). There is no secondary merits review for decisions to approve or not approve a grant in this program.
>
> The process for determining funding recipients is set out in the program guidelines available on the Department of Agriculture and Water Resources' website (www.agriculture.gov.au/ag-farm-food/leadership-ag-fund) and on GrantConnect (www.grants.gov.au).
>
> Applicants must meet specified eligibility criteria and each eligible application will be assessed on its merit against five program criteria with the relative weighting of each criteria defined in the guidelines. An assessment panel will assess applications on their merit and then assess against other applications at a moderation meeting to determine a final ranking. The ranking will be based on the total score that an applicant receives. Each application will be assessed in consideration of the size of the project and amount of funding requested. There is diversity in the size, maturity and leadership needs across national agricultural industry representative bodies and the program will be responsive to the requirements specified by each applicant organisation. More comprehensive applications with supporting information should be expected from organisations requesting larger amounts. The total funding per grantee is limited to a maximum of $500,000 in this competitive round.
>
> The assessment panel will make recommendations to the Minister for Agriculture and Water Resources as the final decision-maker on whether

to approve a grant. Funding decisions for the program will be made in accordance with the assessment process set out in the program guidelines and in accordance with the applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2014*.

Following the decision by the Minister, applicants will be advised of the outcomes of their applications in writing. Unsuccessful applicants can request feedback about their applications from the department after the funding decisions have been made and notified. Applicants may ask for feedback on their applications within 30 days of being advised of the outcome and the department may contact a nominated person for a discussion and/or give written feedback within 30 days of feedback being requested.

Persons who are otherwise affected by decisions or who have complaints about the program also have recourse to the department. The department will investigate any complaints about the program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the department handles the complaint they may lodge a complaint with the Commonwealth Ombudsman.

Committee's response

The committee thanks the ministers for their detailed response and has concluded its examination of the instrument.

The committee notes that this information would have been useful in the ES.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220]**
Purpose	Establishes legislative authority for certain spending activities administered by the Department of Social Services and the Office of the Children's eSafety Commissioner
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 4 of 2017

Constitutional authority for expenditure

The committee previously commented as follows:

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*,[4] 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 state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220] (the regulation) adds new items 199 and 200 to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) which seek to establish legislative authority for Commonwealth government spending for the Prevention of Domestic Violence program and Domestic Violence Frontline Services.

The committee noted that the objects of new items 199 and 200 each include the following reference to activities:

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

to meet Australia's obligations under:

(i) the Convention on the Elimination of All Forms of Discrimination Against Women (particularly Articles 2, 3, 5(a) and 16); and

(ii) the Convention on the Rights of the Child (particularly Articles 4 and 19); and

(iii) the Convention on the Rights of Persons with Disabilities (particularly Article 6(2)); and

(iv) the International Covenant on Civil and Political Rights (particularly Article 7).

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 199 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 aliens power (section 51(xix));
> - the races power (section 51(xxvi));
> - the immigration power (section 51(xxvii)); and
> - the external affairs power (section 51(xxix)).

The ES for the regulation identifies the constitutional basis for expenditure in relation to item 200 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 aliens power (section 51(xix));
> - the immigration power (section 51(xxvii)); and
> - the external affairs power (section 51(xxix)).

With respect to items 199 and 200, the committee understands that spending in relation to domestic violence programs may be authorised by the external affairs power insofar as the spending is directed to meeting Australia's obligations under international human rights treaties. However, the links between the objectives of the Prevention of Domestic Violence program and Domestic Violence Frontline Services and the external affairs power are not stated clearly and explicitly in the ES.

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 include a clear and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

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

Minister's response

The Minister for Finance, on behalf of the Minister for Social Services, advised:

Prevention of Domestic Violence – Table Item 199

Table item 199 establishes legislative authority for government spending on measures to address deep-seated attitudes and practices that excuse, justify and promote violence against women and their children.

The development of this initiative and drafting of table item 199 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 199, the objective of the item references the external affairs power (section 51(xxix) of the Constitution. Specific reference is also made in table item 199 to the following articles of these international treaties:

- Article 6(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Article 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Articles 2, 3, 5(a) and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
- Articles 4, 18 and 19 of the Convention on the Rights of the Child (CROC).

Section 51(xxix) of the Constitution empowers the parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Articles 2, 5(a) and 16 of CEDAW require Australia to:

- pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
- take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
- take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent

treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Funding will be provided for a range of measures intended to reduce the incidence of domestic violence against women and children. For example, funding will be provided in relation to developing a framework for shared understanding and collaborative action in relation to preventing violence against Indigenous women and children.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided for the development of educational resources to enable witnesses of violence against women and children to take safe and appropriate action.

Articles 18(1) and 18(2) of the CROC deal with the responsibilities of parents for their children and require Australia to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.

Funding will be provided for activities that provide information and advice to men who have become fathers for the first time about the importance of their involvement in the development and care of their child, including by positive role-modelling.

Article 6(2) of the ICESCR requires Australia to take steps to achieve the full realization of the right to work by providing technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Funding will be provided for domestic violence prevention strategies focussing on education, employment and empowerment, particularly for women from culturally and linguistically diverse backgrounds.

Domestic Violence Frontline Services – Table Item 200

Table item 200 establishes legislative authority for the Government to fund domestic violence frontline services to provide pathways of support for women and children leaving, or trying to leave, family and domestic violence that prioritise their safety, minimise disruption to their lives and provide choice.

The development of this initiative and drafting of table item 200 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 200, the objective of the item references the external affairs power (section 51(xxix) of the

Constitution. Specific reference is also made in table item 200 to the following articles of these international treaties:

- Articles 2, 3, 5(a) and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Articles 4 and 19 of the Convention on the Rights of the Child (CROC);
- Article 6(2) of the Convention on the Rights of Persons with Disabilities (CRPD); and
- Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

Section 51(xxix) of the Constitution empowers the parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Articles 2, 3, 5(a) and 16 of CEDAW require Australia to:

- pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
- take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men;
- take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
- take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Funding will be provided for domestic violence frontline services that provide pathways of support for women and children leaving, or trying to leave, family and domestic violence with a focus on funding:

- for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
- for workers in the financial counselling and financial capability sector to equip them to better recognise, and respond to the needs of, women who have experienced domestic violence; and
- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Under the initiative, funding will be provided:

- for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

As noted above, funding will be provided in relation to alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons.

Article 6(2) of the CRPD is intended to ensure the full development, advancement and empowerment of women with disabilities.

Funding will be provided:

- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence; and
- to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

Committee's response

The committee thanks the ministers for their response.

The committee notes that this information would have been useful in the ES.

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
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Disallowance	15 sitting days after tabling (tabled Senate 7 February 2017) The time to give a notice of motion to disallow expired on 31 March 2017 Notice given on 31 March 2017[5] Notice must currently be resolved by 15 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 1 and 4 of 2017

Constitutional authority for expenditure

The committee previously commented as follows:

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*,[6] 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

5 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 13 June 2017).

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

Powers) Regulations 1997 (FFSP Regulations) which seeks to establish legislative 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.[7]

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.[8]

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

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7 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.

8 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.

Financial Counselling and Financial Capability – Capability Building program, and the 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 minister in relation to the above.

Minister's first response

The Minister for Finance, on behalf of the Minister for Social Services, advised:

> The Financial Wellbeing and Capability (FWC) funding supports a range of services and programs to assist people in time of immediate financial crisis, as well as help them build longer-term financial capability to manage serious debt, move out of financial difficulty and/or provide basic budgeting and financial literacy support. This includes the provision of free access to professional financial counselling and financial capability services to those most at risk of financial and social exclusion and disadvantage. The Commonwealth Financial Counselling and Financial Capability – Capability Building program within the FWC activity aims to build and maintain the capability of financial counsellors and financial capability workers to provide consistent and quality services to individuals and families experiencing financial difficulties.
>
> Communications power
>
> Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.
>
> The Commonwealth Financial Counselling and Financial Capability – Capability Building program provides funding for the management of the National Debt Helpline 1800 007 007, in addition to developing and making available national standards and materials for the Helpline.
>
> The Financial Counselling Australia annual national conference brings together financial counsellors and capability workers, consumer lawyers and community sector workers along with government agencies, universities, regulators and other organisations interested in financial counselling. The conference program includes a range of current topics and issues focusing on bankruptcy and insolvency, social welfare, the National Debt Helpline and information and resources for workers and consumers. The 2017 program includes sessions dealing with consumer credit law, mortgage stress, banks, the National Disability Insurance Scheme and consumer centred care, refugee financial counselling, and problem gambling.
>
> The program also provides funding for a range of online information tools and materials for consumers, financial counsellors and capability workers, which are available on the www.ndh.org.au and www.financialcounsellingaustralia.org.au websites. Additional information and resources for financial capability workers and consumers are available online during the

operation of the Financial Counselling Australia annual national conference.

Bankruptcy and insolvency power

Section 51(xvii) of the Constitution supports legislation with respect to 'bankruptcy and insolvency'. The program supports financially vulnerable people by funding specific sessions of the Financial Counselling Australia annual national conference that relate to bankruptcy and insolvency.

Social welfare power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to social welfare payments with in the meaning of section 51(xxiiiA) of the Constitution.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by section 122 of the Constitution. The program supports people living in the Territories to attend sessions of the Financial Counselling Australia annual national conference.

The program also funds sessions of the Financial Counselling Australia annual national conference that relate to particular issues confronting residents of the Territories.

Invalid and old age pensions power

The program supports financially vulnerable people by funding sessions of the Financial Counselling Australia annual national conference that relate to invalid and old age pensions within the meaning of section 51(xxiii) of the Constitution.

Aliens and immigration powers

The program funds sessions of the Financial Counselling Australia annual national conference that relate to relevant social welfare issues faced by financially vulnerable migrants and refugees. In doing so, the program assists persons within the reach of the aliens and immigration powers in sections 51(xix) and (xxvii) of the Constitution.

External affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia's obligations in relation to children under the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, or in relation to women under the Convention on the Elimination of All Forms of Discrimination Against Women. Funding can also be provided for the presentation of sessions to the extent that they are measures that are

designed to meet Australia's obligations under the International Covenant on Economic, Social and Cultural Rights.

Race power

The race power in section 51(xxvi) of the Constitution supports laws with respect to Indigenous Australians. The program provides funding for Indigenous persons and persons who provide financial counselling and financial capability services predominantly to Indigenous persons, particularly those living in remote communities, to attend the Financial Counselling Australia annual national conference. The program also funds the presentation of sessions at the Financial Counselling Australia annual national conference that relate to particular social welfare issues confronting Indigenous persons.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Committee's first response

The committee thanks the ministers for their detailed response.

While the minister's response is generally helpful in providing a clear and explicit statement of the relevance and operation of the majority of the constitutional heads of power that the regulation seeks to rely on to support the Commonwealth Financial Counselling and Financial Capability – Capability Building program, the committee notes that, in relation to the external affairs power, the minister's response does not specify the articles of the international treaties on which the program seeks to rely.

The committee understands that, in order to rely on the external affairs 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 regulation or the ES.

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

The committee also notes the minister's advice that '[t]his answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.'

The committee takes this opportunity to note that any claims to withhold information from Senate committees require the minister to 'state recognised public

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

interest grounds for any claim to withhold the information' that can be considered by the committee and the Senate.

With respect to claims that legal professional privilege provides grounds for a refusal to provide information in a parliamentary forum, Odgers' Australian Senate Practice states:

> It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for refusal of information in a parliamentary forum.
>
> …the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.[10]

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

Minister's second response

The Minister for Finance, on behalf of the Minister for Social Services, advised:

> The external affairs power
>
> The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia's international obligations under the Convention of the Rights of the Child [1991] ATS 4, the Convention on the Rights of Persons with Disabilities [2008] ATS 12, the Convention on the Elimination of All Forms of Discrimination Against Women [1983] ATS 9, as well as the International Covenant on Economic, Social and Cultural Rights [1976] ATS 5.
>
> *Convention on the Rights of the Child*
>
> The presentation of conference sessions may be designed to meet Australia's international obligations under Articles 18(2) and 27(1), as well as Article 19, of the Convention of the Rights of the Child.

10 *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669.

Article 19 provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 27(1) provides:

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Article 18(2) provides:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

Convention on the Rights of Persons with Disabilities

The presentation of conference sessions may also be designed to meet Australia's international obligations under Articles 12(5), 27(1)(f) and 28(2)(c) of the Convention on the Rights of Persons with Disabilities.

Article 12(5) provides:

Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 27(1)(f) provides:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the

course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

Article 28(2)(c) provides:

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.

Convention on the Elimination of All Forms of Discrimination Against Women

Australia has international obligations under Articles 3, 4(1) and 13(b) of the Convention on the Elimination of All Forms of Discrimination Against Women, and the presentation of conference session may be designed to meet these obligations.

Article 3 provides:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4(1) provides:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 13(b) provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(b) The right to bank loans, mortgages and other forms of financial credit

International Covenant on Economic, Social and Cultural Rights

The presentation of conference sessions may also be designed to meet Australia's international obligations under Article 11(1) of the International

> Covenant on Economic, Social and Cultural Rights. This Article provides as follows:
>
> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Committee's second response

The committee thanks the ministers for their response and has concluded its examination of the instrument.

The committee notes that this information would have been useful in the ES.

Instrument	**Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017 [F2017L00295]**
Purpose	Increases penalties for offences, strengthens the Australian Fisheries Management Authority's infringement notice scheme and adopts the infringement notice scheme of the *Regulatory Powers (Standard Provisions) Act 2014*
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2017) Notice of motion to disallow must be given by 9 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Sub-delegation

The committee previously commented as follows:

Section 44 of the Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017 [F2017L00295] (the regulations) allows the Chief Executive Officer (CEO) of the Australian Fisheries Management Authority (AFMA) to delegate to 'an officer' the power to extend the period in which an infringement notice must be paid and the power to withdraw an infringement notice.

Section 4 of the *Fisheries Management Act 1991* (FMA Act) broadly defines an 'officer' as:

> (a) a person appointed under section 83 to be an officer for the purposes of this Act;[11] or
>
> (b) a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; or
>
> (c) a member of the Defence Force; or
>
> (d) an officer of Customs (as defined in the *Customs Act 1901*).[12]

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 to the regulations does not provide any justification for the need to sub-delegate the abovementioned powers of the CEO of AFMA to 'an officer'.

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

Minister's response

The Assistant Minister for Agriculture and Water Resources advised:

> On the basic intent of s44 of the Regulation, the inclusion of a power to withdraw an infringement notice is consistent with the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The guide provides that infringement notice provisions should state that an authorised officer may withdraw an infringement notice and that the infringement notice should indicate that the person issued with the notice may make representations as to why a notice should be withdrawn. The delegation by the AFMA CEO of the decision to withdraw a notice to the same level of officer authorised to issue a notice ensures that any representations can be taken into account by the issuing officer.
>
> The committee notes that an officer (as defined under s4 of the FMA) appears to encompass a relatively large class of persons. However, the

11 See *Fisheries Management Act 1991, s*ection 83. This section provides a very broad definition of who can be appointed as 'an officer' for the purposes of the FMA Act.

12 See *Customs Act 1901*, section 4. This section provides a very broad definition of the term an 'officer of Customs'.

committee may not be aware of AFMA's strategic alliances and extensive collaboration with the Department of Defence, State and Federal Police and Border Force, in a broad range of practical operations to pursue fisheries compliance. While an AFMA officer is most likely to issue an infringement notice, operational requirements may involve an officer from another of those agencies (as specified under s4 of the FMA) undertaking this task.

In regard to the committee's point about the qualifications or attributes of those exercising that power, any officer who becomes directly involved in Commonwealth fisheries compliance operations is appropriately trained by AFMA. This ranges from briefing sessions on the powers of officers and operational arrangements to specific training on the application of infringement notices. As a result, in terms of operational practices, only a limited number of officers are directly involved, and each person is appropriately qualified.

Finally, in response to the committee's concerns around limiting the sorts of powers that might be delegated, I note that the proposed delegated powers under s44 are strictly limited to the powers of extending the payment period of a fisheries infringement notice or withdrawing an infringement notice.

Committee's response

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

The committee notes that this information would have been useful in the ES.

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 Safety Act 1998*
Last day to disallow	15 sitting days after tabling (tabled Senate 21 November 2016) The time to give a notice of motion to disallow expired on 20 March 2017 Notice given on 20 March 2017[13] Notice must currently be resolved by 19 June 2017
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a), (b) and (d)
Previously reported in	*Delegated legislation monitors* 1 and 3 of 2017

Matter more appropriate for parliamentary enactment

The committee previously commented as follows:

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).[14]

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:

13 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 13 June 2017).

14 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).

> 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.[15]

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,

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15 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).

> *it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[16] (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 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.

Minister's first response

The Minister for Local Government and Territories advised:

> As a general comment, I note that Ordinances made for the external territories and the Jervis Bay Territory (JBT) are quite unlike other types of delegated legislation at the Commonwealth level. Such Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation. Consequently, deviation from strict compliance with Commonwealth guidance framed in the context of general Commonwealth-level delegated legislation is in some cases justifiable.
>
> Having considered this matter in some detail, at this time I do not think it is necessary to amend the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act). I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide more robust justifications in relation to the matters mentioned by the Committee. My response is enclosed.
>
> Reference Sections: 19, 24, 32, 36, 59, 60, 113
>
> The Jervis Bay Territory (JBT) is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) in force in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Act, in force in the JBT as if the JBT formed part of the ACT. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are

16 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).

subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

Section 4F of the Acceptance Act empowers the Governor-General to 'make Ordinances for the peace, order and good government of the Territory'.

In contrast, the Delegated Legislation Monitor (which in turn refers to advice received from the Office of Parliamentary Counsel (OPC) in 2014) refers to a 'general regulation-making power'. As noted in the OPC advice, a 'general regulation-making power' is one that authorises the making of regulations 'required or permitted' or 'necessary or convenient' (see paras 9 to 18 of *Drafting Direction No.3.8-Subordinate Legislation* (DD3.8), which is referred to in the 2014 advice from OPC). Such a law-making power is different in scope from the power to make laws 'for the peace, order and good government' of a territory. The latter is not aptly described as a 'general regulation-making power' as that term is used in the Delegated Legislation Monitor, the 2014 OPC advice or DD3.8. Instead, a power granted in these terms is a plenary power. Although some limits apply to such a power, a grant of power in these terms includes the power to prescribe offences that are punishable by imprisonment.

Ordinances are made by the Governor-General under section 4F of the Acceptance Act to complement the ACT laws that are applied in the JBT (which mainly pertain to state or local government-type issues). Such Ordinances are generally made to account for the JBT's unique legal and administrative arrangements or to address matters, which may not be dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the proximity of the JBT to NSW.

In practice, the Ordinance-making power under the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three are modelled on NSW legislation (which include offence provisions).

In relation to the Marine Ordinance, the ACT does not have a coastal marine environment to regulate so there is no ACT coastal marine law that applies in the JBT. The policy goal behind the making of the Marine Ordinance is to put in place a legal regime covering use of the JBT marine environment similar to that applying across the JBT-NSW maritime border. The Marine Ordinance offence provisions and penalties mirror those in the *Marine Safety Act 1998* (NSW). The *Marine Safety Act 1998*, including its penalty provisions, were scrutinised by the elected NSW legislature.

Other recent JBT Ordinances have been made which mirror NSW legislation, namely the Jervis Bay Territory Rural Fires Ordinance 2013 and the Jervis Bay Territory Emergency Management Ordinance 2015. These Ordinances also replicate the offence provisions in the mirrored NSW legislation, and carry penalties of imprisonment.

> In summary, JBT Ordinances generally apply state-type law and are a rarely used tool. Offence provisions and penalties mirror NSW requirements to provide similar protections on both sides of a contiguous border. Penalties of imprisonment are exceptional, and engaged only for the most serious offences including endangering life. The *Marine Safety Act 1998* (NSW) was scrutinised by the elected NSW legislature.
>
> For the reasons set out above, I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more rigorous justification for the provisions of the Ordinance that provide for penalties in excess of 50 penalty units and or terms of imprisonment.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions of the ordinance mirror NSW legislation. While the committee understands the desire to provide similar protection on both sides of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the provisions of the ordinance that provide for penalties in excess of 50 penalty units and/or terms of imprisonment. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that the inclusion of such penalties is not a matter that is more appropriate for parliamentary enactment.

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

Minister's second response

The Minister for Local Government and Territories advised:

> The Department of Infrastructure and Regional Development has prepared a replacement explanatory statement for the Ordinance addressing the Senate Standing Committee on Regulations and Ordinances' (the Committee) scrutiny concerns detailed in *Delegation legislation monitor* 3 of 2017.
>
> As soon as practical, the Department will register the approved explanatory statement on the Federal Register of Legislation, which will cause its tabling by the Office of Parliamentary Counsel.
>
> I have enclosed an advance copy of the approved explanatory statement for consideration by the Committee.

The replacement ES states:

> Legislative Framework
>
> The JBT is a Commonwealth administered territory and has no state legislature. Section 4A of the Acceptance Act applies to the JBT the laws (including the principles and rules of common law and equity) in force from time to time in the ACT are [sic], so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Acceptance Act. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, and are subject to the scrutiny of the ACT legislature. They apply to the JBT without Commonwealth parliamentary scrutiny.
>
> Although the laws in force in the JBT are generally those of the ACT, the Acceptance Act provides a framework within which the Governor-General may make Ordinances to adjust and complement the applied ACT laws. Specifically, section 4C of the Acceptance Act permits an applied ACT law to be amended or repealed by an Ordinance made under the Acceptance Act, or a law made under such an Ordinance, and subsection 4F(1) confers on the Governor-General a plenary power to make Ordinances for the peace, order and good government of the JBT.
>
> It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making powers commonly found in Commonwealth legislation, which permit the making of regulations as 'required or permitted' or 'necessary or convenient'. They are used by Parliament to indicate that, within the relevant subject matter, there is to be very little limitation on what can be provided for. They are generally only used for the external territories and the JBT, where the relevant Ordinances deal with state-level matters not normally dealt with in other types of Commonwealth legislation. The Commonwealth Parliament recently enacted a provision similar to s 4F of the Acceptance Act for the governance of Norfolk Island: section 19A of the *Norfolk Island Act 1979* (Cth) (which was enacted in 2015).
>
> Ordinances made by the Governor-General under subsection 4F(1) of the Acceptance Act are generally made to account for the JBT's unique legal and administrative arrangements or to address matters not dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the close proximity of the JBT to NSW land and water. In practice, the Ordinance-making power in subsection 4F(1) of the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three of which are modelled on NSW legislation.
>
> Because the ACT does not have a coastal marine environment, there is no ACT coastal marine law that can be applied in the JBT. This Ordinance establishes a marine safety regime for the JBT marine environment that is

similar to the regime applying across the JBT-NSW maritime border, and which draws on both NSW marine safety legislation and the Cth National Law…

Offences and Penalties

The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT waters to that already enjoyed by people in the adjoining NSW waters. As such, it is desirable for a person to be subject to similar offences and penalties on each side of the adjoining JBT / NSW border. In order to achieve this policy objective, the Ordinance contains offences and impose[s] penalties exceeding 50 penalty units and terms of imprisonment. The Acceptance Act does not contain any offence provisions.

While it is generally more appropriate to create offence provisions imposing penalties greater than 50 penalty units or terms of imprisonment in Acts of Parliament rather than in subordinate legislation, it is not appropriate to create these offence provisions in the Acceptance Act or other territory governance Acts. The reason for this is that imposing penalties in the Acceptance Act may change the basic framework of JBT's legislative scheme and unintentionally limit the scope of the Ordinance making power.

The plenary power provided in the Acceptance Act authorises Ordinances to create offences and does not limit the size or nature of the penalties that can be imposed. This power is inconsistent with the general Commonwealth policy that delegated legislation should not be authorised to impose penalties of imprisonment or fines exceeding 50 penalty units (see paragraph 3.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) (the Guide)).

The Acceptance Act does not place any limitation on the types of penalties that may be imposed by Ordinances made under that Act because Ordinances made for the JBT (together with Ordinances made for other territories) are quite unlike other types of delegated legislation at the Commonwealth level. Ordinances operate within the framework of ACT law applied by the Acceptance Act and are used to adjust and (when necessary) make State-type laws within the JBT. In some circumstances, such legislation will be required to prohibit conduct that is so serious that the imposition of penalties of imprisonment, or above 50 penalty units, will be appropriate. A similarly broad Ordinance-making power was enacted by the Commonwealth Parliament recently (see section 19A of the *Norfolk Island Act 1979* (Cth), enacted in 2015).

In this context, it is relevant to note that, under section 4L of the Acceptance Act and section 118(2) of the Ordinance, offence provisions cannot be created in regulations, rules or by-laws made under the Ordinance.

Certain offences created by the Ordinance are of a sufficiently serious nature that they warrant the imposition of penalties of greater than 50 penalty units and/or penalties involving terms of imprisonment. Specifically, sections 19, 24, 31, 32, 36, 59, 60 and 113 of the Ordinance provide maximum penalties in excess of 50 penalty units and/or a term of imprisonment, to reflect the seriousness of the conduct to be deterred. These penalties are engaged only for the most serious offences giving rise to a danger of harm or death to another person, or damage to property of another person or the environment.

Penalties similar to those imposed by this Ordinance have been imposed by the provisions of other Ordinances made under the Acceptance Act. These provisions include sections 14, 15 and 16 of the Jervis Bay Territory Marine Safety Ordinance 2007 (2007 Ordinance), and section 24 of the Jervis Bay Territory Emergency Management Ordinance 2015.

During the development of the Ordinance, the Attorney-General's Department and the Australian Federal Police were consulted specifically in relation to penalty and imprisonment provisions. Affected persons including JBT business operators and the Wreck Bay community were also consulted and were given adequate notice that these offence provisions would be introduced.

Committee's second response

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

The committee also thanks the minister for the informative replacement ES which the committee notes has been registered on the Federal Register of Legislation.

The committee acknowledges JBT's unique legal and administrative arrangements and notes that the replacement ES provides detailed justifications for the provisions of the ordinance that provide for penalties in excess of 50 penalty units and/or terms of imprisonment.

Insufficient information regarding strict liability offences

The committee previously commented as follows:

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.[17]

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.

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.

Minister's first response

The Minister for Local Government and Territories advised:

> Subsections: 87(6) and 105(4) and section 113
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more comprehensive justification for the three strict liability offence created by these sections, addressing the matters set out in, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide). As noted above, these justifications are that:
>
> - the Marine Ordinance is a state-type law;
> - JBT has a contiguous border with NSW;
> - strict liability provisions mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of a contiguous marine border between the JBT and NSW;

17 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 *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the strict liability provisions of the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of strict liability offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the strict liability offence provisions of the ordinance. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

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

Minister's second response

The replacement ES provided by the Minister for Local Government and Territories states:

> Strict liability offences
>
> Subsections 87(6), 105(4) and section 113 of the Ordinance create strict liability offences. Strict liability removes the requirement that the prosecution prove the fault element of an offence, which would otherwise attach to a physical element of that offence. The application of strict liability in relation to these particular offences is appropriate, noting that:
>
> - the penalties for the relevant offences do not include imprisonment or exceed 60 penalty units;
> - for these offences, strict liability is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct;
> - it is necessary to ensure the integrity of the regulatory regime in question;
> - there are legitimate grounds for penalising persons lacking fault, eg, because he or she will be placed on notice to guard against the possibility of any contravention;

- there is general public support and acceptance for both the measure and the penalty.

Strict liability is imposed in respect of limited offences for specific reasons. These reasons include public safety and the public interest and ensuring that the regulatory scheme is observed where the sanction of criminal penalties is justified. They also arise in a context where a defendant can reasonably be expected, because of his or her involvement in marine activities, to know what the requirements of the law are, and the mental, or fault, element can justifiably be excluded.

The general rationale for making these offences strict liability offences is that there is a community expectation that people will be aware of and comply with their marine safety obligations. For example, a person who drives a powered vessel for recreational purposes at a speed of 10 knots or more must be aged 12 years or over and have a current general boat licence. To be granted a general boat licence a person is required to undertake a mandatory knowledge test, including marine safety requirements, and provide evidence of practical boating experience. Accordingly, when in charge of a powered vessel, vessel operators are expected to be aware of their marine safety responsibilities and the obligations they owe to their passengers and the wider community in the JBT marine environment.

For strict liability offences in this Ordinance, the prosecution will have to prove only the conduct of the accused. However, where the accused produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made that conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

Subsections 87(7) and 105(5) of the Ordinance also provide the strict liability offence 'specific defence' of 'reasonable excuse'…

Committee's second response

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

Evidential burdens of proof on the defendant

The committee previously commented as follows:

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-compliance 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.[18]

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 out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[19]

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

Minister's first response

The Minister for Local Government and Territories advised:

> Sections: 108 and 110 and subsections 15(2); 28(2); 41(2); 47(4); 71(1) and (2); and 105(5)
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the reversal of the burden of proof contained in each of the provisions above,

18 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.

19 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.

addressing the matters set out in the Guide each of the detailed sections. As noted above the justifications are that:

- the Marine Ordinance is a state-type law;
- JBT has a contiguous border with NSW;
- Offence provisions reversing the evidentiary burden of proof mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side the contiguous marine border between the JBT and NSW;
- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions reversing the evidentiary burden of proof in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the offence provisions in the ordinance that reverse the evidentiary burden of proof. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

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

Minister's second response

The replacement ES provided by the Minister for Local Government and Territories states:

> An evidential burden of proof requires a person to provide evidence of an asserted fact in order to prove that fact to a court. Subsections 87(7) and 105(5) of the Ordinance place an evidential burden on an individual to demonstrate that they had a reasonable excuse for failing to meet a duty or obligation.
>
> Sections 108 and 110 and subsections 15(2), 28(2), 30(8), 31(2), 32(2), 41(2), 47(4) and 71(1) and (2) of the Ordinance also place an evidential burden on the defendant by requiring the defendant to raise evidence about the relevant matter that suggests a reasonable possibility that the

matter exists or does not exist, after which the prosecution must disprove those matters beyond reasonable doubt.

An evidential burden has been placed on defendants in these provisions as the conduct proscribed by each of the offences may pose a grave danger to public safety. In addition, in each case, a defendant will be the only person in the circumstances with the relevant knowledge able to provide evidence of any reason for refusing or failing to comply with the relevant duty or obligation and it would be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

Committee's second response

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

Legal burden of proof on the defendant

The committee previously commented as follows:

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.[20]

20 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 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 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*.[21]

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

Minister's first response

The Minister for Local Government and Territories advised:

> Sections 56 and 63
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the section 63 requirement for defendants to positively prove the matters set out in that section. As noted above, these justifications are that:
>
> - the Marine Ordinance is a state-type law;
> - JBT has a contiguous border with NSW;
> - offence provisions and penalties mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus

21 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.

ensuring the same legal regime applies on either side of the contiguous marine border between the JBT and NSW;

- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions and penalties in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the reversal of the legal burden of proof that applies to a section 56 offence under the ordinance. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that this offence does not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

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

Minister's second response

The replacement ES provided by the Minister for Local Government and Territories states:

> ..section 63 of the Ordinance provides a defence to the offence created by section 56 of the Ordinance relating to underage alcohol consumption while operating a vessel, or supervising a person under 16 years of age who is operating a vessel. Section 63 of the Ordinance provides for a defence, which applies if the defendant proves that the relevant breath or blood alcohol was not caused by certain things, including the consumption of an alcoholic beverage. This defence requires the defendant to discharge the legal burden of proof for an element of the offence.
>
> It is appropriate in this particular circumstance that the defendant bears the legal burden in relation to this defence rather than the evidential burden because of the potentially significant risks to public safety posed by a person under 18 years of age who is affected by alcohol while in charge of a vessel.
>
> In addition, each specific matter capable of being raised as a defence by the defendant is peculiarly within the knowledge of the defendant. It

> would also be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

Committee's second response

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

Unclear definition

The committee previously commented as follows:

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';

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.

Minister's first response

The Minister for Local Government and Territories advised:

> Section 92
>
> I note the matters raised by the Committee and I have asked my Department to amend the explanatory statement for the Marine Ordinance to clarify:

- whether the class of person who may assist police officers is limited in any way;
- if the exemptions for police officers that are provided for in sections 109 and 110 apply to persons assisting police officers;
- whether the conduct of persons assisting police officers can be questioned in the same manner as the conduct of police officers; and
- how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officers.

Committee's first response

The committee thanks the minister for her response.

However, while the committee notes the minister's undertaking to amend the ES to the ordinance to clarify the committee's initial queries, the minister's response does not provide any information to clarify the matters raised by the committee.

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

Minister's second response

The replacement ES provided by the Minister for Local Government and Territories states:

> Section 92 - Persons assisting police officers
>
> Subsection 92(1) provides that a police officer may be assisted by other persons in the execution of their marine investigation and enforcement powers, functions and duties (provided for under Part 9 of the Ordinance) if that assistance is necessary and reasonable. Someone who assists a police officer in the exercise of their powers, functions and duties is called a 'person assisting' the police officer. The Ordinance does not limit the class of persons who may be a 'person assisting'…
>
> Paragraphs (a) and (b) of subsection 92(2) provide for specific things that a person may do in assisting a police officer, namely, board a vessel or enter premises, and exercise powers and perform functions and duties under Part 9 of the Ordinance. However, under paragraph (c) of subsection 92(2), a person is only authorised by the Ordinance to do such things if they do them in accordance with a direction given to them by the police officer. If a person assisting did such things other than in accordance with a direction given by the relevant police officer, their actions would not be authorised by the Ordinance, and any such power, function or duty purportedly exercised or performed by them would not be taken to have been exercised by the relevant police officer under subsections 92(3) and 92(4) (see below).
>
> Under subsections 92(3) and 92(4), if a person exercises a power or performs a function or duty under Part 9 of the Ordinance in the course of giving necessary and reasonable assistance to a police officer who is also

> exercising powers or performing functions or duties under Part 9, and the person does so in accordance with a direction given to them by the police officer, the power, function or duty exercised or performed by the person will be taken for all purposes to have been exercised or performed by the police officer in question. Section 109 of the Ordinance provides that certain provisions of Part 6 do not apply to a police officer in certain circumstances: if s 109 would apply to a police officer exercising a power or performing a function or duty, then, provided the relevant criteria in sections 92 and 109 are satisfied, then [sic] the same exemption would apply to a person assisting who was exercising the power or performing the function or duty.
>
> 'For all purposes' an action of a person assisting a police officer, who is acting in accordance with the police officer's directions, is taken to be the action of the instructing police officer. Therefore, the police officer can generally be questioned about the action in the same way as they could be questioned had they taken the action themselves.
>
> Exemptions under section 110 do not apply to a person assisting (only on the basis that they are a person assisting), as section 110 applies to persons assisting the Australian Defence Force or the naval, military or air forces of another country.

Committee's second response

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

Access to documents

The committee previously commented as follows:

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.

Minister's first response

The Minister for Local Government and Territories advised:

> Subparagraph 21(2)(b)(i)
>
> Australian Standard AS1799.1-2009 Small Crafts Part One (AS1799.1-2009), sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. Australian Standard AS1799.1-2009 is readily available, but at a cost to the public.
>
> Vessels cannot be registered in the JBT and they must meet the registration conditions set in their home state. Due to the proximity of NSW, the majority of vessels using JBT waters are likely to be registered in NSW. Further, it is likely that most vessels operating in JBT waters will traverse NSW regulated waters. In order to be registered and/or operate in NSW waters vessel operators must comply with regulation 13 of the Marine Safety Regulations 2016 (NSW), which makes similar provision, to section 21 of the Marine Ordinance.
>
> Section 21 of the Marine Ordinance prohibits a vessel operating in JBT waters from having a motor that exceeds the appropriate power rating for the vessel. In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified (or the specification is not apparent) and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799.1-2009.
>
> Noting the comments above, I have instructed my Department to paraphrase this response to address the Guide's requirement to include incorporated documents in the Explanatory Statement.

Committee's first response

The committee thanks the minister for her response.

The committee notes the minister's advice that the Australian Standard incorporated into the ordinance is readily available, but at a cost to the public.

In this regard, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. 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.[22] 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.

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

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

Minister's second response

The replacement ES provided by the Minister for Local Government and Territories states:

> Section 21 – Offence – exceeding the appropriate power rating for a vessel
>
> This section creates an offence of operating a vessel in JBT waters with a motor that exceeds the appropriate power rating for the vessel. For the purposes of practical jurisdictional application subsection 21(2) of the Ordinance reflects section 13 of the NSW Regulations, which expressly refers to Australian Standard AS 1799.1 - 2009 *Small craft – General requirements for power boats* (as in force on the commencement day) and the power rating approved by NSW Roads and Maritime Services (RMS) for vessels of that kind (again, as in force on the commencement day).
>
> In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified, or the specification is not apparent, and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799 .1 -2009. If the vessel does not have an outboard motor, the appropriate power rating is the power rating for vessels of the kind approved by RMS for the purposes of clause 13 of the NSW Regulation (as in force on the commencement day).
>
> AS 1799.1-2009 sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in

22 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 2 March 2017).

overall length when used as recreational vessels. It does not apply to boats used for commercial purposes or exclusively for racing, nor to canoes, kayaks, inflatable boats, rigid inflatable boats, yachts or auxiliary yachts. A hardcopy or PDF version of AS 1799.1-2009 is available for purchase via the publisher's website.[23] Alternatively, AS 1799.1-2009 can be viewed free of charge at the National Library, the Shoalhaven Library, the Department's Library in Canberra, and the Department's Jervis Bay Territory Administration Office (Village Road, Jervis Bay Village, JBT).

Committee's second response

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

In concluding, the committee welcomes the minister's advice that AS 1799.1-2009 can be viewed free of charge at various libraries, as well as at the Department of Infrastructure and Regional Development's Jervis Bay Territory Administration Office. However, the committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

Instrument	**National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 [F2017L00209]**
Purpose	Sets rules for funding specialist disability accommodation for participants under the National Disability Insurance Scheme
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a) and (d)
Previously reported in	*Delegated legislation monitor* 4 of 2017

Access to incorporated documents

The committee previously commented as follows:

23 See SAI Global website https://infostore.saiglobal.com/store/details.aspx?ProductID=1141233 (accessed 18 April 2017)

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 the National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 [F2017L00209] (the rules) incorporate the NDIS (National Disability Insurance Scheme) Price Guide and Legacy Stock Price List, as in force from time to time. However, the ES does not provide a description of these documents, or indicate how they may be freely obtained, other than to state that the documents are published by the National Disability Insurance Agency (NDIA).

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 an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*.

With respect to providing a description of the incorporated documents, the committee understands that NDIS prices and associated arrangements included in these documents are designed to assist disability support providers to understand the way pricing and payments work in the NDIS, and that the documents may be described as administrative in character. However, the committee is interested to understand why it is appropriate for the NDIS Price Guide and Legacy Stock Price List to be issued by the NDIA without Parliamentary oversight given that their application in the rules will determine the amounts that will be funded by the NDIS for specialist disability accommodation.[24]

With respect to indicating how the incorporated documents may be obtained, the committee notes that the NDIS Price Guide is available for free online.[25] Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed. The committee remains concerned about how the Legacy Stock Price List may be obtained.

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24 See paragraph 5.4.

25 See National Disability Insurance Agency, https://www.ndis.gov.au/providers/pricing-and-payment (accessed 28 March 2017).

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.

Minister's response

The Minister for Social Services advised:

> Having regard to paragraph 15J(2)(c) of the *Legislation Act 2003*, I will submit a revised Explanatory Statement which includes a description of these documents, as well as website links indicating how the documents may be publicly accessed.
>
> In relation to the Committee's comments on the authority of the National Disability Insurance Agency (NDIA) to issue the NDIS Price Guide and Legacy Stock Price List, the NDIS Act 2013 establishes the NDIA and its functions. The functions are set out in section 118(1) of the NDIS Act 2013 and include:
>
> - 'to manage the financial sustainability of the National Disability Insurance Scheme' (s 118(1)(b)) and
> - 'to do anything incidental or conclucive to the performance of the above functions' (s 118(1)(h)).
>
> To undertake these functions, it is appropriate that the NDIA set prices and use other methods to ensure that the prices of supports under the NDIS support financial sustainability.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's undertaking to register a revised ES that will include a description of the incorporated documents and where they can be publicly accessed.

The committee also notes the minister's advice that in order for the NDIA to undertake its functions as set out in the *National Disability Insurance Scheme Act 2013*, it is appropriate for the NDIA to 'set prices and use other methods to ensure that the prices of supports under the NDIS support financial sustainability', and that this may include issuing the NDIS Price Guide and Legacy Stock Price List.

Instrument	**National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 2) (PB 22 OF 2017) [F2017L00361]**
Purpose	Amends the National Health (Listed drugs on F1 or F2) Determination 2010 (PB 93 of 2010)
Authorising legislation	*National Health Act 1953*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Drafting

The committee previously commented as follows:

The *National Health Act 1953* (the Act) provides that drugs listed on the pharmaceutical benefits scheme may be assigned to formularies identified as F1 and F2.

F1 is intended for single brand drugs and F2 for drugs that have multiple brands, or are in a therapeutic group with other drugs with multiple brands. Drugs identified as F2 are subject to the provisions of the Act relating to first new brand statutory price reductions, price disclosure and guarantee of supply.

The ES for National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 2) (PB 22 OF 2017) [F2017L00361] (the determination) states that, in addition to adding 5 new drugs to the F1 list, the determination is also moving 5 currently listed drugs from the F1 list to the F2 list.

However, the committee notes that one of the drugs listed as being moved from the F1 list to the F2 list (etanercept) has been inserted into Schedule 2 of the determination (relating to the F2 list) but not omitted from Schedule 1 (relating to the F1 list). This drug is therefore now included in both lists. It is unclear to the committee whether this was the intention of the determination, or whether the listing of the drug etanercept on both the F1 list and F2 list is the result of a drafting error in the determination.

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

Minister's response

The Minister for Health advised:

> The F1/F2 determination is one of eleven legislative instruments that were registered for commencement on 1 April 2017 as part of monthly amendments to legislative instruments under the *National Health Act 1953*. As suggested by the Committee, the listing of etanercept on both the F1 list and F2 list was the result of a drafting error in the F1/F2 determination.
>
> Etanercept should have been omitted from the F1 list. This error will be corrected in an amendment to the National Health (Listed drugs on F1 and F2) Determination 2010 (PB93 of 2010) to take effect on 1 June 2017. This has not caused, and will not cause, any impact to Government, suppliers of etanercept or patients.

Committee's response

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

The committee notes the minister's advice that the listing of etanercept on both the F1 list and F2 list has not affected, and will not affect, any individuals.

The committee also notes that this error has been corrected in National Health (Listed drugs on F1 or F2) Amendment Determination 2017 (No. 4) (PB 41 of 2017) [F2017L00623], which was registered on the Federal Register of Legislation on 31 May 2017.

Instrument	**Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) [F2017L00242]**
Purpose	Updates references and changes the minimum benefits payable by private health insurers for nursing-home type patients at public hospitals in some states and at private hospitals nationally
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2017) Notice of motion to disallow must be given by 20 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Indexation method

The committee previously commented as follows:

Item 2 of Schedule A to the Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2) (the amendment rules) decreases the minimum benefit payable per night for nursing-home type patients (NHTPs) in private hospitals in clause 6, Table 2 of Schedule 4 to the Private Health Insurance (Benefit Requirements) Rules 2011 (the principal rules) from $53.05 to $52.30.

The committee acknowledges that section 72-1, table item 5 of the *Private Health Insurance Act 2007* appears to provide legislative authority for the principal rules to set out the minimum benefit, or method for working out the minimum benefit, that a private health insurance policy that covers hospital treatment must provide to policy holders (including the minimum benefit payable for treatment for NHTPs in private hospitals). However, the committee notes that the principal rules do not appear to set out a method by which the minimum benefit payable for treatment for NHTPs is calculated.

The ES to the amendment rules explains:

> The minimum benefits payable per night for hospital treatment provided to NHTPs in Schedule 4 of the Principal Rules is subject to review and change twice annually, to reflect the indexation applied to the Adult Pension Basic Rate and Maximum Daily Rate of Rental Assistance (Pension and Rental Assistance Rates). The latest indexation of these rates takes effect on 20 March 2017.

However, the committee is concerned that this current indexation method, which is used to calculate the minimum benefit payable per night for NHTPs, does not appear

to be codified in the principal rules. The committee is interested in exploring why it is appropriate for this method not to be specified in the principal rules; and whether consideration has been given to providing more detail in relation to this method in the principal rules.

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

Minister's response

The Minister for Health advised:

> I understand that it has not been common practice to provide an explanation of the indexation method in the Private Health Insurance (Benefit Requirements) Rules 2011 (the Rules). The Rules negotiated with relevant parties have been in effect since 2011 and there has been no record of any concern raised regarding the method or this practice since this time by hospitals or private health insurers.
>
> The Committee has also queried whether it would be appropriate for the indexation method to be specified in the Rules in the future. My Department has progressively been reviewing the regulatory instruments that relate to private health insurance and identified a number of possible amendments that aim to strengthen clarity and administrative efficiencies for stakeholders and the Government.
>
> My preference is that any proposed changes be consolidated within a package of reforms that I will shortly receive from the Private Health Ministerial Advisory Committee (PHMAC). The PHMAC has been actively reviewing the arrangements for private health insurance including standard clinical definitions, contracting, minimum default benefits and second tier default benefits; all of which could impact the Rules. Continuing the Rules in their current form will enable my Department to incorporate all required changes in the most efficient, consistent and holistic manner.

Committee's response

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

The committee notes the minister's advice that the Department of Health (the department) has identified a number of possible amendments to regulatory instruments that relate to private health insurance, and that these are proposed to be consolidated within a pending package of reforms.

As part of the review for private health insurance, the committee requests that consideration be given to the appropriateness of the current indexation method used to calculate the minimum benefit payable per night for NHTPs; and whether the indexation method should be codified in the principal rules or elsewhere.

The committee notes that the indexation method itself may be described as administrative. However, the indexation method as applied by future instruments may have an impact on the calculation of the minimum benefit that a private health insurance policy that covers hospital treatment must provide to policy holders. If this is the case, the committee would expect the ES to those instruments to contain a detailed justification as to why it is appropriate for the department to decide the indexation rate without Parliamentary oversight.

The committee will continue to monitor this issue.

Instrument	**Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124]**
Purpose	Amends the *Social Security (International Agreements) Act 1999* to set out the terms of the Agreement on Social Security between the Governments of Australia and New Zealand
Authorising legislation	*Social Security (International Agreements) Act 1999*
Department	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2017) Notice of motion to disallow must be given by 19 June 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 3 of 2017

Incorporation of documents

The committee previously 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.

The Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124] (the regulations) insert a new Schedule 3 to the *Social Security (International Agreements) Act 1999*, which contains the text of the 'Agreement on Social Security between the Government of Australia and the Government of New Zealand' (the agreement). With reference to the above, the committee notes that Article 1 of the agreement contains definitions which rely

on the social security law of New Zealand. Article 18 and Part A of the Schedule to the agreement also incorporate the *New Zealand Privacy Act 1993* and New Zealand privacy laws. However, neither the text of the regulations nor the ES expressly states the manner in which this New Zealand legislation is 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'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.

Minister's response

The Minister for Social Services advised:

> I note the comments of the Committee with respect to the incorporation of documents and would like to take this opportunity to refer to a similar request from the Committee that arose in relation to the Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016.
>
> As noted in our previous response, section 8 of the *Social Security (International Agreements) Act 1999* (the International Agreements Act) provides for regulations to add to the Act a Schedule setting out the terms of an agreement between Australia and another country if the agreement relates to reciprocity in social security or superannuation matters.
>
> The Social Security (International Agreements) Amendment (New Zealand) Regulation 2017, which adds a new schedule 3 to the International Agreements Act, must therefore set out the exact terms of the agreement between Australia and New Zealand. The references to the New Zealand social security law contained in definitions appears in Article 1 (Definitions) and the references to the *New Zealand Privacy Act 1993* and the New Zealand privacy laws appear in Article 18 (Exchange of Information) and Part A (Terms and conditions for exchange of information for social security purposes) of the Schedule to the agreement.
>
> Where the text of an international social security agreement is set out in a Schedule to the Act, the provisions of the agreement have effect despite anything in the social security law (subsection 6(1) of the Act). However, this only applies to provisions of the agreement that:
>
> - are in force; and
> - affect the operation of the social security law (subsection 6(2) of the Act).

> The reference to the New Zealand social security law and the *New Zealand Privacy Act 1993* (including, New Zealand privacy laws) do not affect the operation of the social security law.
>
> The Social Security (International Agreements) Amendment (New Zealand) Regulation 2017 does not therefore apply, adopt or incorporate New Zealand social security law or privacy laws (including the *New Zealand Privacy Act 1993*) for the purpose of section 14 of the *Legislation Act 2003*.
>
> For completeness, and the Committee's further information, Article 2 of the Agreement applies the social security laws of Australia and New Zealand, as well as the *New Zealand Veteran's Support Act 2014*, as they apply to or affect the relevant benefits covered under the Agreement, at the time of signing, and to any legislation that subsequently amends, supplements, consolidates or replaces them.

Committee's response

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

The committee also notes the minister's previous advice provided in relation to a similar issue raised by the committee regarding the Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016 [F2016L00720].[26]

The committee understands this advice to mean that where the text of an international social security agreement (agreement) is set out in a Schedule to the *Social Security (International Agreements) Act 1999*, and the content of a document included in that agreement does not affect the operation of domestic social security law, it is regarded as being 'referred to', not 'incorporated'.

The committee understands the minister's advice to be that this circumstance applies to these particular regulations, and there is no need to specify a method of incorporation because the New Zealand legislation is referred to rather than incorporated.

Where future instruments set out the text of an agreement in a Schedule to the *Social Security (International Agreements) Act 1999*, it would be useful for the ES to include information about whether or not the content of a document included in that agreement affects the operation of the social security law. This would assist the committee in its examination of similar instruments.

26 *Delegated legislation monitor* 7 of 2016, pp 106-108.

Instrument	**Torres Strait Fisheries Management Instrument No. 16 [F2017L00371]**
Purpose	Prohibits the taking of Sea Turtles or Dugong in the Torres Strait region
Authorising legislation	*Torres Strait Fisheries Act 1984*
Department	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 9 May 2017) Notice of motion to disallow must be given by 16 August 2017
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 5 of 2017

Description of consultation

The committee previously 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 instrument provides the following information:

> **Consultation**
>
> Native title notification was undertaken in relation to the Instrument.

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 this case, noting that the ES appears to address only the native title notification requirements in relation to the instrument, the committee considers that it does not provide adequate information regarding consultation for the purposes of the *Legislation Act 2003*.

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 Assistant Minister for Agriculture and Water Resources advised:

> In developing the Instrument, AFMA notified representative Aboriginal and Torres Strait Islander bodies under section 24HA(7) of the *Native Title Act 1993*. An objection was received from one respondent, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation Registered Native Title Body Corporate and the Torres Strait Regional Sea Claim (Part A). This objection was on the basis that, among other things, the Instrument interfered with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, and collect traditional food and to generally access the area.
>
> The Protected Zone Joint Authority (PZJA) considered this objection. However, the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and livelihood of traditional inhabitants and the protection of indigenous fauna. In making its decision, the PZJA also committed to a general review of the impact of Instruments on Native Title rights in the Torres Strait by April 2018.
>
> The explanatory statement for this Instrument has been updated to provide clarity on the consultation and is enclosed. Subject to your endorsement, my department will arrange for the updated explanatory statement to be registered on the Federal Register of Legislative Instruments [sic].

The updated ES states:

> The relevant stakeholders for consultation in relation to the Instrument are Aboriginal and Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants…
>
> To inform the relevant stakeholders about the Instrument a Native title notification under section 24HA(7) of the *Native Title Act 1993* was undertaken. The notification was provided in writing to the Cape York Land Council, including for the Kaurareg Native Title (Aboriginal) Corporation Registered Native Title Body Corporate (RNTBC); Carpentaria Land Council; Malu Lamar (Torres Strait Islander) Corporation RNTBC; and the Torres Strait Regional Authority Native Title Office. The notification included a copy of the Instrument and details of the prohibition of fishing and exemption to the prohibition for traditional fishing.
>
> There was one respondent to the Native Title notification, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation RNTBC and the Torres Strait Regional Sea Claim (Part A). The respondent expressed, on their behalf, objection to the Instrument on the basis that, among other things, the Instrument

interferes with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, collect traditional food and to generally access the area.

The Protected Zone Joint Authority (PZJA) considered this objection. However the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and livelihood of traditional inhabitants and the protection of indigenous fauna. In making its decision, the PZJA also committed to a general review of the impact of instruments on Native Title rights in the Torres Strait by April 2018.

Committee's response

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

The committee notes the assistant minister's undertaking to register the revised ES which addresses the committee's concerns regarding consultation on the Federal Register of Legislation.

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.

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

It is 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

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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

TREASURER

Ref: MC17-004222

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the Committee Secretary's letter of 11 May 2017 seeking further information about the *Competition and Consumer (Industry Code— Sugar) Regulations 2017.*

With regards to consultation, unfortunately due to the events that warranted the Government's intervention in the raw sugar export industry, it was not reasonably practical for the Government to consult on the regulation. The Government started developing the regulations in February as a contingency should commercial negotiations fail; however consulting at that time was not appropriate as it would have undermined those negotiations. When it became clear that a commercial outcome was no longer a reasonable possibility, the Government considered the benefits of acting quickly to provide certainty for the industry outweighed the benefits of taking further time to consult before making the regulation.

In compliance with section 14 of the *Legislation Act 2003*, the Resolution Institute Arbitration Rules 2016 (RIA Rules) are incorporated as in force at the time of commencement. The rules are not a disallowable instrument and the *Competition and Consumer Act 2010* does not alter the operation of section 14. As the Committee has noted, the RIA Rules are freely available online at https://www.resolution.institute/documents/item/1844.

Thank you for bringing these matters to my attention. I trust this information satisfies the concerns of the Committee. I am willing to provide further information should it be required.

Yours sincerely

The Hon Scott Morrison MP
2 / 6 / 2017

Cc: Regords.sen@aph.gov.au

ATTORNEY-GENERAL

CANBERRA

31 MAY 2017

MS17-001361

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600
regords.sen@aph.gov.au

Dear Senator Williams John

Thank you for your letter of 11 May 2017 regarding the *Legal Services Directions 2017* (2017 Directions).

Your letter indicates that the Senate Standing Committee on Regulations and Ordinances seeks advice about the manner of incorporation of the Legal Services Multi-Use List (LSMUL) and sanctions for non-compliance.

Request for advice – Manner of incorporation

Paragraphs 1 and 3 of Appendix F to the 2017 Directions incorporate LSMUL. The Committee has commented that neither the text of the 2017 Directions nor the Explanatory Statement expressly state the manner in which the LSMUL is incorporated into the 2017 Directions.

The 2017 Directions incorporate the LSMUL as in force from time to time.

Matter more appropriate for parliamentary enactment

Paragraph 14 of Part 3 of Schedule 1 of the 2017 Directions states, '[t]he Attorney-General may impose sanctions for non-compliance with the Directions.' The note to this paragraph states, '[e]xamples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC.'

The Committee has commented that neither the 2017 Directions nor the Explanatory Statement set any limitations or provide any guidance as to what sanctions could be imposed, justification of the need for such a broadly defined power, and the reasons for this power to be in the 2017 Directions rather than in primary legislation.

Section 55ZG of the *Judiciary Act 1903* states, '[c]ompliance with a Legal Services Direction is not enforceable except by, or on the application of, the Attorney-General.' Compliance with the 2017 Directions (per paragraph 14) derives its legislative basis from section 55ZG of the *Judiciary Act 1903*.

The OLSC website contains guidance material regarding its approach to compliance with the 2017 Directions in a document entitled the 'Compliance Framework'. It is available at: https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-%20Compliance%20Framework.pdf

Yours faithfully

(George Brandis)

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-045619

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Seacare Authority Code of Practice Approval 2017 (F2017L00326)

This letter is in response to the letter of 11 May 2017 from the Senate Regulations and Ordinances Committee's Secretary requesting information about scrutiny issues raised in the Committee's *Delegated legislation monitor* 5 of 2017. The Committee has sought my advice on matters relating to the incorporation of documents within the text of the Seacare Authority Code of Practice Approval 2017 (F2017L00326) (the Instrument).

The Instrument reapproves the Seacare Authority Code of Practice 1/2000, as made by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority). The Code was reapproved in its current form for an interim period to enable the Seacare Authority to complete its review of the Code.

The Code itself incorporates two codes developed by the private sector and adopted by the Seacare Authority in 2000. These are set out in full in the instrument I approved. The Department of Employment was aware that there were references to standards and other guidance material in the Code. However, as made clear in the explanatory statement, no amendment was made to the Code when I reapproved it for an interim period pending completion of the Seacare Authority's review. Your committee considers that the text of the Code should state the manner in which documents are incorporated. To now include in the text a new description of how matters referred to are incorporated would have been an amendment of the Code.

Access to referenced documents is expressly dealt with in the *Occupational Health and Safety (Maritime Industry) Act 1993*. Subsection 109(7) of the OHS(MI) Act provides that the Australian Maritime Safety Authority (as the Inspectorate under the OHS(MI) Act) will ensure that all incorporated material is available for inspection at its offices, which are located in 19 major ports around Australia (see www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp). Industry participants have had 17 years to locate and become familiar with the relevant referenced material but, if required, the maritime industry is able to obtain referenced material directly from the AMSA.

Failure to comply with any provision of a code approved by me cannot make a person liable for any civil or criminal proceedings (see subsection 109(8) of the OHS(MI) Act). The Code merely provides practical guidance to operators on how to meet their duties under the OHS(MI)Act (see subsection 109(1) of the OHS(MI) Act). The Code provides a benchmark against which maritime industry participants and the Inspectorate can assess compliance and operates alongside other guidance material.

I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawing his attention to the need for the replacement code to meet modern drafting standards.

Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.

Thank you for your attention to this matter.

Yours sincerely

Senator the Hon Michaelia Cash
30/5 / 2017

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC17-045281

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

Dear Senator John

Thank you for your letter of 11 May 2017 seeking a response to comments contained in the report of the Senate Regulations and Ordinances Committee (the Committee), Delegated Legislation Monitor 5 of 2017, concerning the following instrument for which I have portfolio responsibility.

Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017 (the Regulations)

The Committee has requested an explanation in respect of the following two matters:

1. the manner in which Survey Plan S2016/039 (the Survey Plan) is incorporated into the Regulations; and
2. whether the Survey Plan is readily and freely available to the public.

The manner in which the Survey Plan is incorporated

Section 14(1)(b) of the *Legislation Act 2003* (Cth) (Legislation Act) provides (relevantly) that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.

The Regulations and the Explanatory Statement incorporate the extrinsic writing of the Survey Plan. Section 14(2) of the Legislation Act provides that, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by incorporating any matter contained in other writing as in force or existing from time to time. Accordingly, the Regulations can only incorporate the Survey Plan as it exists at the time the Regulations commence. Section 14(2) of the Legislation Act precludes the Regulations incorporating the Survey Plan as in force or existing from time to time.

In addition, the Survey Plan as incorporated into the Regulations cannot, in effect, change. Under s 50(2) of the *Licenced Surveyors Act* (NT) (Surveyors Act), once a survey plan has been lodged with and approved by the Surveyor-General, that survey plan is to be accepted as correct in all questions relating to the boundaries delineated in the plan. The Survey Plan was approved by the Surveyor-General on 25 August 2016.

Given the Survey Plan has been lodged and approved, it cannot be changed (although there is limited scope for errors or omissions made in the Survey Plan to be corrected under s 51(1) of the Surveyors Act). Any change to the boundaries delineated in the Survey Plan would require the preparation of a new plan, and that new plan could only be incorporated into the Regulations through an amendment to the Regulations.

Whether the Survey Plan is readily and freely available to the public

Paragraph 15J(2)(c) of the Legislation Act requires the 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 Regulations and the Explanatory Statement provide that the Survey Plan is lodged with the Northern Territory Surveyor-General in Darwin. Once a survey plan has been lodged with the Surveyor-General it becomes freely available to the public and can be obtained from the Northern Territory Land Information System website via the NT Atlas.

To further address the concerns of the Committee, I have approved a replacement Explanatory Statement with the Survey Plan attached, which will be lodged on the Federal Register of Legislation in accordance with the process set out in section 15G(4)(b) of the *Legislation Act 2003*. I have attached the replacement Explanatory Statement for your reference.

Yours sincerely

NIGEL SCULLION

24 / 5 / 2017

EXPLANATORY STATEMENT

Aboriginal Land Rights (Northern Territory) Act 1976

Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017

Section 78 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Township area vested in the Arnhem Land Aboriginal Land Trust

Section 3AB defines townships, in relation to a Land Trust, for the purposes of the Act. In particular, section 3AB(3) of the Act defines townships to include an area of land that is prescribed by the regulations, for the purposes of section 3AB(3), in relation to the applicable Land Trust only.

A township lease for Gunyangara in North East Arnhem Land is being negotiated between the Gumatj Corporation Limited, the Arnhem Land Aboriginal Land Trust and the Northern Land Council under section 19A of the Act. The Gumatj Corporation Limited intends to establish an approved Commonwealth entity under section 3AAA of the Act (Gumatj Approved Entity) which will enter into and administer the lease in accordance with its terms and conditions.

The *Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017* (the Regulations) amend the *Aboriginal Land Rights (Northern Territory) Regulations 2007* to prescribe a single township of Gunyangara in the Northern Territory in relation to the Arnhem Land Aboriginal Land Trust.

Functions of the Executive Director

The Executive Director of Township Leasing (Executive Director) is a statutory office established by section 20B of the Act. The Executive Director's functions are enumerated in section 20C of the Act. These include the administration of leases granted to the Commonwealth under section 19A of the Act. Section 20C(c) provides that the Executive Director's functions can include "any other functions that are prescribed by the regulations, being functions relating to the matters referred to in this section."

Under the Act, a township lease must be held by an approved entity. Currently, the Commonwealth is the only approved entity (with the Executive Director entering into and administering township leases on behalf of the Commonwealth).

The proposed township lease for Gunyangara is to be granted to a Gumatj Approved Entity. This model of township leasing has been developed at the request of traditional Aboriginal owners to strengthen local decision making in communities and to provide another option for traditional Aboriginal owners to leverage their land assets for economic and community benefit.

The Gumatj Approved Entity may seek the advice and assistance of the Executive Director in relation to administering its township lease.

In addition, other Indigenous communities on Aboriginal land may be interested in establishing approved Commonwealth entities for the purposes of township leasing. The Executive Director may also transfer subleases of Aboriginal land it holds to an Aboriginal and Torres Strait Islander corporation pursuant to section 20CB(1) of the Act.

For such township leases and subleases, the approved Commonwealth entity or corporation may seek the advice and assistance of the Executive Director in relation to administering the lease or sublease or other right granted under the lease or sublease.

The Regulations prescribe a further function to the Executive Director, enabling the Executive Director to enter into an agreement with an approved Commonwealth entity or corporation under which the Executive Director will provide services to the entity or corporation related to administering a township lease or a sublease or other right granted under a township lease or sublease. The Executive Director has gained significant experience in holding and administering township leases and subleases. Approved Commonwealth entities and corporations will benefit from being able to use this expertise to assist in discharging their roles as the holder of a township lease or sublease.

Conditions to be Satisfied

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

Legislative Instrument

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Commencement

The Regulations commence on the date after registration on the Federal Register of Legislative Instruments.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required.

Consultation

Consultations have been undertaken in relation to a township lease for Gunyangara and on the survey for the township. In particular, the Northern Land Council has agreed in principle to the grant of a lease over the Gunyangara township. In accordance with section 19A(2) of the Act, the Northern Land Council has consulted with the traditional Aboriginal owners and other Aboriginal people with an interest in the land.

The Northern Land Council, Central Land Council, Tiwi Land Council, Anindilyakwa Land Council and Northern Territory Government were consulted with, and agree to the Regulations.

Attachments

The Statement of Compatibility with Human Rights as required by the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided in Attachment 1.

A copy of Survey Plan S2016/039, which prescribes the township of Gunyangara, is provided in Attachment 2. Survey Plan S2016/039 can also be obtained from the Northern Territory Land Information System website via the NT Atlas.

Explanation of provisions

Section 1 – Name of Regulations

This section sets out the name of the Regulations, being the *Aboriginal Land Rights (Northern Territory) Amendment (Leases) Regulations 2017* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence the day after registration.

Section 3 – Authority

This section provides that the Authority for the Regulations is the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Schedule 1, item 1

This item adds a note at the end of subregulation 5(1) to state that the area described in subregulation 5(1) is known as Wurrumiyanga.

Schedule 1, item 2

This item inserts regulation 6AA after existing regulation 6. New regulation 6AA provides for a parcel of land to be prescribed as a single township in relation to the Arnhem Land Aboriginal Land Trust.

The parcel of land is in the Northern Territory with an area of 376.2 hectares, more or less, being Northern Territory Portion 7560(A), delineated on Survey Plan S2016/039 lodged with the Northern Territory Surveyor-General in Darwin.

Schedule 1, item 3

This item inserts a new regulation 7 after the existing regulation 6A.

New subregulation 7(1) provides that the Executive Director will have the additional functions prescribed in subregulation 7(2) if:

(a) a Land Trust has granted, or is considering granting, a lease (the **main interest**) to a Commonwealth entity under section 19A of the Act; or
(b) the Executive Director has transferred, or is considering transferring, a sublease (the **main interest**) to an Aboriginal and Torres Strait Islander corporation under subsection 20CB(1) of the Act.

New subregulation 7(2) sets out the additional function the Executive Director will have where the requirements in subregulation 7(1) have been satisfied. New subregulation 7(2) provides that the Executive Director may enter into an agreement with the entity referred to in subregulation 7(1)(a), or the corporation referred to in subregulation 7(1)(b), under which the Executive Director agrees to provide services relating to administering:

(a) the main interest; or
(b) a sublease or other right or interest derived from the main interest.

New subregulation 7(3) provides that the Executive Director must provide the services in accordance with the agreement entered into under subregulation 7(2).

New subregulation 7(4) provides that the agreement entered into under subregulation 7(2) may make provision for the payment of fees to the Commonwealth for the provision of services by the Executive Director.

New subregulation 7(5) provides that a fee provided for by the agreement must not be such as to amount to taxation.

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MC17-012793

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

2 JUN 2017

Dear Senator Williams

Thank you for your correspondence in relation to the *Amendment of List of Exempt Native Specimens - Multiple fisheries March 2017* [F2017L00256]. The amendments relate to the take of specimens of fish or invertebrates in fifteen commercial fisheries as defined in the management regimes for Commonwealth, Western Australian, New South Wales, Northern Territory, and South Australian managed fisheries.

The Committee has advised that where an instrument incorporates non Commonwealth Acts and disallowable instruments by reference, there is an expectation that the manner of incorporation, and where this information can be found, is clearly specified in the explanatory statement. A revised explanatory statement is enclosed and will be registered on the Federal Register of Legislation.

I can confirm that the intention in the instrument *Amendment of List of Exempt Native Specimens - Multiple fisheries March 2017* is to reference definitions in force from time to time under the respective management regimes. As requested, I have copied this letter to regords.sen@aph.gov.au.

Thank you again for taking the time to write and inform me of the Committee's concern on these matters.

Yours sincerely

JOSH FRYDENBERG

Enc

EXPLANATORY STATEMENT

Environment Protection and Biodiversity Conservation Act 1999

Amendment of the List of Exempt Native Specimens in accordance with Section 303DC

Section 303DB of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides for the establishment of a list of exempt native specimens. Specimens included in the list are exempt from the trade control provisions that apply to regulated native specimens.

The instrument **deletes** specimens from the list of exempt native specimens that are taken in fifteen fisheries specified in **Schedule 1**. The instrument also **includes** specimens from the same fifteen fisheries in the list of exempt native specimens, with notations that inclusion of the specimens in the list are subject to restrictions or conditions that the specimen, or the fish or invertebrate from which it is derived, was taken lawfully, and that the specimens are included in the list until the dates specified in **Schedule 2.**

The relevant fisheries are as follows:

- Western Australian Developmental Octopus Fisheries
- Western Australian South Coast Trawl Fishery
- Western Australian Pilbara Fish Trawl Interim Managed Fishery
- Torres Strait Beche-de-mer Fishery
- Torres Strait Tropical Rock Lobster Fishery
- New South Wales Lobster Fishery
- New South Wales Ocean Hauling Fishery
- New South Wales Estuary General Fishery
- New South Wales Ocean Trawl Fishery
- New South Wales Estuary Prawn Trawl Fishery
- New South Wales Abalone Fishery
- Northern Territory Demersal Fishery
- South Australian Scallop and Turbo Fisheries
- South Australian Specimen Shell Fishery
- South Australian Sea Urchin Fishery

Non Commonwealth Acts and disallowable instruments that are incorporated by reference in this instrument are to be incorporated as in force from time to time. All State and Territory legislation incorporated by reference in this instrument can be freely accessed on the relevant State legislation websites:

- New South Wales legislation at www.legislation.nsw.gov.au (as of May 2017)
- Northern Territory legislation at www.legislation.nt.gov.au (as of May 2017)
- South Australian legislation at www.legislation.sa.gov.au (as of May 2017)
- Western Australian legislation at www.slp.wa.gov.au (as of May 2017)

The effect of this instrument is to extend the export approval for the specimens until the dates specified in **Schedule 2**. These fisheries have been identified by the Department of the Environment and Energy as fisheries that may be included in a block assessment approach by jurisdiction over the coming twelve months.

In determining to include the specimens in the list of exempt native specimens regard was had to the Australian Government's 'Guidelines for the Ecologically Sustainable Management of Fisheries – 2nd Edition'. Those Guidelines establish the criteria for assessment of the ecological sustainability of the relevant fishery's management arrangements.

Subsection 303DC(3) of the EPBC Act provides that before amending the list, the Minister for the Environment and Energy must consult such other Commonwealth minister or ministers and such other minister or ministers of each state and self-governing territory, as the minister considers appropriate. The minister may also consult with such other persons and organisations as the minister considers appropriate. In this instance, the Delegate of the Minister for the Environment and Energy consulted with the Australian Fisheries Management Authority, the Western Australian Department of Fisheries, the New South Wales Department of Primary Industries, the Northern Territory Department of Primary Industry and Resources, and the Department of Primary Industries and Regions South Australia as the Australian Fisheries Management Authority, the Western Australian Department of Fisheries, the New South Wales Department of Primary Industries, the Northern Territory Department of Primary Industry and Resources, and the Department of Primary Industries and Regions South Australia have management responsibilities for the fisheries concerned.

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

The instrument commenced on the day after it was registered on the Federal Register of Legislative Instruments.

STATEMENT OF COMPATIBILITY FOR A BILL OR LEGISLATIVE INSTRUMENT THAT DOES NOT RAISE ANY HUMAN RIGHTS ISSUES

Statement of Compatibility with Human Rights

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

Amendment of List of Exempt Native Specimens

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 instrument **deletes** specimens from the list of exempt native specimens that are taken in fifteen fisheries specified in **Schedule 1**. The instrument also **includes** specimens from the same fifteen fisheries in the list of exempt native specimens, with notations that inclusion of the specimens in the list are subject to restrictions or conditions that the specimen, or the fish or invertebrate from which it is derived, was taken lawfully, and that the specimens are included in the list until the dates specified in **Schedule 2**.

The effect of this instrument is to extend the export approval for the specimens until the dates specified in **Schedule 2**.

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.

Paul Murphy, Assistant Secretary, Wildlife Trade and Biosecurity Branch (Delegate of the Minister for the Environment and Energy)

The Hon. Barnaby Joyce MP

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

Ref: MC17-003790

31 MAY 2017

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the committee's letter of 11 May 2017 regarding the Competition and Consumer (Industry Codes—Horticulture) Regulations 2017 (the code).

Regarding clause 39, I note the committee's concern that the code contains no requirement that I be satisfied that a person appointed to the role of mediation adviser is appropriately trained or qualified for the role. The mediation advisor appointed under the code is also contracted by the Commonwealth to serve as the mediation advisor under both the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 and the Competition and Consumer (Industry Codes—Oil) Regulations 2017.

A request for tender (RFT) to procure the mediation advisor service was developed by the Treasury, in consultation with my Department and the Department of the Environment and Energy. The RFT outlined the requirements for the role, including the required experience and qualifications. Applicants were evaluated in line with the RFT giving specific consideration to each code, including the Horticulture Code. Once a preferred bidder was identified through the tender process each department provided a recommendation to myself, the Minister for Small Business and the Minister for the Environment and Energy. My colleagues and I have accepted our departments' recommendation.

Regarding clause 40, in appointing the current mediation adviser specific expectations were included in the contract for the separate codes of conduct. These included the requirements for the appointment of mediators by the mediation adviser. The requirements included having appropriate industry knowledge and qualifications. These requirements are monitored by my department to ensure compliance with the contractual requirements.

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

Regarding the manner in which the FreshSpecs Produce Specifications are incorporated, the intent of subclause 16(i) of the code is to ensure that a product specification is agreed, not that the FreshSpecs Produce Specifications are used in all circumstances. The parties to a horticulture produce agreement are free to choose whichever produce specifications they wish. As the committee's letter notes, because no contrary intention appears in the code, section 14(2) of the *Legislation Act 2003* applies and the specifications are incorporated as existing at the time when the code commenced.

I note the committee's expectations regarding access to the incorporated document. The FreshSpecs Produce Specifications are widely known within the industry and are publically available for free on the Fresh Markets Australia website. The explanatory statement refers to the Fresh Markets Australia website, but does not provide the specific web address. This was done intentionally as Fresh Markets Australia may amend the exact web address in the future.

Thank you again for bringing the committee's concerns to my attention and I trust that this information will be of assistance.

Yours sincerely

Barnaby Joyce MP

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS17-000979

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

Dear Chair

I refer to the Committee Secretary's letters dated 30 March 2017 sent to my office seeking further information about items in the following instruments:

- the *Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017*;
- the *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017*; and
- the *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016*.

The Ministers who are responsible for the items in these instruments have provided responses to the Committee's requests. The response at Attachment A includes responses from the Deputy Prime Minister and Minister for Agriculture and Water Resources, the Hon Barnaby Joyce MP, and the Minister for Social Services, the Hon Christian Porter MP. I trust this advice will assist the Committee with its consideration of the instruments.

I have copied this letter to the Deputy Prime Minister and the Minister for Social Services. Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

June 2017

Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017

Provided by the Deputy Prime Minister and Minister for Agriculture and Water Resources

Response to the Committee's questions about the Leadership in Agricultural Industries Fund

The Commonwealth will provide grants to build the leadership capacity of national agricultural representative organisations.

The objective is to provide funding to national agricultural industry representative bodies to engage with, and represent, their stakeholders in relation to matters of Commonwealth policy responsibility. The development of the Leadership in Agricultural Industries Fund program and the drafting of item 197 of Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references the following heads of legislative power:

- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix));
- the trade and commerce power (section 51(i));
- the taxation power (section 51(ii)); and
- the quarantine power (section 51(ix)).

Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix))

Section 61 of the Constitution, together with section 51(xxxix), supports grants with respect to matters incidental to the executive power of the Commonwealth, including measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation.

This program is designed to ensure that national agricultural industry representative bodies are better able to provide policy advice to their members, the Australian community, the government and their stakeholders. This includes making representations to the Commonwealth about matters of Commonwealth legislative interest affecting their industry and being better able to communicate to their membership and the Australian community who are affected by Commonwealth laws and programs, particularly but not exclusively relating to biosecurity, trade and market access. Ensuring engagement of national agricultural organisations, through fostering their leadership, will enhance the capacity of the Commonwealth to ensure the understanding of and fostering of compliance with its laws and regulations by the organisations' members and stakeholders. Further, the funding of these organisations, at a national level, will engage these organisations and their leaders in the legislative initiatives and other policy developments of importance to the national agricultural sector for the benefit of the nation.

Trade and commerce power (section 51(i))

Section 51(i) of the Constitution empowers the Parliament to make laws with respect to "trade and commerce with other countries, and among the States".

Generally speaking, grants can also be given to support activities that are incidental to the execution of Commonwealth laws made in reliance on the trade and commerce power. Developing the leadership capacity of national agricultural organisations will also build the capacity of those organisations' leaders to engage with, understand and be involved in the development of Commonwealth laws and policies relating to the export and interstate trade of agricultural outputs.

Taxation power (section 51(ii))

Section 51(ii) of the Constitution empowers the Commonwealth to make laws with respect to "taxation; but not so as to discriminate between States or parts of States.".

Grants can be provided in connection with taxation imposed by a Commonwealth law. Grants made under this program are intended to build the capacity of national agricultural organisations, including those who have statutorily mandated consultative roles in the setting of taxes and levies under primary industries legislation.

Quarantine power (section 51(ix))

Section 51(ix) of the Constitution empowers the Parliament to make laws with respect to quarantine.

Grants can be provided in connection with quarantine. Funding under this program will assist national agricultural organisations to develop the capability of their current and future leaders so they are better able to contribute to key policy issues facing the agricultural sector, including the management of biosecurity risks and the measures needed to prevent the introduction and spread of pests that cause disease or that infest animals or plants and the impact that those pests can have on the agricultural sector, its stakeholders and the wider community.

Merits review

The program has a two-tiered merits assessment process: individual merit assessment by assessment panel members and then a merit discussion at the assessment panel moderation meeting. The program involves the allocation of finite resources (up to $500,000 grants funded from a $5 million fund). There is no secondary merits review for decisions to approve or not approve a grant in this program.

The process for determining funding recipients is set out in the program guidelines available on the Department of Agriculture and Water Resources' website (http://www.agriculture.gov.au/ag-farm-food/leadership-ag-fund) and on GrantConnect (www.grants.gov.au).

Applicants must meet specified eligibility criteria and each eligible application will be assessed on its merit against five program criteria with the relative weighting of each criteria defined in the guidelines. An assessment panel will assess applications on their merit and then assess against other applications at a moderation meeting to determine a final ranking. The ranking will be based on the total score that an applicant receives. Each application will be assessed in consideration of the size of the project and amount of funding requested. There is diversity in the size, maturity and leadership needs across national agricultural industry representative bodies and the program will be responsive to the requirements specified by each applicant organisation. More comprehensive applications with supporting information should be expected from organisations requesting larger amounts. The total funding per grantee is limited to a maximum of $500,000 in this competitive round.

The assessment panel will make recommendations to the Minister for Agriculture and Water Resources as the final decision-maker on whether to approve a grant. Funding decisions for the program will be made in accordance with the assessment process set out in the program guidelines and in accordance with the applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2014*.

Following the decision by the Minister, applicants will be advised of the outcomes of their applications in writing. Unsuccessful applicants can request feedback about their applications from the department after the funding decisions have been made and notified. Applicants may ask for feedback on their applications within 30 days of being advised of the outcome and the department may contact a nominated person for a discussion and/or give written feedback within 30 days of feedback being requested.

Persons who are otherwise affected by decisions or who have complaints about the program also have recourse to the department. The department will investigate any complaints about the program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the department handles the complaint they may lodge a complaint with the Commonwealth Ombudsman.

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017

Provided by the Minister for Social Services

Response to the request by the Senate Standing Committee on Regulations and Ordinances for information about the Prevention of Domestic Violence measure and Domestic Violence Frontline Services

The *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017*, added new table items 199 and 200 to Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations).

These items seek to establish legislative authority for Commonwealth government spending for the Prevention of Domestic Violence measure and Domestic Violence Frontline Services.

I refer to the Committee's consideration of table items 199 and 200 in Delegated Legislation Monitor Number 4 of 2017 (at pages 26-28). The committee has noted its concern that the link between the objectives of the Prevention of Domestic Violence measure and Domestic Violence Frontline Services and the external affairs power in section 51(xxix) of the Constitution is not stated clearly and explicitly in the explanatory statement for the instrument.

I provide the following response in relation to the committee's consideration of table items 199 and 200 of the FF(SP) Regulations.

Prevention of Domestic Violence – Table Item 199

Table item 199 establishes legislative authority for government spending on measures to address deep-seated attitudes and practices that excuse, justify and promote violence against women and their children.

The development of this initiative and drafting of table item 199 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 199, the objective of the item references the external affairs power (section 51(xxix) of the Constitution. Specific reference is also made in table item 199 to the following articles of these international treaties:

- Article 6(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR);
- Articles 2, 3, 5(a) and 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); and
- Articles 4, 18 and 19 of the *Convention on the Rights of the Child* (CROC).

Section 51(xxix) of the Constitution empowers the parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Articles 2, 5(a) and 16 of CEDAW require Australia to:

- pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
- take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
- take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Funding will be provided for a range of measures intended to reduce the incidence of domestic violence against women and children. For example, funding will be provided in relation to developing a framework for shared understanding and collaborative action in relation to preventing violence against Indigenous women and children.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided for the development of educational resources to enable witnesses of violence against women and children to take safe and appropriate action.

Articles 18(1) and 18(2) of the CROC deal with the responsibilities of parents for their children and require Australia to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.

Funding will be provided for activities that provide information and advice to men who have become fathers for the first time about the importance of their involvement in the development and care of their child, including by positive role-modelling.

Article 6(2) of the ICESCR requires Australia to take steps to achieve the full realization of the right to work by providing technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Funding will be provided for domestic violence prevention strategies focussing on education, employment and empowerment, particularly for women from culturally and linguistically diverse backgrounds.

Domestic Violence Frontline Services – Table Item 200

Table item 200 establishes legislative authority for the Government to fund domestic violence frontline services to provide pathways of support for women and children leaving, or trying to leave, family and domestic violence that prioritise their safety, minimise disruption to their lives and provide choice.

The development of this initiative and drafting of table item 200 were undertaken having regard to a range of constitutional and other legal considerations.

As indicated in the explanatory statement for table item 200, the objective of the item references the external affairs power (section 51(xxix) of the Constitution. Specific reference is also made in table item 200 to the following articles of these international treaties:

- Articles 2, 3, 5(a) and 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW);
- Articles 4 and 19 of the *Convention on the Rights of the Child* (CROC);
- Article 6(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD); and
- Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR).

Section 51(xxix) of the Constitution empowers the parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party.

Articles 2, 3, 5(a) and 16 of CEDAW require Australia to:

- pursue by all appropriate means and without delay a policy of eliminating discrimination against women;
- take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men;
- take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and
- take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Funding will be provided for domestic violence frontline services that provide pathways of support for women and children leaving, or trying to leave, family and domestic violence with a focus on funding:

- for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
- for workers in the financial counselling and financial capability sector to equip them to better recognise, and respond to the needs of, women who have experienced domestic violence; and
- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Under the initiative, funding will be provided:

- for alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons; and
- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence.

Articles 4 and 19 of the CROC protect children under the age of 18 from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

As noted above, funding will be provided in relation to alternative accommodation for women escaping domestic violence, with a particular focus on mothers with teenage sons.

Article 6(2) of the CRPD is intended to ensure the full development, advancement and empowerment of women with disabilities.

Funding will be provided:

- to develop and deliver service delivery models to meet the needs of women with disabilities, and women who are non-citizens or migrants, for integrated, wrap-around services relating to domestic violence; and
- to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

Article 3 of the CEDAW requires Australia to take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Funding will be provided to develop and deliver training to disability sector workers in identifying, and supporting, the needs of women with disabilities who experience violence.

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016

Provided by the Minister for Social Services

Response to the request by the Senate Standing Committee on Regulations and Ordinances for information about the Commonwealth Financial Counselling and Financial Capability – Capability Building Program

The external affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party. Under the program, funding can be provided for the presentation of sessions at the Financial Counselling Australia annual national conference to the extent that they are measures that are designed to meet Australia's international obligations under the *Convention of the Rights of the Child* [1991] ATS 4, the *Convention on the Rights of Persons with Disabilities* [2008] ATS 12, the *Convention on the Elimination of All Forms of Discrimination Against Women* [1983] ATS 9, as well as the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5.

Convention on the Rights of the Child

The presentation of conference sessions may be designed to meet Australia's international obligations under Articles 18(2) and 27(1), as well as Article 19, of the *Convention of the Rights of the Child*.

Article 19 provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 27(1) provides:

> States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Article 18(2) provides:

> For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

Convention on the Rights of Persons with Disabilities

The presentation of conference sessions may also be designed to meet Australia's international obligations under Articles 12(5), 27(1)(f) and 28(2)(c) of the *Convention on the Rights of Persons with Disabilities*.

Article 12(5) provides:

> Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 27(1)(f) provides:

> States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>
> (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

Article 28(2)(c) provides:

> States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
>
> (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.

Convention on the Elimination of All Forms of Discrimination Against Women

Australia has international obligations under Articles 3, 4(1) and 13(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the presentation of conference session may be designed to meet these obligations.

Article 3 provides:

> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a

basis of equality with men.

Article 4(1) provides:

> Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 13(b) provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> (b) The right to bank loans, mortgages and other forms of financial credit

International Covenant on Economic, Social and Cultural Rights

The presentation of conference sessions may also be designed to meet Australia's international obligations under Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights.* This Article provides as follows:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Senator the Hon. Anne Ruston

Assistant Minister for Agriculture and Water Resources
Senator for South Australia

MC17-003765

29 MAY 2017

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the committee's letter of 11 May 2017 seeking clarification on the *Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017* and the *Torres Strait Fisheries Management Instrument No.16.*

The committee sought advice in relation to the sub-delegation of powers under the *Fisheries Management Amendment (Compliance and Enforcement) Regulations 2017* (specifically s44). These delegated powers by the Australian Fisheries Management Authority Chief Executive Officer (AFMA CEO) relate to extending the period in which an infringement notice must be paid and withdrawing an infringement notice.

As noted by the committee, section 4 of the *Fisheries Management Act 1991* (FMA) defines an 'officer' as:

(a) a person appointed under section 83 to be an officer for the purposes of this Act, or
(b) a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; or
(c) a member of the Defence Force; or
(d) an officer of Customs (as defined in the *Customs Act 1901*).

On the basic intent of s44 of the Regulation, the inclusion of a power to withdraw an infringement notice is consistent with the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The guide provides that infringement notice provisions should state that an authorised officer may withdraw an infringement notice and that the infringement notice should indicate that the person issued with the notice may make representations as to why a notice should be withdrawn. The delegation by the AFMA CEO of the decision to withdraw a notice to the same level of officer authorised to issue a notice ensures that any representations can be taken into account by the issuing officer.

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The committee notes that an officer (as defined under s4 of the FMA) appears to encompass a relatively large class of persons. However, the committee may not be aware of AFMA's strategic alliances and extensive collaboration with the Department of Defence, State and Federal Police and Border Force, in a broad range of practical operations to pursue fisheries compliance. While an AFMA officer is most likely to issue an infringement notice, operational requirements may involve an officer from another of those agencies (as specified under s4 of the FMA) undertaking this task.

In regard to the committee's point about the qualifications or attributes of those exercising that power, any officer who becomes directly involved in Commonwealth fisheries compliance operations is appropriately trained by AFMA. This ranges from briefing sessions on the powers of officers and operational arrangements to specific training on the application of infringement notices. As a result, in terms of operational practices, only a limited number of officers are directly involved, and each person is appropriately qualified.

Finally, in response to the committee's concerns around limiting the sorts of powers that might be delegated, I note that the proposed delegated powers under s44 are strictly limited to the powers of extending the payment period of a fisheries infringement notice or withdrawing an infringement notice.

The committee also sought clarification on the nature of consultation carried out in relation to the *Torres Strait Fisheries Management Instrument No.16* (the Instrument).

In developing the Instrument, AFMA notified representative Aboriginal and Torres Strait Islander bodies under section 24HA(7) of the *Native Title Act 1993*. An objection was received from one respondent, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation Registered Native Title Body Corporate and the Torres Strait Regional Sea Claim (Part A). This objection was on the basis that, among other things, the Instrument interfered with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, and collect traditional food and to generally access the area.

The Protected Zone Joint Authority (PZJA) considered this objection. However, the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and livelihood of traditional inhabitants and the protection of indigenous fauna. In making its decision, the PZJA also committed to a general review of the impact of Instruments on Native Title rights in the Torres Strait by April 2018.

The explanatory statement for this Instrument has been updated to provide clarity on the consultation and is enclosed. Subject to your endorsement, my department will arrange for the updated explanatory statement to be registered on the Federal Register of Legislative Instruments.

I thank the committee for its consideration of these regulatory instruments and its constructive suggestions. I trust that the explanations I have provided clarify the points raised.

For the future, I have reminded AFMA of the importance of reflecting on these points in pursuing further regulatory work.

Yours sincerely

Anne Ruston

EXPLANATORY STATEMENT

Issued by the authority of the Torres Strait Protected Zone Joint Authority

Torres Strait Fisheries Act 1984

Torres Strait Fisheries Management Instrument No. 16

The *Torres Strait Fisheries Management Instrument No. 16* (the Instrument) is a legislative instrument for the purposes of the *Legislation Act 2003*.

Subsection 16(1) of the *Torres Strait Fisheries Act 1984* (the Act) provides for the Minister to regulate fishing through an instrument registered on the Federal Register of Legislative Instruments. Subsection 35(1) of the Act provides for the Protected Zone Joint Authority (PZJA) to exercise the powers of the Minister under Subsection 16(1) of the Act.

The fishery

The Torres Strait Dugong Fishery and Turtle Fishery are traditional subsistence fisheries only, commercial fishing is not permitted. Hunting for dugong and turtle is an important part of the traditional way of life and source of protein in the diet of traditional inhabitants of the Torres Strait. Whilst the importance of the hunting of this species is recognised, measures are still implemented to ensure the conservation of these species through management arrangements across both Australia and Papua New Guinea.

Dugong are hunted using a wap (traditional spear) thrown by hand from a dinghy. Turtles are hunted using a wap (traditional spear) thrown or caught by hand from a dinghy, and they are also caught on the beach while nesting in some areas of the Torres Strait. Turtle eggs are also harvested.

Strong partnerships have been established for research, management and sustainable take of dugongs and turtles between Torres Strait island communities, the Torres Strait Regional Authority, relevant registered native title prescribed bodies corporate, research providers and state and Commonwealth agencies. Research projects that are undertaken for dugong include aerial and migration surveys through satellite tracking, and for turtle are tagging (also during nesting activities), and foraging population, hatching success and migration (satellite tracking) surveys.

There are specific Torres Strait community developed objectives which are outlined in the community based management plans for both turtle and dugong. Each community management plan integrates a range of cultural hunting protocols and traditional knowledge with contemporary fisheries management arrangements appropriate to each community. These are administered by the individual prescribed native title bodies corporate at each community with technical assistance from the Land and Sea Management Unit of the Torres Strait Regional Authority.

The Instrument replaces the *Torres Strait Fisheries Management Notice No. 65* and *Torres Strait Fisheries Management Notice No. 66* (the previous Instruments) which sunset on 1 April 2017. The Instrument maintains the prohibitions of the previous Instrument.

Details of the Instrument

The Instrument includes all existing arrangements contained within the previous Instrument. The Instrument prohibits the taking and carrying of dugong and turtle in the Torres Strait Dugong Fishery and Turtle Fishery. The Instrument provides exemption to the prohibition for those who are engaged in traditional fishing and using a boat less than six metres in length, other than in the area of the dugong sanctuary

Consultation

The relevant stakeholders for consultation in relation to the Instrument are Aboriginal and Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants. Turtle and dugong are listed species under the *Environment Protection and Biodiversity Conservation Act 1999* and various State and Territory legislation. In accordance with section 211 of the *Native Title Act 1993,* turtle and dugong may only be legally hunted by Aboriginal and Torres Strait Islander people.

To inform the relevant stakeholders about the Instrument a Native title notification under section 24HA(7) of the *Native Title Act 1993* was undertaken. The notification was provided in writing to the Cape York Land Council, including for the Kaurareg Native Title (Aboriginal) Corporation Registered Native Title Body Corporate (RNTBC); Carpentaria Land Council; Malu Lamar (Torres Strait Islander) Corporation RNTBC; and the Torres Strait Regional Authority Native Title Office. The notification included a copy of the Instrument and details of the prohibition of fishing and exemption to the prohibition for traditional fishing.

There was one respondent to the Native Title notification, the Torres Strait Regional Authority Native Title Office, on behalf of Malu Lamar (Torres Strait Islander) Corporation RNTBC and the Torres Strait Regional Sea Claim (Part A). The respondent expressed, on their behalf, objection to the Instrument on the basis that, among other things, the Instrument interferes with, and may well make it unsafe for, native title holders to continue to exercise their native title, community and social activities on their traditional land and waters, including the right to hunt, fish, collect traditional food and to generally access the area.

The Protected Zone Joint Authority (PZJA) considered this objection. However the PZJA decided that the Instrument is necessary to ensure there is sustainable use of turtle and dugong in the Torres Strait, particularly in a way that protects the traditional way of life and livelihood of traditional inhabitants and the protection of indigenous fauna. In making its decision, the PZJA also committed to a general review of the impact of Instruments on Native Title rights in the Torres Strait by April 2018.

Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

The PZJA assesses under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* that this legislative Instrument is compatible with human rights. The PZJA's Statement of Compatibility is attached.

Regulation Impact Statement

The Office of Best Practice Regulation (OPBR) advised that a Regulation Impact Statement was not required for the Instrument providing a letter from the agency head was provided certifying that the measures maintained from the sunsetting Instrument efficiently achieved their objectives (**OBPR ID: 21506**). The letter is available for viewing on the OBPR website.

Details of the Instrument are set out below:

Clause 1 Provides for the Instrument to be cited as the *Torres Strait Fisheries Management Instrument No. 16*.

Clause 2 Provides that the Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3 Provides that the Instrument is repealed on 31 December 2026 unless earlier revoked.

Clause 4 Provides for definitions of terms contained within the Instrument, and that a term used in the Instrument and in the Plan or Act has the same meaning in the Instrument as in the Plan or Act.

Clause 5 Provides that taking of dugong or turtle, or taking and carrying of dugong or turtle on a commercial fishing boat, or the take of dugong by any other method than a spear thrown by hand is prohibited.

Clause 6 Provides that those who are engaged in traditional fishing, other than in the area of the dugong sanctuary described in the Schedule, and using a boat less than six metres in length, are exempt from the prohibition contained in Clause 5.

Clause 7 Provides for the manner by which a boat may be measured.

Clause 8 Provides for the revocation of the previous Instruments *Torres Strait Fisheries Management Notice No. 65* and *Torres Strait Fisheries Management Notice No. 66*, and any existing licence or treaty endorsement granted under the revoked Instruments shall continue to operate as if it referred to the prohibition in this Instrument.

Schedule Provides for establishing the area of the dugong sanctuary.

Statement of Compatibility with Human Rights

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

Torres Strait Fisheries Management Instrument No. 16

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

Subsection 16(1) of the *Torres Strait Fisheries Act 1984* (the Act) provides for the Minister to regulate fishing through an instrument registered on the Federal Register of Legislative Instruments. Subsection 35(1) of the Act provides for the Protected Zone Joint Authority (PZJA) to exercise the powers of the Minister under Subsection 16(1) of the Act.

The Instrument replaces the *Torres Strait Fisheries Management Notice No. 65* and *Torres Strait Fisheries Management Notice No. 66* (the previous Instruments) which sunset on 1 April 2017. The Instrument maintains the prohibitions of the previous Instrument.

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.

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MS17-001054

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

- 7 JUN 2017

Dear Chair

Thank you for your letter of 10 May 2017 regarding the *Jervis Bay Territory Marine Safety Ordinance 2016* (Ordinance).

The Department of Infrastructure and Regional Development has prepared a replacement explanatory statement for the Ordinance addressing the Senate Standing Committee on Regulations and Ordinances' (the Committee) scrutiny concerns detailed in *Delegation Legislation Monitor 3 of 2017*.

As soon as practical, the Department will register the approved explanatory statement on the Federal Register of Legislation, which will cause its tabling by the Office of Parliamentary Counsel.

I have enclosed an advance copy of the approved explanatory statement for consideration by the Committee.

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

Yours sincerely

FIONA NASH

Encl

REPLACEMENT EXPLANATORY STATEMENT

Jervis Bay Territory Marine Safety Ordinance 2016

Overview

The *Jervis Bay Territory Acceptance Act 1915* (Acceptance Act) deals with the governance of the Jervis Bay Territory (JBT) and provides a legal framework for the Governor-General to make Ordinances for the peace, order and good government of the JBT.

The purpose of the *Jervis Bay Territory Marine Safety Ordinance 2016* (the Ordinance) is to provide a comprehensive regime to ensure marine safety in the JBT. The Ordinance updates and enlarges the protection of marine safety in the JBT with the object of protecting the safety and amenity of users of JBT waters and occupiers of adjoining land by ensuring vessels are operated safely, and by enabling marine accidents be investigated.

The Ordinance has been drafted with the intention of ensuring that residents of and visitors to the JBT enjoy broadly the same protections in JBT waters as they do in the adjacent NSW waters. It is also intended that operators of vessels in JBT waters are subject to the same safety and licensing requirements as apply in NSW waters.

Accordingly, the Ordinance makes provision for the carrying of mandatory safety equipment, prohibits operating a vessel (or supervising a juvenile) while under the influence of drugs or alcohol, and provides for drug and alcohol testing of persons operating vessels in JBT waters. The Ordinance also recognises boat driving licences and vessel registrations from other jurisdictions, limits the use of vessels in swimming areas, and provides for the investigation of marine accidents.

Many of the provisions of the Ordinance have been adapted from the *Marine Safety Act 1998* (NSW) (NSW Act) and the *Marine Safety Regulations 2008* (NSW) (NSW Regulations), with modifications to reflect the JBT's legal, geographical and administrative position. Where appropriate, some provisions of the Ordinance have been based on sections of the *Navigation Act 2012* and the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law Act). The National Law Act is applied as Commonwealth law by virtue of the Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth (Cth National Law). The NSW Act applies the Cth National Law in NSW waters, to the extent the Commonwealth does not have power to apply the National Law Act in those waters.[1]

Section 64 of the Ordinance incorporates specific provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (the ACT Act) into the Ordinance to provide a framework for the enforcement of drug and alcohol related offences. The AFP have responsibility for the provision of police services in the JBT (section 8(1)(aa) of the *Australian Federal Police Act 1979*), and will be responsible for enforcing the Ordinance. The application of the ACT Act is intended to enable AFP officers, in dealing with the operators of vessels, to utilise the same procedures and equipment as they currently do in policing drug and alcohol matters in relation to road users in the JBT. People operating vessels in JBT waters will be subject to substantially the same legislative provisions as those operating vehicles in the JBT.

The Ordinance repeals the former *Marine Safety Ordinance 2007 (Jervis Bay Territory)* (the 2007 Ordinance).

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[1] See section 4 and Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.

Legislative Framework

The JBT is a Commonwealth administered territory and has no state legislature. Section 4A of the Acceptance Act applies to the JBT the laws (including the principles and rules of common law and equity) in force from time to time in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Acceptance Act. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, and are subject to the scrutiny of the ACT legislature. They apply to the JBT without Commonwealth parliamentary scrutiny.

Although the laws in force in the JBT are generally those of the ACT, the Acceptance Act provides a framework within which the Governor-General may make Ordinances to adjust and complement the applied ACT laws. Specifically, section 4C of the Acceptance Act permits an applied ACT law to be amended or repealed by an Ordinance made under the Acceptance Act, or a law made under such an Ordinance, and subsection 4F(1) confers on the Governor-General a plenary power to make Ordniances for the peace, order and good government of the JBT.

It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making powers commonly found in Commonwealth legislation, which permit the making of regulations as 'required or permitted' or 'necessary or convenient'. They are used by Parliament to indicate that, within the relevant subject matter, there is to be very little limitation on what can be provided for. They are generally only used for the external territories and the JBT, where the relevant Ordinances deal with state-level matters not normally dealt with in other types of Commonwealth legislation. The Commonwealth Parliament recently enacted a provision similar to s 4F of the Acceptance Act for the governance of Norfolk Island: section 19A of the *Norfolk Island Act 1979* (Cth) (which was enacted in 2015).

Ordinances made by the Governor-General under subsection 4F(1) of the Acceptance Act are generally made to account for the JBT's unique legal and administrative arrangements or to address matters not dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the close proximity of the JBT to NSW land and water. In practice, the Ordinance-making power in subsection 4F(1) of the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three of which are modelled on NSW legislation.

Because the ACT does not have a coastal marine environment, there is no ACT coastal marine law that can be applied in the JBT. This Ordinance establishes a marine safety regime for the JBT marine environment that is similar to the regime applying across the JBT-NSW maritime border, and which draws on both NSW marine safety legislation and the Cth National Law.

Consultation

In preparing the Ordinance, the Department of Infrastructure and Regional Development consulted with relevant Commonwealth and NSW government agencies and commercial businesses involved in marine operations in the JBT. There were three rounds of consultation on the draft legislation, as well as correspondence with agencies on comments raised on each draft.

Agencies and other bodies consulted were:

- Attorney-General's Department
- Department of Defence (Navy – HMAS *Creswell*)
- Director of National Parks (Booderee National Park)
- Australian Maritime Safety Authority
- Australian Federal Police
- Transport for NSW (Maritime and Road Services)

- Department of the Environment (Australian Antarctic Division)
- Wreck Bay Aboriginal Community Council
- Marine Rescue NSW
- Australian Government Solicitor

Holders of permits to operate commercial boat services (either for diving or tour purposes) in Booderee National Park also participated in the consultation process.

Issues raised during consultations included the scope of exemptions from the Ordinance, upcoming changes to corresponding legislation in other jurisdictions, and the interaction between the Ordinance and the National Law Act. The draft Ordinance was amended where appropriate to take account of these concerns.

Best Practice Regulation Requirements

The Office of Best Practice Regulation (OBPR), has formally advised a Regulation Impact Statement is not required. OBPR's identification number for this matter is 17333.

Offences and Penalties

The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT waters to that already enjoyed by people in the adjoining NSW waters. As such, it is desirable for a person to be subject to similar offences and penalties on each side of the adjoining JBT / NSW border. In order to achieve this policy objective, the Ordinance contains offences and impose penalties exceeding 50 penalty units and terms of imprisonment. The Acceptance Act does not contain any offence provisions.

While it is generally more appropriate to create offence provisions imposing penalties greater than 50 penalty units or terms of imprisonment in Acts of Parliament rather than in subordinate legislation, it is not appropriate to create these offence provisions in the Acceptance Act or other territory governance Acts. The reason for this is that imposing penalties in the Acceptance Act may change the basic framework of JBT's legislative scheme and unintentionally limit the scope of the Ordinance making power.

The plenary power provided in the Acceptance Act authorises Ordinances to create offences and does not limit the size or nature of the penalties that can be imposed. This power is inconsistent with the general Commonwealth policy that delegated legislation should not be authorised to impose penalties of imprisonment or fines exceeding 50 penalty units (see paragraph 3.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) (the Guide)).

The Acceptance Act does not place any limitation on the types of penalties that may be imposed by Ordinances made under that Act because Ordinances made for the JBT (together with Ordinances made for other territories) are quite unlike other types of delegated legislation at the Commonwealth level. Ordinances operate within the framework of ACT law applied by the Acceptance Act and are used to adjust and (when necessary) make State-type laws within the JBT. In some circumstances, such legislation will be required to prohibit conduct that is so serious that the imposition of penalties of imprisonment, or above 50 penalty units, will be appropriate. A similarly broad Ordinance-making power was enacted by the Commonwealth Parliament recently (see section 19A of the *Norfolk Island Act 1979* (Cth), enacted in 2015).

In this context, it is relevant to note that, under section 4L of the Acceptance Act and section 118(2) of the Ordinance, offence provisions cannot be created in regulations, rules or by-laws made under the Ordinance.

Certain offences created by the Ordinance are of a sufficiently serious nature that they warrant the imposition of penalties of greater than 50 penalty units and/or penalties involving terms of imprisonment. Specifically, sections 19, 24, 31, 32, 36, 59, 60 and 113 of the Ordinance provide maximum penalties in excess of 50 penalty units and/or a term of imprisonment, to reflect the seriousness of the conduct to be deterred. These penalties are engaged only for the most serious offences giving rise to a danger of harm or death to another person, or damage to property of another person or the environment.

Penalties similar to those imposed by this Ordinance have been imposed by the provisions of other Ordinances made under the Acceptance Act. These provisions include sections 14, 15 and 16 of the *Jervis Bay Territory Marine Safety Ordinance 2007* (2007 Ordinance), and section 24 of the *Jervis Bay Territory Emergency Management Ordinance 2015*.

During the development of the Ordinance, the Attorney-General's Department and the Australian Federal Police were consulted specifically in relation to penalty and imprisonment provisions. Affected persons including JBT business operators and the Wreck Bay community were also consulted and were given adequate notice that these offence provisions would be introduced.

Strict liability offences

Subsections 87(6), 105(4) and section 113 of the Ordinance create strict liability offences. Strict liability removes the requirement that the prosecution prove the fault element of an offence, which would otherwise attach to a physical element of that offence. The application of strict liability in relation to these particular offences is appropriate, noting that:

- the penalties for the relevant offences do not include imprisonment or exceed 60 penalty units;
- for these offences, strict liability is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct;
- it is necessary to ensure the integrity of the regulatory regime in question;
- there are legitimate grounds for penalising persons lacking fault, eg, because he or she will be placed on notice to guard against the possibility of any contravention;
- there is general public support and acceptance for both the measure and the penalty.

Strict liability is imposed in respect of limited offences for specific reasons. These reasons include public safety and the public interest and ensuring that the regulatory scheme is observed where the sanction of criminal penalties is justified. They also arise in a context where a defendant can reasonably be expected, because of his or her involvement in marine activities, to know what the requirements of the law are, and the mental, or fault, element can justifiably be excluded.

The general rationale for making these offences strict liability offences is that there is a community expectation that people will be aware of and comply with their marine safety obligations. For example, a person who drives a powered vessel for recreational purposes at a speed of 10 knots or more must be aged 12 years or over and have a current general boat licence. To be granted a general boat licence a person is required to undertake a mandatory knowledge test, including marine safety requirements, and provide evidence of practical boating experience. Accordingly, when in charge of a powered vessel, vessel operators are expected to be aware of their marine safety responsibilities and the obligations they owe to their passengers and the wider community in the JBT marine environment.

For strict liability offences in this Ordinance, the prosecution will have to prove only the conduct of the accused. However, where the accused produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made that conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

Subsections 87(7) and 105(5) of the Ordinance also provide the strict liability offence 'specific defence' of 'reasonable excuse', which is discussed below.

Evidential burden of proof

An evidential burden of proof requires a person to provide evidence of an asserted fact in order to prove that fact to a court. Subsections 87(7) and 105(5) of the Ordinance place an evidential burden on an individual to demonstrate that they had a reasonable excuse for failing to meet a duty or obligation.

Sections 108 and 110 and subsections 15(2), 28(2), 30(8), 31(2), 32(2), 41(2), 47(4) and 71(1) and (2) of the Ordinance also place an evidential burden on the defendant by requiring the defendant to raise evidence about the relevant matter that suggests a reasonable possibility that the matter exists or does not exist, after which the prosecution must disprove those matters beyond reasonable doubt.

An evidential burden has been placed on defendants in these provisions as the conduct proscribed by each of the offences may pose a grave danger to public safety. In addition, in each case, a defendant will be the only person in the circumstances with the relevant knowledge able to provide evidence of any reason for refusing or failing to comply with the relevant duty or obligation and it would be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

Legal burden of proof

In addition, section 63 of the Ordinance provides a defence to the offence created by section 56 of the Ordinance relating to underage alcohol consumption while operating a vessel, or supervising a person under 16 years of age who is operating a vessel. Section 63 of the Ordinance provides for a defence, which applies if the defendant proves that the relevant breath or blood alcohol was not caused by certain things, including the consumption of an alcoholic beverage. This defence requires the defendant to discharge the legal burden of proof for an element of the offence.

It is appropriate in this particular circumstance that the defendant bears the legal burden in relation to this defence rather than the evidential burden because of the potentially significant risks to public safety posed by a person under 18 years of age who is affected by alcohol while in charge of a vessel. In addition, each specific matter capable of being raised as a defence by the defendant is peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than the defendant to establish the matter.

Statement of Compatibility with Human Rights

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

Jervis Bay Territory Marine Safety Ordinance 2016

The *Jervis Bay Territory Marine Safety Ordinance 2016* (the Ordinance) 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.*

Human rights implications

The Ordinance engages the following rights:

- The right to liberty.
- The right to privacy.

- The rights to a fair hearing and fair trial.
- The right to protection against self-incrimination.

The right to liberty

The Ordinance engages the right to liberty, including protection from arbitrary arrest and detention, by virtue of the fact that the Ordinance contains criminal offences for, which a person found guilty may face imprisonment. However, Article 9.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides an exception for imprisonment for offences "...on such grounds and in accordance with such procedure as are established by law."

The ratio of term of imprisonment to penalty units for criminal offences in the Ordinance is consistent with that prescribed by section 4B of the *Crimes Act 1914* (Cth) and the Guide. Under the Ordinance, only police officers have powers of arrest, and any person arrested would be subject to the criminal justice system.

The Ordinance also engages the right to liberty, in that section 64 of the Ordinance imports a provision allowing a police officer to take a person into custody if they have a positive result from, or refuse to take, a screening test (sections 11 and 13D of the ACT Act). Section 64 also imports the offence of failing to stay for a screening test until the test is complete (section 22B of the ACT Act).

Although these provisions limit a person's right to liberty, they do so in circumstances where the person may cause danger to others if they operate a vessel while under the influence of alcohol or drugs. The General Comments of the Human Rights Committee, established under the ICCPR, note that: "The right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws"[2]. Therefore, the Ordinance is compatible with this human right.

Right to privacy

Enforcement powers

Part 9 of the Ordinance engages the right to privacy, in that it sets out enforcement powers which enable police officers to board, inspect, search and detain vessels in JBT waters.

Section 8.6 of the Guide (Entry and Search Without a Warrant), referring to the *Senate Inquiry into Entry and Search Provisions in Commonwealth Legislation,*[3] recommends that legislation should only authorise entry onto premises without consent or a warrant in emergency situations or where there is a serious threat or danger to public health.

Under the terms of the Ordinance, a police officer will usually be required to seek the express and informed consent of the relevant person or obtain a warrant prior to entering premises. However, a police officer may enter premises that are not a residential property in order to gain access to a vessel (section 84). A police officer may also board a vessel (see section 83) without a warrant or consent, to monitor compliance, investigate a marine safety accident or conduct a marine safety investigation in a limited range of circumstances. Police officers must show their identification if requested to do so.

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[2] United Nations Human Rights Committee, 2014: *General Comment No. 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35.

[3] Report 4/2000 Inquiry into Entry and Search Provisions in Commonwealth Legislation, para 1.36 and 1.44 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2000/index (accessed 9 May 2017)

If, in the course of conducting an investigation, a police officer/marine safety investigator believes that something is evidential material and that there is a serious or urgent need to exercise powers to preserve it, or it is otherwise impractical to obtain a warrant, then section 88 allows an inspector to take a sample of the material, secure the material for up to 72 hours, or seize the material. A police officer who is exercising the monitoring powers in section 87 may require a person to state the person's full name, address and date of birth.

These coercive powers are limited to Australian Federal Police (AFP) officers, and may only be exercised in limited circumstances, set out in subsection 83(1). The powers in Part 9 are similar to those exercised by authorised officers under the NSW Act, and by Marine Safety Inspectors under the Cth National Law.

Vessels are inherently mobile in JBT waters, which may be accessed by land or sea via either NSW or the JBT. The nature of the commercial and recreational activities undertaken by these vessels often means that they may not follow a predictable pattern or timetable. This means that investigation and enforcement activities may need to be undertaken when an opportunity arises in an emergency or to prevent loss of life and this may often occur while the vessel is at sea.

Vessels may also be operating in areas where there is limited or no mobile telephone access. JBT waters cover an area of approximately 875 hectares, and vessels are able to leave the jurisdiction and move into NSW waters in a short time. The criminal provisions of the Ordinance also have extra-territorial effect in the Australian Antarctic Territory, on Heard Island and MacDonald Islands, and on Australian ships outside the adjacent area.

The AFP do not have a permanent marine presence in JBT, and their risk management approach is to intervene to investigate incidents or respond to suspicious or dangerous behaviour where there are reasonable grounds to suspect that the Ordinance is not being complied with. In practice, the relevant powers will normally be exercised where a police officer has established that reasonable suspicion exists. However, in exceptionally rare circumstances, police officers should be able to intervene without first determining whether reasonable suspicion exists to ensure users of the JTB marine environment are safe, and to protect their fundamental human right to life.

Obtaining a warrant in these circumstances may be impractical, and may limit police officers' capacity to carry out their investigative functions under the Ordinance effectively. For this reason, the enforcement powers in Part 9 of the Ordinance are appropriate and proportionate.

Section 92 is a measure enabling police officers to receive assistance from other persons, if 'necessary and reasonable' to support their functions and duties. Powers exercised or functions or duties performed by the persons assisting in accordance with the direction of a police officer are taken to have been exercised by the police officer.

In practice, the exercise of such power would be extremely rare and typically involve situations where the police office may require the assistance of the public in a marine rescue to protect the life of users of the JBT marine environment. Critically, persons assisting a police officer at no time act at their own volition and must at all times act at the direction of the police officer they are assisting. The police officer is also accountable for the actions of the person assisting.

Drug and alcohol tests

Part 7 Division 3 of the Ordinance contains drug and alcohol testing provisions, applied from the ACT Act by section 64 of the Ordinance. These provisions also engage the right to privacy. The provisions require people to give samples of breath, blood and oral fluid when requested (sections 12, 13A, 13B, 13E and 15, of the ACT Act). They require a person to undergo a medical examination in some circumstances (section 16, of the ACT Act), and create offences of refusing to undergo a drug or alcohol screening test (section 22C, ACT Act) or a blood test (section 22C, ACT Act).

Sections 10A and 13CA of the ACT Act give police the power to enter premises to administer an alcohol or drug screening test. Section 18C gives the police the power to search a person who is taken into custody, and to search their clothing. In this case, a police officer may request the assistance of another police officer of the same sex as the person being searched.

The provisions from the ACT Act offer some privacy protections: sections 13 and 13F require that reasonably practicable steps be taken so that it is not readily apparent to the public that breath or oral fluid analysis are being carried out. Section 14 also limits the circumstances in which alcohol and drug tests can be carried out, particularly where conducting the test may be detrimental to the health of the subject.

The right to privacy is not an absolute right and may be limited in some circumstances. Article 17 protects against arbitrary and unlawful infringements of privacy, meaning that interference with this right can only be as authorised by law, and that authorities may not unduly interfere with this right.

The public safety benefits offered by random breath testing drivers have been established in Australia over several decades. Since the introduction of random breath testing in NSW in 1982, fatal road accidents involving alcohol have fallen from causing 40 per cent of fatalities to approximately 15 per cent in 2012[4].

Although the implementation of random breath and drug testing provisions in the JBT marine environment involves limitations on individuals' right to privacy, these limitations are consistent with existing marine safety legislation in the adjoining NSW waters, and are reasonable, necessary and proportionate given their potential benefits for public safety in JBT waters.

Right to protection against self-incrimination

The Ordinance engages this right in sections 86, 87 (1) (i) and 91, in which the privilege against self-incrimination is waived. Subsection 106(1) provides that a person is not excused from giving information, producing a document, or answering a question under these sections of the Ordinance, merely because the information, document or answer to the question might tend to incriminate them. The waiver of privilege, however, is qualified in that the information given, document or thing produced, or the answer given, as well as the act of producing the information, document or answer, and anything else obtained as a result of producing the information, document or answer, are not admissible as evidence against the individual in any criminal proceedings, other than a proceeding in respect of whether the information, document, thing or answer is false or misleading.

Privilege against self-incrimination is contained in the ICCPR, which at Article 14.3 (g) states that everyone shall be entitled to the following minimum guarantees: "(g) not to be compelled to testify against himself or to confess guilt".

There are, however, public interest concerns, which justify limiting the right in these circumstances. The investigation of marine accidents often has public safety implications – if the design of a vessel is flawed, or a vessel operator's actions had unintended negative consequences, there is a public interest in obtaining a full account of a matter, which could outweigh the individual's right to not incriminate themselves. Marine accidents can lead to the injury and death of many people, particularly where passenger vessels such as ferries and tour boats are involved. Six tour boats and three dive operators are licensed to operate in JBT waters.

Section 106(2) of the Ordinance contains a 'use and derivative use' immunity in relation to the sections cited above, which means that information given by a person cannot be used in evidence in

[4] Transport for NSW Centre for Road Safety: Random Breath Testing: http://roadsafety.transport.nsw.gov.au/stayingsafe/alcoholdrugs/drinkdriving/rbt/ (accessed 3/8/2016).

criminal proceedings against that person. Immunity, does not apply if the proceedings against the person are for providing false or misleading information. This is consistent with paragraph 9.5.2 of the Guide, which states that the privilege against self-incrimination does not extend to situations where it is alleged that a person has given false or misleading information.

Including these provisions in the Ordinance will mean that people are subject to similar requirements in the investigation of marine accidents in the JBT as they are in adjoining NSW waters; and that owners and operators of recreational vessels in the JBT are subject to investigative powers similar to those applying to operators of domestic commercial vessels under the Cth National Law.
The abrogation of this privilege is consistent with the imperative of ensuring public safety in the JBT marine environment.

Conclusion

The Ordinance is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Detailed description of the Ordinance

Part 1 – Preliminary

Section 1 - *Name*
This is the formal section titling the Ordinance.

Section 2 – *Commencement*
The date of commencement is the day after the Ordinance is registered on the Federal Register of Legislation.

Section 3 - *Authority*
This section explains that the Ordinance is made under the authority of the *Jervis Bay Territory Acceptance Act 1915*.

Section 4– *Schedules*
This section provides that a schedule to the Ordinance can amend or repeal instruments, and otherwise has effect according to its terms.

Section 5– *Object of Ordinance*
This section outlines the purpose of the Ordinance, which is to protect people using JBT waters and occupying land near JBT waters. The Ordinance aims to do this by ensuring that vessels are operated safely in JBT waters, and marine accidents are investigated.

Part 2 – Interpretation

Section 6– Definitions
This section defines key terms used in the Ordinance, including 'boat driving licence', 'making way', 'obstruction to navigation' and 'police officer'.

The definition of 'Director of National Parks' refers to the *Environment Protection and Biodiversity Conservation Act 1999*. This reference is a reference to that Act as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901*.

The definition of 'EPBC Regulations' refers to the *Environment Protection and Biodiversity Conservation Regulations 2000*. This reference to the EPBC Regulations is a reference to those Regulations as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901*.

The definition of 'foreign vessel' refers to the *Navigation Act 2012*. This reference is a reference to that Act as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901*.

The definition of 'JBT Rural Fire Service' refers to the *Jervis Bay Territory Rural Fires Ordinance 2014*. This reference is a reference to that Ordinance as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901* and section 13 of the *Legislation Act 2003*.

The definition of 'Marine Safety (Domestic Commercial Vessel) National Law' refers to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*. This reference is a reference to that Act as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901*.

The definition of 'police officer' refers to the *Australian Federal Police Act 1979*. This reference is a reference to that Act as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901*.

Section 7– Meaning of 'appropriate lifejacket'
This section defines an appropriate lifejacket as the lifejacket that a person would be required to wear, or that the vessel would be required to carry, if the vessel were in NSW waters. The section aims to ensure that vessel operators in JBT waters are subject to the same lifejacket requirements as they would be in the adjoining NSW waters.

Section 8 – Meaning of 'operate'
A person 'operates' a vessel if they control or determine the course or direction of the vessel (whether or not the vessel is under way), or if a person is the owner of the vessel and they allow or direct someone else to operate the vessel.

Section 9 – Meaning of 'owner'
A person owns a vessel if they are registered as the owner under a certificate of registry issued by a State or Territory, under the Cth National Law, or under the *Shipping Registration Act 1981*.

A person also owns a vessel if they jointly own the vessel, charter it, perform any functions of an owner of the vessel, publicly represent that they have those functions, or accept the obligation to exercise them. A person is still the owner of a vessel, even if the vessel is mortgaged, chartered, leased or hired to another person.

Section 10 – Meaning of 'vessel'
This section sets out watercraft that meet the definition of vessel in the Ordinance; the definition is based on the 2007 Ordinance definition. A vessel includes a watercraft that is used, or can be used, as a means of transportation on water. 'Vessel' also includes non-displacement craft (such as hovercraft and hydrofoils), seaplanes that are on the water, and anything declared by the rules to be a vessel. The rules can also list certain types of craft that are not vessels. Part 3 - Provisions relating to the application of this Ordinance

Section 11 – Ordinance to bind the Crown
This section provides that the Ordinance binds the Crown in each of its capacities. The section also states that the Ordinance does not mean that the Crown is liable to be prosecuted for an offence.

Section 12 – Ordinance does not apply to defence force vessels etc.
This section provides that the Ordinance does not apply to vessels operated by the Australian Defence Force, or by the naval, military or air forces of another country.

Part 4 – Vessel registration

Section 13 – Offence – operating an unregistered vessel
This section creates an offence of operating an unregistered vessel, if the vessel is power-driven, has a power rating of more than 3728.5 watts (five horse power), and is not registered in another State or Territory.

Section 14 – Offence – contravening a condition of registration
This section creates an offence of contravening a condition of a vessel's registration. It applies if a person is operating a vessel in JBT waters, the vessel is registered in a State or Territory, and the vessel is being operated in contravention of a condition of registration.

Part 5 – Boat driving licences

Section 15 – Offence – operating a vessel without a current boat driving licence
Subsection 15(1) creates an offence of operating (as master) a power-driven vessel in or from JBT waters, at a speed of greater than 10 knots, without a current boat driving licence. A boat driving licence for a vessel is defined in section 6 as a boat driving licence (however described) that has been granted under a law of a State or Territory, and entitles the holder to operate the vessel in that State or Territory. Subsection 15(2) creates a defence to this offence. Under subsection 15(2), the offence does not apply if the vessel is a domestic commercial vessel and the person operating the vessel holds a certificate of competency under the Cth National Law as applied by the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, or a corresponding State or Territory law, in relation to the person's functions on the vessel.

Subsection 15(2) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, whether a vessel is a domestic commercial vessel depends on whether it is 'a vessel that is for use in connection with a commercial, governmental or research activity' (see s 6 of the Ordinance and s 7(1) of the Cth National Law): the purpose for which a vessel is being used is something that is peculiarly within the knowledge of the defendant.

Similarly, whether the person has a certificate of competency under the Cth National Law is also a matter that is peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter. Other relevant factors include that this offence imposes a relatively low penalty of 15 penalty units, and that a person who has not mastered the requisite knowledge and skills required for the granting of a boat driving licence poses a grave danger to public safety if they operate a power-driven vessel at a speed of greater than 10 knots, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Part 6 – Safety of navigation

Division 1 – Notices relating to safety

Section 16 – Power to make a notice relating to safety
This section gives the Minister the power to regulate or prohibit the operation of vessels in JBT waters by displaying a notice.

Notices may relate to speed, mooring, anchoring, or the use of vessels for particular purposes. They may impose appropriate restrictions for the safety of the public or the protection of vessels or other property. However, notices cannot affect the operation of any law or power granted relating to the Cth National Law, or any other law of the Commonwealth. Notices must be displayed in or near JBT waters, and a notice displayed under this section is a legislative instrument.

Section 17 – Offence – failure to comply with a notice
This section creates an offence of failing to comply with a notice made under section 16 above. This section will not apply, however, if the failure to comply with the notice was intended to avoid injuring persons or damaging property, or if a notice restricts the speed of vessels, and the vessel is not a power-driven vessel.

Subsection 17(3) provides that proof of the display of a notice under section 16(1) is not required until evidence is given to the contrary.

Subsection 17(3) places the evidentiary burden on the defendant as it requires the defendant to produce evidence that a notice was not displayed as required by subsection 16(1), before the prosecution is required to raise evidence that the notice was displayed. This conforms with the overriding principle in Part 4.3.2 of the Guide, which states that "an evidential burden of proof should generally apply to a defence".

The policy intent of subsection 17(3) is that the prosecution should not have to prove in every case under subsection 17(1) that the relevant notice was displayed as required in subsection 16(1). This does not completely displace the prosecutor's evidential burden, but rather defers that burden.

Division 2 – Operation of vessels

Section 18 – Offence – operating a personal watercraft
This section creates an offence of operating a personal watercraft in JBT waters. A personal watercraft is a power-driven vessel that has a fully enclosed hull, does not take on water if it capsizes, and is designed to be operated by a person lying, standing, sitting astride or kneeling on the vessel. A jet powered surfboard is included in the definition of a personal watercraft.

Section 19 – Offence – operating an unsafe vessel
This section creates an offence of operating an unsafe vessel in JBT waters. An unsafe vessel is defined in section 6 as a vessel, which if operated, is dangerous to human life because of any of the following: the condition of the vessel, or of equipment on the vessel; the manner or place in, which cargo or equipment on the vessel is stowed or secured; the nature of the cargo, or the overloading of the vessel. A person found guilty of this offence is liable for a penalty of 100 penalty units, imprisonment for 20 months, or both.

This offence was contained in the 2007 Ordinance, however the penalty for the offence has been amended to align it with the ratio of penalty units to term of imprisonment recommended by the Guide.

The high penalties imposed by s 19 reflect the seriousness of the offence and are necessary to deter and punish a worst case offence. It would be practically simple, and potentially advantageous, for the operator of a vessel to ensure that the vessel is safe, and the consequences of a person operating an unsafe vessel are particularly dangerous: by definition an unsafe vessel is a vessel the operation of which is a danger to human life.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Section 20 – Offence – speed restriction when person under 18 on a vessel
This section creates an offence of operating a vessel in JBT waters at a speed of more than 60 knots, while a person under the age of 18 years is on board the vessel.

Section 21 – Offence – exceeding the appropriate power rating for a vessel
This section creates an offence of operating a vessel in JBT waters with a motor that exceeds the appropriate power rating for the vessel. For the purposes of practical jurisdictional application

subsection 21(2) of the Ordinance reflects section 13 of the NSW Regulations, which expressly refers to Australian Standard AS1799.1 - 2009 *Small craft - General requirements for power boats* (as in force on the commencement day) and the power rating approved by NSW Roads and Maritime Services (RMS) for vessels of that kind (again, as in force on the commencement day).

In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified, or the specification is not apparent, and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799.1-2009. If the vessel does not have an outboard motor, the appropriate power rating is the power rating for vessels of the kind approved by RMS for the purposes of clause 13 of the NSW Regulation (as in force on the commencement day).

AS1799.1-2009 sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. It does not apply to boats used for commercial purposes or exclusively for racing, nor to canoes, kayaks, inflatable boats, rigid inflatable boats, yachts or auxiliary yachts. A hardcopy or PDF version of AS1799.1–2009 is available for purchase via the publisher's website.[5] Alternatively, AS1799.1 – 2009 can be viewed free of charge at the National Library, the Shoalhaven Library, the Department's Library in Canberra, and the Department's Jervis Bay Territory Administration Office (Village Road, Jervis Bay Village, JBT).

As vessels cannot be registered in the JBT they must meet the registration conditions set in their home state. Due to the proximity of NSW, the majority of vessels using JBT waters are likely to be registered in NSW. Further, it is likely that most vessels operating in JBT waters will traverse NSW regulated waters. In order to be registered and/or operate in NSW waters vessel operators must comply with section 13 of the NSW Regulation, which makes similar provision to subsection 21(2) of the Ordinance.

Section 22 – Offence – operating a power-driven vessel in or near a swimming area
This section creates an offence of operating a power-driven vessel in, or within 60 metres of, a swimming area. The section defines an area of waters adjacent to Green Patch Beach as a 'swimming area'.

Section 23 – Offence – failure to comply with minimum distance requirements
This section creates an offence of failing to comply with minimum distance requirements. A person operating a vessel at a speed of 10 knots or more in JBT waters must ensure that the vessel is at least 60 metres, or, if that is not possible, a safe distance, from any person on or in the water, and any other vessel. This safe distance requirement is reduced to 30 metres in relation to other power-driven vessels, vessels, which are moored or anchored, or to any land, structure or other thing.

A 'safe distance' is defined as a distance at which, given all surrounding factors (including weather, visibility, speed and obstructions to navigation), the vessel will not cause danger or injury to a person, or damage to another vessel or thing.

Section 24 – Offence – reckless or negligent operation of a vessel
This section creates an offence of operating a vessel in JBT waters where this operation gives rise to a danger of harm or death to a person, or damage to property, where the vessel operator is reckless or negligent as to whether the operation of the vessel would give rise to the danger. This offence carries a penalty of imprisonment for ten months or 50 penalty units, or both.

The high penalties imposed by s 24 reflect the seriousness of the offence and are necessary to deter and punish a worst case offence, including repeat offences. It would be practically simple, and

[5] See SAI Global website https://infostore.saiglobal.com/store/details.aspx?ProductID=1141233 (accessed 18 April 2017)

potentially advantageous, for the operator of a vessel to ensure that the vessel is operated in a manner that does not gives rise to a danger of harm or death to another person or damage to property of another person. The consequences of failing to do so are extremely serious, particularly where the danger is of death to another person.

This offence was in the 2007 Ordinance, however the penalty for the offence has been amended to align it with the ratio for penalty units to term of imprisonment prescribed by the Guide.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Section 25 – Offence – dangerous operation of a vessel
This section creates an offence of operating a vessel in JBT waters at a speed, which is dangerous to the public, or in a manner that is dangerous to the public.

Section 26 – Offence – towing a person
This section creates an offence of towing a person in JBT waters, or of being towed behind a vessel in JBT waters.

Section 27 – Offence – unsafe towing of a vessel etc.
This section creates two offences.
The first is an offence of operating a vessel in JBT waters, which is towing or pushing another vessel or object, which is not safely secured to the towing or pushing vessel.

The second offence is operating a vessel in JBT waters, which is towing or pushing another vessel or object, in circumstances where there is obscured visibility from the towing or pushing vessel, or there is no person giving safety instructions to the operator.

Section 28 – Offence – contravening a safe loading requirement
Subsection 28(1) creates an offence for owners or operators of vessels in JBT waters, of contravening a safe loading requirement in the State or Territory where the vessel is registered or the owner resides. A safe loading requirement relates to the maximum number or weight of people and equipment a vessel may carry. It includes a requirement to display a label on a vessel relating to the maximum safe load or maximum number of persons that the vessel is permitted to carry.

Under subsection 28(2), the offence does not apply to vessels used solely for the purpose of racing or competition, vessels that are propelled by oars or paddles and do not have an engine, sailing vessels, or domestic commercial vessels operating in accordance with a certificate of survey in force under the Cth National Law.

Subsection 28(2) places an evidential burden of proof on a defendant in relation to the matters its sets out. This is appropriate for several reasons. First, the matters set out in paragraph (2)(a) and (d) are peculiarly within the knowledge of the defendant. Further, for paragraph (2)(a)(b)(c) and (d) it would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

In addition, the following factors make it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence in this case:

- the conduct proscribed by this offence (operation of an overcrowded or overweighted vessel) poses a grave danger to public safety;
- the matters in the defence are not central to the question of culpability. The culpability in this section lies with the contravention of the safe loading requirement that applies to the vessel under State or Territory law. The type of vessel involved is not a critical element of the offence.

Division 3 – Conduct of persons

Section 29 – Offence – conduct that is dangerous to the public
This section creates an offence of being on a vessel in JBT waters and doing something that is dangerous to the public.

Section 30 – Offence – keeping all parts of the body within a vessel while underway etc.
This section creates a number of offences, which relate to recreational vessels or hire and drive vessels.

The first offence under subsection 30(2) applies to the operator of a vessel in JBT waters, if, while the vessel is making way, a person on the vessel extends a part of their body outside the perimeter of the vessel.

The second offence under subsection 30(3) applies to a person on board a vessel in JBT waters, which is making way, who extends a part of their body outside the perimeter of the vessel.

The third offence under subsection 30(4) applies to the operator of a vessel in JBT waters, who makes way while a person is on the bow of the vessel, in a position where they have a higher risk of falling overboard.

The fourth offence under subsection 30(5) applies to a person on board a vessel in JBT waters who, while the vessel is making way, is on the bow of the vessel in a position that puts him or her at an increased risk of falling overboard.

The fifth offence under subsection 30(6) applies to the operator of a vessel in JBT waters, who makes way while another person sits on, rides on or hangs onto a swim ladder, swim platform or transom attached to the vessel.

The sixth offence under subsection 30(7) is for a person who is on board a vessel in JBT waters who sits on, rides on or hangs onto a swim ladder, swim platform or transom attached to the vessel while the vessel is making way.

Subsection 30(8) provides that the offences created by this section do not apply to a person who is anchoring, fishing, mooring or casting off, or involved in any activity relating to securing the safety of any person or property.

Subsection 30(8) places an evidential burden of proof on a defendant in relation to the matters its sets out. This is appropriate for several reasons. First, the matters set out in subsection (8) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

Other relevant factors include that if a person extends a part of their body outside the perimeter of the vessel, or is on the bow of a moving vessel in a position of increased risk of falling overboard, or is on an attached swim ladder (or platform or transom), they pose a grave danger to the safety of themselves and other passengers, and it is thus reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Section 31 – Offence – unauthorised entry to certain areas
This section creates an offence of making an unauthorised entry to certain areas. An offence is committed if a person is in JBT waters and is within 30 metres of any:

- moored or anchored seagoing ship;
- sunken or stranded vessel;
- site that construction work is being carried out by a public authority, including RMS;

or within 100m of any wharf or installation used for the shipment, unshipment or storage of any oil, inflammable liquids, explosives or dangerous goods.

There are a number of exceptions to this offence. A person who is authorised to be in these areas, or a person on board a vessel operated by a police officer, or RMS officer or staff member, or a person who is in an area referred to in the offence because of an emergency, or to avoid injuring persons, or damaging property are not subject to this offence.

Subsection 31(2) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection 31(2) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that the operation of a vessel near the sites specified poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

The maximum penalty for this offence is 100 penalty units. This high penalty reflects the seriousness of the offence, commission of which may cause damage to property or serious harm or death to another person. It is necessary to deter and punish a worst case offence, including repeat offences.

This penalty is consistent with the penalty for the equivalent offences set out in regulations 28, 29 and 30 of the NSW Regulations.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Section 32 – Offence – climbing etc. onto a vessel
This section creates an offence of climbing onto or attaching oneself to a vessel in JBT waters, or helping another person to do so.

A person does not, however, commit an offence if they have been authorised to climb onto the vessel or attach themselves to it by the owner or master of the vessel.

The penalty for this offence is 100 penalty units. This high penalty reflects the seriousness of the offence which may cause damage to property or serious harm or death to another person, and is necessary to deter and punish a worst case offence, including a repeat offence.

This penalty is consistent with the penalty for the similar offence set out in regulation 31 of the NSW Regulations.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Subsection 32(2) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection 31(2) are something that is peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that climbing onto a vessel unexpectedly without providing adequate warning to the owner or master poses a grave danger to individuals and to public safety. This makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Section 33 – Offence – conduct of passengers on a domestic commercial vessel
This section creates two offences that passengers on domestic commercial vessels in JBT waters may commit.

A person commits an offence if they obstruct someone engaged in the navigation or operation of the vessel, deliberately damage or misuse any part of the vessel or the vessel's equipment, or remove, damage or deface a sign, notice or survey plate.

A person will also commit an offence if they are in, or on a prohibited part of the vessel, which includes the roof, awning, mast, or a part of the vessel, which passengers are not permitted to enter, which is marked out by a notice.

Division 4 – Interference

Section 34 – Offence – interfering with the lawful use of waters or land
This section creates an offence of operating a vessel in JBT waters, where the operation of the vessel interferes with another person's lawful use of JBT waters or adjoining land.

Section 35 – Offence – interfering with other vessels
This section creates two offences involving interfering with other vessels while operating a vessel in JBT waters.

The first is operating a vessel in such a way as to cause wash, which damages or impacts unreasonably on another vessel.

The second involves operating a vessel, which passes a dredge (or another vessel, which has a limited ability to manoeuvre), and passing the dredge or other vessel other than on the side of the dredge or other vessel that is displaying the shapes or lights indicating safe passage. These shapes and lights are specified in the *Convention on the International Regulations for Preventing Collisions at Sea*, which is applied in JBT waters by the *Navigation Act 2012*.

Section 36 – Offence - interfering etc. with lightships and navigation aids
This section creates an offence of being on, damaging or interfering with a lightship in JBT waters; or of securing any vessel to a navigation aid in JBT waters. This offence carries a penalty of 100 penalty units. This high penalty reflects the seriousness of the offence, which may cause damage to property or serious harm or death to another person, and is necessary to deter and punish a worst case offence, including repeat offences.

This penalty is the same as the penalty for the equivalent offences created by regulations 26 and 27 of the NSW Regulations.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Section 37 – Offence - interfering with equipment on a vessel
This section creates an offence of interfering with equipment on a vessel in JBT waters. If a person cuts, breaks, destroys, casts off, unties or detaches any rope, cable, chain or other means by which a vessel is secured in JBT waters, without authorisation from the owner or operator of the vessel, they are guilty of this offence.

Section 38 – Offence - interfering with safety equipment
This section creates an offence of untying or detaching any safety equipment located in JBT waters. A person is not, however, guilty of the offence if they untie or detach the safety equipment in order to secure a person's safety, or to prevent loss of or damage to property.

Division 5 – Signals and Lights

Section 39 – Offence – unwarranted use of distress signals etc.
This section creates two offences relating to the use of distress signals or distress signalling equipment.

A person is guilty of an offence if they are on board a vessel in JBT waters, or in, or in the vicinity of, JBT waters, and use distress signals or distress signalling equipment, other than for the purpose of indicating distress.

If a person operates a vessel in JBT waters, and another person on board the vessel commits the above offence, then the operator of the vessel is also guilty of an offence.

Section 40 – Offence – use of lights and signals without proper reason
This section creates two offences relating to the use of lights and signals.

If a person is on board a vessel in JBT waters, or in, or in the vicinity of JBT waters, they are guilty of an offence if they show a visual signal, or make a sound signal, of a type used as a warning or guide to vessels, without good reason.

A person is also guilty of an offence, if they operate a vessel in JBT waters on, which another person commits the above offence.

Section 41 – Offence - unauthorised use of an emergency patrol signal
This section creates an offence of unauthorised use of an emergency patrol signal. If a person operates a vessel in JBT waters, they are guilty of an offence if they display an emergency patrol signal, unless:

- displaying the emergency patrol signal has been authorised by a police officer for the purpose of carrying out emergency patrol duty, or

- the vessel is operated on behalf of a police officer, the JBT Rural Fire Service, the NSW Rural Fire Service, or the Ambulance Service of NSW, for carrying out emergency patrol duty.

'Emergency patrol signal' is defined in section 6 of the Ordinance as denoting "an all-around flashing blue light, or flashing blue and red lights".

Subsection 41(2) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection 41(2) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that unauthorised use of an emergency patrol signal poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Division 6 – Obstructions to navigation

Section 42 – Offence – failure to give warning about an obstruction to navigation etc.
This section creates an offence of failing to warn about an obstruction to navigation. A person who operates a vessel is guilty of an offence if the vessel potentially obstructs navigation, or is a danger to other vessels in JBT waters, and the person does not warn other vessel operators of the potential obstruction or danger.

Section 43 – Offence – obstructing fairways and channels
This section creates an offence of operating a vessel, which obstructs or limits access to any fairway or channel in JBT waters; or blocks the approach to a wharf, jetty, boatshed, slip, launching ramp or mooring, in JBT waters.

Section 44 – Offence – obstructing vessels etc.
This section creates an offence of obstructing several activities related to vessels in JBT waters. A person is guilty of an offence if they impede or obstruct the launching, removal from the water, or securing of a vessel; the handling of cargo or the boarding or landing of passengers from a vessel; or the safe navigation of a vessel.

Section 45 – Offence – causing an obstruction, danger or nuisance with objects
A person is guilty of an offence if they cause an object or apparatus to float on, extend over or be in JBT waters, or they throw or otherwise project an object or apparatus into JBT waters, and the object or apparatus obstructs navigation, causes nuisance or danger, or causes damage to property, or is likely to do any of these things.

Section 46 – Offence – failure to light or mark an obstruction to navigation
This section creates an offence of failing to illuminate or mark an obstruction to navigation.

Division 7 – Directions and other powers relating to safety

Section 47 – Directions relating to the conduct of persons – general
This section specifies the powers of the police in certain situations and creates an offence of refusing or failing to comply with a direction from a police officer. A police officer may give a direction to a person in, on or near JBT waters if the officer reasonably believes that the direction is necessary to ensure any person's safety or to prevent damage to property, and the direction is reasonable. A person is guilty of an offence if they fail to comply with a direction, after the police officer has identified him or herself, and has warned the person that failing to do so is an offence.

People must follow directions of police officers made under this section, even if to do so would contravene another provision of the Ordinance. However, under subsection 47(4) people can use the fact that they were acting under the direction of a police officer as a defence to a prosecution against another offence under the Ordinance.

Subsection 47(4) places an evidential burden of proof on a defendant in relation to the matters it sets out. This proof is appropriate for several reasons. First, the matter set out in subsection 47(4) is peculiarly within the knowledge of the defendant. The defendant is best placed to provide information on the circumstances in which the direction occurred. Other relevant factors include that contravening this provision of the Ordinance poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on this defence to produce evidence supporting the defence.

Section 48 – Directions relating to the conduct of persons – domestic commercial vessels
This section specifies the powers of 'designated persons' on domestic commercial vessels, and creates an offence of failing to comply with a direction. A 'designated person' is a person who is concerned in navigating, operating or managing a domestic commercial vessel, including at its berth.

A designated person can tell a person not to board, or not to remain on board a vessel; not to enter, or not to stay in a part of the vessel; and to move to or from a part of the vessel, or to cease an activity the person is engaged in. Refusing or failing to comply with a direction from a designated person is an offence.

A designated person cannot give a direction under this section to a 'relevant officer' – a police officer, an officer of the Commonwealth or NSW Government, or an officer of a Commonwealth or NSW statutory authority.

Section 49 – Directions relating to lighting and marking obstructions
This section empowers police officers to give directions about lighting and marking obstructions, and creates an offence. A police officer can give a written direction to a person who owns an obstruction to navigation, to mark or light the obstruction, and to maintain the marking or lighting in good condition. A person is guilty of an offence if they do not comply with the direction.

A person who owns an obstruction to navigation and who has been given a direction to mark or light the obstruction, must notify a police officer in the JBT immediately if they become aware of a defect in the lighting or marking of the obstruction. If the owner of an obstruction to navigation does not comply with a direction, a police officer can cause the obstruction to be marked or lit. If the Commonwealth incurs reasonable costs or expenses as a result of lighting or marking an obstruction to navigation, the Commonwealth can recover the amount of those costs and expenses from the owner of the obstruction as a debt in a court.

Section 50 – Directions to remove obstructions
This section gives the Minister the power to give a written direction to the owner or the person responsible for an obstruction to navigation, that they must remove the obstruction within a specified period of time. A person commits an offence if they are given such a direction and refuse or fail to comply with the direction.

Section 51 – Power to remove obstructions
This section gives the Minister the power to remove, or authorise the removal of any obstruction to navigation, whether or not a direction has been issued under section 50 above. The obstruction can be removed by destroying if it is reasonable in the circumstances, and the Commonwealth can recover any reasonable expenses associated with the removal or destruction, from the owner or person who is responsible for it.

Section 52 – Power to dispose of obstructions
This section enables the Minister to dispose of anything removed (but not destroyed) under section 51, in an appropriate manner.

The Minister may dispose of the thing if he or she has taken reasonable steps to return the thing to its owner, and has been unable to locate the owner, the owner has refused to take possession of the thing, or the owner has not taken possession of the thing within three months of being contacted by the Minister.

Part 7 – Alcohol and drug use

Division 1 – Preliminary

Section 53 – Vessels to which this Part applies
This section provides that Part 7 does not apply to a surfboard or a similar item, which supports the swimmer or surfer in the water, apart from a sailboard or kiteboard. This Part only applies to a vessel while it is underway.

Section 54 – Prescribed concentrations of alcohol
This section sets out the prescribed concentrations of alcohol, which form part of offences in Part 7. One of the goals of the Ordinance is that operators of vessels in the JBT should be subject to the same standards as operators of vessels in the adjoining NSW waters. Accordingly, the prescribed concentrations of alcohol, and offences for using vessels while under the influence of drugs or alcohol in Part 7, are drawn from those in the NSW Act.

This section prescribes the amounts of alcohol in people's breath or blood, which constitute high range, low range, middle range, special range and youth range prescribed concentrations of alcohol.

Division 2 – Offences etc. relating to alcohol and drugs

Section 55 – Offence – operating a vessel under the influence of alcohol or another drug
This section creates an offence of operating a vessel under the influence of alcohol or another drug. A person is guilty of an offence if they operate a vessel in JBT waters, or supervise a juvenile operator of a vessel in JBT waters, while under the influence of alcohol or any other drug. 'Juvenile operator' is defined in section 6 of the Ordinance as a person who is operating a power-driven vessel and is 16 years of age or younger.

The section creates a further offence for a master of a vessel permitting a person to operate, or to supervise a juvenile operator of a vessel in JBT waters, while knowing, or having reasonable cause to believe that the person is under the influence of alcohol or any other drug.

A court attendance notice for either of the above offences can allege that the person was under the influence of more than one drug, and the offence cannot be dismissed for uncertainty if each of those drugs is described in the court attendance notice. Further, the offence will be proved if the court is satisfied that the person was under the influence of either a drug described in the court attendance notice, or several drugs, of which at least one was described in the court attendance notice.

Section 56 – Offence – Youth range prescribed concentration of alcohol
This section creates an offence for a person under 18 years of age of operating a vessel, or supervising a juvenile operator, while having in the person's breath or blood the youth range prescribed concentration of alcohol. This concentration is prescribed in section 54 as more than zero grams, but less than 0.02 grams per 210 litres of breath or 100 millilitres of blood.

A defence to this provision is available under section 63 of the Ordinance, which is discussed below.

Section 57 – Offence – special range prescribed concentration of alcohol
This section creates an offence for a person operating a vessel in JBT waters, or supervising a juvenile operator in JBT waters, while the special range prescribed concentration of alcohol is present in the person's breath or blood.

This offence will only apply in two situations: firstly, if the person operating the vessel is under 18 years of age; or secondly, if the person or the juvenile operator being supervised is operating the vessel for a commercial purpose. The special range concentration of alcohol is prescribed in section 54 as 0.02 grams or greater, but less than 0.05 grams per 210 litres of breath or 100 millilitres of blood.

Section 58 – low range prescribed concentration of alcohol
This section creates an offence of operating a vessel, or supervising a juvenile operator in JBT waters, while the low range prescribed concentration of alcohol is present in the person's breath or blood. This is prescribed in section 54 as 0.05 grams or more, but less than 0.08 grams per 210 litres of breath or 100 millilitres of blood.

Section 59 – Offence – middle range prescribed concentration of alcohol
This section creates an offence of operating a vessel in JBT waters, or supervising a juvenile operator in JBT waters, while the middle range prescribed concentration of alcohol is present in the person's breath or blood. This concentration is defined in section 54 as 0.08 grams or more, but less than 0.15 grams, of alcohol per 210 litres of breath or 100 millilitres of blood.

The penalty for this offence is 30 penalty units, imprisonment for 6 months or both. These high penalties reflect the seriousness of the offence, as a person operating a vessel (or supervising a juvenile operator) with a middle range prescribed concentration of alcohol present in their breath or blood is in danger of causing damage to property or serious harm or death to another person. These penalties are necessary to deter and punish a worst case offence (including a repeat offence) and are comparable to penalties imposed in NSW marine safety and ACT driving legislation relating to drink driving

offences, which generally include terms of imprisonment. The penalty of imprisonment is also comparable to these laws, and reflect community values and community concern about the dangers drink drivers (and, by extension, drunk operators of vessels) pose to the community and innocent parties.

This maximum number of penalty units is the same as the number of penalty units prescribed for the equivalent offence in section 24(4) of the NSW Act However, the maximum period of imprisonment provided for in s 59 of the Ordinance reflects the standard Commonwealth ratio of penalty units to term of imprisonment and is shorter than the period provided for in section 24(4) of the NSW Act.

A general discussion about the creation of high-level offences by the Ordinance is included at the beginning of this explanatory statement.

Section 60 – Offence – high range prescribed concentration of alcohol
This section creates an offence of operating a vessel in JBT waters, or supervising a juvenile operator in JBT waters, while the high range prescribed concentration of alcohol is present in the person's breath or blood. This is prescribed in section 54 as a concentration of 0.15 grams or more of alcohol per 210 litres of breath or 100 millilitres of blood.

The penalty for this offence is 50 penalty units, imprisonment for 10 months, or both.
This penalty is based on the penalty for the same offence in section 24(5) of the NSW Act, however it has been altered to bring the ratio of penalty units to term of imprisonment into line with that recommended in the Guide.

These high penalties reflect the seriousness of the offence, as a person operating a vessel (or supervising a juvenile operator) with a high range prescribed concentration of alcohol present in their breath or blood is in danger of causing damage to property or serious harm or death to another person.

These penalties are necessary to deter and punish a worst case offence (including a repeat offence) and are similar to penalties imposed in NSW marine safety and ACT legislation relating to drink driving offences, which generally include terms of imprisonment. The penalty of imprisonment reflects community values, and community concern about the dangers drink drivers (and, by extension, drunk operators of vessels) pose to the community and innocent parties.

Section 61 – Alternative verdicts for lesser offences
This section enables alternative verdicts to be given by the court for lesser offences in certain circumstances. If a person is being prosecuted for an offence against section 59, but the court is satisfied that at the relevant time the low range prescribed concentration of alcohol was present in the person's blood rather than the middle range prescribed concentration, the court can convict the person of an offence against section 58.

Subsection 61(2) provides that if a person is being prosecuted for an offence against section 60, but the court is satisfied that at the relevant time, the person had in their breath or blood the middle range prescribed concentration of alcohol, or the low range prescribed concentration of alcohol, the court can convict the person of an offence against section 58 or section 59.

Subsection 61(3) provides that if a person is being prosecuted for an offence against sections 58, 59 or 60, and the court is satisfied that the at the time of the alleged offence, the person was under the age of 18 years, or the vessel was being operated for a commercial purpose, and the special range prescribed concentration of alcohol was present in the person's blood or breath rather than the low, middle or high range prescribed concentrations of alcohol, the court can convict the person of an offence against section 57.

Subsection 61(4) provides that if a person is being prosecuted for low, middle, high or special range concentrations of alcohol, and the court is satisfied that at the time of the alleged offence, the person

was under the age of 18 years, and youth range prescribed concentration of alcohol was present in their blood or breath, rather than the low, middle, high or special range prescribed concentration of alcohol, the court can convict the person of an offence against section 56.

Section 62 – Presence of higher concentration of alcohol not a defence
If a person is prosecuted for an offence against sections 56, 57, 58 or 59 of the Ordinance, and the person can prove that at the time of the offence they had a higher concentration of alcohol in their blood or breath than the range specified in the offence (for example, in the case of an offence against section 56, a concentration greater than 0.02 grams per 210 litres of breath or 100 millilitres of alcohol was present in the defendant's breath or blood), this is not a defence to the prosecution.

This section limits the defence available to a defendant to ensure that a prosecution for an offence of having a prescribed concentration of alcohol while operating a vessel or supervising a juvenile operator does not fail because the defendant has a higher concentration of alcohol in their blood or breath than that for which they were prosecuted.

Section 63 – Defence for offence relating to youth range prescribed concentration of alcohol
This section provides that it is a defence to prosecution for an offence against section 56 of the Ordinance if the defendant proves that, at the time the defendant was operating the vessel, or supervising a juvenile operator thereof, the presence in their breath or blood of the youth range prescribed concentration of alcohol was not caused by the consumption of an alcoholic beverage (other than for religious observance) or the consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol.

The defence available under this section reverses the burden of proof by requiring the defendant to positively prove matters relevant to their defence on the balance of probabilities. This section creates a presumption that the presence at the relevant time in a defendant's breath or blood of the relevant concentration of alcohol was caused by either the consumption of an alcoholic beverage (otherwise than for the purposes of religious observance) or by the consumption or use of any other substance for the purpose of consuming alcohol.

It is appropriate for a legal burden of proof to be imposed because the purpose for which a person has consumed alcohol (e.g. for the purpose of religious observance or consumption of medicine) is something that is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. Further, the conduct proscribed by the offence in section 56 of the Ordinance involves persons who are particularly vulnerable, and involves the prevention of a grave danger to public safety. Specifically, the risks posed to public safety by a person under 18 years of age who is affected by alcohol being in charge of a vessel include death or injury to the person himself or herself as well as other persons, as well as significant damage to property.

Division 3 – Alcohol and drug testing

Section 64 – Application of ACT Road Transport (Alcohol and Drugs) legislation
The enforcement provisions of Part 7 of the Ordinance have been applied from the ACT Act.

This section specifies the portions of the ACT Act that will be applied to the marine context in the JBT, and how they will be applied. For example, the section provides that a reference to a driver of a motor vehicle on a road in the ACT will apply as if it were a reference to a person operating a vessel in JBT waters. References to motor vehicles are to be read as including references to vessels, references to driving a vehicle are to be read as including references to operating a vessel, and references to motor vehicles involved in accidents are to be read as references to vessels involved in marine accidents.

The provisions of the ACT Act, as defined in section 6 of the Ordinance and incorporated by this section, are a reference to that legislation as in force from time to time, relying on section 10 of the *Acts Interpretation Act 1901* and section 13 of the *Legislation Act 2003*.

The provisions of the ACT Act that are applied by the Ordinance include definition sections, provisions allowing police to test people for the use of drugs and alcohol, offences of refusing to provide breath, blood or oral fluid samples, and operating a vehicle while driving or riding a vehicle. They further include provisions relating to evidence, the right of an arrested person to a medical examination, and a schedule of drugs.

Section 10A of the ACT Act gives police the power to enter premises to administer an alcohol screening test. Section 13CA of the ACT Act gives police officer the power to enter premises to require the person to undergo one or more drug screening tests. This power may only be exercised by the AFP, and only in limited circumstances. Where a police officer reasonably suspects that a person was driving a vessel involved in an accident, or the person failed to comply with a police officer's request to stop the vessel, and the officer reasonably suspects the person has committed an offence, and that the person is on any premises, the police officer may enter the premises to administer a screening test.

Section 14 of the ACT Act qualifies some of the above powers. For example, a police officer cannot require a person to undergo a screening test or provide a sample of breath or oral fluid if more than two hours have elapsed since an accident, since a person's arrival in hospital, or if to do so would be detrimental to a person's medical condition.

The Guide provides at paragraph 8.1 that entry to premises should be on the basis of a warrant or the consent of the owner of premises, except where there is compelling justification. Here, if a police officer were required to obtain a warrant prior to entering premises to administer a test, the person's blood-alcohol limit, or the concentration of a prescribed drug in their system might fall below prescribed levels, or the two-hour time limit in section 14 might elapse. Further, if a person could evade drug or alcohol testing merely by entering premises (their own or another person's), this would provide an incentive for offenders to avoid apprehension and enter premises, which would undermine the regulatory scheme and could endanger the offender and other members of the public. The Scrutiny of Bills Committee has stated that legislation should authorise entry without consent or warrant only in "situations of emergency, serious danger to public health, or where national security is involved[6]". It is submitted that in this situation a danger to public safety is involved.

Section 11 of the ACT Act empowers a police officer to take a person into custody if they have the prescribed concentration of alcohol in their blood or breath. Section 13D of the same legislation empowers a police officer to take a person into custody if a drug screening device indicates to the police officer that a prescribed drug is present in the person's oral fluid.

Section 18C of the ACT Act provides that a police officer can search a person who is taken into custody and may take possession of anything found in the person's possession. The search will be undertaken by a police officer and the officer may request the assistance of a police officer of the same gender as the person being searched. The search is necessary in these circumstances to enable seizure of any weapon, prohibited substance, or object or device, which a person might use to harm themselves or others while in custody.

Anything taken from a person must be returned when they cease to be in custody, unless the item meets the definition of a seizable item or may otherwise be seized or retained under another Territory law. The retention of seized material, only until the person is no longer in custody, is consistent with the Guide, paragraph 8.5.2.

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[6] Report 4/2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation*, paragraphs 1.36 and 1.44.

Sections 41 and 41AA of the ACT Act enable evidentiary certificates to be used in relation to the administration of alcohol and drug related tests. These certificates are signed by police officers who are independent of the prosecution, as required by the Guide at paragraph 5.3.

Part 8 – Mandatory safety equipment

Division 1 – Safety equipment requirements for certain recreational vessels

Section 65 – Application of this Division
This section specifies that this Division applies to recreational vessels, but not to canoes, kayaks, sailboards or kiteboards.

Apart from the requirements relating to lifejackets, this Division does not apply to a recreational vessel, which is not usually operated in JBT or NSW waters, and has not been continuously in JBT waters or NSW waters for three or more months, and which complies with the safety equipment requirements in the vessel's place of registration or home port.

Section 66 – Obligations of owners and operators in relation to safety equipment
This section sets out the responsibilities of owners and operators of recreational vessels in relation to safety equipment, and creates an offence.

If a person owns or operates a recreational vessel in JBT waters, they must ensure that the vessel carries the safety equipment required by the rules, and that the equipment complies with the relevant standards, is in good condition, properly maintained, and is easily accessible. Lifejackets must be stored where they are clearly visible and accessible, and marked by a sign. Failing to comply with these requirements is an offence.

Section 67 – Power to require production of evidence relating to safety equipment
This section enables police officers to require a person who owns or operates a recreational vessel in JBT waters to produce evidence about the condition of safety equipment for the vessel, or how it is maintained or stored. If the person doesn't have the evidence in his or her possession, they must produce the evidence to a police officer within 24 hours, or, if the officer approves, a longer period. Failing to comply with these requirements is an offence.

Division 2 – Requirements to wear lifejackets

Section 68 – Lifejacket requirements for children under 12 years of age
This section sets out lifejacket requirements for children who are less than twelve years of age, and creates two offences.

A child who is less than 12 years old and is on a recreational vessel less than 4.8 metres in length in JBT waters, must wear an appropriate lifejacket. If they do not, the operator of that vessel is guilty of an offence.

A child who is less than 12 years old, who is in an open area of a recreational vessel less than 8 metres in length, which is underway in JBT waters, must wear an appropriate lifejacket. If they do not, the operator of that vessel is guilty of an offence. 'Appropriate lifejacket' is defined in section 7 of the Ordinance as a lifejacket, which a person on a vessel would be required to wear, if the vessel were in NSW waters.

Section 69 – Lifejacket requirements for vessels under 4.8 metres in length
This section sets out lifejacket requirements for vessels under 4.8 metres in length and creates two offences.

A person who is on board a vessel less than 4.8 metres in length in JBT waters must wear an appropriate lifejacket if they are on board the vessel at night, or if they are not accompanied by another person who is 12 years of age or older.

Failing to wear an appropriate lifejacket in such circumstances constitutes an offence. The operator of a vessel on, which the above offence is committed, is also guilty of an offence.

Section 70 – Requirement to wear a lifejacket if directed by the master of a vessel
This section creates an offence of not wearing a lifejacket when directed to do so. A person who does not wear an appropriate lifejacket while on board a recreational vessel in JBT waters is guilty of an offence, if the master of the vessel has directed the person to wear the lifejacket.

Section 71 – General defences to lifejacket requirements
This section sets out two defences for lifejacket requirements under Division 2 of Part 8 of the Ordinance.

A person does not commit an offence if they fail to wear an appropriate lifejacket on a recreational vessel in JBT waters, provided they are not operating the vessel, and they establish that there was no available appropriate lifejacket on board the vessel at the time.

Secondly, a person does not commit an offence if they are the operator of the vessel, and they do not ensure that another person on the vessel is wearing an appropriate lifejacket, provided the operator took all reasonable measures to ensure that the other person was wearing a lifejacket.

Subsections 71(1) and 71(2) place an evidential burden of proof on a defendant in relation to the matters they set out. This is appropriate for several reasons. First, the matters set out in subsections 71(1) and 71(2) are peculiarly within the knowledge of the defendant. Other relevant factors include that failing to wear a life jacket as required under Part 8, Division 2 poses a grave danger to public safety, and it is reasonable to require a person seeking to rely on the defences in subsections 71(1) and 71(2) to produce evidence supporting the defence.

Division 3 – Requirements of hatches and exterior doors

Section 72 – Application of this Division
This section outlines vessels, which are not covered by this Division. There are three criteria that must be met to exempt a vessel from the operation of the Division:

Vessels are not subject to this Division if they:

- are not usually operated within JBT or NSW waters;
- have not been continuously in JBT or NSW waters for more than three months; and
- comply with safety equipment requirements in the vessel's place of registration or home port.

Section 73 – Hatches and exterior doors – construction
This section applies to recreational vessels in which the construction of the hull began on or after 1 January 1991.

The owner of a recreational vessel that the section applies to, which is in JBT waters, must make sure that any hatch or exterior door on the vessel, which can be used to enter or leave the vessel, can be opened both from the outside and the inside of the vessel. Failing to ensure this constitutes an offence.

Further, a person who supplies a recreational vessel to another person for recreational purposes, must ensure that either there is no hatch or exterior door on the vessel, which can be used to enter or leave the vessel; or that the hatch or exterior door can be opened from both the outside and the inside of the

vessel. If the vessel does not have these characteristics, the supplier of the vessel will commit an offence.

Section 74 – Hatches and exterior doors – locking
A person who is operating a recreational vessel in JBT waters must ensure that any hatch or exterior door on the vessel, which can be used to enter or leave the vessel, is kept unlocked if it is reasonably practical to do so. Failing to do so will constitute an offence.

Part 9 – Marine investigation and enforcement

Division 1 – Marine safety investigations

Section 75 - Marine safety investigations
This section relates to marine safety investigations. The Minister can order a marine safety investigation into a marine accident, a situation that could cause a marine accident, alleged incompetence or misconduct by a vessel operator, or a vessel detained because it is unsafe.

Marine safety investigations are intended to determine the circumstances of marine accidents or other matters relating to marine safety, and make recommendations to prevent similar accidents or circumstances from occurring again.

Marine safety investigations can be carried out even if they relate to matters that are being investigated under other laws, or may be the subject of criminal or civil proceedings. If an investigation is carried out into the holder of a current boat driving licence, the Minister may notify the State or Territory, which granted the licence about that investigation.

Section 76 – Appointment of marine investigators
This section gives the Minister the power to appoint marine investigators to carry out investigations. Marine investigators must be appointed in writing, and they are subject to the control and direction of the Minister, except in relation to the contents of their investigation report. The Minister can appoint either a police officer, or a person with qualifications or experience relevant to the investigation, as a marine investigator.

Section 77 – Conduct of marine safety investigations
This section sets out the way marine safety investigations may be conducted. A marine investigator may conduct an investigation in the way they consider appropriate, given the purpose of the investigation.

The investigation may deal with events and circumstances prior to the marine accident or other matter relating to the accident. A marine investigator may rely on evidence about the matter being investigated, which has been given in civil or criminal proceedings, or in any coronial or other judicial inquiry. If the marine investigator is not a police officer, the investigator has the same powers as a police officer would have under Divisions 2 to 6 of Part 9 of the Ordinance.

The Minister can determine at any time to discontinue a marine safety investigation and require the marine safety investigator to prepare and submit a report.

Section 78 – Marine Safety investigation reports
This section sets out the particulars of marine safety investigation reports. After a marine safety investigation is completed, or if the investigator is requested to conclude an investigation under the previous section, the marine investigator must prepare and submit a marine safety investigation report to the Minister.

The report must include findings as to the facts of the marine accident or matter; the cause or most likely cause of the accident; and any recommendations to prevent the recurrence of similar marine

accidents or matters. At any time, the marine safety investigator may submit an interim report to the Minister.

Section 79 – Representations by persons affected by a marine safety investigation report
This section provides that if all or part of a marine safety investigation report significantly relates to a person's affairs, then the marine investigator must give that person a copy of the marine safety investigation report, or the relevant part of that report.

If a person receives such a report (or part of a report), they can make written representations to the marine investigator within 14 days of receiving it.

If representations are made to the marine investigator, the investigator must consider them and notify the person who made the representations of the result; can make further investigations and can change the marine safety investigation report; and must submit a final report to the Minister about the representations, and the conclusions reached and actions taken as a result of them.

Section 80 – Action by Minister following marine safety investigation
This section sets out the courses of action the Minister may take after receiving a marine safety investigation report. The Minister may: choose to take no further action; take action to improve safety procedures; reprimand the holder of a boat driving licence for incompetence or misconduct; inform the State or Territory authority, which granted the boat driving licence about the report and any action taken after the report; recommend to the Commonwealth Director of Public Prosecutions or another law enforcement agency that criminal or other legal proceedings be taken against a person.

Before making a final decision on action under this section, the Minister can conduct a further investigation of the matter; or can refer the matter to a marine investigator for further investigation and report. The Minister may refer the matter to the original marine investigator, or to a different marine investigator.

The Minister must give written notice to the holder of a boat driving licence of any action taken against them, as well as a copy of the final marine safety investigation report. If a person holds more than one boat driving licence, action taken under this section can affect any of the person's boat driving licences.

Section 81 – Public release of a marine safety investigation report
This section enables a marine investigator to make recommendations to the Minister at any time during the course of a marine safety investigation. It also empowers the Minister to publicly release recommendations, if it is in the interests of marine safety to do so.

The Minister can publicly release a report submitted to him or her by a marine investigator, either wholly or in part, unless doing so might prejudice the rights of any person in criminal proceedings connected with the matter.

Section 82 – Protection from liability
This section provides that if a person supplies information to the Minister or a marine investigator in connection with a marine safety investigation, civil proceedings for defamation or breach of confidence in respect of that information cannot be brought against the Commonwealth, the Minister, the marine investigator, or the person who supplied the information.

Division 2 – Entry, search, seizure, detention and information gathering powers

The powers in this Division are intended to give police officers the same powers under the Ordinance as authorised officers have under the NSW Act, within the parameters for enforcement powers set out in the Guide. Enforcement powers from the Cth National Law and the *Navigation Act 2012* have been adapted for use in the Ordinance where appropriate.

Section 83 – Power to board a vessel
This section gives a police officer the power to board a vessel and exercise the monitoring powers set out in section 87 of the Ordinance for several purposes: to determine whether the Ordinance and the rules are being complied with; to investigate a marine accident; to conduct a marine safety investigation; or to ask questions under section 86 of the Ordinance.

The police officer must produce appropriate identification if the master of the vessel requests this. If the police officer fails to produce appropriate identification, the officer must leave the vessel, and not board the vessel again without producing the identification; however, a police officer need not produce identification or leave the vessel for this reason if he or she reasonably believes that to do so would endanger a person.

This section of the Ordinance provides for entry to a vessel without a warrant. The Guide notes at 8.6 that there are limited circumstances where consent or a warrant may not be necessary: "A search without a warrant will only be permitted where the inherent mobility of the particular conveyance means that there may not be time, or it would be impractical to obtain a warrant".

Vessels in JBT waters are inherently mobile, and the time taken to obtain a warrant may give these vessels the opportunity to evade search or to leave the jurisdiction. Vessels may be operating where mobile telephone access is limited or non-existent. The extra-territorial application of criminal provisions in JBT Ordinances means that they also have effect on the Australian Antarctic Territory, Heard Island and McDonald Islands, and on Australian ships outside the adjacent area. Entry to vessels may need to be undertaken when an opportunity is available, including where it is impractical to obtain a court-ordered warrant. The enforcement powers here are appropriate and proportional in the circumstances.

Section 84 – Power to enter premises to access a vessel
This section gives police officers the power to enter premises (other than residential premises), to gain access to a vessel for a purpose referred to in subsection 83(1). If entering premises, the police officer must produce appropriate identification if the occupier requires it, unless the police officer reasonably believes that to do so would endanger a person. If a police officer does not show identification because of reasonable concerns about the safety of a person, the officer must show identification to the occupier as soon as possible after entering the premises.

This provision provides for entry to premises without a warrant or consent, in order to enable access to a vessel. The Guide provides at section 8.6 that "A person who obtains a licence or registration for non-residential premises can be taken to accept entry to those premises by an inspector for the purpose of ensuring compliance with the licensing or registration conditions". The Senate Standing Committee on Scrutiny of Bills has said that these powers can be conferred "...where a person has accepted a commercial benefit subject to being monitored by this means".

The operation of a vessel in JBT waters carries with it certain safety obligations similar to those in other jurisdictions, which issue boat driving licences, such as NSW. Obtaining a boat driving licence involves vessel owners and operators in a regulatory scheme for the oversight of vessel operations, which includes monitoring safety requirements.

This section gives the AFP comparable enforcement powers to those in the equivalent section in NSW legislation (section 116 of the *Marine Safety Act 1998*). Similar provisions to those in section 84 apply to domestic commercial vessels and regulated Australian vessels, both in JBT waters and beyond them: Cth National Law (section 97) and *Navigation Act 2012* (section 257).

Section 85 – Power to enter premises with consent
This section enables a police officer to enter premises and exercise the monitoring powers set out in section 87, for several purposes, provided the occupier of the premises gives consent, and the police

officer shows identification if required to do so by the occupier. Entry with consent may be undertaken to investigate whether the Ordinance and the rules are being complied with; to investigate a marine accident; or to conduct a marine safety investigation.

Section 93 of the Ordinance provides that the police officer and anyone assisting the police officer must leave the premises if the consent ceases to have effect.

Section 86 – Power to require master to answer questions
This section empowers a police officer to require the master of a vessel to answer questions about the nature or operations of the vessel, and to produce any books, records or documents about the vessel or its operations, which are in his or her possession. A police officer can also require a person to provide information about the identity and address of the owner or master of a vessel. It is an offence to fail to comply with either of these requirements.

This section abrogates the privilege against self-incrimination by requiring that a person answers questions and produce books, records or documents in their possession. This is justified in this situation because it is consistent with ensuring public safety in the JBT marine environment through the thorough investigation of marine accidents and incidents. Section 106 also provides for 'use and derivative use immunities', which mean that although a person required to give information under this section cannot refuse to do so because this might incriminate them, any information provided cannot be used in evidence in criminal proceedings against the person. The exception to this is if the proceedings are in respect of whether the information provided was false or misleading.

Section 87 – Monitoring powers
This section sets out a number of powers, which may be exercised by police officers under the Ordinance. A police officer who boards a vessel under section 83, or enters premises under section 85 may exercise the following monitoring powers:

- search the vessel or premises and anything on the vessel or premises;
- examine or observe any activity conducted;
- inspect, examine, take measurements or test anything;
- inspect any document;
- take extracts from, or copy any document;
- make any still or moving image or a recording of the vessel or anything on the vessel or premises;
- take onto the vessel or premises any equipment required to exercise powers;
- request that a person demonstrate the operation of machinery or equipment;
- if the officer has boarded a vessel under section 83, require a person on the vessel to give the officer their name, address, date of birth, or evidence of the person's identity;
- the powers set out in subsections 87(2), 87(3) and 87(4).

This section abrogates the privilege against self-incrimination by requiring that a person give their name, address, date of birth and identity. This is justified in this situation because it is consistent with ensuring public safety in the JBT marine environment. Section 106 also provides for 'use and derivative use immunities', which mean that although a person required to give this information under this section cannot refuse to do so because this might incriminate them, any information provided cannot be used in evidence in criminal proceedings against the person. The exception to this is if the proceedings are in respect of whether the information provided was false or misleading.

Subsection 87(2) provides that if a police officer boards a vessel under section 83, the monitoring powers include the power to require the master of the vessel to stop the vessel, travel on or maintain a specified course or speed, or take the vessel to a specified place.

Subsection 87(3) provides that the monitoring powers include the power to operate or to require a person to operate electronic equipment to see whether the equipment, disk, tape or other storage device

contains information, which is relevant to compliance with the Ordinance and the rules, or to a marine accident or a marine safety investigation.

Subsection 87(4) provides that the monitoring powers include the following powers in relation to data found in the exercise of a power under subsection (3) of this section:

- the power to operate or to direct a person to operate electronic equipment on the vessel or premises, to print out the data, and to take those documents from the vessel or premises;
- the power to operate, or to direct a person to operate electronic equipment on the vessel or premises, to save the data to a disk, tape or other storage device, and to remove the storage device from the premises.

Subsection 87(5) provides that a police officer may operate electronic equipment as mentioned in subsections 87(3) or 87(4) above, only if the officer reasonably believes that the operation of the equipment can be carried out without damage to the equipment.

Subsection 87(6) provides that a person commits an offence if they are required to show or demonstrate the operation of machinery or equipment on the vessel; or to give their name, address, date or birth or proof of identity, or to stop or manoeuvre a vessel, adopt or maintain a specified course or speed, or take a vessel to a specified place, and the person fails to comply with the requirement.

Subsection 87(7) notes that subsection (6) does not apply if the person has a reasonable excuse. Subsection 87(7) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection 87(7) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that failing to assist a police officer when directed poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Subsection 87(8) notes that an offence against subsection 87(6) is an offence of strict liability. 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 imposition of strict liability, and a penalty of 50 penalty units, reflects the seriousness of the offence and is intended to deter vessel owners or operators from operating vessels unsafely and prevent unlawful activity in JBT waters.

In accordance with the Guide, strict liability is justified in these circumstances as the penalty does not include imprisonment or exceed 60 penalty units. In addition:

- imposing strict liability is likely to significantly enhance the effectiveness of the Ordinance;
  - by deterring a person from failing to demonstrate the operation of equipment, or identify themselves, or manoeuvre a vessel as directed by the police officer, as this failure may comprimise an investigation; and
  - failure to manoeuvre a vessel as directed by the police officer may result in endangering a police officer's life in.
- imposing strict liability is necessary to ensure the integrity of the regulatory regime as the investigation may be comprimised if a police officer is unable to undertake these monitoring activities.
- there are legitimate grounds for penalising persons lacking fault because he or she will be placed on notice by the police officer to guard against the possibility of the contravention of failing to comply with the requirements.
- there is community support and acceptance for both the measure and the penalty as police officers require reasonable monitoring powers to effectively undertake marine investigation and enforcement activities in JBT waters.

Section 88 – Sampling, securing or seizing things found using monitoring powers in relation to a vessel
This section applies if a thing is found during the exercise of monitoring powers in relation to a vessel, and a police officer reasonably believes that it is evidential material, and any of the powers under this section need to be exercised without a warrant, in order to prevent evidence being concealed, lost or destroyed.

A police officer may take a sample of the thing and remove the sample from the vessel, may secure the thing for up to 72 hours, and may seize the thing. If a police officer exercises a power under this section on the basis of a reasonable belief that the power needs to be exercised without a warrant, because it is not practicable to obtain a warrant, they must give the Minister a report describing (a) the exercise of the power and (b) the grounds for their belief.

This section allows for seizure of property found when a vessel is being searched, without a warrant. This section is only intended to be used where it is impractical to obtain a warrant, such as in remote locations with little or no mobile phone coverage, that would make it impossible to obtain such a warrant in a reasonable timeframe. This section is also intended to enable the timely seizure of material after a marine accident in order to prevent the destruction of evidence. Other Commonwealth legislation contains comparable provisions, including section 100 of the Cth National Law and subsection 68(6) of the *National Vocational Education Training Regulator Act 2011*.

Section 89 – Power to detain vessels
This section enables a police officer to detain a vessel in JBT waters and bring it to a holding area, if the officer reasonably suspects that the vessel is or was involved in an offence against the Ordinance, or will be involved in such an offence in future.

If a vessel is detained under this section, the police officer must give written notice to the owner of the vessel, or if the owner cannot be found, to the person in charge of the vessel just before it was detained. The notice must be given within 14 days, and must identify the vessel, state that it has been detained and the reasons for the detention, contact details of a police officer who can give further information about the detention, and information about the return of the vessel. Part 9 Division 5 provides further detail about how the costs of detention are dealt with.

If the police officer cannot conveniently give the notice in person, they may give notice by attaching the notice to the vessel.
Operating a vessel, which has been detained under this section, before it has been released from detention, or without the authorisation of a police officer, constitutes an offence.

Section 90 – Power to require production of a boat driving licence
This section empowers a police officer to require the holder of a boat driving licence to produce that licence, if they are doing something for which the licence is required. If the licence is not in the person's possession at the time the requirement is made, the person must produce the licence within 24 hours, or a longer period, which is approved by a police officer. A police officer may seize a boat driving licence, which is expired or, which the officer has reason to believe is false. Failing to produce a licence on demand, within 24 hours, or within the period approved by a police officer, constitutes an offence.

Section 91 – Power to require persons to give information, produce documents or answer questions
This section enables police officers to give a notice to a person requiring the person to give a police officer information, to produce a document, or to answer questions before a specified police officer. The notice must specify the period within which the person is required to comply with the notice, which must be at least 14 days after the notice is given to the person. It must also specify the manner

in which the person is required to comply with the notice, the time and place at which the person is expected to appear (if applicable), and that is it an offence not to comply with the notice.

A police officer may require answers to questions given by a person, who is required by the notice to answer questions, to be given under oath or affirmation, and to be given either orally or in writing. The police officer to whom information or answers are verified or given may administer the oath or affirmation.

If the place specified in the notice is more than 16 kilometres from the person's place of residence when the person receives the notice, the person is entitled to be paid a reasonable allowance for expenses incurred by the person for transport, meals and accommodation in connection with appearing before the police officer. Failing to comply with a notice given under this section is an offence.

This section abrogates the privilege against self-incrimination by requiring that a person give information or produce a document. It is justified in this situation because it is consistent with ensuring public safety in the JBT marine environment. Section 106 also provides for 'use and derivative use immunities', which mean that although a person required to give information under this section cannot refuse to do so because this might incriminate them, any information provided cannot be used in evidence in criminal proceedings against the person. The exception to this is if the proceedings are in respect of whether the information provided was false or misleading.

Division 3 – Persons assisting police officers

Section 92 – Persons assisting police officers

Subsection 92(1) provides that a police officer may be assisted by other persons in the execution of their marine investigation and enforcement powers, functions and duties (provided for under Part 9 of the Ordinance) if that assistance is necessary and reasonable. Someone who assists a police officer in the exercise of their powers, functions and duties is called a 'person assisting' the police officer. The Ordinance does not limit the class of persons who may be a 'person assisting'.

'Police officer' is defined under section 6 of the Ordinance to mean a member or special member of the Australian Federal Police within the meaning of the *Australian Federal Police Act 1979* (see, in particular, section 4(1) of that Act).

Paragraphs (a) and (b) of subsection 92(2) provide for specific things that a person may do in assisting a police officer, namely, board a vessel or enter premises, and exercise powers and perform functions and duties under Part 9 of the Ordinance. However, under paragraph (c) of subsection 92(2), a person is only authorised by the Ordinance to do such things if they do them in accordance with a direction given to them by the police officer. If a person assisting did such things other than in accordance with a direction given by the relevant police officer, their actions would not be authorised by the Ordinance, and any such power, function or duty purportedly exercised or performed by them would not be taken to have been exercised by the relevant police officer under subsections 92(3) and 92(4) (see below).

Under subsections 92(3) and 92(4), if a person exercises a power or performs a function or duty under Part 9 of the Ordinance in the course of giving necessary and reasonable assistance to a police officer who is also exercising powers or performing functions or duties under Part 9, and the person does so in accordance with a direction given to them by the police officer, the power, function or duty exercised or performed by the person will be taken for all purposes to have been exercised or performed by the police officer in question. Section 109 of the Ordinance provides that certain provisions of Part 6 do not apply to a police officer in certain circumstances: if s 109 would apply to a police officer exercising a power or performing a function or duty, then, provided the relevant criteria in sections 92 and 109 are satisfied, then the same exemption would apply to a person assisting who was exercising the power or performing the function or duty.

'For all purposes' an action of a person assisting a police officer, who is acting in accordance with the police officer's directions, is taken to be the action of the instructing police officer. Therefore, the police officer can generally be questioned about the action in the same way as they could be questioned had they taken the action themselves.

Exemptions under section 110 do not apply to a person assisting (only on the basis that they are a person assisting), as section 110 applies to persons assisting the Australian Defence Force or the naval, military or air forces of another country.

Division 4 – Obligations and incidental powers of police officers

Section 93 – Consent
This section requires a police officer seeking consent to enter premises under section 85 to inform the occupier that they may refuse consent. If obtained, consent to enter premises has no effect unless it is voluntary. Consent may be given for a limited time, and may be withdrawn at any time. The police officer and any person assisting the police officer must leave the premises if the consent ceases to have effect.

Section 94 – Compensation for damage to electronic equipment
This section requires the Commonwealth to provide agreed and reasonable compensation to the owner of electronic equipment or the user of data or programs for damage to that equipment or corruption of data or programs. The damage or corruption must result from insufficient care exercised by the operator of the equipment or in the selection of the operator of the equipment, and includes erasing or corrupting data or adding other data.

The owner or user of the electronic equipment may seek compensation from a court if the amount of compensation cannot be agreed between the owner and the Commonwealth. In determining reasonable compensation, regard is to be had to whether the occupier of premises, or their employees or agents, provided any appropriate warning or guidance on the operation of the equipment.

Division 5 – General provisions relating to seizure and detention

Section 95 – Copies of seized things to be provided
This section requires a police officer to give a copy of a document, film, computer file or storage device, which has been seized from a vessel or premises, to the master of the vessel or the occupier of the premises. Such a copy must be given as soon as practicable after the seizure, unless possession of the document, film, computer file, thing or information by the master or occupier could constitute an offence against a law of the Commonwealth, a State or a Territory.

Section 96 – Receipts for seized things
This section provides that a receipt must be provided by a police officer for a thing seized under this Part of the Ordinance. A receipt may cover two or more things seized.

Section 97 – Return of seized things
This section requires a police officer to take reasonable steps to return things seized under this Part when the reason for seizing the thing no longer exists, or it is decided not to use the thing in evidence, or 60 days have passed since the seizure of the thing. These provisos, however, do not apply if a court makes an order to the contrary, if the thing is forfeited or forfeitable to the Commonwealth, or is the subject of a dispute about its ownership.

A police officer does not need to take reasonable steps to return a thing before 60 days expires if proceedings for which the thing may be evidence were instituted before the end of the 60 days and are not yet complete. The thing may continue to be retained because of an order under section 98 of the Ordinance (made by a Magistrate), or the Commonwealth, or if a police officer is otherwise authorised to keep, dispose of or otherwise deal with the thing.

A thing required to be returned under this section must be returned to the person it was seized from, unless they are not entitled to be in possession of it, in which case it must be returned to its owner.

Section 98 – Magistrate may permit a thing to be retained
This section empowers a police officer to apply to a magistrate for an order authorising a thing to be retained for longer than 60 days, provided the order is sought before the end of the 60-day period, or before the end of a period previously specified in an order of a magistrate under this section, and proceedings for which the thing may form evidence have not yet been instituted.

If the magistrate is satisfied that it is necessary to continue to retain the thing, he or she may make an order that it can be retained for a period specified in the order (which must not be longer than 3 years). Before making this application, the police officer must attempt to find people who have an interest in the retention of the thing, and notify each of them about the proposed application.

Section 99 – Disposal of seized things
This section gives the Minister the power to dispose a thing seized under this Part of the Ordinance if a police officer has taken reasonable steps to return the thing to a person (under section 97 above), and the officer has either been unable to locate the person, or the person has refused to take possession of the thing. If these conditions are met, the Minister may dispose of the thing in an appropriate manner.

Section 100 – Costs of detention
This section requires the Commonwealth to pay reasonable compensation to the owner of a vessel for the costs of, and incidental to, the detention of the vessel; and for any loss or damage suffered by the owner as a result of the detention of the vessel, if there was no reasonable cause for the detention of the vessel.

If a vessel is detained under this Part of the Ordinance, and the circumstances of the detention were reasonable, and the Commonwealth incurred costs in relation to the detention, the owner of the vessel is liable to pay compensation of a reasonable amount in respect of the detention of the vessel.

If the owner and the Commonwealth cannot agree on the amount of compensation payable in the cases above, either party may institute court proceedings for the recovery of reasonable compensation.

Division 6 – Rights and responsibilities of masters etc.

Subdivision A – Responsibilities relating to marine accidents

Section 101 – Obligation to stop and give assistance
This section creates an obligation on the master of a vessel to stop or give any necessary assistance, if their vessel is involved in a marine accident involving another vessel or the death or injury of another person. Failing to stop in these circumstances will constitute an offence.

Section 102 – Obligation to produce licence and give particulars
This section creates an offence. If a person is the master of a vessel, the vessel is involved in a marine accident, and a person with reasonable grounds to do so asks the master to produce the boat driving licence held by the master, and give particulars of the master's name and address, or the name and address of the owner of the vessel, or the name of the vessel and any distinguishing number on the vessel; the master must disclose this information. Failing to do so will constitute an offence.

Section 103 – Obligation to report marine accidents to the Minister
This section creates an obligation to send a report of a marine accident to the Minister, containing particulars of the accident as soon as possible. These particulars include the time, place and type of marine accident; the name and number of each vessel involved; the name and address of each person

who was involved in, or witnessed, the accident; and any loss of life, injury or damage resulting from the marine accident.

The report must be sent by the master (and the owner of the vessel if they are aware of the accident). Reports need not be sent if a report of the accident has already been sent by the owner or master, or if the marine accident involves recreational vessels only and does not result in loss of life or injury; property damage greater than $5,000, or damage to the environment. Failing to send a report, if a person is required to send a report, is an offence.

Section 104 – Obligation to preserve evidence
This section imposes an obligation to preserve evidence on the owner or master of a vessel, or a person otherwise concerned in a marine accident. If a person is the owner or master of a vessel involved in a marine accident, or is otherwise concerned in a marine accident, and the person has reason to believe that evidence relating to the marine accident may be required for an investigation into the marine accident, and the person fails to take all reasonable measures to preserve the evidence, this constitutes an offence. Evidence relating to the marine accident includes nautical charts, logbooks and other documents.

Subdivision B – Other rights and responsibilities

Section 105 – Requirement to facilitate boarding
This section requires a person to comply with a police officer's request to take reasonable steps to facilitate the boarding of a vessel under this Part. This requirement may be made by any reasonable means, and the requirement is made whether or not the person in charge of the vessel understands or is aware of the requirement. A person commits an offence if a requirement is made and the person fails to comply with the requirement.

This is an offence of strict liability, unless the person has a reasonable excuse.

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. The imposition of strict liability, and a penalty of 50 penalty units reflects the seriousness of the offence, and is intended to deter vessel owners or operators from operating vessels unsafely and prevent unlawful activity in JBT waters. It is likely that making this an offence not involving fault will significantly enhance the effectiveness of enforcement in deterring the offending conduct.

In accordance with the Guide, strict liability is justified in this circumstance as the penalty does not include imprisonment or exceed 60 penalty units. In addition:

- imposing strict liability is likely to significantly enhance the effectiveness of the Ordinance;
  - by deterring a person from failing to facilitate a police officer boarding a vessel, as this failure to comply with the requirement may result in endangering the police officer's life in dangerous marine circumstances; and
  - an investigation may be comprimised if a police officer is unable to board the vessel and undertake monitoring activties.
- there are legitimate grounds for penalising persons lacking fault because he or she will be placed on notice by the police officer to guard against the possibility of the contravention of failing to comply with the requirement.
- there is a general community and acceptance for both the measure and the penalty as police officers require reasonable enforcement powers to effectively undertake their marine investigation and enforcement activities in JBT waters.

Subsection 105(5) places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection 105(5) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that failing to comply with a police officer's request to take reasonable steps to facilitate boarding the vessel poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Section 106 – Self-incrimination
This section states that a person is not excused from giving information, producing a document or thing or answering a question under section 86, paragraph 87(1)(i) or section 91 of the Ordinance on the basis that the information, document, thing or answer to the question might incriminate the person, or expose them to a penalty.

If a person has provided information, a document, a thing or an answer to a question, the fact that they provided them, and any information, document or thing obtained as a consequence of the person providing them, cannot be admitted as evidence against that person in criminal proceedings. The exception to this is in proceedings about whether the information, document, thing or answer is false or misleading.

An abrogation of the privilege against self-incrimination is intended to enable the thorough investigation of marine accidents and incidents with implications for public safety. If the design of a vessel is flawed, or a vessel operator's actions had negative consequences, there is a public interest in obtaining a full account of a matter, which outweighs an individual's right not to incriminate themselves.

Section 106(2) provides for a 'use and derivative use' immunity, which means that information provided by an individual cannot be used in criminal proceedings against that person, as outlined in paragraph 9.5.4 of the Guide. These immunities, however, will not apply to information provided, which was false or misleading, which is listed as an exception to the privilege against self-incrimination at paragraph 9.5.2 of the Guide.

Part 10 – Miscellaneous

Division 1 – Exemptions

Section 107 – Exemption on safety or emergency grounds
This section provides that a person does not contravene a provision of the Ordinance if they act (or fail to act) with the aim of ensuring a person's safety, or avoiding significant risk to the environment. Further, a person operating a vessel does not contravene a provision of the Ordinance if they display an emergency patrol signal in the circumstances set out in paragraph 41(2)(a) or (b).

These exemptions do not apply in relation to contravening a mandatory provision. Mandatory provisions are defined in section 6 of the Ordinance.

Section 108 – Exemption for certain activities
This section provides for exemptions from most provisions of the Ordinance (with the exception of a number of provisions listed in the section) for activities, which are authorised by permits in force under regulations 12.06(2) or 12.09(1) of the EPBC Regulations, or carried out by an Indigenous person in accordance with regulation 12.08 of the EPBC Regulations.

This section places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsection (a) (b) and (c) are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant

factors include that failing to comply with the offence provisions in the Ordinance poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Section 109 – Exemption for police officers acting in course of duties
This section provides an exemption for police officers acting in the course of their duties from a number of provisions of the Ordinance. Police officers are exempted from some of the provisions of Part 6 of the Ordinance, if they are acting in the course of their duties as police officers, are taking reasonable care, and it is reasonable that the provision should not apply. This exemption is intended to allow police officers to perform their functions under the Ordinance without being subject to prosecution, and is intended to be similar to the exemption for drivers of police vehicles under the *Australian Road Rules*.

Section 110 – Exemption for persons assisting Australian Defence Force etc.
This section sets out an exemption for persons assisting the Australian Defence Force, or a foreign defence force, from some of the provisions of the Ordinance. Exemptions are made from provisions including those relating to speed, climbing onto vessels, and interfering with equipment on a vessel. These exemptions are intended to enable persons or organisations assisting defence personnel with exercises to undertake activities, which would in an ordinary context be dangerous, but are necessary for training purposes.

This section places an evidential burden of proof on a defendant in relation to the matters it sets out. This is appropriate for several reasons. First, the matters set out in subsections (a) to (h) inclusive are peculiarly within the knowledge of the defendant. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters. Other relevant factors include that the conduct proscribed by the offence (e.g. failing to provide assistance at the request of the Australian Defence Force, or the naval, military or air forces of another country) poses a grave danger to public safety, which makes it reasonable to require a person seeking to rely on a defence to produce evidence supporting the defence.

Section 111 – Exemption by the Minister
This section enables the Minister to grant exemptions from provisions of the Ordinance or the rules, or notices made under section 16, subject to certain conditions. The exemptions may cover a person or a vessel. The exemption must be given to each person to whom it applies, and may specify conditions.

The Minister cannot grant an exemption or impose conditions, unless satisfied that the exemption and any conditions will not jeopardise the safety of a person on board a vessel, or a vessel; or detrimentally affect the conduct of a marine safety investigation. The Minister must not grant an exemption from a mandatory provision. Mandatory provisions of the Ordinance are defined in section 6 of the Ordinance.

The Minister's decision not to grant an exemption to a person or a vessel may be reviewed by the Administrative Appeals Tribunal.

Section 112 – Exemption by the rules
This section enables the rules to provide that a class of persons, or a class of vessels, is exempt from specified provisions of the Ordinance or the rules, or notices made under section 16 of the Ordinance. The exemptions granted may be conditional, but must not attempt to exempt any class of persons or vessels from the application of a mandatory provision. The sections of the Ordinance, which are mandatory provisions are defined in section 6 of the Ordinance.

Section 113 – Offence – breaching a condition of an exemption
This section provides that if a person operates a vessel in JBT waters, and an exemption from section 111 or section 112 of the Ordinance relates to either the person or the vessel, and the exemption is

subject to a condition, and the person breaches the condition, the person has committed an offence. This offence is an offence of strict liability.

Exemptions from the provisions of the Ordinance (not including mandatory provisions defined in section 6), whether granted by the Minister or by the rules, sometimes carry conditions, which are intended to ensure the safety of all users of JBT waters, or of the individuals on a vessel. Breaching a condition could compromise public safety, or the safety of individuals on a vessel, which is why this offence carries a relatively high maximum penalty of 60 penalty units, and has been designated as a strict liability offence. Strict liability offences still allow a defence of honest and reasonable mistake of fact to be raised (paragraph 2.2.6 of the Guide).

In accordance with the Guide, strict liability is justified in these circumstances as the penalty does not include imprisonment or exceed 60 penalty units. In addition, imposing strict liability is likely to significantly enhance the effectiveness of the Ordinance by deterring a person, or master of a vessel, from breaching a condition to an exemption, as if the exemption was not subject to a condition.

There is also community support and acceptance for both the measure and the penalty as exemptions from the Ordinance, subject to conditions, permits a lower standard of marine safety to that imposed on the general public. Breaching a condition may futher jepordise community safety.

Division 2 – Other matters

Section 114 – Delegation by Minister
This section enables the Minister to delegate most of his or her functions under the Ordinance to an Australian Public Service employee at Executive Level 2 or higher level, within the Department responsible for Territories. The Minister may not, however, delegate the power to make rules under the Ordinance, nor the power to delegate.

The Minister's power to delegate here includes the power to delegate to an employee below SES level in order to allow delegations to be made to the Director of the JBT Administration, an EL2 position. The Director of the JBT Administration has day-to-day responsibility for the governance of the JBT and has the ability to respond quickly to emergency situations in the JBT. For these reasons, the power of delegation has been drafted to enable Ministerial delegations to be made to this position.

Section 115 – Summary proceedings for offences
This section provides that proceedings for an offence against the Ordinance may be dealt with summarily by a court.

Section 116 – Persons who may bring proceedings
This section provides that a police officer may bring proceedings for an offence against the Ordinance.

Section 117 – Compensation for acquisition of property
This section provides that if the operation of the Ordinance would result in the Commonwealth acquiring property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to that person. If the amount of compensation cannot be agreed between the person and the Commonwealth, the person may commence proceedings in court to recover reasonable compensation from the Commonwealth, as determined by the court.

Section 118 – Rules
This section gives the Minister the power to make rules to prescribe matters, which the Ordinance requires or allows to be prescribed by rules, or which are necessary or convenient to be prescribed to carry out or give effect to the Ordinance. Rules may not, however, create an offence or a civil penalty, create powers of arrest, detention, entry, search or seizure, impose a tax, or amend the text of the Ordinance.

Part 11 – Application, savings and transitional provisions

Section 119 – Savings – proceedings for offences
This section provides that sections 23 and 24 of the 2007 Ordinance continue to apply in relation to any proceeding for an offence under the 2007 Ordinance, even though the Ordinance repeals the 2007 Ordinance.

Schedule 1 – Repeals
This schedule repeals the *Marine Safety Ordinance 2007*.

The Hon Christian Porter MP
Minister for Social Services

MC17-006075

10 MAY 2017

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 30 March 2017 regarding the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016*. I appreciate the time you have taken to bring this matter to my attention.

I note the comments provided in the Delegated Legislation Monitor number 4 of 2017, in regards to the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* [F2017L00209], that the Explanatory Statement does not include a description of the National Disability Insurance Scheme (NDIS) Price Guide and Legacy Stock Price List, or indicate how they may be obtained. Having regard to paragraph 15J(2)(c) of the *Legislation Act 2003*, I will submit a revised Explanatory Statement which includes a description of these documents, as well as website links indicating how the documents may be publicly accessed.

In relation to the Committee's comments on the authority of the National Disability Insurance Agency (NDIA) to issue the NDIS Price Guide and Legacy Stock Price List, the *NDIS Act 2013* establishes the NDIA and its functions. The functions are set out in section 118(1) of the *NDIS Act 2013* and include:

- "to manage the financial sustainability of the National Disability Insurance Scheme" (s 118(1)(b)) and
- "to do anything incidental or conducive to the performance of the above functions"(s 118(1)(h)).

To undertake these functions, it is appropriate that the NDIA set prices and use other methods to ensure that the prices of supports under the NDIS support financial sustainability.

Thank you again for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-008945

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

01 JUN 2017

Dear Chair John

I refer to your letter of 11 May 2017 noting the Senate Standing Committee on Regulations and Ordinances' requests for advice on the *National Health (Listed drugs on F1 and F2) Amendment Determination 2017 (No. 2) (PB22 of 2017)* ('F1/F2 Determination') and the *Private Health Insurance (Benefit Requirements) Amendment Rules 2017 (No. 2)* ('Benefit Rules'). I will address the requests for advice in turn.

The F1/F2 determination is one of eleven legislative instruments that were registered for commencement on 1 April 2017 as part of monthly amendments to legislative instruments under the *National Health Act 1953*. As suggested by the Committee, the listing of etanercept on both the F1 list and F2 list was the result of a drafting error in the F1/F2 determination.

Etanercept should have been omitted from the F1 list. This error will be corrected in an amendment to the *National Health (Listed drugs on F1 and F2) Determination 2010 (PB93 of 2010)* to take effect on 1 June 2017. This has not caused, and will not cause, any impact to Government, suppliers of etanercept or patients.

In relation to the Benefit Rules, the Committee has sought clarification on why the indexation method used to calculate the minimum benefit payable per night for nursing-home type patients by private health insurers does not appear to be codified in the principal rules.

I understand that it has not been common practice to provide an explanation of the indexation method in the *Private Health Insurance (Benefit Requirements) Rules 2011* (the Rules). The Rules negotiated with relevant parties have been in effect since 2011 and there has been no record of any concern raised regarding the method or this practice since this time by hospitals or private health insurers.

The Committee has also queried whether it would be appropriate for the indexation method to be specified in the Rules in the future. My Department has progressively been reviewing the regulatory instruments that relate to private health insurance and identified a number of possible amendments that aim to strengthen clarity and administrative efficiencies for stakeholders and the Government.

My preference is that any proposed changes be consolidated within a package of reforms that I will shortly receive from the Private Health Ministerial Advisory Committee (PHMAC). The PHMAC has been actively reviewing the arrangements for private health insurance including standard clinical definitions, contracting, minimum default benefits and second tier default benefits; all of which could impact the Rules. Continuing the Rules in their current form will enable my Department to incorporate all required changes in the most efficient, consistent and holistic manner.

I trust this information will be of assistance to the Committee.

Yours sincerely

Greg Hunt

The Hon Christian Porter MP
Minister for Social Services

MC17-007134

25 MAY 2017

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Chair

Thank you for your letter of 23 March 2017, on behalf of the Senate Standing Committee on Regulations and Ordinances, regarding the Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124].

I note the comments of the Committee with respect to the incorporation of documents and would like to take this opportunity to refer to a similar request from the Committee that arose in relation to the *Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016*.

As noted in our previous response, section 8 of the *Social Security (International Agreements) Act 1999* (the International Agreements Act) provides for regulations to add to the Act a Schedule setting out the terms of an agreement between Australia and another country if the agreement relates to reciprocity in social security or superannuation matters.

The *Social Security (International Agreements) Amendment (New Zealand) Regulation 2017*, which adds a new schedule 3 to the International Agreements Act, must therefore set out the exact terms of the agreement between Australia and New Zealand. The references to the New Zealand social security law contained in definitions appears in Article 1 (Definitions) and the references to the *New Zealand Privacy Act 1993* and the New Zealand privacy laws appear in Article 18 (Exchange of Information) and Part A (Terms and conditions for exchange of information for social security purposes) of the Schedule to the agreement.

Where the text of an international social security agreement is set out in a Schedule to the Act, the provisions of the agreement have effect despite anything in the social security law (subsection 6(1) of the Act). However, this only applies to provisions of the agreement that:

- are in force; and
- affect the operation of the social security law (subsection 6(2) of the Act).

The reference to the New Zealand social security law and the *New Zealand Privacy Act 1993* (including, New Zealand privacy laws) do not affect the operation of the social security law. The *Social Security (International Agreements) Amendment (New Zealand) Regulation 2017* does not therefore apply, adopt or incorporate New Zealand social security law or privacy laws (including the *New Zealand Privacy Act 1993*) for the purpose of section 14 of the *Legislation Act 2003*.

For completeness, and the Committee's further information, Article 2 of the Agreement applies the social security laws of Australia and New Zealand, as well as the *New Zealand Veteran's Support Act 2014*, as they apply to or affect the relevant benefits covered under the Agreement, at the time of signing, and to any legislation that subsequently amends, supplements, consolidates or replaces them.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services