

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Introduction

## Terms of reference

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

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

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

## Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister 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*.<sup>1</sup>

## 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

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

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

### **Ministerial correspondence**

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

### **Guidelines**

Guidelines referred to by the committee are published on the committee's website.<sup>4</sup>

### **General information**

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

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

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

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2 Regulations and Ordinances Committee, *Index of instruments*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index).

3 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

4 See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines](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](http://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](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](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 9 and 30 January 2018 (new matters).

Guidelines referred to by the committee are published on the committee's website.<sup>1</sup>

### Response required

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

<b>Instrument</b>	<b>Autonomous Sanctions (Designated Persons and Entities – Democratic People’s Republic of Korea) Continuing Effect Declaration 2018 [F2018L00049]</b>
<b>Purpose</b>	Extends the imposition of targeted financial sanctions on 11 designated persons and 10 designated entities for a further three years; and extends travel bans on 10 of those persons for a further three years
<b>Authorising legislation</b>	Autonomous Sanctions Regulations 2011
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>2</sup>

### Description of consultation<sup>3</sup>

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1 See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines](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).

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 ES to the instrument provides the following information regarding consultation:

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the DPRK List are part, has been the subject of extensive consultation with governmental and non-governmental stakeholders since May 2010.

The Department of Foreign Affairs and Trade (DFAT) conducts public consultations, including with the Australian financial services sector and broader business community, in relation to these types of measures.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this case, the committee considers that the ES provides an overly general description of consultations undertaken since 2010 on the broad autonomous sanctions framework, rather than a description of any consultation undertaken in relation to this particular instrument—or, if no consultation was undertaken on this instrument, an explanation as to why not.

The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>4</sup>

**The committee requests the minister's advice as to what consultation, if any, was undertaken on the instrument, or why no consultation was undertaken; and requests that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.**

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4 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

<b>Instrument</b>	<b>Basin Plan Amendment (SDL Adjustments) Instrument 2017 [F2018L00040]</b>
<b>Purpose</b>	Amends the [Murray-Darling] Basin Plan 2012 to adjust the long-term average sustainable diversion limits for surface water
<b>Authorising legislation</b>	<i>Water Act 2007</i>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>5</sup>

### Compliance with authorising legislation<sup>6</sup>

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 as well as any constitutional or other applicable legal requirements.

The instrument is made under section 23B of the *Water Act 2007* (Water Act), which applies if the Murray-Darling Basin Authority (Authority) proposes the adjustment of any of the sustainable diversion limits (SDL) set out in the Basin Plan made under the Act.

Subsection 23B(2) of the Water Act requires that for any proposed adjustment, the Authority must prepare a notice, containing a range of specified information about the calculation of the adjustment, including an outline of the material on which the Authority based its assessments. Subsection 23B(3) sets out additional information that must be in the notice. Paragraph 23B(7)(b) provides that the notice made under subsection 23B(2) is not a legislative instrument.

Subsection 23B(4) requires that an amendment of the Basin Plan, which is a legislative instrument, must also be prepared, implementing the limits included in the notice. This instrument is made pursuant to that subsection.

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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)(a).

Under subsections 23B(5) and (6), the Authority is to provide to the relevant minister both the notice and the amendment instrument for consideration and adoption.

Paragraph 23B(7)(a) then requires that:

(7) The notice made under subsection (2):

(a) must accompany the amendment when the amendment is laid before a House of the Parliament under section 38 of the *Legislation Act 2003*.

The committee notes that a copy of the notice made under subsection 23B(2) did not accompany the instrument when it was provided to the committee and to the Parliament for tabling, and that no such document has been published with the instrument on the Federal Register of Legislation. As a result, the instrument was tabled in both Houses of Parliament on 5 February 2018, without the accompanying notice as required by paragraph 23B(7)(a) of the Water Act.

The explanatory statement (ES) to the instrument states that:

The 2017 SDL adjustment is set out in the *Basin Plan Amendment (SDL Adjustments) Instrument 2017* (the Amendment Instrument), which gives effect to the proposed 2017 SDL adjustments set out in the *Water (SDL Adjustments) Notice 2017*. This notice also includes an outline of material on which the Authority based its decision in determining the adjustments, in accordance with section 23B of the Water Act.

...

The *Water (SDL Adjustments) Notice 2017*, **also tabled with the Amendment Instrument in accordance with the requirements of section 23B of the Water Act**, is not a legislative instrument. [emphasis added]

It therefore appears to the committee that the instrument-maker was aware of the requirement of paragraph 23B(7)(a) of the Water Act, but failed to comply with that provision when the instrument was registered on the Federal Register of Legislation and provided to Parliament for tabling.

**The committee requests:**

- **the minister's advice as to why the notice made under subsection 23B(2) of the *Water Act 2007* did not accompany the instrument when it was tabled before both Houses of Parliament, as required by paragraph 23B(7)(a) of the Act; and**
- **that the notice be provided to Parliament and published on the Federal Register of Legislation without further delay.**

<b>Instrument</b>	<b>Cockatoo Island Management Plan 2017 [F2018L00053]</b>
<b>Purpose</b>	Establishes a plan to protect and manage the World, National and Commonwealth Heritage values of Cockatoo Island
<b>Authorising legislation</b>	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>7</sup>

### Incorporation of documents<sup>8</sup>

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

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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).

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*.<sup>9</sup>

The Cockatoo Island Management Plan is a large and comprehensive instrument, and includes references to a number of other legal, policy and research documents. The committee acknowledges that a clear effort has been made to provide appropriate information about the referenced documents, including an appendix of documents available for viewing at the Sydney Harbour Trust, and the inclusion of relevant excerpts from some key documents.

The committee notes, however, that there are three documents which appear to be incorporated in operative provisions of the instrument, without information as to the manner of incorporation and/or where they can be freely accessed. In this respect the committee draws attention to the following:

- Australia ICOMOS Charter for Places of Cultural Significance (the Burra Charter) [Policy 2, p. 82]
  - Policy 2 requires that conservation and adaptation be undertaken in accordance with the principles of the Charter and 'any revisions of the Charter that might occur in the future'. However, neither the instrument nor the ES identifies a legislative provision overriding subsection 14(2) of the Legislation Act that would authorise the incorporation of the Charter from time to time.

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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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

- In addition, neither the instrument nor the ES provides information about how the document may be accessed. The committee's research indicates that it is available for free online.<sup>10</sup> However, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.
- Harbour Trust's Comprehensive Plan ['Relationship with the Harbour Trust's Comprehensive Plan', p. 14; Policies 23 and 24, p. 88]
  - The instrument states at p. 14 that it must be interpreted in conjunction with the Comprehensive Plan, in particular the Outcomes in Part 5 and the Objectives and Policies in Part 3. Further, Policies 23 and 24 require that consultation be undertaken in accordance with specified Objectives in Part 3. While the Part 5 Outcomes are reproduced in the instrument, the Objectives and Policies in Part 3 are not.  
No information is provided in the instrument or ES as to the manner in which the Comprehensive Plan is incorporated: that is, as in force from time to time, as at the date of commencement of the instrument, or as at an earlier date.
  - In addition, neither the instrument nor the ES provides information about how the document may be accessed. The committee's research indicates that it is available for free online.<sup>11</sup> However, the committee considers that a best-practice approach is for the ES to provide details of the website where the documents can be accessed.
- Significant Impact Guidelines 1.1 and 1.2, Department of Environment and Heritage, May 2006 [Policy 1, p. 82]
  - Policy 1 states that Significant Impact Guidelines 1.1 and 1.2 will be used to assist in reaching decisions about the level of impact. The committee's research indicates that while these guidelines are freely available online, the versions on the department's website are dated 2013.<sup>12</sup> Neither the instrument nor the ES provides information about how the May 2006 versions of the guidelines, as incorporated in the instrument, may be freely accessed.

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10 See <http://australia.icomos.org/publications/charters/>.

11 See [http://www.harbourtrust.gov.au/planning-projects/strategic-plans#comprehensive\\_plan](http://www.harbourtrust.gov.au/planning-projects/strategic-plans#comprehensive_plan).

12 See <http://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance> and <http://www.environment.gov.au/epbc/publications/significant-impact-guidelines-12-actions-or-impacting-upon-commonwealth-land-and-actions>.

The committee requests the minister's advice regarding:

- the legislative authority for incorporation in the instrument of the Australia ICOMOS Charter for Places of Cultural Significance as in force from time to time;
- the manner in which the Harbour Trust's Comprehensive Plan is incorporated into the instrument; and
- how the Department of Environment and Heritage's Significant Impact Guidelines 1.1 and 1.2, dated May 2006, are 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 updated to include this information.

<b>Instrument</b>	<b>Defence Determination (Short-term overseas duty travel and benchmark schools) 2018 (No. 2) [F2018L00050]</b>
<b>Purpose</b>	Provides for the payment of travel costs for members on short-term duty in Marshall Islands, Micronesia and Palau; amends education allowances for the children of Defence personnel posted in Canada; and corrects an error in allowances payable for prior service on Operations AUGURY and MANITOU
<b>Authorising legislation</b>	<i>Defence Act 1903</i>
<b>Portfolio</b>	Defence
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>13</sup>

### Retrospective effect<sup>14</sup>

Schedule 4 to the instrument amends Defence Determination 2017/40, Deployment allowance – amendment [F2017L01636] (principal instrument), which commenced on 15 December 2017. The principal instrument had amended certain deployment allowances, including those relating to Operations AUGURY and MANITOU. Schedule 2 to the principal instrument contained transitional provisions which

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

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

included, under subclause 1.3 and clause 3, provision for the payment of an allowance of \$85.45 per day retrospectively to members who served on Operations AUGURY and MANITOU between November 2016 and November 2017, and did not receive deployment allowance at the time.

Schedule 4 of the present instrument amends the relevant transitional provisions in Schedule 2 of the principal instrument, to reduce those entitlements from \$85.45 to \$85.44 per day. The explanatory statement (ES) to the instrument states that:

The rate of AUD 85.45 was a typographical error and would create a disparity between the rates payable to members. It would also create an increased risk of incorrect administration and incorrect payments.

It appears to the committee that a consequence of this amendment is that any person who has been paid the allowance of \$85.45 per day under the relevant provisions of the principal instrument will now be disadvantaged by the retrospective effect of the amendment.

The committee's usual approach in cases such as this is to assess the instrument against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee's expectation is that the retrospective effect of an instrument will be specifically addressed in the ES, and in particular, that the ES will address whether the retrospective provisions have the effect of disadvantaging any person.

The ES does not specifically address the issue of the retrospective effect of the reduction of allowances in Schedule 4 to the instrument. The ES does not indicate whether any persons have been paid an allowance between the commencement of the principal instrument on 15 December 2017 and the commencement of the amendment on 25 January 2018, and if so, whether any action is intended by Defence to recover the overpayment now resulting from the retrospective operation of the amendment.

The committee acknowledges that in this instance the change to the relevant allowances is very small, such that the potential disadvantage to each affected individual would only amount to a maximum of \$3.63. However, the committee emphasises the general principle that, where an instrument has a retrospective effect that is potentially disadvantageous to an individual, this should be considered, and measures taken to ensure that the instrument does not have such effect.

In this regard, the committee notes that Schedule 3 to the instrument also applies certain provisions of the instrument retrospectively, providing eligibility for education costs amended by Schedule 2 as if those changes had commenced on 24 February 2017. In this case, however, the changes appear to be clearly and only beneficial in effect.

The committee requests the minister's advice as to whether any persons have been disadvantaged by the retrospective reduction of allowances effected by Schedule 4 to the instrument, and if so, what measures have been taken to redress this disadvantage.

In addition, the committee notes its general expectation that, where a legislative instrument has retrospective effect, this will be specifically addressed in its explanatory statement, particularly to indicate whether the retrospective provisions have the effect of disadvantaging any person.

<b>Instrument</b>	<p>Migration (IMMI 18/004: Specification of Occupations—Subclass 457 Visa) Instrument 2018 [F2018L00044]</p> <p>Migration (IMMI 18/006: Specification of Occupations—Subclass 407 Visa) Instrument 2018 [F2018L00047]</p>
<b>Purpose</b>	Specify occupations on the Medium and Long-term Strategic Skills List and the Short-term Skilled Occupation List for the purpose of nominations for Subclass 457—Temporary Work (Skilled) Visas, and Subclass 407 (Training) Visas, respectively
<b>Authorising legislation</b>	Migration Regulations 1994
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>15</sup>

### Drafting<sup>16</sup>

The instruments set out occupations eligible for nomination for temporary work and training visas for skilled foreign workers. They do so by listing, in each instrument, lists of occupation titles with corresponding references to the 'ANZSCO code' for each occupation. A note in the 'Definitions' section (section 4) of each instrument states that a number of terms used in the instrument are defined in the Migration Regulations 1994 (regulations), including ANZSCO.

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).

Section 1.03 of the regulations provides the following definition of ANZSCO:

**ANZSCO** has the meaning specified by the Minister in an instrument in writing for this definition.

Neither the instruments, their explanatory statements (ES), nor the regulations provide any further information regarding whether the minister has made such an instrument in writing, what that instrument is, or how it defines ANZSCO. The committee observes that the consequence of this is that the note in each instrument regarding the definition of ANZSCO provides no practical assistance to a reader seeking to understand the term.

The committee is aware that ANZSCO is the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics. The committee observes, nonetheless, that the use of the term 'ANZSCO' is prominent in the operative provisions of both of these instruments, and that the instruments are likely to be of interest and relevance to a large number of persons, including employers, training providers and potential visa applicants, not all of whom have legal expertise.

The committee therefore considers that, in the interests of promoting the clarity and intelligibility of the instruments to persons interested in or affected by them, the instruments or their explanatory statements should include a meaningful definition of ANZSCO (or more useful direction as to where such a definition can be found); and ideally, information about where ANZSCO can be accessed.

**The committee requests the minister's advice as to the use of 'ANZSCO' within the instruments, and whether a more meaningful definition of the term can be included in the instruments or their explanatory statements, to improve the clarity and intelligibility of the instruments to persons interested in or affected by them.**

## Advice only

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

<b>Instrument</b>	<p><b>Accounting Standard AASB 2017-5 Amendments to Australian Accounting Standards – Effective Date of Amendments to AASB 10 and AASB 128 and Editorial Corrections [F2018L00067]</b></p> <p><b>Accounting Standard AASB 1048 Interpretation of Standards (December 2017) [F2018L00069]</b></p>
<b>Purpose</b>	<p>Defers the mandatory effective date (application date) of amendments made to certain other Australian Accounting Standards (AAS) from 1 January 2018 to 1 January 2022, and makes editorial corrections to specified AAS</p> <p>Updates the Australian Interpretations applicable to AAS</p>
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>17</sup>

### Retrospective commencement<sup>18</sup>

Subsection 12(1) of the *Legislation Act 2003* (Legislation Act) provides that an instrument commences the day after it is registered on the Federal Register of Legislation, or if the instrument provides otherwise, in accordance with such provision. However, subsection 12(2) provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration.

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

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

Accordingly, the committee's usual expectation is that the explanatory statement (ES) to an instrument which commences retrospectively should explicitly address the question of whether the retrospective commencement would disadvantage any person other than the Commonwealth.

These instruments were registered on 30 January 2018. The instruments provide that they commence 'for legal purposes' on 31 and 30 December 2017, respectively. The ESs to the instruments provide no information about the retrospective commencement of the instruments or its potential effect on individuals. The committee notes that in this instance, it appears that the instruments are unlikely to have a detrimental impact on any individual.

The committee further notes that both instruments were made on 12 December 2017. It therefore appears that their retrospective commencement was due to a delay of some seven weeks between their making and registration. In this regard, the committee draws attention to subsection 15G(1) of the Legislation Act, which requires the rule-maker for a legislative instrument to lodge that instrument for registration 'as soon as practicable' after it is made.

**The committee draws the retrospective commencement of the instruments to the minister's attention, and notes that instruments should be registered as soon as practicable after they are made.**

<b>Instrument</b>	<b>AD/BN-2/63 Amdt 1 Nacelle Box Structure at Bottom Fitting of MLG [F2018L00029]</b>
<b>Purpose</b>	Clarifies certain safety inspection requirements for Britten Norman BN-2 series aircraft
<b>Authorising legislation</b>	Civil Aviation Safety Regulations 1998
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 <sup>19</sup>

### **Incorporation of document**<sup>20</sup>

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 are set out in its *Guideline on incorporation of documents*.<sup>21</sup>

The instrument incorporates the Britten-Norman Mandatory Service Bulletin BN2/SB.235 Issue 1, as in force at the time of the issue of the instrument. The ES to the instrument states that:

Britten-Norman Mandatory Service Bulletin BN2/SB.235 Issue 1, as in force at the time of issue of this [Airworthiness Directive], can be obtained from

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).

21 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

Britten-Norman, however, any Australian airline or operator which operates the BN-2 aircraft are provided with these documents by Britten-Norman via subscription.

The committee acknowledges that anticipated users of the instrument would be likely to be in possession of the incorporated documents. However, in addition to access for operators of the relevant aircraft in Australia, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

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 has been one of ongoing concern to Australian parliamentary scrutiny committees.

The committee's expectation, at a minimum, is that consideration be given by the agency to any means by which the document is or may be made available free of charge 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 draws to the minister's attention the absence of information in the explanatory statement regarding free access to the document incorporated by reference in the instrument.**



## **Chapter 2**

### **Concluded matters**

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

There are no concluded matters in this monitor.

**Senator John Williams (Chair)**