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Regulations and
Ordinances

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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, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

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 seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

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

Publications

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

1 For further information on the disallowance process and the work of the committee see *Oggers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

in the monitor are also listed in the 'Index of instruments' on the committee's website.²

Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.³

Guidelines

Guidelines referred to by the committee are published on the committee's website.⁴

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.⁵

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.⁶

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.⁷

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

3 See www.aph.gov.au/regords_monitor.

4 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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

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

7 Regulations and Ordinances Committee, *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 registered on the Federal Register of Legislation between 29 March and 9 May 2018 (new matters).

Guidelines referred to by the committee are published on the committee's website.¹

Response required

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

Instrument	Air Navigation (Aircraft Noise) Regulations 2018 [F2018L00448]
Purpose	Regulates noise standards applicable to air navigation and the provision of related noise certificates and approvals
Authorising legislation	<i>Air Navigation Act 1920</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ²

Offences: strict liability³

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 impose offences of strict liability (which negates the requirement to prove fault), this infringement on a fundamental protection of the criminal law is justified.

1 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(b).

The instrument imposes four offences containing elements of strict liability:

- section 6 sets out requirements for different types of aircraft in relation to noise standards, noise certificates and other specified approvals. Subsection 6(4) imposes an offence if an aircraft engages in air navigation without complying with the relevant requirements. Subsection 6(5) applies strict liability to elements of the offence, such as the type of aircraft and the existence of a relevant approval;
- section 13 provides for the revocation of a noise certificate, and subsection 13(4) imposes an offence of strict liability if an aircraft operator fails to return a noise certificate that has been revoked (or to have its revocation appropriately noted in relevant flight documents);
- section 20 imposes an offence if a 'large marginally compliant aircraft' operates at a restricted airport in contravention of a relevant ministerial notice. Subsection 20(3) applies strict liability to the matter of whether the aircraft operator's conduct resulted in such a contravention; and
- subsection 21(3) imposes an offence of strict liability if a person ceases to be an inspector, and does not return their identity card within 14 days.

In a criminal law offence, proving fault is usually a basic requirement, but offences of strict liability remove the fault element that would otherwise apply. This means that a person could be punished for doing or failing to do something whether or not they have a guilty intent. This should only occur in limited circumstances.

The committee's expectation is that the explanatory statement (ES) to an instrument should include a justification for any strict liability offences imposed by the instrument, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Offences Guide).⁴

The ES to the instrument provides no information in relation to the imposition of strict liability in the above offences.

The committee requests the minister's advice as to the justification for the imposition of strict liability in each of the offences in sections 6, 13, 20 and 21 of the instrument.

4 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>.

Offences: evidential burden of proof on the defendant⁵

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 offence provisions in instruments reverse the burden of proof for persons in their individual capacities (requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

As noted above, subsection 21(3) of the instrument imposes an offence if a person does not return their identity card within 14 days of ceasing to be an inspector. Subsection 21(4) provides an offence-specific defence to the offence, where the person had a 'reasonable excuse' for failing to return the identity card. In so doing, it imposes on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence.⁶

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

The committee's expectation is that the appropriateness of provisions that have the effect of reversing burdens of proof should be explicitly addressed in the explanatory statement (ES) to the instrument, consistent with the Offences Guide.

The ES to the instrument provides no information in relation to the justification for reversing the evidential burden of proof in subsection 21(4).

The committee requests the minister's advice as to the justification for using an offence-specific defence that reverses the burden of proof in subsection 21(4) of the instrument.

5 Scrutiny principle: Senate Standing Order 23(3)(b).

6 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is reflected in the Note to subsection 21(4) of the instrument.

Subdelegation⁷

Section 24 of the instrument provides that the secretary (of the Department of Infrastructure, Regional Development and Cities) may delegate his or her powers under the instrument to any employee of the department, officer of the Civil Aviation Safety Authority or employee of Airservices Australia. No limitations are placed on the level of seniority, qualifications or expertise that delegates must have, and the ES provides no information in relation to the broad subdelegation of powers.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to

- **why it is necessary to allow such broad delegation of the secretary's powers under the instrument, to all employees of three government agencies; and**
- **the appropriateness of amending the instrument to require that the secretary be satisfied that officials to whom powers are delegated under section 24 have the expertise appropriate to the power delegated.**

Incorporation of document⁸

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);

7 Scrutiny principle: Senate Standing Order 23(3)(a).

8 Scrutiny principle: Senate Standing Order 23(3)(a).

- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁹

With reference to the above, the committee notes that several provisions of the instrument incorporate 'the Annex', defined in section 4 as Volume 1 of Annex 16 to the Chicago Convention,¹⁰ as in force at the commencement of the instrument.

⁹ Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

The instrument therefore appears to indicate clearly the date at which the Annex is applied in the relevant provisions of the instrument (the date of commencement of the instrument), consistent with the Legislation Act. In this regard, however, the committee notes that section 10 of the instrument requires noise certificates to 'contain information required by the Annex'. In its explanation of section 10, the ES states that:

Section 10 references the Annex rather than setting out in the Regulations the form and content of the noise certificate. The provisions of the Annex are subject to regular amendment and specifying the form and content of the noise certificate in the Regulations is likely to result in Australia being non-compliant with obligations under the Chicago Convention. The form and content of noise certificates is set out in procedural guidance issued by Airservices Australia for aircraft operators when applying for a noise certificate.

This explanation appears to the committee to suggest that the form and content requirements for noise certificates would be expected to change from time to time when the Annex is amended. However, section 10 of the instrument can only require that noise certificates contain information required by the Annex as it is incorporated: that is, as it exists at the commencement of the instrument.

In relation to access to the Annex, the ES states that it 'is not a publically available document, however, aircraft operators requiring access to the document are entitled to be provided with a copy upon request'. The ES does not indicate the person or body from whom aircraft operators can request and obtain such access, whether such access is provided free of charge, and why similar access on request can not be provided to members of the public.

The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms. While aircraft operators may be able to access the Annex freely, the committee is also interested in the broader issue of access for other parties who might be affected by, or who are otherwise interested in, the law.

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made available to all interested or affected persons. This might, for example, involve noting the availability of the document through specific public libraries, or making the document available for viewing on request (such as at the department's offices). Consideration of this

10 The Chicago Convention is defined in section 3 of the *Air Navigation Act 1920* as the Convention on International Civil Aviation concluded at Chicago on 7 December 1944.

principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to:

- **whether the requirement in section 10 is that noise certificates contain information required by the Annex as in force at the date of commencement of the instrument, consistent with the definition in section 4 and with the requirements of the *Legislation Act 2003*; and**
- **how the Annex is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.**

The committee also requests that the instrument and/or its explanatory statement be amended to include this information.

Instrument	Amendment of List of Exempt Native Specimens – NSW Estuary Prawn Trawl, NSW Ocean Trawl and NT Demersal Fisheries, April 2018 [F2018L00575]
Purpose	Amends the List of Exempt Native Specimens by deleting specimens taken from the New South Wales Estuary Prawn Trawl and Prawn Trawl Fisheries, and the Northern Territory Demersal Fishery; and including specimens taken from those same three fisheries, subject to certain conditions
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ¹¹

Legislative authority: power to make instrument¹²

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

11 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

12 Scrutiny principle: Senate Standing Order 23(3)(a).

legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under paragraph 303DC(1)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It amends the list of exempt native specimens established under section 303DB of the EPBC Act (exempt specimens list) by including and deleting items from the list.

Subsection 303DC(1A) of the EPBC Act provides that, in deciding whether to amend the exempt specimens list to include a specimen derived from a commercial fishery, the minister must rely primarily on the outcomes of any assessment in relation to the fishery carried out for the purposes of Division 1 or 2 of Part 10 of the EPBC Act. The requirement in subsection 303DC(1A) appears to be a precondition to the making of an instrument under subsection 303DC(1) to amend the exempt specimens list by including a specimen derived from a commercial fishery.

Schedule 2 to the instrument amends the exempt specimens list by including specimens derived from fish or invertebrates taken in the New South Wales (NSW) Estuary Prawn Trawl, NSW Ocean Trawl and Northern Territory (NT) Demersal Fisheries. The committee's research indicates that these fisheries may be commercial fisheries of the type contemplated by subsection 303DC(1A) of the EPBC Act.¹³ If so, it would appear that the requirement in that subsection applies to the making of the instrument. Neither the instrument nor its explanatory statement (ES) specifies whether the specimens are derived from a commercial fishery.

The ES to the instrument does state that:

In determining to include 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.

However, it is unclear to the committee whether the guidelines referred to in the ES constitute the outcomes of an assessment in relation to the fisheries mentioned in Schedule 2. Moreover, neither the instrument nor the ES provides any further information in relation to whether an assessment was made for the purposes of

13 For example, the NSW Department of Primary Industries lists the NSW Estuary Prawn Trawl and Ocean Trawl Fisheries under the heading of 'commercial fishing'. See <https://www.dpi.nsw.gov.au/fishing/commercial/fisheries>. Similarly, the NT Department of Primary Industry and Resources lists the NT Demersal Fishery under the heading of 'commercial fisheries.' See <https://nt.gov.au/marine/commercial-fishing>.

Division 1 or 2 of Part 10 of the Act,¹⁴ and if so, whether it was primarily relied on by the minister in adding the specimens listed in Schedule 2 to the list. It is therefore unclear whether the requirements in subsection 303DC(1A) of the EPBC Act applied and were satisfied in this instance.

The committee requests the minister's advice as to:

- **whether the specimens included in the exempt specimens list by the instrument were derived from a 'commercial fishery' within the meaning of subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*;**
- **if so, whether an assessment was made for the purposes of Division 1 or 2 of Part 10 of the Act in relation to the fisheries from which the specimens listed in Schedule 2 to the instrument were derived; and**
- **if so, whether the minister relied primarily on the outcomes of such an assessment when deciding whether to amend the list of exempt native specimens to include these specimens.**

14 While Division 1 of Part 10 of the EPBC Act appears to provide some ministerial discretion in relation to certain assessments, Division 2 requires the Australian Fisheries Management Authority (AFMA), prior to determining a management plan for a fishery, to make an agreement with the minister for an assessment of the impacts of actions under the plan on matters protected under Part 3 of the EPBC Act. Similar requirements apply where AFMA proposes to determine that a management plan is not required for a fishery. It therefore appears that assessments in relation to fisheries (as contemplated by subsection 303DC(1A)) may be mandatory in certain circumstances.

Instrument	Banking (prudential standard) determination No. 1 of 2018 [F2018L00530] Banking (prudential standard) determination No. 2 of 2018 [F2018L00531]
Purpose	[F2018L00530]: Determines Prudential Standard APS 180 Capital Adequacy: Counterparty Credit Risk [F2018L00531]: Determines Prudential Standard APS 112 Capital Adequacy: Standardised Approach to Credit Risk
Authorising legislation	<i>Banking Act 1959</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ¹⁵

Incorporation of document¹⁶

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents

15 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

16 Scrutiny principle: Senate Standing Order 23(3)(a).

may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁷

With reference to the matters above, the committee notes that each of the instruments incorporates the Committee on Payment and Market Infrastructures and International Organization of Securities Commission's *Principles for Financial Market Infrastructures* (CPMI-IOSCO Principles). However, neither the instruments nor their (shared) ES indicate the manner in which the CPMI-IOSCO Principles are incorporated or where they may be accessed free of charge.

The committee's research indicates that the CPMI-IOSCO Principles are available for free online.¹⁸ Nevertheless, as noted above the Legislation Act requires the ES to an instrument to contain a description of any incorporated document and to indicate how it may be obtained.

The committee requests the minister's advice as to:

- **the manner in which the Committee on Payment and Market Infrastructures and International Organization of Securities Commission's**

17 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

18 <https://www.bis.org/cpmi/publ/d101.htm>.

(CPMI-IOSCO) *Principles for Financial Market Infrastructures* is incorporated into the instruments; and

- how that document is or may be made readily and freely available to persons interested in or affected by the instruments.

The committee also requests that the instruments and/or their explanatory statements be amended to include this information.

Instrument	Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503]
Purpose	Amends the Customs (Prohibited Exports) Regulations 1958 in relation to the export of goods on the Defence and Strategic Goods List, including adding new decision-making criteria for export permits, enhanced powers to revoke permits, and a process for review of decisions
Authorising legislation	<i>Customs Act 1901</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ¹⁹

Subdelegation²⁰

Item 4 of Schedule 1 to the instrument amends the Customs (Prohibited Exports) Regulations 1958 (principal regulations) to repeal section 13E and insert new Division 4A relating to defence and strategic goods. The new Division comprises a replacement section 13E and new sections 13EA to 13EK.

New section 13EJ provides for the delegation by the Defence Minister of certain powers he or she holds under the instrument. The minister's powers to grant export permissions in relation to defence and strategic goods; to impose, vary or remove conditions on such permissions; and to take certain other actions in managing the permissions process (such as requesting additional information, and approving forms) may be delegated to the secretary of the department, or a departmental officer at Acting Executive Level 1 or higher. The minister's power to grant certain

19 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

20 Scrutiny principle: Senate Standing Order 23(3)(a).

export permissions may also be delegated to 'an officer of Customs'. The minister's powers to refuse or revoke permissions may not be delegated.

Section 13EK provides that the secretary may delegate any of his or her powers under section 13EI, which relate to the disclosure of information and documents obtained or generated for the purposes of Division 4A, to a departmental officer at Acting Executive Level 1 or higher.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The instrument sets no limits or requirements in relation to the qualifications or expertise that delegates must possess, and the explanatory statement (ES) provides no justification of the need to subdelegate the minister's and secretary's powers to officials below senior executive service level, nor any explanation of how the delegation powers will be exercised.

The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the minister or secretary be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to

- **why it is necessary to allow subdelegation of the minister's and secretary's powers to employees below senior executive service level in new sections 13EJ and 13EK of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument); and**
 - **the appropriateness of amending the instrument to require that the minister or secretary, respectively, be satisfied that officials to whom powers are delegated under sections 13EJ and 13EK have the expertise appropriate to the power delegated.**
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Personal rights and liberties: privacy²¹

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

New section 13EI of the principal regulations (inserted by item 4 of Schedule 1 to the instrument) provides for disclosure by the Secretary of Defence of any information or documents obtained or generated for the purposes of Division 4A of the principal regulations. While the secretary may only disclose information 'for a purpose connected with the administration' of Division 4A, disclosure may be made to a broad range of persons and entities set out in subsection 13EI(1), including governments and authorities of foreign countries. Further, subsection 13EI(2) provides for the minister to specify by legislative instrument other persons or entities to whom disclosure may be made.

Subsections 13EI(3) and (4) provide that the secretary must be satisfied that a recipient of information or documents disclosed under the section will not disclose it further without the secretary's consent.

It appears to the committee that, given the nature of the information and documents that may be provided by applicants under Division 4A, it is possible that information covered by the section could include personal and sensitive information. While the terms of section 13EI limit the purpose for which information can be disclosed, and provide a partial limitation on the possibility of onward disclosure by recipients, it is unclear to the committee what safeguards are in place to ensure the appropriate protection of any personal information that may be disclosed by the secretary (or a delegate), or considered for disclosure, under the provision.

The ES to the instrument provides no information regarding the nature of information that is expected to be disclosed, or circumstances in which such disclosures may be made. Moreover, there is no information in the ES regarding any safeguards in place to protect individuals' privacy in relation to their personal information, including whether consent is sought for such disclosure (as part of the export permission process), and how protection will be ensured for information provided to foreign authorities. The statement of compatibility with human rights does not recognise that the right to privacy may be engaged by the instrument.

21 Scrutiny principle: Senate Standing Order 23(3)(b).

The committee seeks the minister's advice as to:

- whether information covered by new section 13E1 of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) could include personal and sensitive information;
- if so, the justification for authorising the secretary to disclose such information to a broad range of persons and entities, including foreign governments, and persons or entities who may be later determined by legislative instrument; and
- what safeguards are in place to protect the privacy of individuals in relation to such information.

Retrospective effect²²

Item 12 of Schedule 1 to the instrument inserts new section 18 into the principal regulations, providing for transitional matters in relation to the introduction of new Division 4A. New subsection 18(3) provides that the new provisions will apply, on and after the instrument's commencement day, to applications for a permission made under the previous section 13E but not yet decided at the time the instrument commenced.

While the instrument, including subsection 18(3), commences prospectively, the committee is concerned that the provision may result in the instrument having a retrospective effect, to the potential detriment of persons who had lodged an application prior to its commencement which was not yet decided at the time the scheme changed. The committee notes that the provisions relating to export permissions under new Division 4A have been substantively changed from the previous section 13E, including through the addition of new decision-making criteria in subsection 13E(4).

The ES provides no information as to whether any person whose application was pending at the time of commencement of the instrument may be disadvantaged by consideration of their application under the new criteria, which the person would not have had the opportunity to address at the time the application was made. The ES does not indicate, for example, how many applications will be subject to new subsection 18(3), and whether those applicants will be given an opportunity to address any new criteria which may be relevant to their applications, before their application is decided.

22 Scrutiny principle: Senate Standing Order 23(3)(b).

The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of subsection 18(3) of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 12 of Schedule 1 to the instrument); and if so, what steps have been or will be taken to avoid such disadvantage and to ensure natural justice for applicants.

Merits review²³

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.

New section 13EF of the principal regulations (inserted by item 4 of Schedule 1 to the instrument) provides for merits review by the Administrative Appeals Tribunal (AAT) of decisions made under new Division 4A to refuse or revoke export permissions, or to impose or vary conditions on permissions.

However, section 13EH provides that the Defence Minister may refuse to disclose reasons for the decision to an applicant, where the minister believes that their disclosure 'would prejudice the security, defence or international relations of Australia'. The committee is concerned about the impact that lack of access to reasons for a decision may have on an affected person's ability to obtain effective merits review of that decision.

Understanding the reasons for an administrative decision is essential to the ability of a person to challenge that decision through a merits review process. If an applicant does not know the reasons for the decision it may be very difficult to assess whether grounds exist for challenging the decision, and what evidence the applicant needs to bring forward to make a case in any review proceeding.

Importantly, the committee also notes that section 28 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) provides that persons eligible to apply to the AAT for review of a decision are entitled to request, and obtain, a statement of reasons for the decision from the decision maker. This is subject to specific exceptions and qualifications, including subsection 28(2), which provides that the Attorney-General may issue a 'public interest certificate' to restrict disclosure of any matter where disclosure would be contrary to the public interest for specified reasons, including where it would prejudice the security, defence or international relations of Australia.

23 Scrutiny principle: Senate Standing Order 23(3)(c).

Subsection 28(3A) then applies parts of section 36 and 37 of the Act to situations where the Attorney-General has issued a public interest certificate. The referred provisions have the effect that the information withheld from the applicant may still be received and considered by the AAT in any review proceedings, and in some circumstances, the AAT may consider whether disclosure to the applicant is appropriate.

Notably, subsection 36(4) of the AAT Act states that, in considering whether information subject to a public interest certificate should be disclosed to applicants:

...the Tribunal shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceedings should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the matter contained in the document, as the case may be, would be contrary to the public interest.

It is not clear to the committee how new section 13EH of the principal regulations, in allowing the Defence Minister to withhold reasons, would interact with these provisions of the AAT Act. In addition, it is not clear whether the proposed section 13EH procedure allows for consideration, by the Defence Minister or the AAT, of 'the principle that it is desirable... that the parties to a proceeding should be made aware of all relevant matters', when dealing with decisions that are subject to merits review by the AAT.

The committee seeks the minister's advice regarding:

- **the impact that the minister withholding reasons for a decision under new section 13EH of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) may have on the ability of an applicant to seek effective merits review of the decision by the Administrative Appeals Tribunal; and**
- **how the proposed operation of section 13EH would interact with the provisions of the *Administrative Appeals Tribunal Act 1975* relating to the disclosure of reasons and consideration of reasons in AAT proceedings, particularly sections 28 and 36 of the Act.**

Instrument	Defence Determination, Conditions of Service Amendment (Flexible Service Determination) Determination 2018 (No. 15) [F2018L00496]
Purpose	Determines conditions of service and provides for their administration in relation to ADF members undertaking flexible service
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ²⁴

Consultation²⁵

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.²⁶

The ES to the instrument provides no information regarding consultation.

The committee requests the minister's advice as to:

- **whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or**
- **whether no consultation was undertaken and, if not, why not.**

24 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

25 Scrutiny principle: Senate Standing Order 23(3)(a)

26 Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

The committee also requests that the explanatory statement be amended to include this information.

Incorporation of document²⁷

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge.

27 Scrutiny principle: Senate Standing Order 23(3)(a)

This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.²⁸

Sections 1.54A and 1.61A of the instrument incorporate, by reference, DFRT Determination No. 2 of 2017, *Salaries* (DFRT determination). The ES to the instrument provides no information regarding the manner in which the DFRT determination is incorporated, nor where it may be accessed.

The committee notes that the DFRT determination is made under section 58H of the *Defence Act 1903* (Defence Act) and that table item 12(b) of section 7 of the Legislation (Exemptions and Other Matters) Regulation 2015 provides that determinations made under section 58H of the Defence Act are not legislative instruments. However, the present instrument is made under section 58B of the Defence Act, and subsection 58B(1A) of that Act provides that determinations made under section 58B may incorporate determinations made under section 58H as if they were legislative instruments: that is, as amended from time to time.

In addition, the committee notes that the DFRT determination appears to be freely available online.²⁹

Nevertheless, as noted above, the committee's expectation is that where a document is incorporated by reference, the instrument and/or its ES should clearly set out the manner in which the document is incorporated as well as providing a description of it and where it may be freely accessed, as required by the Legislation Act.

The committee draws to the minister's attention the absence of information in the explanatory statement to the instrument regarding the manner of incorporation of DFRT Determination No. 2 of 2017, and where that document may be freely accessed.

²⁸ Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

²⁹ See https://www.dfrt.gov.au/_data/assets/pdf_file/0017/102563/Det-2-of-2017.pdf (accessed 1 June 2018).

Instrument	Export Control (Animals) Amendment (Export of Livestock) Order 2018 [F2018L00475]
Purpose	Amends the Export Control (Animals) Order 2004 to require an exporter of livestock to pay the costs of activities undertaken by authorised officers in relation to an approved export program
Authorising legislation	<i>Export Control (Orders) Regulations 1982</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ³⁰

Consultation³¹

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.³²

With reference to these requirements, the committee notes that the ES to the instrument only states that 'no consultation was undertaken'. The ES contains no information regarding *why* no consultation was undertaken.

While the committee does not 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 of consultation may be insufficient to satisfy the requirements of the Legislation Act. In this case, the statement 'no consultation was

30 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

31 Scrutiny principle: Senate Standing Order 23(3)(a)

32 Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

undertaken' does not appear to satisfy the requirement in paragraph 15J(2)(e) of the Legislation Act that the ES explain why no consultation was undertaken.

The committee requests the minister's advice as to why no consultation was undertaken in relation to the instrument; and requests that the explanatory statement be amended to include this information.

Instrument	Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 [F2018L00580]
Purpose	Amends the Export Control (Animals) Order 2004 to provide for the collection and disclosure of personal and commercial information in relation to live animal export activities
Authorising legislation	<i>Export Control (Orders) Regulations 1982</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ³³

Personal rights and liberties: privacy³⁴

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

Item 3 of Schedule 1 to the instrument inserts new section 6.04 into the Export Control (Animals) Order 2004 (principal instrument). Section 6.04 provides that the secretary (of the Department of Agriculture and Water Resources) may disclose to an agriculture regulator, personal or commercial-in-confidence information that relates to a live animal, or animal reproductive material, for which a notice of intention to export is given on or after 1 July 2018. The secretary may disclose such information

33 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

34 Scrutiny principle: Senate Standing Order 23(3)(b).

when it is obtained by the secretary or an authorised officer under or for the purposes of the principal instrument or the *Export Control Act 1982*.³⁵

Subsection 6.04(2) provides that the information may be disclosed for the purposes of ensuring the health and welfare of live animals, or the health and condition of animal reproductive material, in the course of export activities; and/or administering or enforcing the Act, the principal instrument or the Export Control (Prescribed Goods—General) Order 2005.

'Agriculture regulator' is defined in subsection 6.04(3) as:

- (a) A Commonwealth, State or Territory authority or other body that is responsible for the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production; or
- (b) a body that is authorised to perform functions or exercise powers in relation to the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production under a Commonwealth law or the law of a State or Territory.

While subsection 6.04(2) limits the purposes for which information may be disclosed, it is not clear to the committee what other safeguards are in place to ensure the appropriate protection of individuals' privacy in relation to personal information that may be disclosed by the secretary under these provisions. This includes whether individuals' consent is sought for the disclosure of their personal information, how disclosed information is to be stored and handled, and whether any restrictions apply to the onward disclosure and retention of the information by those entities to whom the information is disclosed.

The statement of compatibility with human rights included in the explanatory statement (ES) to the instrument recognises that the right to privacy is engaged by the instrument and states that the disclosure 'is limited to agriculture regulators and is reasonable and proportionate to the aim of ensuring the health and welfare of live animals in the course of export activities'. The ES also states that the instrument 'will not have any adverse effect on the wider community as the exchange of information will only occur between agriculture regulators'. However, the ES does not provide further detail about the agriculture regulators to whom information is expected to be

35 Paragraph 6.04(1)(c) provides some exceptions to the information that may be disclosed. It does not include information obtained in response to a request made or notice issued by the secretary or as part of an audit conducted under the principal instrument, or obtained under Part III of the *Export Control Act 1982* (which deals with enforcement of the Act).

disclosed under the instrument, nor the safeguards in place to protect the privacy of the information.

The committee understands that personal information disclosed to Commonwealth authorities and to some businesses and other organisations would be subject to the relevant provisions in the *Privacy Act 1988* (Privacy Act) for the protection of personal information.³⁶

The committee notes, however, that the agriculture regulators to whom information may be disclosed, as defined in subsection 6.04(3), may extend to state and territory authorities and also to 'other bodies'. It is not clear to the committee whether or not all of the regulators to whom information may be disclosed under the provision would be subject to the Privacy Act or to equivalent protections under another relevant law (such as applicable state or territory privacy legislation). In particular, the committee is concerned to ensure that information disclosed to 'other bodies' will be subject to appropriate requirements for the protection of individuals' privacy.

The committee requests the minister's more detailed advice as to:

- **the nature of the agriculture regulators to whom information may be disclosed under new section 6.04 of the Export Control (Animals) Order 2004, inserted by the instrument;**
- **whether all bodies to whom information may be disclosed will be subject to the *Privacy Act 1988*; and**
- **if not, what safeguards are in place to protect individuals' privacy in relation to personal information disclosed to any bodies not subject to the *Privacy Act 1988*.**

36 The Privacy Act applies the Australian Privacy Principles to Australian and Norfolk Island government agencies, to all private sector and not-for-profit organisations with an annual turnover of more than \$3 million, and to certain other businesses and organisations including health services providers, Commonwealth contracted service providers, and small businesses that voluntarily opt in to the Act. See <https://www.oaic.gov.au/agencies-and-organisations/business-resources/privacy-business-resource-10>.

Instrument	Health Insurance (Eligible Collection Centres) Approval Amendment (Application Form) Principles 2018 [F2018L00489]
Purpose	Amends the Health Insurance (Eligible Collection Centres) Approval Principles 2010 to set out requirements for an application for approval of an eligible collection centre
Authorising legislation	<i>Health Insurance Act 1973</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ³⁷

Consultation³⁸

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.³⁹

With reference to these requirements, the committee notes that, under the heading of consultation, the ES to the instrument states:

The change is administrative in nature and is intended to ensure that the collection of information (which occurs presently) is not impacted by the move to more proactive enforcement of the prohibited practices provisions.

37 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

38 Scrutiny principle: Senate Standing Order 23(3)(a)

39 Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

The ES contains no information regarding any consultation undertaken in relation to the instrument, nor does it specify that no consultation was undertaken and explain why not.

While the committee does not interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation, it considers that an overly bare or general description of consultation may be insufficient to satisfy the requirements of the Legislation Act. In this case, the brief description of the nature and intent of the amendments made by the instrument does not appear to satisfy the requirements in paragraphs 15J(2)(d) and (e) of the Legislation Act that the ES either describe the nature of any consultation undertaken in relation to the instrument or explain why no such consultation was undertaken.

The committee requests the minister's advice as to:

- **whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or**
- **whether no consultation was undertaken and, if not, why not.**

The committee also requests that the explanatory statement be amended to include this information.

Instrument	Trade and Customs Legislation Amendment (Miscellaneous Measures) Regulations 2018 [F2018L00459]
Purpose	Amends various regulations to improve and strengthen customs policies and practices, including in relation to labelling requirements, and drug and tobacco controls
Authorising legislation	<i>Commerce (Trade Descriptions) Act 1905; Customs Act 1901</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ⁴⁰

Offences: evidential burden of proof on the defendant⁴¹

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 burden of proof for persons in their individual capacities (requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

Item 1 of Schedule 1 to the instrument repeals and replaces section 8 of the Commerce (Trade Descriptions) Regulation 2016 (principal regulation), and inserts new section 8A. The new subsection 8(1) prohibits the import of certain goods, while subsection 8(2) provides that the prohibition does not apply if a trade description is applied to the goods in accordance with Division 2 (of the principal regulation). Section 8A imposes an offence if a person contravenes section 8.

By providing a specific exception to the prohibition in subsection 8(1) which triggers the offence, subsection 8(2) imposes on a defendant to the offence in section 8A an evidential burden of proof, requiring the defendant to raise evidence about the defence.⁴² The committee notes that the previous version of section 8 of the

40 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

41 Scrutiny principle: Senate Standing Order 23(3)(b)

42 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is reflected in the Note to section 8A of the instrument.

principal regulation contained a similar prohibition, but was not drafted in such a way as to place an evidential burden of proof on defendants.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

The committee's expectation is that the appropriateness of provisions that have the effect of reversing burdens of proof should be explicitly addressed in the explanatory statement (ES) to the instrument, consistent with the Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Powers*.⁴³

While the ES to the instrument explains the offence in new section 8A, including justifying the imposition of strict liability in that offence, it provides no information in relation to the justification for reversing the evidential burden of proof.

The committee requests the minister's advice as to the justification for using an offence-specific exception that reverses the burden of proof in relation to the offence in new section 8A of the Commerce (Trade Descriptions) Regulation 2016, inserted by item 1 of Schedule 1 to the instrument.

43 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>.

Instrument	Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Regulations 2018 [F2018L00515]
Purpose	Amends seven regulations consequential to the enactment of the <i>Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018</i>
Authorising legislation	<i>ASIC Supervisory Cost Recovery Levy Act 2017</i> <i>Australian Prudential Regulation Authority Act 1998</i> <i>Corporations Act 2001</i> <i>National Consumer Credit Protection Act 2009</i> <i>Retirement Savings Accounts Act 1997</i> <i>Superannuation (Resolution of Complaints) Act 1993</i> <i>Superannuation Industry (Supervision) Act 1993</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ⁴⁴

Access to incorporated document⁴⁵

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents

44 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

45 Scrutiny principle: Senate Standing Order 23(3)(a).

to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁴⁶

With reference to these matters, the committee notes that the instrument appears to incorporate Australian/New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations*. The instrument provides that the standard is incorporated as in force or existing on 29 October 2014.

The ES also provides web references for where the standard may be obtained. However, the references are to websites for SAI Global and Standards New Zealand, and the committee's research indicates that the complete standard is only available from those organisations on payment of a fee. No information is provided in the instrument or the ES as to where the standard may be obtained free of charge.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.⁴⁷

The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to how the standard AS/NZS 10002:2014, which appears to be incorporated in the instrument, is or may be

46 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

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

made readily and freely available to persons interested in or affected by the instrument; and requests that the explanatory statement be amended to include this information.

Advice only

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

Instrument	Defence Determination, Conditions of Service Amendment (Administration of Salary for Officer Aviation Pay Structure) Determination 2018 (No. 19) [F2018L00579]
Purpose	Determines conditions of service for Air Force members under a new Officer Aviation Pay Structure introduced in May 2018
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ⁴⁸

Incorporation of document⁴⁹

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁵⁰

48 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

49 Scrutiny principle: Senate Standing Order 23(3)(a).

Schedule 2 to the instrument inserts new Division 4A into Defence Determination 2016/19, Conditions of Service. New Division 4a includes new sections 3.2.47B, 3.2.47D and 3.2.47K, all of which incorporate by reference, DFRT Determination No. 2 of 2017, *Salaries* (DFRT determination). The explanatory statement (ES) to the instrument states that the DFRT determination is incorporated as in force from time to time, as authorised by subsection 58B(1A) of the *Defence Act 1903*.

However, neither the instrument nor the ES indicates where the DFRT determination can be accessed. In this case the committee has observed that the DFRT determination appears to be freely available online.⁵¹ Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to DFRT Determination No. 2 of 2017, *Salaries*, incorporated by reference in the instrument.

50 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

51 See https://www.dfrt.gov.au/_data/assets/pdf_file/0017/102563/Det-2-of-2017.pdf (accessed 1 June 2018).

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

Correspondence relating to these matters is available on the committee's website.¹

Instrument	Archives Regulations 2018 [F2018L00343]
Purpose	Provides for procedural and technical matters in support of the legislative framework for the management of Commonwealth records by the National Archives of Australia
Authorising legislation	<i>Archives Act 1983</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 26 March 2018) Notice of motion to disallow must be given by 14 August 2018 ²
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Unclear basis for determining fees³

Committee's initial comment:

Section 15 of the instrument contains a table specifying amounts or rates of charges for the provision of various discretionary services by the National Archives of Australia (Archives) to persons other than Commonwealth institutions. These relate to services such as the transport, storage, searching and destruction of records, and provision of training.

The committee's usual expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement (ES) will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular,

1 See www.aph.gov.au/regords_monitor.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(a).

to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

The committee notes that subsection 71(e) of the *Archives Act 1983* (Archives Act) provides that regulations made under the Act may make provision for charges in respect of the provision of prescribed discretionary services for persons other than Commonwealth institutions. However, the ES to the instrument does not specify the basis on which any of the fees in section 15 have been calculated. It merely states that section 15 of the instrument has the same effect as equivalent provisions in the previous regulations.

The committee requests the minister's advice as to the basis on which each of the fees in section 15 of the instrument has been calculated.

Minister's response

The Attorney-General advised:

In remaking the Regulations, section 15 prescribes the charges payable for discretionary services for persons other than Commonwealth institutions in accordance with the charges prescribed in regulations 10 and 11 and Schedule 1 of the former Regulations.

The National Archives of Australia (the Archives) has advised that the charges for discretionary services were calculated on a partial cost-recovery basis in accordance with the Department of Finance's guidelines in 1990 when the charges were first introduced, in the *Archives Regulations (Amendment) 1990 No. 393*. There were adjustments made to the charges in 1991, 1995, and 1998 in accordance with relevant government financial guidelines, in the *Archives Regulations (Amendment) 1991 No. 159*, *Archives Regulations (Amendment) 1995 No. 260*, and *Archives Regulations (Amendment) 1998 No. 273*. There have been no further increases to the charges since 1998. As such, the fees continue to reflect a partial cost-recovery of the costs actually incurred by the Archives in providing the services.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the fees prescribed by section 15 of the instrument reflect partial recovery of the costs incurred by the Archives in providing discretionary services.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

In this regard, the committee also emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee has concluded its examination of this matter.

Broad delegation of administrative powers⁴

Committee's initial comment:

Section 10 of the instrument makes provision for giving written notices of approval for the disposal, destruction, transfer or alteration of Commonwealth records under sections 24 and 26 of the Archives Act. Subsection 10(3) provides that the Director-General of the Archives may authorise, in writing, 'a person' to give such approvals.

The committee's expectations in relation to broad delegation of administrative powers accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The ES notes the significance of the powers able to be conferred under subsection 10(3) of the instrument:

An authorised person would be able to authorise the destruction of Commonwealth records. Given the significance of this power, it is important for a person authorised by the Director-General to hold subject matter expertise, or other appropriate skills and qualifications and attributes required of an authorised person.

...Under current arrangements, the Director-General has authorised the Assistant Director-General, Access and Communication Branch and the Director of Commonwealth Information Policy. The persons occupying these positions have the seniority and subject matter expertise necessary to approve the giving of the permission, notification or authorisation.

While the committee acknowledges that appropriate care appears to be being exercised in relation to authorisation as a matter of policy, the committee remains concerned that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. Moreover, it is not clear to the committee whether

4 Scrutiny principle: Senate Standing Order 23(3)(a).

the 'person' authorised under subsection 10(3) need be an Archives or APS employee, or whether any member of the public could legally be authorised to approve the disposal, destruction, transfer or alteration of Commonwealth records.

The committee's expectation is not necessarily that details of the qualifications and attributes for authorised persons be specified in the instrument; rather, that it should include a requirement that the Director-General be satisfied that the person has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to:

- whether there are any legislative limits on who may be authorised by the Director-General under subsection 10(3) of the instrument;
- if not, why it is necessary or appropriate that a person who is not a public servant may be able to be authorised to exercise powers under the subsection; and
- the appropriateness of amending the instrument to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

Minister's response

The Attorney-General advised:

Section 10 of the Regulations prescribes the manner in which the Archives may give permission for dealings with Commonwealth records for the purposes of sections 24 and 26 of the Archives Act. It provides that this must be by written notice signed by the Director-General of the Archives or by a person authorised by the Director-General. Section 10 adopts the provisions for dealings with Commonwealth records, without substantive change, from the provisions in regulation 4 of the former Regulations.

Under section 8 of the Archives Act, the Director-General may delegate all or any of his powers to any person. The Director-General has authorised two members of staff of the Archives to give written notices of approval for the disposal, destruction, transfer and alteration of Commonwealth records under sections 24 and 26 of the Archives Act.

The staff members are the Assistant Director-General, Collection Management and the Director, Commonwealth Information Policy (who are both persons engaged under the *Public Service Act 1999* as staff members of the Archives). These individuals are the only persons who hold delegations from the Director-General to exercise the powers in sections 24(2)(b), 24(2)(c) and 26(2)(b) of the Archives Act in respect of Commonwealth records. In practice, the authorisation under section 10 of the Regulations enables the delegate to give effect to his or her exercise of these powers, by giving a written notice. A copy of the delegation

instrument is enclosed for reference, with the relevant delegations listed from page 2 onwards.

However, responding to the Committee's concern in this matter, I propose to amend the Regulations at the next available opportunity in accordance with the Committee's suggestion to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the authorisation power under subsection 10(3) of the instrument is consistent with the Director-General's power to delegate all or any of his or her powers to 'any person' under section 8 of the Archives Act. The committee further notes the advice that while this is a very broad power of delegation, only two persons—both senior officers of the Archives—are currently authorised under subsection 10(3) of the instrument to give notices of approval for the disposal, destruction, transfer and alteration of records under sections 24 and 26 of the Act.

The committee considers that further legislative safeguarding of these powers is important, given the breadth of the authorisation power and the significance of the functions concerned. The committee therefore welcomes the Attorney-General's undertaking to amend the instrument to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

The committee has concluded its examination of the instrument.

Instrument	Child Support (Registration and Collection) Regulations 2018 [F2018L00313]
Purpose	Prescribes matters relevant to the registration and collection of child and spousal maintenance liabilities
Authorising legislation	<i>Child Support (Registration and Collection) Act 1988</i>
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2018) Notice of motion to disallow must be given by 28 June 2018 ⁵
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Personal rights and liberties: certificate constituting prima facie evidence⁶

Committee's initial comment:

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 burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

Section 28 of the instrument provides that in an action for the recovery of a debt payable to the Child Support Registrar (Registrar), a certificate signed by the Registrar certifying that the person named in the certificate is liable to pay the debt, and that the debt is payable by that person to the Registrar at the date of the certificate, is prima facie evidence of those facts. This means that the alleged debtor would need to raise evidence to rebut the Registrar's certification.

It is a general principle of the common law that in a civil action the burden lies with the plaintiff to provide evidence establishing its case, and must prove each essential element of its claim in order to obtain relief. A respondent must only answer a case first established by the plaintiff. Section 28 of the instrument has the effect of shifting the evidential burden in a relevant debt recovery action on to the respondent, the alleged debtor, to raise evidence to rebut the matters contained in the Registrar's certificate.

5 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

6 Scrutiny principle: Senate Standing Order 23(3)(b).

No information is provided in the explanatory statement (ES) regarding the justification for effectively placing the burden of proof in debt recovery actions on to the alleged debtor. The ES notes that a similar provision is contained in section 116 of the *Child Support (Registration and Collection) Act 1988*, but states that section 28 of the instrument 'is intended to extend the operation of section 116 of the Act by broadening the category of debts to which the evidentiary certificates issued by the Registrar apply', beyond the registrable maintenance liabilities covered by section 116, to all debts payable to the Registrar.

The ES further states that section 28 is 'procedural and assists with the administration of the child support scheme'. However, it provides no explanation of the likely effect of the measure on alleged debtors.

The committee requests the minister's advice as to the justification for effectively shifting the burden of proof on to alleged debtors in actions for the recovery of debts payable to the Child Support Registrar.

Minister's response

The Minister for Social Services advised:

Evidentiary certificates are used as evidence of the amount of debt owing to the Child Support Registrar (Registrar) by a person at a particular date. These certificates are used in actions under sections 113 and 113A of the *Child Support (Registration and Collection) Act 1988* (CSRC Act) for recovery of a child support debt by the Registrar or the payee, and provide prima facie evidence of amounts due and payable. Section 116 of the CSRC Act provides for evidentiary certificates that specify amounts due and payable in relation to registrable maintenance liabilities.

Section 28 of the *Child Support (Registration and Collection) Regulations 2018* (2018 Regulations) provides a broader power for evidentiary certificates to be issued in relation to matters arising under child support legislation, beyond the child support debt in the registrable maintenance liability, including the recovery of court costs or penalties imposed in relation to the child support debt.

Evidentiary certificates are only used in limited circumstances, after all administrative options for enforcement of the debt have been exhausted. Options for administrative enforcement include the ability to directly garnishee wages, recover funds from bank accounts, tax returns or certain income support payments, and the power to prevent child support defaulters from travelling overseas.

Where court action is necessary, an evidentiary certificate signed by the Registrar will be sufficient evidence of the facts stated in the certificate. This is because the information contained in the certificate is factual in nature and by the time court action occurs the facts are well established. If the Registrar was required to prove the amount of debt in question in every court proceeding, this would be administratively burdensome and

an inappropriate use of judicial process. Prior to issuing a certificate of debt, the Department of Human Services (OHS) will review the debt to ensure its accuracy.

The debtor also has opportunities to appeal earlier decisions relating to the debt under the legislation, before enforcement action becomes necessary. There are a number of administrative avenues available to a debtor to contest the debt or the liability from which it arose, prior to enforcement proceedings. This may include lodging an objection, applying for a change of assessment, lodging outstanding tax returns or having direct payments credited towards a liability as non-agency payments. If unsatisfied with the outcome of an objection decision, a debtor may also appeal the matter to the Administrative Appeals Tribunal for independent merits review, and ultimately to court on a question of law. More information on objecting to a child support debt is contained in *Part 4 - Objecting, Seeking a Review, Appealing & Applying to Court* of the on line Child Support Guide, available at guides.dss.gov.au.

Further, it is open to the debtor to dispute the accuracy of the debt in the enforcement proceedings, thereby offering the debtor another opportunity to contest the basis of the claimed debt.

I note that section 28 of the 2018 Regulations operates in equivalent manner to regulation 11 of the *Child Support (Registration and Collection) Regulations 1988* (1988 Regulations). The 1988 Regulations were repealed and replaced by the 2018 Regulations on 20 March 2018 as they were due to sunset on 1 April 2018.

The 1988 Regulations were amended in 1994 to include a new regulation 11 providing for the use of evidentiary certificates as evidence in debt recovery action (see [Child Support \(Registration and Collection\) Regulations \(Amendment\) \(F1996B00892\)](#)). The Explanatory Statement for the 1994 Amendment Regulations that updated the 1988 Regulations states that the "new Regulation 11 provides that in any proceedings against a person for the recovery of debts payable to the Registrar, a certificate signed by the Registrar will be evidence of the facts stated. Information that is to be included in the certificate is the name of the person liable to pay the debt and the debt specified in the certificate is at the date of the certificate, a debt payable to the Registrar".

Committee's response

The committee thanks the minister for his detailed response, and notes the minister's advice that evidentiary certificates are only used in court processes after all administrative options for enforcing a debt have been exhausted, and that by the time court action occurred the facts contained in the certificate would have been well established and their accuracy verified. The committee also notes the minister's advice that debtors have various opportunities to address or appeal the debt before the matter reaches the stage of enforcement action in court.

The committee further notes the minister's view that having to prove the amount of debt in every relevant court proceeding would be administratively burdensome and an inappropriate use of the judicial process.

While the committee notes the minister's advice that section 28 of the instrument operates in an equivalent manner to regulation 11 of the previous regulations, the committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee has concluded its examination of the instrument.

Instrument	Coral Sea Marine Park Management Plan 2018 [F2018L00327] North Marine Parks Network Management Plan 2018 [F2018L00324] North-West Marine Parks Network Management Plan 2018 [F2018L00322] South-West Marine Parks Network Management Plan 2018 [F2018L00326] Temperate East Marine Parks Network Management Plan 2018 [F2018L00321]
Purpose	Provides for management, recreational and commercial activities to be undertaken in Commonwealth marine parks, that would otherwise be restricted under legislation
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2018) Notice of motion to disallow must be given by 28 June 2018 ⁷
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Incorporation of document⁸

Committee's initial comment:

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

⁷ In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

⁸ Scrutiny principle: Senate Standing Order 23(3)(a).

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁹

With reference to the matters above, the committee notes that each of the instruments incorporates the International Convention for the Prevention of Pollution from Ships (MARPOL). However, while the glossary to the instrument contains a description of the Convention, neither the instruments nor their ESs

⁹ Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

indicate the manner in which the Convention is incorporated or where it may be accessed free of charge.

With respect to where the Convention may be accessed, the committee's research indicates that MARPOL is available for free online.¹⁰ Nevertheless, the Legislation Act requires the ES to an instrument to contain a description of any incorporated document and to indicate how it may be obtained.

The committee requests the minister's advice as to the manner in which the International Convention for the Prevention of Pollution from Ships is incorporated into the instruments; and how the Convention is or may be made readily and freely available to persons interested in or affected by the instruments. The committee also requests that the instruments and/or their explanatory statements be updated to include this information.

Minister's response

The Minister for the Environment and Energy advised:

Re the manner in which the International Convention for the Prevention of Pollution from Ships is incorporated into the instruments - The management plans incorporate MARPOL as in force from their commencement on 1 July 2018. The specific provisions for MARPOL are contained in Part 4 Managing Activities (Section 4.2.1 General use access, and waste management). Reference is made to MARPOL in Section 4.2 Commercial shipping; the Glossary; and Schedule 1 Summary of Legislative and Policy Contexts (S 1.3 International Agreements).

Re how the Convention is or may be made readily and freely available to persons interested in or affected by the instruments - The text of MARPOL is freely and readily available to persons interested in or affected by the Management Plan from the United Nations Treaty Collection.

Re the instruments and/or their explanatory statements be updated to include this information - Supplementary Explanatory Statements have been prepared for the five management plans setting out the above information and will be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the management plans incorporate MARPOL as in force at the commencement of the instruments on 1 July 2018, and that MARPOL may be freely accessed online through the United Nations Treaty Collection.

10 <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280291139>.

The committee also notes the minister's undertaking to register supplementary ESs to the instruments, setting out how MARPOL is incorporated and how it may be accessed free of charge, on the Federal Register of Legislation.

The committee has concluded its examination of the instruments.

Instrument	Defence Amendment (Defence Aviation Areas) Regulations 2018 [F2018L00315]
Purpose	Regulates the construction and use of certain buildings, structures and objects in defence aviation areas in order to prevent, remove or reduce hazards to aircraft and aviation-related communications, navigation or surveillance
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2018) Notice of motion to disallow must be given by 28 June 2018 ¹¹
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Subdelegation¹²

Committee's initial comment:

Item 4 of Schedule 1 to the instrument inserts new subsection 82(1A) into the Defence Regulations 2016 (principal regulations). Subsection 82(1A) provides that the minister may, by instrument in writing, delegate his or her powers under Part 11A of the principal regulations to an APS employee in a position not below APS6 level in the department, or a military officer at the equivalent level.¹³

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers

11 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

12 Scrutiny principle: Senate Standing Order 23(3)(a).

13 The equivalent ranks are: Lieutenant Commander in the Navy, Major in the Army, and Squadron Leader in the Air Force. The explanatory statement states that for administrative purposes (as opposed to the exercise of military command responsibilities), the APS6 classification is treated in Defence as comparable to these military ranks.

might be delegated; and delegates should be confined to the holders of nominated offices, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The explanatory statement (ES) to the instrument states that '[t]he delegation levels were determined having regard to the nature of the powers in question, and how they may need to be administered in practice'. The ES explains that the minister's powers in Part 11A of the principal regulations include receiving and dealing with applications for construction and activity in defence aviation areas, approving or refusing such applications, setting conditions on approved applications, and giving directions such as for the removal of buildings. The ES states that these are powers that, by their nature, will sometimes be appropriate to make at a local level by commanders and staff responsible for day-to-day decision making at defence airfields.

The committee remains concerned, however, that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee's expectation is not necessarily that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the minister be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to the appropriateness of amending the instrument to require that the minister be satisfied that persons authorised have the expertise appropriate to the power delegated.

Minister's response

The Minister for Defence Personnel advised:

I understand the Committee is concerned about the delegation provision that these regulations have inserted at subsection 82(1A) of the *Defence Regulation 2016* (the principal regulations) The provision enables the Minister to delegate the various powers in the new Part 11A of the principal regulations to Australian Defence Force (ADF) officers no lower than Lieutenant Commander, Major or Squadron Leader rank, and to Australian Public Servant (APS) employees in the Department no lower than APS6 level. As outlined in the explanatory statement, this level of delegation was considered appropriate given the nature of the powers in question, and the practical requirement that some of the powers will need to be exercised at a local level in order to effectively administer the scheme for defence aviation areas. The Committee is seeking my advice as to the appropriateness of amending the delegation provision to include a requirement that the Minister be satisfied that persons authorised have the expertise appropriate to the power delegated.

My view is that such an amendment is unnecessary for several reasons:

- ADF members will have undergone careful selection and significant training in order to be promoted to the relevant ranks. These officers will have significant responsibility in their chain of command and will often be second-in-command or even in command of a regional base. APS6 employees in Defence are promoted or employed following a merit selection process, in which they must demonstrate high levels of skill and expertise. APS employees at this level will often have significant responsibilities with limited supervision, and may lead large teams, especially in the regions. The delegable powers in Part 11A include matters such as receiving applications for approval to construct or use hazardous objects, seeking further information in relation to applications, making decisions on whether to grant or refuse applications, and making decisions to direct the removal of hazardous objects. I am satisfied that, having gone through the relevant recruitment, promotion and selection processes, ADF officers and APS employees at the relevant ranks and levels will have the skills and expertise to understand and fulfil their responsibilities, including to obtain additional technical information on aviation hazards from experts where necessary.
- The powers in Part 11A can only be exercised within declared defence aviation areas. This imposes a practical limitation on who can effectively exercise a delegation, even without a provision of the sort described by the Committee. Even if a Minister were to delegate powers to all APS6 employees within Defence for example (which is unlikely), only a limited number of APS6 employees would be able to exercise the powers consistently with the duties of their position. Further, ADF members and APS employees in Defence are officials under the *Public Governance, Performance and Accountability Act 2013*, and are subject to the general duties of officials under that Act. This includes exercising powers, performing functions and discharging duties with the degree of care and diligence that a reasonable person would exercise if they occupied the position and had the same responsibilities as the official. It is unlikely that an official whose duties do not include some responsibility for defence aviation areas could reasonably exercise any of the powers in Part 11A, even if there were a blanket delegation of those powers in place.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's view that amending the instrument to require that the minister be satisfied that delegates have the expertise appropriate to the power delegated is unnecessary due to the careful selection and training of and the nature of the roles performed by, those members of the ADF and APS to whom the powers in Part 11A would be delegated. The committee also notes the minister's advice that the exercise of the delegated powers would be further constrained in practical terms by the fact that the powers can only be exercised within defence aviation areas.

The committee nevertheless remains concerned that the delegation power encompasses a very broad group of APS and ADF personnel, with no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee is aware of the merit-based selection processes for, and the attributes expected of, APS employees, including at APS6 level. However, the committee notes its long-standing expectation that significant powers are delegated to officers at a more senior level. This is particularly relevant where such powers can determine the rights or interests of persons, such as powers to grant or refuse applications.

As the committee has previously stated, its expectation is not that details of the qualifications and attributes for delegates be specified in the instrument; rather, that the instrument should include a requirement that the minister be satisfied that the delegate has the appropriate expertise to properly exercise the powers or functions delegated.

The committee has concluded its examination of the instrument. However, the committee draws to the attention of the minister and the Senate its concern as to the lack of any legislative requirement that the minister be satisfied that delegates have appropriate expertise.

Instrument	Defence Force Discipline Regulations 2018 [F2018L00265]
Purpose	Repeals and replaces the Defence Force Discipline Regulations 1985
Authorising legislation	<i>Defence Force Discipline Act 1982</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ¹⁴
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Personal rights and liberties: privacy¹⁵

Committee's initial comment:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

14 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

15 Scrutiny principle: Senate Standing Order 23(3)(b).

Subsection 22(2) of the instrument provides that the officer in charge or an approved staff member of a Defence detention centre may open, inspect and read letters and parcels sent to, or proposed to be sent by, detainees in the detention centre. Subsection 23(1) has the effect that a detainee must agree to the opening or inspection of their letters and parcels in order to send or receive mail.

Section 23 contains some exceptions to these provisions, intended to preserve the confidentiality of detainees' communications with certain persons, including the Defence Force Ombudsman, the Inspector-General ADF, members of Parliament and legal practitioners, with certain conditions.

Subsections 23(6) and 24(2) provide for the officer in charge or approved staff member of the detention centre to impound money, contraband or any other item contained in detainees' mail, if they reasonably believe that such material may adversely affect the security, discipline or good order of the detention centre. Section 25 provides that anything impounded under subsection 23(6) or 24(2) may be dealt with in accordance with such directions as may be given by the Chief of the Defence Force (CDF) or a service chief. The ES advises that impounded items will not be treated in such a way as to constitute an unlawful acquisition of property.

The ES to the instrument does not provide any justification for the limitation on detainees' right to privacy imposed by sections 22-25, and the statement of compatibility does not recognise that the instrument engages the right to privacy. The committee recognises that some limitations on personal privacy may be justified in the detention context. However, in the absence of information about the rationale and justification for the particular limitations on privacy imposed by these provisions, it is not possible for the committee to conclude that they do not trespass unduly on the personal rights and liberties of Defence detainees.

In addition, subsection 53(1) of the instrument requires the service chief of each arm of the Defence Force to cause to be kept a record of the convictions for service offences, civil court offences and overseas offences of each member of that arm of service. The record is to be kept for the purpose of facilitating compliance with subsection 70(2) of the *Defence Force Discipline Act 1982*, which relevantly requires a service tribunal sentencing a convicted person to have regard to the absence or existence of previous convictions of the person for service, civil court and overseas offences.

It appears to the committee that it may be possible that such records contain sensitive and personal information which is not otherwise publicly available. While the purpose for which the records are to be kept is specified in the instrument, the ES does not provide any information about how these records will be managed; what use can be made of them, including any permitted onward disclosure (other than to

the person to whom the record relates¹⁶); and what safeguards are in place to protect the privacy of individuals whose personal information is contained in the records.

The committee requests the minister's advice as to:

- the justification for the limitations placed on Defence detainees' privacy by sections 22-25 of the instrument; and
- how personal information collected in accordance with subsection 53(1) of the instrument will be managed, and what safeguards are in place to protect the personal privacy of individuals in relation to that information.

Minister's response

The Minister for Defence Personnel advised:

Sections 22 to 25

The limitation placed on Defence detainees' privacy by sections 22 to 25 is justified by the need to maintain security and safety in detention. Reasonable and proportional disciplinary rules are required to maintain a well ordered environment in a detention setting, while having procedures that safeguard a detainee's dignity and rights in the circumstances.

Detention centres may be located in war or warlike operations indicating the potential for a higher level of vigilance against external threats to security, or internal threats to security where detainees may be undergoing detention for serious offences against the safety of others (e.g. assault), the discipline of the Defence Force, or relating to the security of the nation.

The power to open letters and parcels is analogous to similar powers in civilian corrective services. The authority under subsection 22(2) does not have blanket operation. It is expressed to be subject to the provisions of Part 2 Division 3 of the instrument, which includes subsection 24(1). Subsection 24(1) requires the relevant detention centre officer or staff member to reasonably believe that the dispatch or delivery of a letter or parcel may adversely affect the security, discipline, or good order of the detention centre. Only with this reasonable belief may a detention centre operator open and read or inspect letters and parcels. Reasonable belief is intended to be the procedural test by which a detainee's dignity and rights are safeguarded to the extent that detention centre operators have due cause to be concerned for the security, discipline, or good order of the detention centre.

Subsection 53(1)

16 Subsection 53(2) of the instrument provides that a copy of a record kept in respect of a defence member must be provided to that member, on their request.

There are safeguards in place to protect the privacy of individuals in relation to personal information collected under subsection 53(1).

The ADF maintains a record of the convictions of a member for Service offences, civil offences, and overseas offences. This information is collected for the purpose of maintaining the discipline and good order of the Defence Force. The information is necessary for decision makers who manage the careers of ADF members and determine the suitability of members for particular roles. The information is also relevant to recruiting decisions, and Defence also has obligations to ensure members' court commitments are not prevented by their Defence Force commitments.

Information collected under subsection 53(1) is managed openly and transparently, in accordance with Defence Instruction (General) PERS 55-4 *Reporting, recording and dealing with Civil Offences, Service and Civil Convictions and Diversionary Programs*.

The information is classified as 'sensitive and personal information'. It is stored on a PD103 file and is recorded on the Conduct Reporting and Tracking System, which is a limited access system. Where a civilian conviction is spent or is subsequently quashed, that conviction must be struck through and annotated on the PD103, the record archived or disposed of as appropriate, and the Conduct Reporting and Tracking System updated. The PD103 is kept at the member's unit and upon discharge is retained by the Service records retention office. Consideration of external requests for disclosure is the responsibility of specified offices within Defence. For instance, policy requires that where a third party (e.g. an employer or prospective employer of a former member) requests information about a member's Service convictions, the request is to be forwarded to Service Police Central Records Office for resolution.

Committee's response

The committee thanks the minister for his response. In relation to sections 22-25 of the instrument, the committee notes the minister's advice that the limitation placed on Defence detainees' privacy derives from a need to maintain security and safety in detention. The committee notes the minister's advice regarding the environments in which Defence detention centres may be located and the nature of the risks which may pertain in such environments. The committee further notes the minister's advice that the power to open letters and parcels is analogous to similar powers in civilian corrective services, and that letters and parcels may only be opened and inspected where the relevant staff member has a reasonable belief that the correspondence may adversely affect the security, discipline or good order of the detention centre.

With regard to protecting the privacy of personal information collected under subsection 53(1) of the instrument, the committee notes the minister's advice about restrictions on the collection, use and retention of such information, and safeguards to protect individuals' privacy.

The committee notes that a replacement ES that includes additional explanation of the privacy limitations and protections relevant to these provisions, consistent with the above information provided by the minister, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Incorporation of documents¹⁷

Committee's initial comment:

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁸

Subsection 30(2) of the instrument incorporates two documents by reference: Australian Standard AS 4691.1-2003 *Laser-based speed detection devices, Part 1: Definitions and device requirements*; and Australian Standard AS 4691.2-2003 *Laser-based speed detection devices, Part 2: Operational procedures*. The instrument indicates that both documents are incorporated as in force when the instrument commenced, but neither the instrument nor its ES provides any information regarding where they may be accessed. The committee's research indicates that the documents may only be available to the public on payment of a fee.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published

17 Scrutiny principle: Senate Standing Order 23(3)(a).

18 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

a detailed report on the issue.¹⁹ The report comprehensively outlined the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made available to interested or affected persons. This might, for example, involve noting the availability of the document through specific public libraries, or making the document available for viewing upon request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to how the documents incorporated in subsection 30(2) of the instrument are or may be made readily and freely available to persons interested in or affected by the instrument, and requests that the explanatory statement be updated to include this information.

Minister's response

The Minister for Defence Personnel advised:

Subsection 30(2) incorporates two documents (by reference) as in force when the instrument commenced:

- Australian Standard AS 4691.1-2003 Laser based speed detection device part 1: Definitions and device requirements; and
- Australian Standard AS 4691.1-2003 Laser based speed detection device part 2: Operational procedures.

Defence holds an ongoing licence from SAI Global through its Defence Library Service which provides online access to the two documents for Defence members. The versions as at 1 April 2018 have been made readily and freely available to all Defence members via the Defence Force Discipline Instruments Register which is searchable and accessible on the Defence Restricted Network.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the relevant standards (AS 4691.1-2003 parts 1 and 2) have been made readily and freely available to all Defence members via the Defence Force Discipline Register. The committee also notes that the ES to the instrument has been updated to include this information.

19 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/416D0BF968BDB17048257FDB0009BEF9/\\$file/dg.asa.160616.rpf.084.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf) (accessed 6 February 2018).

However, the committee understands that the Register is not accessible by persons who are not Defence members, and therefore remains concerned that the incorporated standards do not appear to be freely available to the public.

In addition to access for Defence Force members, 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 committee reiterates that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely, and that the committee expects, at a minimum, that consideration be given to any means by which an incorporated document may be made available to all interested or affected persons.

The committee has concluded its examination of the instrument. However, the committee remains concerned about the lack of free access to documents incorporated by reference in legislation, and will continue to monitor this issue.

Instrument	Defence (Inquiry) Regulations 2018 [F2018L00316]
Purpose	Prescribes matters providing for, and in relation to, inquiries concerning the Defence Force
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 21 March 2018) Notice of motion to disallow must be given by 28 June 2018 ²⁰
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Personal rights and liberties: privacy²¹

Committee's initial comment:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

Sections 26-28 and 58-60 of the instrument provide for the authorised use, disclosure and copying of information and documents relating to Defence Commissions of Inquiry and inquiry officer inquiries, respectively. In particular, sections 26 and 58 provide that an employee of the Commonwealth or a member of

20 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

21 Scrutiny principle: Senate Standing Order 23(3)(b).

the Defence Force may do any of the following things in the performance of their duties as such an employee or member:

- use information in inquiry records or reports;
- disclose information in inquiry records or reports, or part or all of documents that form part of such records or reports; and
- copy documents, or part of documents, that form part of inquiry records or reports.

Subsection 26(2) also provides, in relation to Commissions of Inquiry, that these things may be done despite any direction from the President of the Commission under subsection 25(1) prohibiting the disclosure of specified information or documents, including where the President believes that such disclosure may be unfair to a person affected by the inquiry.

The committee notes that these sections are framed very broadly, such that any Commonwealth employee may use or disclose any inquiry information for any purpose related to their employment. For example, it appears that this provision would operate to allow any employee of the Commonwealth—at any APS level, and without further authorisation—to make any information in inquiry records publicly available.

The explanatory statement (ES) to the instrument notes that 'this overcomes privacy and other restrictions on disclosure that might apply', and states that:

The ability for [inquiry] records and [inquiry] reports to be used and disclosed in such circumstances is necessary to promote transparency and enable swift implementation of the findings and recommendations of [inquiries]...It is important for Defence to retain the ability to disclose such information from [inquiry] reports and records with a minimum of bureaucratic complexity and associated delay.

The ES states that the requirement that use, disclosure and copying of information can only occur in the performance of the person's duties provides a significant safeguard against improper use or disclosure. The ES also cites Chief of the Defence Force Directive 08/2014 as a relevant safeguard, which the ES indicates restricts the types of disclosures falling within the scope of a person's official duties, and requires employees or members to consider the redaction of personal information in such records where appropriate. However, the committee understands that such a directive would only apply to Defence employees and members, and not to any other Commonwealth employees who are authorised to use and disclose information

under sections 26 and 58 of the instrument. The status and enforceability of such a directive is also unclear to the committee.²²

In addition, sections 27 and 59 provide that the minister may authorise an employee of the Commonwealth or a member of the Defence Force to use information in inquiry records and reports for a specified purpose, and disclose or copy inquiry documents, records and reports. The minister may set conditions on such an authorisation. It is not clear to the committee how these sections interact with sections 26 and 58, which already authorise Commonwealth employees and Defence members to do these things without ministerial approval or conditions.

Further, sections 28 and 60 authorise the minister to use, disclose and copy certain information and documents. Information may be used 'for purposes relating to the Defence Force', while there is no limit on the purpose for which inquiry documents, records and reports may be disclosed or copied by the minister.

The committee notes that it is likely that Defence inquiry documents, records and reports will, in at least some cases, contain sensitive and personal information, and considers that the provisions in the instrument for the use and disclosure of such information are framed in an extremely broad manner, with limited justification provided in the ES regarding the need for such broad authority, and relevant safeguards in place.

The committee requests the minister's detailed advice as to:

- the justification for the inclusion in the instrument of very broad authorisation for Commonwealth employees and Defence members (at any level, without further authorisation), to use, copy and disclose inquiry information;
- what safeguards are in place to protect the privacy of individuals in relation to such information, including in relation to the use or disclosure of that information by non-Defence Commonwealth employees; and
- how the imposition of conditions by a minister on Commonwealth employees or Defence members' use or disclosure of information under sections 27 or 59 of the instrument would interact with sections 26 and 58, which authorise Commonwealth employees and Defence members to use or disclose the same information without ministerial authorisation or conditions.

Minister's response

The Minister for Defence Personnel advised:

22 The information about Chief of the Defence Force Directive 08/2014 is drawn from the ES to the instrument; the committee's research indicates that the document is not publicly available.

Sections 26 and 58 do not operate to allow any employee of the Commonwealth to make any information in inquiry records publicly available. Disclosure of inquiry records to the public would only be permitted if the disclosure was within the course of the person's duties or authorised by the Minister.

Performance of duties - justification for inclusion in the instrument

Whether disclosure is within the scope of a person's duties will depend on the nature of the person's position and the role of the individual seeking to disclose the information. Guidance contained in Chief of the Defence Force Directive 08/2014 states that disclosure to the public or wide disclosure within Defence is unlikely to be part of, or incidental to, a person's duties. The Directive provides general examples of different roles and functions within the ADF. A commanding officer in the ADF has functions associated with the welfare of his or her subordinates, so their performance of duties includes matters incidental to maintaining the welfare of his or her subordinates. A legal officer in the ADF has functions associated with giving legal advice to command, so their performance of duties includes matters incidental to giving the legal advice. The Directive also provides common examples of disclosures internally within and externally to Defence that may fall within the performance of a person's duties. These include internal disclosures of inquiry records to other Defence staff for the purpose of implementing inquiry outcomes, dealing with complaints, designing training, policy, procedures, instructions and orders; and affording procedural fairness. The Directive states that external disclosures would usually be within the duties of a dedicated liaison officer of the relevant external Department or agency.

Safeguards

Unauthorised disclosures may constitute an offence for any person under section 37 or 66 of the *Defence (Inquiry) Regulations 2018*, as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, the current guidance in Chief of the Defence Force Directive 08/2014 constitutes a general order to ADF members for the purposes of the *Defence Force Discipline Act 1982*, meaning that unauthorised public disclosure of inquiry records by ADF members, who for the most part will be handling such records, may result in internal administrative or disciplinary action. I am advised by the Department that the intention is that a new joint Secretary and CDF Directive will be updated and issued which would be enforceable as a lawful order for ADF members, and would also constitute a direction to APS employees for the purposes of subsection 15(5) of the *Public Service Act 1999*. These Directives are and will be widely available throughout Defence, and the relevant parts can be made publicly available including to non-Defence staff that are provided access to inquiry records.

In the event that Commonwealth employees outside the Department of Defence are provided with access to inquiry records, they will similarly be

bound by the law in relation to their use and disclosure of those records. Again, disclosure of records publicly by a non-Defence Commonwealth employee is unlikely to be within the scope of their duties.

The reference in the explanatory statement that sections 26 and 58 'overcome privacy and other restrictions on disclosure that might apply' reflects the requirement to transmit information quickly across the Defence Force, the Department, and sometimes to other Government departments and agencies which enables necessary steps to be quickly taken, such as to mitigate risks to individuals where a report contains safety critical information which needs to be actioned quickly to prevent further safety incidents from occurring. In such instances, while steps will be taken to protect the privacy of individuals referred to in the records where practicable, where time or other factors do not permit this action, the risk to safety will outweigh any risks associated with breach of a person's privacy (noting that the *Administrative Inquiries Manual* requires inquiry documents to be redacted to protect personal information where appropriate).

Given that the purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force (section 6), few inquiry records would need to be made available to employees in other Government departments and agencies. The most likely scenario is where inquiry records concerning a safety incident are provided to the Department of Veterans' Affairs to enable that Department to consider an ADF member's compensation claim. In the event that an APS employee outside the Department is provided with inquiry records under section 26 or 58, then that APS employee will be also bound by the legislative restrictions. That is, they will equally not be permitted to use, disclose or copy inquiry records unless it is within the course of their employment.

Sections 27 and 59, and sections 26 and 58, serve different purposes. As discussed above, the latter provide for the limited use, disclose or copying of inquiry records where such is within the scope of their employment. By contrast, the former provide a broader mechanism for inquiry records to be used, disclosed or copied in any circumstances. The purpose of sections 27 and 59 is to allow use, disclosure or copying of inquiry records in circumstances where it is appropriate to do so but which would not ordinarily be within the course of an APS employee or ADF member's employment. For example, it may be appropriate to disclose an inquiry report to the family of a deceased ADF member, but doing so would not ordinarily be within the scope of a person's duties. In this instance, the Minister could authorise the Chief of the Defence Force to disclose a copy of an inquiry report to the family, and could impose conditions, such as that the personal information of other individuals be redacted prior to it being disclosed. Since sections 27 and 59 allow, in theory, the use, disclosure or copying of inquiry records in any circumstances, the requirement for ministerial authorisation and oversight provides an

important safeguard. Proposals to disclose inquiry records publicly require Ministerial Advice to be provided. Furthermore delegation of functions under sections 27 and 59 is limited to a small number of senior ADF officers and when exercised by such delegates is to be used supplementary to sections 26 and 58.

Sections 28 and 60 provide a broad power for the Minister to use, disclose and copy inquiry records for purposes relating to the Defence Force. As the Minister for Defence has general control and administration of the Defence Force under the *Defence Act 1903*, and the purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force, it is essential that the Minister retains this broad power. As with the exercise of other statutory powers, the Minister will remain accountable to Parliament.

Committee's response

The committee thanks the minister for his detailed response. The committee notes the minister's further advice about current limitations on disclosure of information by ADF personnel, and notes that a new directive on this matter is to be issued by the Secretary of Defence and the Chief of the Defence Force, which will be enforceable in relation to both ADF and APS Defence personnel. The committee also notes the minister's advice regarding administrative requirements that inquiry documents be redacted to protect personal information where appropriate.

The committee further notes the additional information provided by the minister about disclosure of information beyond Defence, including the minister's advice that 'few inquiry records would need to be made available to employees in other Government departments and agencies'. In this regard, the committee also notes the minister's advice that unauthorised disclosure of inquiry information by any person may be an offence under sections 37 or 66 of the instrument, and that other relevant safeguards may be provided by the *Privacy Act 1988* and the *Crimes Act 1914*.

With regard to sections 27 and 59 of the instrument, the committee notes the minister's clarification that these provisions are intended to enable the use, disclosure or copying of inquiry records, with ministerial approval and under specified conditions, in certain circumstances that would not ordinarily be within the course of an ADF member or Defence employee's duties.

The committee notes that a replacement ES that includes additional explanation of the privacy limitations and protections relevant to sections 26 and 58, consistent with the above information provided by the minister, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Offences: evidential burden of proof on the defendant²³***Committee's initial comment:***

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 burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

Sections 29, 30, 32, 36, 37, 61, 62 and 66 of the instrument set out a range of offences relating to Defence inquiries, including various types of failure or refusal to cooperate with the inquiry, and unauthorised disclosure of inquiry information or documents. Each of these offences provides for one or more offence-specific defences to the offence, and in so doing, the provisions impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence.²⁴

The ES to the instrument contains no discussion of nor justification for the reversal of the burden of proof in these provisions. The committee's expectation is that the appropriateness of provisions that reverse the burden of proof should be explicitly addressed in the ES, with reference to the relevant principles set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Offences Guide).²⁵

The committee requests the minister's advice in relation to the justification for reversing the evidential burden of proof in each of sections 29, 30, 32, 36, 37, 61, 62 and 66 of the instrument; and requests that the explanatory statement be amended to include that information.

Minister's response

The Minister for Defence Personnel advised:

The *Defence (Inquiry) Regulations 2018* contain a number of offences associated with failing to comply with a notice or order to appear or provide documents or answer questions, and disclosing inquiry records without permission or authorisation. The offences under the *Defence (Inquiry) Regulations 2018* also provide express matters that could be considered excuses for complying with notices or orders. This means that a

23 Scrutiny principle: Senate Standing Order 23(3)(b).

24 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

25 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>.

defendant who wishes to rely on the relevant matter bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists.

This requires them to adduce or point to evidence that they held the relevant belief, that the circumstances made compliance unduly onerous for them, or that they had the relevant permission or authorisation. Once they have done this, the prosecution would need to disprove the existence of the belief, circumstances, permission or authorisation in order to prove the offence. This amounts to a reversal of the burden of proof.

For example, a prosecution for disclosure of inquiry records without authorisation would require a reasonable belief that there was no authorisation or permission, which would be difficult for a prosecutor to establish. Additionally, the belief of the person that compliance is likely to cause damage to defence, or that the circumstances made compliance unduly onerous, requires consideration of factors which are peculiarly within the knowledge of the defendant. For example, in relation to whether compliance is unduly burdensome, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person.

The penalties for these offences are relatively low, and reversal of the burden of proof in relation to the existence of a belief, circumstance, authorisation or permission is reasonable in order to ensure the effectiveness of these provisions.

Committee's response

The committee thanks the minister for his response and notes the minister's view that it is reasonable to reverse the evidential burden of proof in sections 29, 30, 32, 36, 37, 61, 62 and 66 of the instrument because the penalties for the offences are relatively low, and 'in order to ensure the effectiveness of these provisions'.

The committee notes that the Offences Guide states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of the offence), which results in reversing the burden of proof, where:

- the matter 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.²⁶

As indicated in the examples provided in the minister's response, matters that relate to the belief or personal circumstances of the defendant may indeed be peculiarly within the defendant's knowledge, and significantly more difficult for the prosecution to establish. The committee considers that the offence-specific defences

26 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

in sections 29, 30, 32, 61 and 62, establishing defences relating to the reasonable belief of the defendant (sections 29, 32, 61 and 62), or where it would be 'unduly onerous' for the defendant to comply (section 30), are likely to be consistent with the Offences Guide. The committee notes that justification for the reversal of the burden of proof in these provisions has been provided in the amended ES to the instrument registered on the Federal Register of Legislation.

However, sections 36, 37 and 66 of the instrument provide defences where a defendant had a relevant permission or authorisation to disclose information or documents. Notwithstanding the justification provided in the minister's response (and the explanation of these provisions included in the amended ES), It is not apparent to the committee that whether a person was permitted or authorised to undertake an action would be a matter peculiarly within the defendant's knowledge, nor that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The committee has concluded its examination of this matter. However, the committee draws its concern about the reversal of the evidential burdens of proof in relation to offences established by sections 36, 37 and 66 of the instrument to the attention of the minister and the Senate.

Subdelegation²⁷

Committee's initial comment:

Part 3 of the instrument makes provision for 'inquiry officer' inquiries. Subsection 72(1) provides that the CDF may, in writing, delegate any or all of his or her powers under Part 3 to a Navy Officer not below the rank of Lieutenant, an Army officer not below the rank of Captain, or an Air Force officer not below the rank of Flight Lieutenant. The CDF's powers under Part 3 include establishing an inquiry officer inquiry, giving directions as to its subject matter and conduct, and appointing the inquiry officer and other officials to conduct the inquiry.

The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation 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, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

27 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee notes that the minimum military ranks set out in subsection 72(1) are treated within Defence as equivalent to the APS5 classification in the Australian Public Service.²⁸

The ES acknowledges that the number of officers to whom the CDF's powers could be delegated under subsection 72(1) is broad, but states that this is necessary given the different environments in which inquiries may be conducted, including in operational environments such as on small vessels. The ES states that '[d]elegations will be limited to individuals who are suitable to carry out the inquiry taking into account their command responsibilities, rank and position'.

The committee remains concerned, however, that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. The committee notes that in this instance the powers to be delegated are significant. The committee's expectation is not necessarily that details of the qualifications and attributes for delegates be specified in the instrument; rather, that it should include a requirement that the CDF be satisfied that the delegate has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to the appropriateness of amending the instrument to require that the CDF be satisfied that officers to whom powers are delegated under subsection 72(1) have the expertise appropriate to the power delegated.

Minister's response

The Minister for Defence Personnel advised:

The Committee has sought advice on the appropriateness of amending these Regulations to require that the CDF be satisfied that officers to whom powers are delegated under subsection 72(1) have the expertise appropriate to the power delegated. In my view, such an amendment is unnecessary, for several reasons.

The purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force (section 6). In relation to inquiry officer inquiries undertaken under Part 3, only ADF members are compellable to give evidence (section 53). Inquiry officer inquiries are therefore an information-gathering tool to assist commanders in the Defence Force.

Section 72 allows CDF to delegate his or her powers under Part 3 to an officer at or above the rank of Lieutenant in the Navy, Captain in the Army or Flight Lieutenant in the Air Force. While this rank is treated for some

28 See Department of Defence, *Defence Pay and Conditions*, Part 4: Equivalent ranks and classifications, at <http://www.defence.gov.au/PayAndConditions/ADF/chapter-1/Part-4/default.asp> (accessed 3 May 2018).

purposes as the equivalent to an APS5 classification in the Australian Public Service, the Committee should not be misled by such a comparison in this context.

Officer recruitment and selection is a robust process, and comprises cognitive as well as physical testing. If successful, officer cadets receive years of general officer training, followed by trade-specific training. They must then demonstrate their aptitude 'on the job' at the most junior officer levels before being eligible for promotion to the Lieutenant/Captain/Flight Lieutenant level where they may take on command responsibility. All officers in command are selected as fit and proper and provided with the necessary training and experience they require in order to take on the responsibilities demanded by their position. In order to achieve the ranks referred to in subsection 72, an ADF officer will have undergone careful selection and training, and they will have a significant level of responsibility within the chain of command, especially in operational environments.

It is not necessary or desirable for section 72 to impose additional qualifications or attributes on officers in order for them to be delegated power under Part 3. The inclusion of specific requirements would represent a unique attempt to define one central aspect of the responsibilities of ADF officers. This would risk either distorting the selection of officers for positions of command, or it would seek to separate the authority to direct the gathering of evidence from the authority to command.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that, in his view, it is unnecessary to amend the instrument to require that the CDF be satisfied that officers to whom powers are delegated under subsection 72(1) have the expertise appropriate to the power delegated. The committee notes the minister's advice that the selection, training and experience of ADF officers at the specified ranks indicates their suitability to exercise the powers delegated. However, the committee notes its long-standing expectation that significant powers are only delegated to officers at a more senior level.

The committee further notes the minister's advice that 'imposing additional qualifications or attributes on officers in order for them to be delegated powers' would 'risk either distorting the selection of officers for positions of command, or it would seek to separate the authority to direct the gathering of evidence from the authority to command'. The committee notes, with respect, that this comment appears to indicate a misunderstanding of the request made by the committee. The committee reiterates that its expectation is not that details of the qualifications and attributes for delegates be specified in the instrument. Rather, the committee's expectation is that the instrument should include a legislative requirement that the

CDF be satisfied that the delegate has the appropriate expertise to properly exercise the powers or functions delegated.

The committee has concluded its examination of the instrument. However, the committee draws to the attention of the minister and the Senate its concern as to the lack of any legislative requirement that the Commander of the Defence Force be satisfied that delegates have appropriate expertise.

Instrument	Defence (Public Areas) By-laws 2018 [F2018L00349]
Purpose	Facilitates the management of public areas declared under Part IXB of the <i>Defence Act 1903</i>
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 26 March 2018) Notice of motion to disallow must be given by 14 August 2018 ²⁹
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Offences: evidential burden of proof on the defendant³⁰

Committee's initial comment:

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 burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

Sections 10-16 of the instrument set out a range of offences relating to prohibited conduct in Defence public areas. Each of these provisions provides that the offence does not apply if the person has a written permit from an authorised officer or ranger for the relevant conduct. In so doing, the provisions impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence that they have such a permit.³¹

29 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

30 Scrutiny principle: Senate Standing Order 23(3)(b).

31 Subsection 13.3(3) of the Criminal Code schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

The ES to the instrument contains no discussion or justification for the reversal of the burden of proof in these provisions. The committee's expectation is that the appropriateness of provisions that reverse the burden of proof should be explicitly addressed in the ES, with reference to the relevant principles set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Offences Guide).³²

The committee requests the minister's advice in relation to the justification for placing the evidential burden of proof on defendants in sections 10-16 of the instrument; and requests that the explanatory statement be amended to include that information.

Minister's response

The Minister for Defence Personnel advised:

For these offences, the existence of a specific written permit could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permit beyond reasonable doubt as a matter of course (noting that, once the defendant has met the evidential burden, the prosecution would be required to meet this legal burden). In the case of a ranger issuing an infringement notice for a contravention of an offence provision, this would require a reasonable belief that there was no written permit, which would be difficult for a ranger in the field to establish without having access to information of all written permits issued by all rangers and authorised officers. This would not be feasible in many cases. The penalties for these offences are relatively low (especially when enforced by way of an infringement notice), and reversal of the burden of proof in relation to the existence of a written permit is reasonable in order to ensure the effectiveness of these provisions.

Committee's response

The committee thanks the minister for his response and notes the minister's view that it is reasonable to reverse the evidential burden of proof in sections 10-16 of the instrument because the penalties for the offences are relatively low, and 'in order to ensure the effectiveness of these provisions'.

The committee notes, however, that the Offences Guide states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), which results in reversing the burden of proof, where

- it is peculiarly within the knowledge of the defendant; and

32 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>.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.³³

In this respect, it is not apparent to the committee that the existence of a specific written permit would be peculiarly within the knowledge of the defendant, nor that it would be significantly more difficult and costly for the prosecution to disprove. The committee considers that it is reasonable to expect that official processes and records would be in place in relation to issuing written permits to persons for activities in Defence public areas, and that it would therefore be quite straightforward for a prosecutor to establish whether or not a person had been issued such a permit.

The committee further notes that the 'reasonable belief' of a ranger who may issue an infringement notice to a person is irrelevant to the question of whether the prosecution's subsequent burden of proving the commission of the relevant offence should be shifted to the defendant.

The committee has concluded its examination of the instrument. However, the committee draws its concerns about the reversal of the evidential burden of proof in relation to offences established by sections 10-16 of the instrument to the attention of the minister and the Senate.

33 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

Instrument	Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018 [F2018L00273]
Purpose	Establishes legislative authority for Commonwealth expenditure on two activities administered by the Department of Communications and the Arts
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ³⁴
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Merits review³⁵

Committee's initial comment:

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 on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations). The items establish legislative authority for Commonwealth spending on two initiatives administered by the Department of Communications and the Arts: the Regional Journalism Scholarships Program (scholarships program) and the Regional and Small Publishers Cadetship Program (cadetship program). The explanatory statement (ES) to the instrument explains that the programs will involve the provision of grants to higher education providers and news media organisations, respectively, to provide scholarships and cadetships to students and trainees from regional and remote areas.

The ES states that this grant funding to higher education providers and media organisations will not be subject to independent review, on the basis that the programs involve the allocation of finite resources between competing applicants.

34 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

35 Scrutiny principle: Senate Standing Order 23(3)(c).

This committee notes that this is an established ground which may justify the exclusion of merits review.³⁶

However, the ES also indicates that decisions made by higher education providers and media organisations regarding the allocation of the scholarships and cadetships will not be reviewable. In relation to this matter, the ES states:

Disputes in relation to decisions of [higher education providers and media media organisations] will be dealt with in accordance with the terms of the grant guidelines and the terms of...funding agreements [with] the Commonwealth.

The ES provides no further information regarding policy considerations or program characteristics that would justify excluding the relevant decisions of higher education providers and media organisations from merits review.

It is not apparent to the committee that the fact that disputes relating to decisions of higher education providers and media organisations will be dealt with under the terms of relevant grant guidelines and funding agreements is sufficient to justify excluding such decisions from merits review. Further, the ES states that the scholarships and cadetships will be awarded through a merit-based selection method to persons from regional or remote areas or having a sufficient connection to such areas. This suggests that scholarships and cadetships may be awarded on a discretionary basis. In this regard, the committee emphasises that a key reason for merits review is to ensure that there is accountability for discretionary decisions.

The committee's expectations regarding merits review are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.³⁷

The committee requests the minister's advice regarding the characteristics of decisions by higher education providers and media organisations, in relation to the allocation of scholarships and cadetships under the programs authorised by the instrument, that would justify their exclusion from merits review.

Minister's response

The Minister for Communications, through the Minister for Finance, advised:

The Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018

36 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (accessed 4 May 2018).

37 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

[F2018L00273] (the Regulations) establish legislative authority for Commonwealth expenditure on two activities administered by the Department of Communications and the Arts (the Department): the Regional Journalism Scholarships Program (Scholarships Program) and the Regional and Small Publishers Cadetships Program (Cadetships Program).

A distinction needs to be drawn between the decision making process for the award of grant funding by the Minister under both Programs and the decisions that would be made by the grant recipients as part of their performance of the grant activity (in accordance with the terms of the grant agreement entered into between the Commonwealth and the successful grant applicant under each Program).

The decision of the Minister to award funding to a higher education provider (in the case of the Scholarships Program) or a media organisation (in the case of the Cadetships Program) are decisions of the Minister under the respective Programs. Those funding award decisions are not subject to merits review for the reasons as set out in the Explanatory Statement accompanying the Regulations.

On the other hand, decisions made by those organisations will be governed by the terms of a legally binding grant agreement and form an integral part of each organisation's performance of the grant activity under their grant agreement. The grant activity is designed to achieve (or contribute towards the achievement of) the Program objectives.

Decisions made by a higher education provider to award a scholarship (in the case of the Scholarships Program) or a media organisation to engage a cadet (in the case of the Cadetships Program) are decisions made by non-government bodies in accordance with parameters and requirements governed by a contractual arrangement with the Commonwealth (i.e. the grant agreement). These kinds of decisions are made pursuant to a contractual arrangement, which will set out the terms and conditions for the award of grant funding. They are not discretionary in nature, given that decisions on who to award either a scholarship or a cadetship will be made against objective criteria as part of a robust, transparent, and merit based process.

The higher education providers and media organisations which are awarded funding under each respective Program would not act as agents for the Commonwealth, nor would they exercise any administrative decisions under the respective Program on behalf of the Minister.

I note that in relation to the Cadetships Program successful grant recipients will be contractually required to provide a matching funding contribution to the cadetship.

I also note that, consistent with other Commonwealth grant programs, any aggrieved parties would be able to make a complaint in relation to any aspect of the Department's grant application assessment process or the

Department's administration of the Programs, either to the Department or the Commonwealth Ombudsman.

Committee's response

The committee thanks the ministers for their response. The committee notes the ministers' advice that decisions by higher education providers to award scholarships, and media organisations to award cadetships, are made in accordance with contractual grant agreements with the Commonwealth, and the ministers' view that in making those decisions, the organisations 'would not act as agents for the Commonwealth, nor would they exercise any administrative decisions under the respective Program on behalf of the Minister'. The committee also notes the ministers' view that these decisions are 'not discretionary in nature' because they are made against 'objective criteria' as part of a merit-based process.

However, the committee remains concerned that the ministers' response does not appear to identify any established ground for the exclusion of these decisions from merits review. In this regard, the committee draws attention to the accepted guidelines for government on the issue of merits review, contained in the Attorney-General's Department, Administrative Review Council document, *What decisions should be subject to merit review?*. This document states that:

As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test...

...

The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.

If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.³⁸

The committee does not consider that the fact that decisions relating to government programs are made by service providers contracted by government is an appropriate basis for excluding merits review. The committee notes that the organisations awarding the scholarships and cadetships will be allocating public funds for public

38 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), paragraphs 2.1 and 2.4-2.5.

services, and considers that the same accountability mechanisms should therefore apply as apply to public decision-makers. In this regard, the committee notes that the Administrative Review Council has expressed the view that:

when a contractor exercises statutory decision-making powers...the decisions of the contractor should be subject to merits review and agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision taken by a merits review tribunal reviewing the contractor's decision.³⁹

The committee further understands that in other areas of government, such as the migration sector, merits review has been provided for the decisions of private companies contracted to provide government services.

Finally, it is not apparent to the committee that decisions made to award scholarships and cadetships under the program are not discretionary in nature merely because of the existence of criteria against which the decisions are made. While the ministers have not provided the committee with the criteria against which applications will be assessed (and they do not appear to be publicly available at the time of this report), it appears clear to the committee that bodies awarding scholarships or cadetships among competing applicants on a merits basis are unlikely to be mechanically applying technical formulae. Rather, it appears that these bodies will be exercising at least an element of discretion in determining which applications hold the most merit, albeit against specified criteria.

The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate its concern about the exclusion from merits review of decisions relating to the award of scholarships and cadetships under the Regional Journalism Scholarships Program and the Regional and Small Publishers Cadetship Program.

39 Attorney-General's Department, Administrative Review Council, *Report to the Attorney-General: The Contracting Out of Government Services*, Report No. 42, August 1998, <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo42.aspx>, Recommendations 20 and 21.

Instrument	Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2018 [F2018L00269]
Purpose	Establishes legislative authority for Commonwealth expenditure on four activities administered by the Department of Jobs and Small Business
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ⁴⁰
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Merits review⁴¹

Committee's initial comment:

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 on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument adds four items to Parts 3 and 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations), establishing legislative authority for Commonwealth spending on initiatives administered by the Department of Jobs and Small Business (the department). Two of these initiatives are:

- the New Enterprise Incentive Scheme (NEIS) (item 127), which provides training, assistance and mentoring for the owners and operators of new businesses; and
- transition support services (item 268), which provides services to assist workers transition into new employment prior to and post retrenchment.

Each of these initiatives involves the department contracting service providers to deliver training and support services to eligible participants. With respect to the NEIS, the explanatory statement (ES) states that providers are responsible for assessing participant eligibility and for managing participation in the scheme, and that NEIS participants will receive notification of decisions affecting their participation.

40 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

41 Scrutiny principle: Senate Standing Order 23(3)(c).

The ES does not provide any information regarding the assessment of eligibility for the transition support services scheme.

In relation to each of the initiatives, the ES states:

Decisions by providers in relation to the provision of services will be subject to independent review. If a job seeker is not satisfied with a provider's decision, the job seeker may request a review of the decision by the provider or raise the matter with the department. The department will acknowledge receipt of the complaint and contact the job seeker with a view to resolving the complaint as soon as practicable. If the complaint remains unresolved, the contact officer in the department will refer the complaint to the complaints officer, who is independent of the program, for independent review.

Given the availability of such review and noting that decisions in relation to the provision of services are not made under an enactment, the *Administrative Decisions (Judicial Review) Act 1977* does not apply.

The ES provides no further information regarding any policy considerations or program characteristics that would justify excluding decisions made by providers under the NEIS or the transition support services scheme from merits review by a tribunal or body external to the department, such as the Administrative Appeals Tribunal.

It is not apparent to the committee that review by a departmental official of a decision by a service provider contracted by government constitutes sufficiently independent merits review. The committee further notes that it does not consider that the fact that decisions by service providers are not made under an enactment is an appropriate basis for excluding merits review.

The committee's expectations regarding merits review are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.⁴²

The committee requests the minister's advice regarding the characteristics of decisions by providers in relation to the provision of services under the New Enterprise Incentive Scheme and transition support services scheme that would justify their exclusion from merits review by an external body independent of the department.

42 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

Minister's response⁴³

The Minister for Jobs and Innovation, through the Minister for Finance, advised:

The Committee has sought further information as to why there is no merits review by a tribunal or body external to the Department of Jobs and Small Business (the Department), in connection with the New Enterprise Incentive Scheme (NEIS) and Transition Support Services (TSS) under the Stronger Transitions package.

The nature of the assistance provided to participants of both programs, and the eligibility criteria for both programs, are outlined at the end of this response.

Independence of the Department from NEIS and TSS providers

The Committee has questioned whether review by a Departmental official of a decision by NEIS and TSS service providers contracted by the Government constitutes sufficiently independent merits review.

Departmental officials are independent of NEIS and TSS providers. They must comply with their Australian Public Service Code of Conduct obligations at all times, including in relation to impartiality and conflicts of interest. In the unlikely event that a Departmental official had a connection to a provider, such as if a relative owned or worked at a provider, the official would need to declare that interest so it could be managed accordingly, in the same way that a member of an external review body would need to declare a connection, if any, to a provider.

The Department's involvement in reviewing provider decisions is not a matter which would substantially disadvantage a complainant compared to review by an external body. Rather than trying to minimise participation in NEIS or TSS, the Department promotes them to encourage eligible people and employers to participate. Such participation helps achieve the Australian Government objectives of creating jobs, reducing unemployment and reducing dependence on the social security system.

If the Department forms the view that a provider has made an incorrect or unreasonable decision regarding a person's eligibility for NEIS, the Department may require the provider to implement a different decision within a specified timeframe.

This is because the deeds the Department has entered with NEIS providers require a provider to immediately comply with all directions the Department issues to it.

43 This is an edited extract of the minister's response which does not include certain details relating to review by the Commonwealth Ombudsman. The full text of the minister's response may be accessed online at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

Failure by the provider to comply with a reasonable Departmental direction would mean that it would be in breach of the deed and the Department could take action against it under the deed.

In practice, providers generally cooperate with the Department about a person's eligibility for NEIS without the need for formal correspondence under the deed. While the providers generally make sound initial decisions about eligibility, the Department has on occasion instructed a provider to treat a person as eligible either following amendments to the person's business idea, or where the provider originally proposed to terminate the person's participation in NEIS.

In the case of TSS under Stronger Transitions, the Department will determine which employers are eligible, determined by the policy parameters for eligibility outlined at the end of this response. Participation by employers is voluntary. For the pre-retrenchment phase, the Department will determine which workers are eligible, noting that all participation is voluntary. For the post-retrenchment phase, *jobactive* providers will determine which persons are eligible for the Stronger Transitions measures, according to program guidelines, and refer eligible persons to the TSS provider for a comprehensive skills assessment, where appropriate. This will be in accordance with relevant program guidelines. The policy parameters for eligibility are outlined later in this response.

The *jobactive* deeds also require providers to immediately comply with all directions the Department issues to them. The same provision will be included in the deeds for TSS, which has not yet commenced. However TSS providers will not determine eligibility; their role will be to provide the transition services, such as undertaking comprehensive skills assessment or resilience training. The Department will undertake program assurance activities to ensure that decisions on eligibility are made in line with the policy parameters set by Government.

...

The Committee has stated that it does not consider the fact that decisions by employment service providers are not made under an enactment to be an appropriate basis for excluding merits review.⁴⁴ The Department's primary reason for not enabling merits review by a body independent of the Department is not that the decisions are not made under an enactment. Rather, there is no need for such review given the availability of the above review mechanisms and taking into account the above factors

44 By way of background, the reason that administrative details of employment programs have not been placed in legislation is that this would reduce the flexibility of the programs. Very few employment programs have been embodied in legislation for this reason. To the extent that some employment providers make decisions which impact on a person's entitlement to their social security payment, those decisions are reviewable under the social security law including, following internal review, by the Administrative Appeals Tribunal.

and the additional factors telling against external merits review outlined below in this response.

As a secondary matter, the Department notes that for the programs in question there is no decision-making power under an enactment, which is required under the *Administrative Appeals Tribunal Act 1975* for that tribunal to have jurisdiction.

Other factors relevant to the question of external merits review

A decision that a person is ineligible for NEIS or TSS does not preclude a person from future eligibility. For example, a person who is denied NEIS assistance on the basis that their business proposal has not been assessed as commercially viable could modify their proposal to make it more viable and thereby achieve eligibility.

Similarly, where a person has been receiving NEIS assistance but their provider decides that they are no longer eligible because their business has lost commercial viability, the person could make changes to their business to maintain eligibility.

When the Department receives a complaint from a person in connection with their NEIS eligibility, the Department will take a practical and constructive approach and make suggestions to the person about which aspects of their proposal they might need to reconsider in order to demonstrate viability or eligibility, in order to help the person access NEIS assistance. The Department generally aims to respond to such complaints within about one week.

This approach is likely to enable the person to achieve faster NEIS assistance, and a more successful business, than pursuing external review in connection with a proposal of questionable viability, or which does not meet other NEIS eligibility criteria.

In the case of TSS, the Department will also take a practical and constructive approach and use its discretion to help achieve positive outcomes for persons wishing to receive assistance.

For example, as outlined below, to participate in TSS a person must have been a permanent employee of a participating employer, and not a contractor, unless the Department otherwise agrees. There is sometimes ambiguity about whether a person is an independent contractor or an employee. In addition, some employers incorrectly classify employees as contractors even where there is no ambiguity.

Where there is doubt about a person's employment status, the Department's approach will be to use its discretion to include a person in TSS for the pre-retrenchment phase rather than exclude them based upon a narrow view of the meaning of employment. Similarly, for the post-retrenchment phase, should there be doubt about a person's employment status and a *jobactive* provider exclude the person from eligibility, the Department could use its discretion to include the person.

The Department may also use its discretion to include a person even if they are a contractor, if it decides that to do so would be appropriate in the circumstances, having regard to factors such as the nature of their industry and employer.

Policy parameters for eligibility for and the nature of assistance provided by TSS under the Stronger Transitions package

The Committee commented on the absence of information about the eligibility criteria for TSS. Those criteria are now available. Participation is voluntary for both employers and workers. To be eligible, employers must:

- be retrenching permanent employees
- be located in one of the Stronger Transitions Regions (unless otherwise approved by the Department of Jobs and Small Business)
 - o Adelaide (South Australia)
 - o Mandurah (Western Australia)
 - o North Queensland (Queensland)
 - o Melbourne North/West (Victoria)
 - o North/North-West Tasmania (Tasmania)
- be in a position to co-contribute to the transition services for their workers
- have a valid Australian Business Number (ABN)
- not be a Commonwealth entity or company under the *Public Governance, Performance and Accountability Act 2013*
- not be a State/Territory or local Government department or agency
- be trading still (not insolvent)
- have a record of sound corporate practices

To be eligible, participants in the pre-retrenchment phase must:

- be in the process of being retrenched from a Participating Employer that has partnered with the Department to participate in Stronger Transitions
- be permanent employee of the Participating Employer, not a contractor or sub-contractor (unless otherwise agreed by the Department)

To be eligible, participants in the post-retrenchment phase must:

- be able to produce a *letter of retrenchment*, which includes their date of retrenchment and details of their retrenching Employer
- be retrenched and register with a *jobactive* provider within nine months of their retrenchment date. Note: if the Participant has a

Stronger Transitions Support Statement they can also register up to three months prior to their retrenchment date

- reside in, or the Employer their position is to be retrenched from is located in, one of the following identified Stronger Transitions Regions:
 - o Adelaide (South Australia)
 - o Mandurah (Western Australia)
 - o North Queensland (Queensland)
 - o Melbourne North/West (Victoria)
 - o North/North-West Tasmania (Tasmania)
- not be participating in *jobactive* under an existing Structural Adjustment Program, or eligible for an existing Structural Adjustment Program.

The Department will identify eligible employers and participation by employers is voluntary, as noted above. A person's access to TSS prior to retrenchment will depend on their employer agreeing to participate. The transition services will be provided by a panel of providers selected by the Department. The transition services may include advice on future career options and skills in demand; resilience, health and wellbeing support; access to language, literacy and numeracy training; support towards recognition of prior learning; financial education, and digital literacy and online job search training.

Eligibility criteria for and the nature of assistance provided by NEIS

NEIS is longstanding employment program which assists up to 8,600 participants each financial year to start their own business. NEIS is currently delivered by a network of 21 contracted providers in metropolitan and regional areas. NEIS provides accredited small business training, assistance to develop a business plan, and business mentoring and support during the first year of the participant's new business.

NEIS providers are responsible for assessing participant eligibility and managing their participation in the program, in accordance with their deeds with the Department.

To be eligible for NEIS a person must:

- be at least 18 years old when they start NEIS;
- be available to participate in NEIS Training (if relevant) and work full-time in the proposed NEIS business;
- not be prohibited by law from working in Australia;
- not be an overseas visitor on a working holiday visa or an overseas student studying in Australia;
- not have participated in NEIS in the past year; and

- not be an undischarged bankrupt.

If a person is eligible, NEIS providers will assess the business idea to make sure it meets the business eligibility criteria. This means the proposed NEIS business:

- is not currently operating on a commercial basis;
- has an independent business structure;
- is lawful and capable of withstanding public scrutiny;
- has been assessed as commercially viable by a NEIS provider;
- will be established, located and operated solely within Australia; and
- will be structured so that the person has and will maintain a controlling interest over the NEIS business for the duration of the person's time in NEIS.

Committee's response

The committee thanks the ministers for their detailed response. The committee notes the ministers' further advice regarding the operation of the departmental process for review of service providers' decisions in relation to the NEIS and TSS programs. In particular, the committee notes that the department's approach is aimed at encouraging participation in the schemes by eligible people and employers, and that the department works proactively with applicants and service providers to seek to achieve positive outcomes for people who wish to seek assistance under the programs.

The committee also notes that the ministers' advice, and the eligibility criteria for the two programs (provided to the committee in the minister's response), indicate that the determination of eligibility for assistance under the NEIS and TSS programs is largely, if not wholly, based on objective matters of fact, and does not appear to involve significant discretionary elements. In this regard, the committee notes that to the extent that decisions are mandatory or procedural in nature (that is, based on an obligation to act on the existence of specified circumstances) they may not be considered suitable for merits review.⁴⁵

However, while it appears that decisions regarding eligibility for the NEIS and TSS programs may not require external merits review in this instance, the committee emphasises that it does not generally consider that review by departmental officials of decisions by contracted service providers would constitute sufficiently independent merits review. The committee will consider whether decisions made in relation to programs should be subject to merits review on a case-by-case basis, taking into account relevant information provided in ESs and, where appropriate, in ministerial responses.

45 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), paragraphs 3.8-3.12.

The committee considers that it would be appropriate for the further information provided by the ministers to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

Finally, the committee notes the ministers' advice that there is no decision-making power under an enactment in relation to the NEIS and TSS programs, as required under the *Administrative Appeals Tribunal Act 1975* for that tribunal to have jurisdiction. However, the committee reiterates that it does not consider the fact that decisions in relation to those programs are not made under an enactment to be sufficient, on its own, to justify excluding merits review. Rather, the committee would expect that, if merits review by the Administrative Appeals Tribunal (AAT) is appropriate for decisions made in relation to those programs (and other programs authorised under legislative instruments), the necessary reference to AAT review should be included in the relevant instrument or in primary legislation.

In this regard, the committee emphasises that the use of the Financial Framework (Supplementary Powers) Regulations 1997 to authorise spending on programs that otherwise lack legislative authority should not give rise to an effective 'loophole', excluding rights that persons should have to independent merits review of decisions that affect them.

The committee has concluded its examination of the instrument.

Instrument	Fisheries Management (Small Pelagic Fishery) Fishing Method Determination 2018 [F2018L00413]
Purpose	Determines fishing methods in the Small Pelagic Fishery
Authorising legislation	<i>Fisheries Management Act 1991</i> ; Small Pelagic Fishery Management Plan 2009
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ⁴⁶
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Compliance with authorising legislation⁴⁷

Committee's initial comment:

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 legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made pursuant to paragraph 17(6)(aa) of the *Fisheries Management Act 1991*, under subsection 27(1) of the Small Pelagic Fishery Management Plan 2009 (Management Plan). Subsection 27(1) of the Management Plan provides that the Australian Fisheries Management Authority (AFMA) may determine a fishing method (other than the purse seine or mid-water trawl fishing methods) for use in the Small Pelagic Fishery. Paragraph 27(2)(b) of the Management Plan provides that a determination made under subsection 27(1) must specify the period for which the determination applies.

An ordinary reading of paragraph 27(2)(b) of the Management Plan suggests that a determination made under subsection 27(1) should specify a period with a clear start and end date. However, neither the instrument nor its accompanying explanatory statement (ES) specifies such a period. The only information relevant to the period for which the instrument applies appears in section 2 of the instrument—which provides that the instrument commences on 1 May 2018.

The committee notes that the entry for the instrument on the Federal Register of Legislation website states that 'this instrument determines the fishing methods in

46 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

47 Scrutiny principle: Senate Standing Order 23(3)(a).

the Small Pelagic Fishery for the 2018-19 fishing season'.⁴⁸ The committee further notes that the AFMA website provides that the fishing season for the Small Pelagic Fishery is the 12-month season beginning on 1 May.⁴⁹ This suggests that the instrument applies for the 12-month period beginning on 1 May 2018.

Nevertheless, the committee notes that the empowering legislation for the instrument requires the instrument to *specify* the period for which the instrument applies. This requirement does not appear to have been satisfied in this instance, and the application period for the instrument is not apparent without reference to external sources. The committee considers that, in order to ensure compliance with its authorising provisions, the instrument should clearly set out the period of application of the relevant fishing methods.

The committee seeks the minister's advice as to the period for which it is intended the instrument will apply, and as to whether the instrument should be amended to specify that period, in accordance with paragraph 27(2)(b) of the Small Pelagic Fishery Management Plan 2009.

Minister's response

The Assistant Minister for Agriculture and Water Resources Advised:

The Committee is correct in identifying the omission of the specific period for which the instrument will apply. To address this omission and for clarity, the Australian Fisheries Management Authority (AFMA) will revoke the existing instrument and remake it to include specific reference to its period of effect.

....

The remaking process will involve consideration of the new draft instrument by the AFMA Commission. Accordingly, AFMA intends to prepare the new draft instrument with the period of application from the day after its registration with the Federal Register of Legislation until 30 April 2023. Although AFMA does not anticipate large amounts of catch using the jigging and minor line methods, and a previous trial of jigging resulted in very little catch, this end date will provide a period of five years in which to assess fishing operations.

I thank the Committee for its consideration of the instrument and its constructive suggestions, which will be reflected in drafting the remade instrument. I trust that the explanations I have provided clarify the points raised by the Committee.

I have also reminded AFMA of the importance of reflecting on the Committee's feedback when preparing future instruments.

48 <https://www.legislation.gov.au/Details/F2018L00413>.

49 <http://www.afma.gov.au/fisheries/small-pelagic-fishery/>

Committee's response

The committee thanks the assistant minister for her response, and notes the assistant minister's advice that the specific period for which the instrument applies was incorrectly omitted from the instrument.

The committee also notes the assistant minister's advice that, to address this omission and for clarity, AFMA will revoke the instrument and remake it to include specific reference to its period of effect. The committee notes the advice that the new instrument will apply from the day after it is registered on the Federal Register of Legislation until 30 April 2023.

Finally, the committee welcomes the assistant minister's advice that she has reminded AFMA of the importance of reflecting on the committee's feedback when preparing future instruments.

The committee has concluded its examination of the instrument.

Instrument	Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 1) [F2018L00226] Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 2) [F2018L00227]
Purpose	Declare two activities (the Australian Otolaryngology Head and Neck Quality Assurance Network and the Tonsil, Grommet and Nasal Septum Surgery Registry) to be 'quality assurance activities' within the scheme established by Part VC of the <i>Health Insurance Act 1973</i>
Authorising legislation	<i>Health Insurance Act 1973</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁵⁰
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Personal rights and liberties: privacy⁵¹

Committee's initial comment:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

The instruments declare two activities to be 'quality assurance activities' for the purposes of the *Health Insurance Act 1973* (Health Insurance Act). The Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 1) (Declaration No. 1) declares the Australian Otolaryngology Head and Neck Quality Assurance Network (AOQAN) to be a quality assurance activity. The Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 2) (Declaration No. 2) declares the Tonsil, Grommet and Nasal Septum Surgery Registry (TGNSR) to be a quality assurance activity.

The description of the AOQAN in clause 2 of the Schedule to Declaration No. 1 states:

This quality assurance activity consists of the collection of sensitive information about surgical procedures and patient outcomes from Otolaryngology Head and Neck Surgeons through a web-based system. The information relates to cancer diagnosis and staging, treatment plans, surgeon, patient and hospital details, surgical and non-surgical interventions, tumour properties, follow-up appointments, and monitoring

50 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

51 Scrutiny principle: Senate Standing Order 23(3)(b).

of results and will later expand to include rhinology and otology as two additional modules.

The description of the TGNSR in clause 2 of the Schedule to Declaration No. 2 states:

This quality assurance activity consists of the collection of sensitive pre-operative and post-operative data, through a web-based system, about three surgical operations: tonsillectomy, middle ear ventilation tube insertion (grommets) or nasal septum surgery. Data is collected through the use of four questionnaires: a pre-surgery questionnaire completed by the surgeon, a pre-surgery questionnaire completed by the patient, a short term outcome questionnaire completed by the patient approximately four weeks after surgery, and a medium term outcome questionnaire completed by the patient approximately six months after surgery.

The data relates to patient and surgeon details, indications for surgery, the surgery performed, surgical techniques used, and post-surgery patient outcomes.

Each of the activities declared by the instruments appears to involve the collection, use and sharing of sensitive patient information. The ES to each instrument states that Part VC of the Health Insurance Act creates a scheme to encourage efficient quality assurance activities in connection with the provision of health services by protecting information from disclosure, and by providing protection from civil liability in certain circumstances. The ESs do not provide any further information regarding measures in place to protect individuals' privacy with respect to the information collected for the purposes of quality assurance activities, and the statements of compatibility with human rights for the instruments do not recognise that the right to privacy is engaged.

The committee acknowledges that the Health Insurance Act prohibits the disclosure of information acquired solely as the result of a quality assurance activity, unless that disclosure is for the purposes of the activity, in accordance with a ministerial authorisation, or with the consent of the person to which the information relates.⁵²

However, it is unclear to the committee what safeguards are in place with respect to the collection, storage, use and retention of patient information (as opposed to its disclosure). With respect to the AOQAN (covered by Declaration No. 1), the relevant instrument and its ES only provide that the activity consists of the collection of sensitive information through a web-based system. No further explanation is provided as to how this system will be administered. While Declaration No. 2 and its ES explain how information used for the purposes of the TGNSR will be collected, no explanation is provided as to how that information will be stored. Further, neither the instruments nor their ESs provide any information regarding what constraints

52 *Health Insurance Act 1973*, sections 124Y and 124Z.

exist on the use or retention of information collected for the purpose of the declared activities.

The committee also notes that the instruments and their ESs do not address whether a patient's consent is required before information about that patient is collected, or whether patients are to be informed that their information will be used in the quality assurance activities to which the instruments relate.

The committee requests the minister's advice as to:

- the manner in which information will be collected, stored and used for the purposes of the quality assurance activities declared by the instruments, and how long such information will be retained;
- whether consent is required to collect and use patients' information for the quality assurance activities, and if not, why consent is not required; and
- what safeguards are in place to protect individuals' privacy in relation to such information, including constraints on its use, storage and retention.

Minister's response

The Minister for Health advised:

The manner in which information will be collected, stored and used for the purposes of the quality assurance activities declared by the instruments, and how long such information will be retained.

In terms of collecting the data, patients and surgeons use a unique login and password to respond to questions in a questionnaire relevant to a specific procedure for that patient. Each user has secure access to their own information using their login and password. Patients are emailed their unique login and password by their surgeon.

Regarding the TGNSR, an email address is recorded and available for the surgeon to send a post-operative follow up questionnaire. Patients who use the questionnaire will be able to advise whether their symptoms have improved since the operation, or whether there were post-operative complications such as bleeding, re-admission to hospital or if they needed additional pain relief. In relation to the AOQAN, the patient's initials and date of birth are visible to the surgeon. Individual surgeons can review their own cases and assess their patients' results through the outcomes reported following surgery. The system does not allow a surgeon to view the responses of other patients.

Regarding the storage of the data, each registry collects information from patients and surgeons using secure web-based questionnaires specifically designed to support the confidential collection and analysis of de-identified information from surgeries performed in Australia. The information is collected and stored in a secure database hosted in a secure Microsoft Azure environment. Microsoft Azure is a "Platform as a Service" cloud computing service that is certified by the Australian Signals

Directorate.⁵³ The Windows Azure cloud-based model enables ASOHNS to use web applications and proprietary software that are purpose built to securely host each of the two registries.⁵⁴

Analysis of the de-identified outcome data held in the databases for each registry will be undertaken by a specifically-formed Data Sub-Committee of ASOHNS. The Data Sub-Committee comprises of otolaryngology head and neck surgeons and one member would have expertise in statistics and data analysis.

Any data collected by each of the registries for the purpose of the quality assurance activities will be held only while the Declaration is in force, and thereafter destroyed.

Whether consent is required to collect and use patients' information for the quality assurance activities, and if not, why consent is not required.

Patients are asked to provide their consent if they wish to participate in either of the surgical registries. In agreeing to participate patients are advised that their data will be recorded in the registry and will be de-identified for research purposes. Prior to accessing the data collection questionnaire the patient is provided a link to the consent form and a copy of the ASOHNS Privacy Policy. If a patient agrees they then click the 'Patient Consent' check box to proceed.

What safeguards are in place to protect individuals' privacy in relation to such information, including constraints on its use, storage and retention.

There are minimal risks to individual's privacy in relation to using data collected, stored or subsequently analysed from either of the registries. Only system administrators employed by ASOHNS will have access to information about individual surgeons and patients relating to the information provided through the activity. As discussed above, the database is hosted in a secure cloud computing service that is certified by the Australian Signals Directorate.

To access the data for analysis, the Data Sub-Committee must request a report of the data within specific parameters, such as data related to certain medical procedures or data fields. The system administrator then accesses the database using a secure login and extracts the data into a report according to the request. As part of this process any information that may identify, expressly or by implication a particular individual, or particular individuals is removed prior to analysis.

The data held in each registry will not be used for any purpose other than for research in a de-identified, aggregated manner in accordance with the

53 https://www.asd.gov.au/infosec/irap/certified_clouds.htm updated April 2018 (accessed 14 May 2018)

54 https://www.asd.gov.au/publications/protect/cloud_computing_security_considerations.htm (accessed 14 May 2018)

descriptions set out in the Declarations. In line with the legal requirements of qualified privilege, any information that may identify an individual patient surgeon, either expressly or by deduction will not be publicly disclosed.

To reflect these safeguards to privacy, I have instructed my Department to lodge replacement explanatory statements for each of the Declarations which will include:

- a description of how the data is collected, including the method of obtaining patient consent to use their personal data for research purposes;
- a description of how the information is stored, used, and retained by ASOHNS for the purposes of the quality assurance activity; and
- an analysis of the impact of the quality assurance activity on the individual right to privacy in the Statement of Compatibility with Human Rights

Committee's response

The committee thanks the minister for his detailed response. The committee notes the minister's advice regarding arrangements for the collection, use, storage and retention of information for the purposes of the quality assurance activities. The committee notes in particular that patient information is de-identified when accessed and used for research purposes.

The committee further notes the minister's advice that patient consent is obtained for the collection and use of information for the purpose of the quality assurance activities, and the minister's advice regarding the safeguards in place to ensure that individuals' privacy is adequately protected.

The committee welcomes the minister's undertaking to lodge a replacement explanatory statement for each of the declarations, including the information set out in the minister's response.

The committee has concluded its examination of the instrument.

Instrument	International Air Services Commission Policy Statement [F2018L00410]
Purpose	Provides guidance about the way in which the International Air Services Commission is to perform its functions
Authorising legislation	<i>International Air Services Commission Act 1992</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 ⁵⁵
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

No statement of compatibility⁵⁶

Committee's initial comment:

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable legislative instrument to prepare a statement of compatibility in relation to that instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights. Paragraph 15J(2)(f) of the *Legislation Act 2003* requires that the statement of compatibility be included in the explanatory statement (ES) to the instrument.

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

The committee requests the minister's advice as to why a statement of compatibility with human rights was not included in the explanatory statement to the instrument; and requests that the explanatory statement be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

Minister's response

The Minister for Infrastructure and Transport (and Deputy Prime Minister) advised:

Due to an oversight in drafting the Explanatory Statement that accompanies the Policy Statement, a 'Statement of Compatibility with Human Rights' was unfortunately not included.

I can advise the Committee that I have since taken steps to amend the Explanatory Statement in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*. The

55 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

56 Scrutiny principle: Senate Standing Order 23(3)(a).

revised Explanatory Statement will be lodged shortly with the Australian Government Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response, and notes the minister's undertaking that an amended ES, including a statement of compatibility with human rights in accordance with legislative requirements, will be lodged on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	List of Specimens Taken to be Suitable for Live Import (No. 2) [F2018L00402]
Purpose	Amends the List of Specimens Taken to be Suitable for Live Import to: <ul style="list-style-type: none"> • add Clarion Angelfish to Part 2 of the list, and update the listing for the Angelfish family accordingly; • update references in the preamble to Parts 1 and 2 of the list to include the <i>Biosecurity Act 2015</i>; and • update the preamble to Part 1 of the list to provide that Part 1 should not contain a CITES specimen
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 28 March 2018) Notice of motion to disallow must be given by 16 August 2018 ⁵⁷
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Legislative authority: power to make instrument⁵⁸

Committee's initial comment:

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 legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under subparagraphs 303EC(1)(a)(i) and (ii) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It amends

57 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

58 Scrutiny principle: Senate Standing Order 23(3)(a).

the List of Specimens Taken to be Suitable for Live Import (live import list) to include and delete certain items. Subsection 303EC(5) of the EPBC Act provides that the minister must not amend the live import list by including an item unless:

- the amendment is made following consideration of a relevant report under section 303ED or 303EE; or
- the amendment is made following consideration of a relevant review under section 303EJ.

These requirements appear to be preconditions to the making of an instrument under section 303EC to amend the live import list by including an item.

Section 303ED provides that the minister may formulate a proposal (that is, on his or her own initiative) for the live import list to be amended by including an item. Subsection 303ED(2) provides that, before such an amendment is made, the minister must cause to be conducted an assessment of the environmental impacts of the proposed amendment and cause to be prepared a report of those impacts. Subsection 303ED(3) provides that, as an alternative, the minister may consider a report prepared by Biosecurity Australia. These appear to be the 'relevant reports' contemplated by subsection 303EC(5).

The explanatory statement (ES) to the instrument states that the amendment to the live import list was initiated by the minister under section 303ED of the EPBC Act. It would therefore appear to the committee that the requirements in subsection 303EC(5) and section 303ED apply. However, neither the instrument nor the ES indicates whether the minister considered a 'relevant report' before making the instrument. It is therefore unclear to the committee whether the requirements in subsection 303EC(5) of the EPBC Act were satisfied in this instance.

The committee requests the minister's advice as to whether the minister considered a 'relevant report' before making the instrument, as required by subsection 303EC(5) of the *Environment Protection and Biodiversity Conservation Act 1999*; or if not, the power relied on to make the instrument.

Minister's response

The Minister for the Environment and Energy advised:

Prior to making a decision to amend the List of Specimens Taken to be Suitable for Live Import (29/11/2001) (the live import list) to include the Clarion Angelfish in Part 2 of the live import list, I considered a risk assessment prepared by the Department of the Environment and Energy. This risk assessment is the relevant report for the purposes of paragraph 303EC(5)(a) of the EPBC Act and was made under section 303EE(3) in accordance with section 303EF.

To provide clarity, the Department has advised that it will provide this information in the explanatory statements of future amending instruments

that include an item in the live import list in accordance with paragraph 303EC(l)(a) of the EPBC Act.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that, prior to making a decision to amend the live import list, the minister considered a risk assessment prepared by the Department of the Environment and Energy, and that this risk assessment constitutes the 'relevant report' for the purposes of paragraph 303EC(5)(a) of the EPBC Act.

The committee also welcomes the minister's advice that the department will provide information regarding consideration of relevant reports in ESs to future amending instruments that include items in the live import list.

The committee has concluded its examination of this matter.

Parliamentary oversight: registration of incorrect version of instrument⁵⁹

Committee's initial comment:

The instrument was initially registered on 26 March 2018, and tabled in the Senate on 28 March 2018. On 29 March 2018, the instrument was 'corrected' by the Office of Parliamentary Council (OPC) on the Federal Register of Legislation (FRL), to add an additional section and to make a number of editorial changes. The additional section amends the preamble to Part 1 of the live imports list to add the following text: 'Part 1 of the list must not contain a CITES specimen'.

A replacement ES for the instrument was registered on 9 April 2018. Neither the instrument nor the replacement ES contains any explanation for the corrections. The only information in this regard appears in a note by OPC on the FRL, which provides that the reason for the correction was 'to replace the incorrect attachment as registered with the correct attachment that reflects the original instrument as signed by the rule-maker'.⁶⁰

It appears to the committee that the instrument was corrected using section 15D of the *Legislation Act 2003* (Legislation Act). Section 15D provides that, if the First Parliamentary Counsel (FPC) is satisfied there is a mistake, omission or other error in the FRL consisting of an error in the text of an Act or legislative instrument, or of a compilation of an Act or such an instrument, the FPC must correct the error as soon as possible. The FPC must also include on the FRL a statement outlining the correction in general terms. There is no requirement in section 15D that the corrected version of an instrument be tabled in Parliament.

59 Scrutiny principle: Senate Standing Order 23(3)(a).

60 See <https://www.legislation.gov.au/Details/F2018L00402/Download>.

The committee previously commented on the operation of section 15D when it was used to make substantive corrections to another instrument after it had been registered on the FRL and tabled in Parliament.⁶¹ At that time, the committee expressed concerns that using section 15D to make substantive corrections does not appear to fit within the circumstances envisaged by that section. The committee was also concerned that using an administrative process (that is, the 'corrections' power in section 15D) to make substantive changes to an instrument could have significant adverse impacts on parliamentary oversight. This is because, as there is no statutory requirement to table a corrected version of an instrument in Parliament, changes made under section 15D may not be brought to the attention of parliamentarians. Members and senators may therefore lose the opportunity to consider the correct version of the instrument during all or part of the applicable disallowance period.

The committee expressed the view that, where an error in an original instrument is substantive, and where the instrument has already been tabled in Parliament, consideration should be given to effecting any necessary changes by re-making or amending the instrument, to ensure that the correct version of the instrument is subject to the full parliamentary scrutiny and disallowance process. Where section 15D of the Legislation Act is used to 'correct' an instrument that has already been tabled, the revised version of the instrument should be required to be tabled in the Parliament, the ES should expressly state what changes have occurred and why, and a process should be put in place to ensure that parliamentarians are alerted to the relevant change. The committee also suggested that these matters be taken into account if and when section 15D of the Legislation Act is next reviewed.⁶²

The correction to the present instrument was made one day after the instrument was tabled in the Senate, and consequently the correction is likely to have had only a limited impact on parliamentary oversight. The secretariat also received notification of the correction from OPC. Nevertheless, the correction to the instrument was a substantive one. The committee therefore reiterates its concern that, in general, using an administrative process to 'correct' an instrument on the FRL after it has been tabled in Parliament has the potential to seriously undermine parliamentary scrutiny, as well as its view that any substantive corrections to a legislative instrument should be brought about by amending or re-making the instrument.

The committee further emphasises that the process of making and registering legislative instruments should be undertaken with sufficient care to ensure that incorrect versions of instruments are not registered and tabled.

61 See Senate Standing Committee for Regulations and Ordinances, *Delegated legislation monitor 1 of 2018*, pp. 23-27.

62 See Senate Standing Committee for Regulations and Ordinances, *Delegated legislation monitor 3 of 2018*, pp. 66-73

The committee requests the minister's advice as to the circumstances that led to the incorrect version of the instrument being registered on the Federal Register of Legislation and tabled in Parliament; and the appropriateness of using an administrative process to make changes to a tabled legislative instrument, and the impact on parliamentary scrutiny (particularly in light of the disallowance period beginning from the date the initial 'incorrect' version of the instrument was tabled, and that there is no legislative requirement that the 'corrected' version be tabled).

Minister's response

The Minister for the Environment and Energy advised:

Re the circumstances that led to an incorrect version of the instrument being registered; and the appropriateness of using an administrative process to make changes to a tabled legislative instrument, and the impact on parliamentary scrutiny - I now refer to the Committee's comments in relation to the incorrect version of the instrument being registered on the Federal Register of Legislation (the Register). The Department has advised that an administrative error led to an incorrect version of the legislative instrument being registered on the Register and tabled in Parliament.

In the Delegated Legislation Monitor No. 5 of 2018, the Committee expressed its concerns that an administrative process was being used to make substantive changes to a tabled legislative instrument. In this respect, I note that the section providing 'Part 1 of the list must not contain a CITES specimen' which was included in the correct version of the instrument replicates subsection 303EB(5) of the EPBC Act. It was therefore already a requirement under the EPBC Act, rather than a new requirement or obligation. As such, the correction of the error on the Register did not result in a substantive change to the effect of the instrument.

Re the correction of the error on the Register - I am advised by the Department that the version that was first registered on the Register was not the version of the instrument that I signed. As the instrument on the Register was not the instrument made by me, it should not have been lodged for registration on the Register under section 15G of the Legislation Act 2003 (the Legislation Act).

The Department became aware of the error the day after registration. Under paragraph 15L(l)(e) of the Legislation Act, a responsible person (being the rule-maker for the instrument) is required to give notice to the First Parliamentary Counsel that there is an error in the Register. In accordance with these obligations, the Department notified the Office of Parliamentary Counsel (OPC) on my behalf. I understand the Department was liaising with OPC to resolve the issue on the day the incorrect version was tabled in the Senate.

I am advised by the Department that the correct version of the instrument was tabled in the Senate on 8 May 2018, one sitting day after the incorrect

version of the instrument was tabled. As noted by the Committee, the impact on Parliamentary oversight of the instrument was minimal due to the Department's prompt actions to correct the error. Nonetheless, I note the Committee's concerns and the Department has advised it has amended the procedures used when submitting live import list instruments for tabling in future to avoid errors of this nature.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that an administrative error led to an incorrect version of the instrument being registered on the FRL and tabled in Parliament. The committee also notes the minister's advice that the correction of the instrument on the FRL did not result in a substantive change to its effect.

The committee further notes the minister's advice that the department became aware of the error the day after the instrument was registered, and was liaising with OPC to resolve the issue on the day the incorrect version of the instrument was tabled in the Senate.

The committee acknowledges that the correct version of the instrument was tabled in the Senate one sitting day after tabling of the incorrect version, and that, owing to the department's prompt action to correct the error, the impact on parliamentary oversight was minimal.

The committee nevertheless remains of the view that where substantive changes are being made to an instrument (that is, corrections of more than a minor, typographical nature), consideration should be given by the relevant agency to making any necessary changes by re-making or amending the instrument, rather than relying on section 15D of the Legislation Act.

The committee also considers that, where section 15D is used to 'correct' an instrument that has already been tabled, a revised ES should be registered expressly stating what changes have occurred and why, and a process should be put in place to ensure parliamentarians are alerted to the change in the originally tabled instrument. The committee notes that while a replacement ES to this instrument was registered on the FRL, the replacement ES does not indicate that changes were made to the instrument under section 15D, nor does it explain the differences between the original and the corrected instrument.

More broadly, the committee considers that any future review of the Legislation Act should address these issues of concern arising from the terms and operation of section 15D. In particular, the committee considers that there may be value in amending section 15D to include one or both of the following measures:

- some limitation or guidance on the requirement that the FPC 'correct' instruments under section 15D. In this respect, the committee notes the detailed limitations placed on the FPC's editorial powers under sections 15V, 15W and 15X of the Legislation Act;

- a requirement that disallowable instruments corrected by the FPC under section 15D after they have been tabled in Parliament, be tabled anew.

The committee has concluded its examination of the instrument. However, the committee remains concerned about the use of the power in section 15D of the *Legislation Act 2003* to make substantive changes to a tabled instrument, and the impact of this approach on effective parliamentary scrutiny. The committee will continue to monitor this issue.

Instrument	Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018 [F2018L00290]
Purpose	Specifies the forms, fees, and ways of making an application in relation to temporary skilled entry, temporary activity and occupational training visas
Authorising legislation	<i>Migration Regulations 1994</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ⁶³
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Unclear basis for determining fees⁶⁴

Committee's initial comment:

Four provisions of the instrument specify fees for visa-related applications and nominations, as follows:

- subsection 6(3) sets a fee of \$420 for an application for approval as a standard business sponsor;
- subsection 8(2) sets a fee of \$420 for an application for approval, or variation of an approval, as a temporary activities sponsor;
- subsection 10(2) sets a fee of \$330 for nomination of an occupation for a subclass 457 or 482 (temporary skilled work) visa; and
- subsection 12(5) sets a fee of \$170 for nomination of a program of occupational training for a subclass 407 visa.

63 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

64 Scrutiny principle: Senate Standing Order 23(3)(a).

The committee's usual expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement (ES) will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

The committee notes that each of these subsections is made pursuant to a specified provision of the Migration Regulations 1994, which in each case provides for the relevant fees to be specified by the minister in a legislative instrument made for that purpose.⁶⁵ However, the ES to the instrument provides no information about the basis on which any of the above fees has been calculated.

The committee requests the minister's advice as to the basis on which each of the fees in subsections 6(3), 8(2), 10(2) and 12(5) of the instrument has been calculated.

Minister's response

The Minister for Citizenship and Multicultural Affairs advised:

In relation to the fees specified by Migration (IMMI 18/038: Sponsorship Applications and Nominations/or Subclasses 407, 457 and 482 visas) Instrument 2018, these remain consistent with the fees specified in revoked instrument Forms, Fees, Circumstances and Different Way of Making an Application - IMMI 13/036. Those fees were last varied on 1 July 2012 when the fees were increased in line with the Consumer Price Index.

At the time the amount of the fees in question were set, they were calculated on the basis of cost recovery, using departmental data for direct and indirect costs incurred in undertaking the activity or function. This includes staffing and relevant oncosts, suppliers, IT, property, contractors/consultants and corporate overhead where appropriate. The fees were last increased on 1 July 2012, on an indexation basis.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the fees remain consistent with those imposed in the revoked previous version of the instrument. In this respect, the committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

However, the committee also notes the minister's advice that at the time the fees were set, they were calculated on the basis of cost recovery using relevant

65 The relevant authorising provisions are paragraph 2.61(3A)(c), subsection 2.66(4), subsection 2.73(5) and paragraph 2.73A(3)(b) of the Migration Regulations 1994.

departmental data about direct and indirect costs, and that the fees were last indexed on 1 July 2012.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of the instrument.

Instrument	Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 [F2018L00262]
Purpose	Amends the Migration Regulations 1994 to repeal the Temporary Work (Skilled) visa subclass 457, and introduce the new Temporary Skill Shortage visa subclass 482; and address consequential matters
Authorising legislation	<i>Medical Indemnity Act 2002; Migration Act 1958</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁶⁶
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Merits review⁶⁷

Committee's initial comment:

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.

Item 127 of Schedule 1 to the instrument repeals and substitutes subsections 4.02(4A) to 4.02(4C) of the Migration Regulations 1994 (Migration Regulations). These provisions have the effect of excluding businesses that are not operating in Australia from access to review by the Administrative Appeals Tribunal (AAT) of decisions to refuse to approve a person as a sponsor, refuse a nomination, or impose a sanction on a sponsor, in relation to the subclass 482 (temporary skill

⁶⁶ In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

⁶⁷ Scrutiny principle: Senate Standing Order 23(3)(c).

shortage) visa. The explanatory statement (ES) advises that these provisions replicate the exclusions from AAT review applicable to the predecessor subclass 457 visa, because '[i]t is long-standing policy that only businesses which operate in Australia should have access to merits review'.

It is not clear to the committee that 'long-standing policy' is an established ground for the exclusion of independent merits review.⁶⁸ The committee is also conscious that these provisions would selectively exclude a class of potential applicants from review available to other applicants; a situation which warrants particular justification. Accordingly, the committee considers that the ES does not provide sufficient information to establish the characteristics of these decisions, or of the class of excluded applicants, that would justify their exclusion from merits review.

Finally, the committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee requests the minister's advice as to the characteristics of decisions relating to sponsorship and nominations for subclass 482 visas, or of overseas businesses affected by such decisions, that would justify excluding such businesses from access to independent merits review of those decisions.

Minister's response

The Minister for Citizenship and Multicultural Affairs advised:

As noted by the Committee, the Explanatory Statement refers to the long-standing policy in relation to access to merits review by overseas businesses. This policy is part of the merits review arrangements introduced almost 25 years ago. The policy distinguishes between persons and organisations with a connection to Australia, and those who lack a connection. The policy is implemented in section 338 of the *Migration Act 1958* (the Act) and regulation 4.02 of the *Migration Regulations 1994* (the Regulations). For example, sponsorship by "a company that operates in the migration zone" can give rise to an entitlement to merits review of a visa decision (subparagraph 338(5)(b)(ii) of the Act). An overseas company is excluded.

The provision of access to merits review by persons and business with no connection to Australia would have significant implications for the workload of the Administrative Appeals Tribunal and the Department of Home Affairs, and would be a significant departure from long-standing policy. In my view, it was appropriate for the Amending Regulations to maintain the status quo in relation to merits review.

68 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the policy relating to access to merits review by overseas businesses is part of arrangements introduced almost 25 years ago, and is reflected in the *Migration Act 1958* and the Migration Regulations. The committee also notes the minister's view that it is appropriate to maintain the status quo in this regard because providing access to merits review for persons and businesses 'with no connection to Australia' would have significant implications for the workload of the AAT and the department.

The committee remains concerned that the advice provided by the minister does not reflect an established ground that would justify the exclusion of persons affected by these decisions from independent merits review. The committee also reiterates its concern that this policy has the effect of selectively excluding a class of potential applicants from review rights available to other applicants.

In this regard, the committee further considers that it may be reasonable to regard an overseas business's intention to establish operations in Australia, as demonstrated by an application for the approval of relevant sponsorships or nominations, as constituting a 'connection to Australia'.

The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate the exclusion of businesses that are not operating in Australia from access to independent merits review of decisions relating to sponsorship and nominations for subclass 482 (Temporary Skill Shortage) visas.

Unclear basis for determining fees⁶⁹

Committee's initial comment:

Item 132 of Schedule 1 to the instrument repeals and replaces subsections 5.37(2), (3) and (4) of the Migration Regulations. The new provisions specify a fee of \$540 for each of three types of applications relating to the nomination of positions for the purpose of subclass 186 and 187 employer-nominated permanent residence visas. The fees apply for nominations under the Temporary Residence Transition stream, the Direct Entry stream and the Labour Agreement stream, respectively, where the relevant positions are not in regional Australia.

Item 135 of Schedule 1 inserts a new item 1240 into Part 2 of Schedule 1 of the Migration Regulations. This item sets out visa application charges relating to the new Temporary Skill Shortage (subclass 482) visa. Applicants for visas in the short-term stream must pay an application fee of \$1,150 for the primary applicant, plus \$1,150

69 Scrutiny principle: Senate Standing Order 23(3)(a).

for each additional adult family member and \$290 for each child family member included in the application. For the medium-term stream the application fee is \$2400 for the primary applicant, \$2400 per additional adult and \$600 per additional child.

The committee's usual expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement (ES) will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

However, the ES to the instrument provides no information about the basis on which any of the above fees has been calculated. In relation to the fees specified in item 132, the ES only states that the previously existing fee structure is maintained for the Temporary Residence Transition stream, and now extended to apply to the Direct Entry stream and the new Labour Agreement stream. In relation to the fees in item 135, the ES simply notes the difference between fees applicable to the short-term and medium-term streams for the subclass 482 visa.

The committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee requests the minister's advice as to the basis on which each of the fees in items 132 and 135 of Schedule 1 to the instrument has been calculated.

Minister's response

The Minister for Citizenship and Multicultural Affairs advised:

Calculation of visa application charges under item 135 of the Amending Regulations

The Committee has requested advice as to the basis on which the relevant visa application charges were calculated. As noted at pages 62-3 of the Consolidated Financial Statements for the Australian Government for the financial year ended 30 June 2016, a review of the classification of visa application charges (VACs) determined that the revenue for these charges had increased over a number of years without a commensurate increase in costs. As a result, VACs were reclassified from non-taxation to taxation revenue to reflect the sustained change in the nature of the revenue. This reclassification took effect from the 2015-16 Mid-Year Economic and Fiscal Outlook (MYEFO).

In particular, the reclassification is consistent with the principle that fees from regulatory services are designed to cover all or part of the cost of providing a regulatory function. If the revenue collected is clearly out of proportion to the costs of providing the regulatory service, then the fee is classified as taxation revenue.

The VAC amount for individual visa subclasses is set by Government as part of the Budget process. The *Migration Act 1958* provides that the amount of the VAC is to be prescribed in the Regulations and must not exceed the limit determined under the *Migration (Visa Application) Charge Act 1997*.

The VAC amounts set out at item 135 of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (the Amending Regulations) are consistent with the above principles, and I consider them appropriate.

Calculation of fees under item 132 of the Amending Regulations...

Item 132 of the Amending Regulations made changes to subregulations 5.37(2), (3) and (4) of the Regulations. These provisions prescribe a fee of \$540 for nomination applications for the purpose of the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186 visa) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187 visa) where the nominated position is not in regional Australia. Where the nomination relates to a position in regional Australia, the nomination application does not attract a fee.

The amendments to regulation 5.37 maintain the previously existing fee structure for the Temporary Residence Transition stream and apply this fee structure to the Direct Entry stream. The amendments also apply this fee structure for nominations to the new Labour Agreement stream of the Subclass 186 visa. In practice, this means that nominations for the purpose of the Subclass 186 visa may be \$540, but no fee is payable for nominations for the purpose of the Subclass 187 visa. I consider that these changes are appropriate to reflect the intended policy settings of these visa, including in relation to supporting nomination applications relating to positions in regional Australia. The amount of the nomination fees prescribed by regulation 5.37 was last varied on 1 July 2012, when it was raised from \$520 to \$540.

...

At the time the amount of the fees in question were set, they were calculated on the basis of cost recovery, using departmental data for direct and indirect costs incurred in undertaking the activity or function. This includes staffing and relevant oncosts, suppliers, IT, property, contractors/consultants and corporate overhead where appropriate. The fees were last increased on 1 July 2012, on an indexation basis.

Committee's response

The committee thanks the minister for his response. In relation to the fees inserted into the Migration Regulations by item 132 of Schedule 1 to the instrument, the committee notes the minister's advice that the fees maintain the previously existing fee structure, and that the changes to fees made by the instrument 'are appropriate to reflect the intended policy settings of these visa[s]'. The committee also notes the

minister's advice that at the time the relevant fee structure was established, the fees were calculated on the basis of cost recovery using relevant departmental data about direct and indirect costs, and that the fees were last indexed on 1 July 2012.

In relation to the charges inserted by item 135, the committee notes the minister's advice that visa application charges (VAC) were reclassified from non-taxation to taxation revenue effective from the 2015-16 Mid-Year Economic and Fiscal Outlook, and that imposing taxation via VACs is enabled by the *Migration (Visa Application) Charge Act 1997*.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of the instrument.

Instrument	Norfolk Island Continued Laws Amendment (Community Title) Ordinance 2018 [F2018L00236]
Purpose	Amends the Norfolk Island Continued Laws Ordinance 2015 to commence community land title legislation on Norfolk Island
Authorising legislation	<i>Norfolk Island Act 1979</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁷⁰
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Unclear basis for determining fees⁷¹

Committee's initial comment:

This ordinance amends the Norfolk Island Continued Laws Ordinance 2015 [F2018C00159] (principal ordinance) to amend the *Community Title Act 2015* (Community Title Act), a Norfolk Island enactment. Norfolk Island enactments, made by the former Norfolk Island Legislative Assembly, are continued in force for Norfolk Island under section 16A of the *Norfolk Island Act 1979* (Norfolk Island Act). Subsection 17(3) of the Norfolk Island Act authorises the amendment of a continued

70 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

71 Scrutiny principle: Senate Standing Order 23(3)(a).

law by an ordinance made under section 19A of that Act. The present ordinance was made under section 19A of the Norfolk Island Act.

The ordinance inserts new item 37T into the principal ordinance, which inserts new Schedule 6 into the Community Title Act. Sections 16 and 30 of that schedule set fees payable to obtain information and records as follows:

- section 16 sets a maximum fee of 0.05 fee units⁷² for providing copies of records of a body corporate;⁷³ and
- section 30 sets fees for applications to obtain information relating to the affairs of a body corporate, referred to in subsections 138(1) and (2) of the Community Title Act.⁷⁴ The fees range from \$5 to \$25, depending on the nature of the application.

Additionally, section 45 sets out a schedule of fees payable in relation to a variety of matters covered by the Community Title Act, including applications for divisions of land, filing of certain contracts and the submission of an outer boundary plan. The fees range from 1 to 32 fee units.

The committee's longstanding view is that, unless there is specific authority in primary legislation to impose fees in delegated legislation, fees in legislative instruments should be limited to cost recovery. Otherwise, there is a risk that such fees are more properly regarded as taxes, which require specific legislative authority. While the committee acknowledges the unusual circumstances of continued Norfolk Island laws, the committee understands that the effect of section 16A of the Norfolk Island Act is to make the laws to which that section refers Commonwealth laws, meaning any taxes imposed under those laws would constitute Commonwealth taxation. The committee notes that while the Norfolk Island Act authorises the Governor-General to make ordinances for the peace, order and good government of the territory,⁷⁵ it does not provide specific authority to set fees or impose taxation.

The committee's expectation in cases where an instrument carries financial implications via the imposition of or a change to a charge, fee, levy, scale or rate of costs or payment is that the relevant explanatory statement (ES) will make clear

72 Pursuant to section 12B of the *Interpretation Act 1979 (Norfolk Island)*, where a fee of less than two fee units is imposed by an enactment, the dollar amount is determined by multiplying the number of fee units by \$28.40 and rounding to the nearest dollar. Where a fee of two or more fee units is imposed, the dollar amount is determined by multiplying the number of fee units by \$28.40, and rounding to the nearest multiple of 5 dollars.

73 Section 5 of the *Community Title Act 2015* provides that a 'body corporate' is a body corporate established when a plan of community division or a strata plan is registered.

74 The information referred to in those subsections includes (among other things) minutes of general meetings, statements of accounts and particulars of expenditure.

75 See section 19A of the *Norfolk Island Act 1979*.

the specific basis on which an individual imposition or change has been calculated. In this instance, the ES does not specify the basis on which the fees imposed by the instrument have been calculated. It merely restates (in brief) the operation of the relevant provisions.

The committee requests the minister's advice as to the basis on which the fees in sections 16, 30 and 45 of Schedule 6 to the Community Title Act—inserted by item 37T of the Norfolk Island Continued Laws Ordinance 2015, which is inserted by item 1 of the instrument—have been calculated.

Minister's response

The Minister for Regional Development, Territories and Local Government advised:

The fees were calculated on a cost recovery basis to reflect the administrative costs to the Norfolk Island Regional Council (NIRC). These costs include staff time and materials associated with managing community title. The NIRC was consulted on the Community Title Ordinance as it was developed, including the quantum of the fees.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that the relevant fees have been calculated on a cost recovery basis, reflecting administrative costs to the Norfolk Island Regional Council, including staff time and materials.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee has concluded its examination of the instrument.

Instrument	Norfolk Island Legislation Amendment (Public Health) Ordinance 2018 [F2018L00237]
Purpose	Amends the Norfolk Island Applied Laws Ordinance 2016 to apply remaining suspended provisions of the <i>Public Health Act 2010</i> (NSW) and the Public Health Regulation 2012 (NSW) to Norfolk Island
Authorising legislation	<i>Norfolk Island Act 1979</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁷⁶
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Immunity from liability⁷⁷

Committee's initial comment:

This ordinance amends the Norfolk Island Applied Laws Ordinance 2016 [F2018C00166] (principal ordinance) to amend the *Public Health Act 2010* (NSW) (Public Health Act) and the Public Health Regulation 2012 (NSW) as they apply in Norfolk Island. Section 18A of the *Norfolk Island Act 1979* (Norfolk Island Act) provides that the provisions of the law of New South Wales, as in force in NSW from time to time, are in force on Norfolk Island.⁷⁸ That section also authorises the amendment of a New South Wales law in force on Norfolk Island by a section 19A ordinance. The present ordinance was made under section 19A of the Norfolk Island Act.

Section 24 of the Public Health Act provides that the provision of any information or advice concerning drinking water by the Chief Health Officer,⁷⁹ or by a supplier of drinking water pursuant to a direction by the Chief Health Officer, does not subject the following persons to any action, liability, claim or demand:

- the state of NSW;
- a Minister of the Crown in right of NSW;

76 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

77 Scrutiny principle: Senate Standing Order 23(3)(b).

78 It is noted that the principal ordinance has suspended the application of most NSW laws to Norfolk Island until 1 July 2018. The Public Health Act is not suspended, however, and applies (along with its regulations) to Norfolk Island as amended by Schedule 6 to the principal ordinance.

79 'Chief Health Officer' means the Chief Health officer of the NSW Department of Health.

- a member of staff of the NSW Department of Health;
- a member of the NSW Health Service; and
- the relevant supplier of drinking water or any of its staff.

To rely on the immunity, the relevant information or advice must have been provided in good faith for the purposes of executing the Public Health Act.

The ordinance inserts a new item 7A into the principal ordinance, which amends section 24 of the Public Health Act to substitute a provision protecting the following Commonwealth and Norfolk island entities from liability:

- the Commonwealth;
- a minister of state of the Commonwealth;
- an official of a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*);
- the manager of the Norfolk Island Health and Residential Aged Care Service (NIHRACS) or a person employed by the manager;
- the Norfolk Island Regional Council (NIRC); and
- an employee of the NIRC.

The immunity from liability conferred by section 24 of the Public Health Act removes any common law right to bring an action to enforce legal rights against the entities listed in that section—unless it can be demonstrated that a lack of good faith is shown. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake a task, and will involve a personal attack on the honesty of the decision-maker. The courts have therefore taken the position that bad faith can only be shown in very limited circumstances.

Consequently, the committee expects that, if a legislative instrument seeks to confer immunity from liability or to extend the operation of an existing immunity, this should be clearly justified in the explanatory statement (ES). In this instance, the ES provides no explanation for the extension of the immunity from liability in section 24 of the Public Health Act to the Commonwealth and Norfolk Island entities listed above. It merely restates the operation and effect of the relevant provisions.

The committee requests the minister's advice as to why it is considered necessary and appropriate to extend the immunity from liability in section 24 of the Public Health Act to the listed Commonwealth and Norfolk Island entities, such that affected persons would have their right to bring an action to enforce their legal rights removed or limited to situations where a lack of good faith is shown.

Minister's response

The Minister for Regional Development, Territories and Local Government advised:

The Commonwealth, the relevant Minister, the NIRC and the Norfolk Island Health and Residential Aged Care Service have powers, functions

and duties in respect of public health on Norfolk Island. Section 24 of the *Public Health Act 2010 (NSW) (NI)* was amended to provide protection from liability for these entities. This protection is to ensure that public safety is the paramount consideration in providing information and advice about drinking water. The protection from liability reduces the risk of an overly cautious or restrictive approach to providing public safety information.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that the immunities granted under section 24 of the Public Health Act are intended to protect public safety in relation to drinking water by reducing the risk of 'an overly cautious or restrictive approach' to providing information and advice.

The committee notes, however, that the minister's response provides no specific justification for why it is necessary or appropriate to extend the immunity from liability beyond individual officials, to the Commonwealth and the Norfolk Island Regional Council. The committee notes that an effect of the provision as currently drafted is to significantly undermine the potential ability of individuals to obtain legal redress in relation to damage, injury or even death that may result from the provision of inaccurate or misleading advice (provided in good faith) in relation to the safety of drinking water.

The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate its concern about the immunity from liability granted to the Commonwealth and the Norfolk Island Regional Council in relation to the provision of information or advice concerning drinking water, under new section 24 of the *Public Health Act 2010 (NSW) (NI)* inserted by the instrument.

Instrument	Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]
Purpose	Determines classes of participants, authorised community bodies and other matters for the purpose of the cashless debit card trial in the Kimberley, Ceduna and Goldfields areas
Authorising legislation	<i>Social Security (Administration) Act 1999</i>
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ⁸⁰
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Incorporation of document⁸¹

Committee's initial comment:

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that an instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable

80 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

81 Scrutiny principle: Senate Standing Order 23(3)(a).

legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.⁸²

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁸³

Section 7 of the instrument has the effect of excluding Plumridge Lakes from the Goldfields area for the purpose of the cashless debit card trial. Section 5 defines Plumridge Lakes as 'the locality of Plumridge Lakes referred to in the definition of the Goldfields – Esperance Police District in Schedule 1 to the *Police Districts Notice 2017* (Western Australia)'. However, neither the instrument nor the ES indicates the manner in which the Police Districts Notice has been incorporated, or where that document can be freely accessed.

82 The committee notes that section 10A of the *Acts Interpretation Act 1901*, as applied by section 13 of the *Legislation Act 2003*, has the effect that a reference to a state law incorporated in an instrument may also be construed as a reference to that law as amended from time to time. However, the document incorporated in this instrument does not appear to be a state law, as it is not listed on the register of Western Australian Legislation at <https://www.legislation.wa.gov.au/legislation/statutes.nsf/home.html>.

83 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

The committee requests the minister's advice as to:

- the manner in which the *Police Districts Notice 2017* (Western Australia) is incorporated into the instrument; and
- how that document is or may be made readily and freely available to persons interested in or affected by the instrument.

Minister's response

The Minister for Social Services advised:

In relation to the incorporation by reference of the *Police Districts Notice 2017* (Western Australia) (the Notice) in section 6 of the *Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018* (the Determination), as the Committee notes, documents that are not Acts or disallowable legislative instruments may not be incorporated as in force from time to time unless authorised by the enabling legislation. I can confirm that the Notice is incorporated as in force at the commencement of Part 1 of the Determination.

The Explanatory Statement for the Determination will be amended as at Attachment A to clearly specify that the Notice is incorporated in the Determination as in force at the commencement of Part 1 of the Determination and provide information about how the Notice may be found free of charge.

The Notice was made by the Governor of Western Australia in Executive Council under the *Police Act 1892* (Western Australia) and published in the *Government Gazette of Western Australia* on 20 January 2017. The Notice can be found at the State Law Publisher on the Department of Premier and Cabinet (WA) website (see [Government Gazette No. 19 of 2017](#)).

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that the *Police Districts Notice 2017* (Western Australia) is incorporated into the instrument as in force at the commencement of Part 1 of the Determination. The committee also notes the minister's advice as to how the Notice can be accessed. The committee notes that a replacement ES that clarifies the manner of incorporation of the Notice and how the Notice may be accessed free of charge has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	Social Security (Parenting payment participation requirements – classes of persons) Instrument 2018 [F2018L00238]
Purpose	Specifies two classes of persons who will be subject to certain participation requirements in order to continue to qualify for parenting payments
Authorising legislation	<i>Social Security Act 1991</i>
Portfolio	Jobs and Innovation
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁸⁴
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Incorporation of document⁸⁵

Committee's initial comment:

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act or a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time.

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument is made. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection

84 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

85 Scrutiny principle: Senate Standing Order 23(3)(a).

14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. Additionally, where a legislative instrument incorporates a document as in force from time to time, the committee expects the ES to set out the legislative authority (in the enabling legislation or another Commonwealth Act) for the incorporation of the document as in force from time to time.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁸⁶

The instrument was made under subsection 500(2) of the *Social Security Act 1991* (Social Security Act). Subparagraphs 6(1)(e)(iii) and 7(1)(e)(iii) of the instrument provide that, to be classified as a 'targeted participant' or an 'intensive participant', the person must (among other matters) be classified as highly disadvantaged by their Job Seeker Classification Instrument (JSCI). A person in one of those classes of participants must meet additional participation requirements in order to receive their parenting payments.⁸⁷ A failure to meet these requirements may result in the suspension of the person's parenting payments.⁸⁸

Section 4 of the instrument provides that:

Job Seeker Classification Instrument means the tool used by the Human Services Department to measure a job seeker's relative level of disadvantage based on the expected difficulty in finding the job seeker employment because of the job seeker's personal circumstances and labour market skills.

86 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

87 See section 500A of the *Social Security Act 1991*. The requirements include entering into a Parenting Payment Employment Pathway Plan when requested by the Secretary to do so, compliance with the requirements of the plan, and compliance with any further requirements that the Secretary notifies to the person under subsection 502(1) of the Act.

88 See section 42SB of the *Social Security (Administration) Act 1999*.

The ES provides no further information about the nature of the JSCI, merely restating the definition provided in section 4 of the instrument.

The committee's research indicates that the JSCI comprises a series of questions that a job seeker is asked in an interview with the Department of Human Services or with their employment services provider. The JSCI is designed to collect information about job seekers' work experience, education, language, nationality and heritage, work capacity, living circumstances, transport arrangements and personal circumstances. This information is used to measure a job seeker's relative difficulty in gaining and maintaining employment, to identify the level of support the job seeker may need, and to identify job seekers with complex or multiple barriers to employment that need further assessment.⁸⁹

The JSCI questionnaire appears to be an 'instrument' for the purposes of the Legislation Act.⁹⁰ It does not, however, appear to be a legislative instrument.⁹¹ The committee therefore expects the instrument or its ES to describe the manner in which the JSCI is incorporated (and, if appropriate, to specify the provision that permits the incorporation of the JSCI as in force from time to time) and to indicate where the JSCI may be obtained free of charge. However, neither the instrument nor its ES provides any information in this regard.

With respect to the manner of incorporation, the committee also notes that while the Social Security Act permits certain instruments to incorporate documents as in force from time to time,⁹² there does not appear to be any general or specific provision which would permit instruments made under section 500 to incorporate documents in this manner.

With regard to access to the document, the committee's research indicates that the questions comprising the JSCI appear to be available for free online.⁹³ Nevertheless,

89 See Department of Jobs and Small Business, *Components of the Job Seeker Classification Instrument (JSCI)*, <https://www.jobs.gov.au/components-and-results-job-seeker-classification-instrument#questions>.

90 Pursuant to section 4 of the *Legislation Act 2003*, an 'instrument' means any document in writing, and includes an electronic instrument.

91 Pursuant to section 8 of the *Legislation Act 2003*, for an instrument to be a legislative instrument it must (among other matters) be made under a power delegated by the Parliament, or declared by section 10 or 57A of that Act to be a legislative instrument. The JSCI was not made under a power delegated by the Parliament, nor is it an instrument declared by section 10 or 57A to be a legislative instrument.

92 For example, section 592N of the *Social Security Act 1991* provides that a determination that a course of study or instruction is an 'approved scholarship course' may incorporate any matter contained in an instrument or other writing as in force from time to time.

93 See Department of Jobs and Small Business, *Job Seeker Classification Instrument (JSCI) Assessment Guideline*, https://docs.jobs.gov.au/system/files/doc/other/pn_parentsnext_jsci_assessments.pdf.

the committee considers that a best-practice approach would be for the ES to provide details of where the document including those questions can be obtained. Given that a person's ability to access parenting payments will be affected by their JSCI classification, the committee considers it particularly important that persons interested in or affected by this instrument are made aware of where they can access the JSCI free of charge.

The committee requests the minister's advice as to:

- the manner in which the JSCI is incorporated (that is, either in force at a particular time or in force from time to time); and
- if it is intended to incorporate the JSCI as in existence from time to time, the provision in the *Social Security Act 1991* or other Commonwealth legislation which authorises the incorporation of the JSCI in this manner.

The committee also requests that the instrument and/or its explanatory statement be updated to include a more comprehensive description of the document, the manner of its incorporation and where it may be obtained free of charge.

Minister's response

The Minister for Jobs and Innovation advised:

Manner in which the JSCI is incorporated - as in force at the commencement of the Instrument

The JSCI is defined in the Instrument to mean 'the tool used by the Human Services Department to measure a job seeker's relative level of disadvantage based on the expected difficulty in finding the job seeker employment because of the job seeker's personal circumstances and labour market skills'. The JSCI identifies the job seeker's level of disadvantage using a series of questions that cover 18 factors identified as having a significant relationship with the likelihood of a job seeker remaining unemployed for another year.

A similar reference to the JSCI was made in the *Social Security (Parenting payment participation requirements - classes of persons) Specification 2016*. The relevant explanatory statement did not specify that the JSCI was incorporated by reference, and the Committee did not question whether it was incorporated by reference.

However, given the broad language in paragraph 14(l)(b) of the *Legislation Act 2003*, I agree it is appropriate to move forward on the basis that the JSCI is incorporated in the Instrument.

As such, the JSCI is incorporated as in force at the commencement of the Instrument (that is, as in force on 1 July 2018). The manner of incorporation will be clarified in the explanatory statement to the Instrument. It is not possible for the JSCI to be incorporated as in force from time to time as there is no specific provision in the *Social Security Act 1991* that allows this (see section 14 of the *Legislation Act 2003*).

Updating the explanatory statement

I will update the explanatory statement to the Instrument to include the following information in relation to the JSCI:

The Job Seeker Classification Instrument (JSCI) is defined in the Instrument to mean 'the tool used by the Human Services Department to measure a job seeker's relative level of disadvantage based on the expected difficulty in finding the job seeker employment because of the job seeker's personal circumstances and labour market skills'. The JSCI identifies the job seeker's level of disadvantage using a series of questions that cover 18 factors identified as having a significant relationship with the likelihood of a job seeker remaining unemployed for another year. The JSCI factors and sub-factors reflect different aspects of labour market disadvantage, such as work experience, living circumstances, work capacity and educational qualification. Each JSCI factor is given a numerical 'weight' or points which indicate the average contribution that factor makes to the job seeker's difficulty in finding and maintaining employment. The points are added together to calculate the JSCI score which reflects a job seeker's relative level of disadvantage in the labour market. A higher score indicates a higher likelihood of the job seeker remaining unemployed for at least another year.

The JSCI is incorporated as in force at the time of the commencement of the Instrument (that is, as in force on 1 July 2018).

The JSCI questions (which are used to identify a job seeker's level of disadvantage) are at:

<https://.docs.jobs.gov.au/documents/job-seeker-classification-instrument-jsci-assessmentguideline>.

The JSCI factors and other information on how the JSCI's various components interact to provide a score that reflects a job seeker's relative level of disadvantage are at:

www.jobs.gov.au/components-and-results-job-seeker-classification-instrument.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that the JSCI is incorporated as in force at the commencement of the instrument (that is, as in force on 1 July 2018). The committee also notes the minister's advice regarding where the JSCI questions, and information regarding how the JSCI is implemented in practice, may be accessed free of charge.

The committee further notes that an amended ES, providing a more comprehensive description of the JSCI and information regarding the manner in which the JSCI is incorporated and how it may be accessed free of charge, has been registered on the Federal Register of Legislation.

In relation to the minister's observation about the reference to the JSCI in the previous instrument, the committee notes that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)