

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles, 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 10 and 23 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	CASA 33/18 – Required Communication Performance and Required Surveillance Performance (RCP 240 and RSP 180) Capability Declarations – Direction 2018 [F2018L00616]
Purpose	Directs certain classes of aircraft operators not to make declarations about their required communication and surveillance performance capabilities unless certain equipment and performance standards are met
Authorising legislation	Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018 ²

Access to incorporated documents³

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.

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)(a).

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*.⁴

With reference to these matters, the committee notes that the instrument appears to incorporate the following documents:

- EUROCAE ED-100A/RTCA DO-258A; and
- ICAO Doc 9869 *Performance-based Communications and Surveillance*.

The instrument and ES make clear that these documents are incorporated as in force from time to time.⁵ However, no information is provided as to where the documents may be obtained. The committee's research indicates that each of the documents may be obtained online, but only on payment of a fee.

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.⁶

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

4 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.

5 Section 3 of the instrument provides that EUROCAE ED-100A/RTCA DO-258A is incorporated as in force from time to time. The ES also states that in relation to both Australian and foreign documents referenced in the instrument for the purposes of definitions, 'unless the contrary intention appears, the reference is taken to be a reference to the relevant document as in force or existing from time to time.' The committee notes that section 98(5D) of the *Civil Aviation Act 1988* provides authority for the instrument to incorporate any document as in force from time to time.

6 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>.

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 documents incorporated by 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 amended to include this information.

Instrument	Norfolk Island National Park and Norfolk Island Botanic Garden Management Plan 2018-2028 [F2018L00619]
Purpose	Provides for the management of Norfolk Island National Park and Norfolk Island Botanic Garden
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018 ⁷

Incorporation of documents⁸

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.

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).

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. 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 for the incorporation of the document as in force from time to 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 the instrument appears to incorporate the following documents:

- Director of National Parks Climate Change Statement 2017-2032 Action Plan (section 2.7.2);
- 'General Safety Rules' (section 3.1.10—defined in Appendix A);
- Parks Australia Compliance and Enforcement Manual (section 4.6.1); and
- Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* (PGPA Act) (sections 4 and 4.4.3).

With respect to the manner in which the documents are incorporated, the committee notes that Appendix A to the instrument defines the 'General Safety Rules' as 'rules for recreational use of remotely piloted aircraft in Commonwealth

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.

reserves as determined by the Director of National Parks Aircraft Use Policy as varied from time to time'. However, it is not clear to the committee that such rules would be legislative instruments, and if they are not, the committee notes that neither the instrument nor the ES identifies a legislative provision overriding subsection 14(2) of the Legislation Act which would authorise their incorporation as in force from time to time.

Neither the instrument nor its ES indicates the manner in which the other three documents noted above are incorporated.¹⁰

In addition, no information is provided in the instrument or the ES about where these four documents may be obtained.

The committee requests the minister's advice as to:

- **the legislative authority for incorporation in the instrument of the 'General Safety Rules' as in force from time to time;**
- **the manner in which the Director of National Parks Climate Change Statement 2017-2032 Action Plan, the Parks Australia Compliance and Enforcement Manual, and the Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* are incorporated in the instrument; and**
- **how each of these four documents is or may be made readily and freely available to persons interested in or affected by the instrument.**

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

10 With regard to the Chief Executive Instructions made under the PGPA Act, the committee notes that the PGPA Act is defined in Appendix A to include rules made under the Act. However, the Chief Executive Instructions are not rules made under the Act and the committee's research indicates that such instructions would not be legislative instruments.

Advice only

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

Instrument	Financial Framework (Supplementary Powers) Amendment (Infrastructure, Regional Development and Cities Measures No. 1) Regulations 2018 [F2018L00609]
Purpose	Establishes legislative authority for Commonwealth expenditure on a program administered by the Department of Infrastructure, Regional Development and Cities
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018 ¹¹

Parliamentary scrutiny: ordinary annual services of government¹²

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

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

The Senate has resolved that ordinary annual services should not include spending on new proposals, because the Senate's constitutional right to amend proposed laws

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)(d).

appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.¹³ In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.

The committee's considerations in this regard are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.¹⁴

The instrument establishes legislative authority for Commonwealth government spending on the Regional Growth Fund, which will be administered by the Department of Infrastructure, Regional Development and Cities. The explanatory statement (ES) to the instrument explains that the Fund is a \$272.2 million investment program designed to provide grants of \$10 million or more for 'major transformational projects', and will fund capital infrastructure projects that involve the construction of new infrastructure, or the upgrade of existing infrastructure. With respect to funding for the program, the ES further states:

Funding of \$272.2 million was included in the 2017-18 Budget under the measure 'Regional Growth Fund'. Details are contained in the *Budget 2017-18, Budget Measures, Budget Paper No. 2 2017-18*...Grant funding under the program will be provided over four years commencing in 2018-19.

The ES further states that funding for this item will come from from Program 3.1: Regional Development, which is part of Outcome 3 in the Infrastructure and Regional Development portfolio.

It appears to the committee that the Regional Growth Fund may be a new policy not previously authorised by special legislation, and that the initial appropriation may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-18 (which is not subject to amendment by the Senate).

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

14 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.

The committee draws the establishment of legislative authority for what appears to be a new policy not previously authorised by special legislation, and the classification of the initial appropriation for it as ordinary annual services of the government, to the attention of the minister, the Senate and relevant Senate committees.

Instrument	National Health (Pharmaceutical Benefits) Amendment (Safety Net) Regulations 2018 [F2018L00621]
Purpose	Prescribes the amount of a patient payment that can be tallied toward the general patient or concessional patient safety net under the Pharmaceutical Benefits Scheme
Authorising legislation	<i>National Health Act 1953</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018 ¹⁵

Access to incorporated 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. 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*.¹⁷

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).

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.

With reference to the matters above, the committee notes that the instrument appears to incorporate the Sixth Community Pharmacy Agreement, as in force on 1 June 2018. However, neither the instrument nor the ES indicates where the document may be obtained.

In this instance, the committee has observed that the agreement appears to be freely available online.¹⁸ Nevertheless, the Legislation Act requires the ES to an instrument to contain a description of any incorporated document and to indicate where it may be obtained. In cases 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 the Sixth Community Pharmacy Agreement, which appears to be incorporated by reference in the instrument.

18 https://www.guild.org.au/_data/assets/pdf_file/0007/6100/6cpa-final-24-may-201558b59133c06d6d6b9691ff000026bd16.pdf.

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	Wine Australia Regulations 2018 [F2018L00286]
Purpose	Prescribes controls to ensure the quality of grape products that include Australian wine and are exported, to implement Australia's international obligations and to ensure Australian wine that is exported complies with importing country requirements
Authorising legislation	<i>Wine Australia Act 2013</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 March 2018) Notice of motion to disallow must be given by 27 June 2018 ²
Previously reported in	<i>Delegated legislation monitor 5 of 2018</i>

Broad delegation of administrative powers³

Committee's initial comment:

Section 115 of the instrument provides that Wine Australia ('the Authority') may, by writing under its seal, delegate any or all of its powers under the instrument to any of its employees. Two specific powers are specified as exceptions which may not be delegated.⁴ The relevant powers under the instrument mainly relate to making decisions and implementing processes for product approvals, export licences and export certificates.

The committee's expectations in relation to broad delegation of administrative powers accord with the approach of the Senate Standing Committee for the Scrutiny

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).

4 Wine Australia may not delegate its power of delegation, or the power under section 13 to suspend or cancel an export licence.

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 explanatory statement (ES) to the instrument states that the delegation power is necessary so that the employees of the Authority, rather than its directors, are able to exercise the powers set out in the instrument. The ES states that the powers are 'delegated broadly to employees of the Authority for the purposes of administrative necessity' and advises that:

When determining whether it is necessary or reasonable for an employee of the Authority to be delegated a power under these Regulations, it is intended that regard will be had to any skills, training or relevant experience of that person, including whether appropriate training is required.

The ES provides examples of employees who would exercise particular powers, including wine analysts, auditors, and administrators of the export approval system, advising that due to the volume and nature of the work required, it is not practical for only senior officers to be able to exercise these powers.

The committee remains concerned, however, that there is no legislative requirement that a person to whom powers are delegated under section 115 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 Authority 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 Wine Australia be satisfied that officers to whom powers are delegated under section 115 have the expertise appropriate to the power delegated.

Minister's response

The Assistant Minister for Agriculture and Water Resources advised:

Wine Australia ('the Authority' in the instrument) delegates its administrative and decision-making powers according to the professional classification levels of its staff. In practice therefore, Wine Australia must already be satisfied that delegates have the relevant expertise to properly exercise the powers they are delegated.

On this basis I am supportive of amendments being made to section 115 of the instrument to address the Committee's comments next time further

amendments are required. I understand the Department of Agriculture and Water Resources is consulting the Office of Parliamentary Counsel on how these amendments will be pursued.

Committee's response

The committee thanks the assistant minister for her response. The committee welcomes the assistant minister's undertaking to amend the instrument to address the committee's comments the next time further amendments to the instrument are required.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)