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Standing Committee on 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 *Odgers' 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]

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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.

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 8 and 28 March 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	**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	*Archives Act 1983*
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]

Unclear basis for determining fees[3]

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

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).

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 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.

Broad delegation of administrative powers[4]

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.

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

> …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 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.**

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	*Child Support (Registration and Collection) Act 1988*
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]

Personal rights and liberties: certificate constituting prima facie evidence [6]

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.

No information is provided in the explanatory statement (ES) regarding the justification for effectivly 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

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).

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.

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	*Environment Protection and Biodiversity Conservation Act 1999*
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]

Incorporation of document[8]

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

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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.

Pollution from Ships (MARPOL). However, while the glossary to the instrument contains a description of the Convention, neither the instruments nor their ESs 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.

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	*Defence Act 1903*
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]

Subdelegation[12]

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

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

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).

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 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.

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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.

Anticipated authority[14]

Section 4 of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4).

The instrument was made on 15 March 2018 and registered on the Federal Register of Legislation on 19 March 2018.

The instrument was made under section 117AD of the *Defence Act 1903* (Defence Act). That provision was inserted into the Defence Act by Item 7 in Part 2 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* (amendment Act). Part 2 of Schedule 1 to the amendment Act commenced on 26 March 2018.

The committee notes that pursuant to section 2 of the instrument, it commenced at the same time as Part 2 of Schedule 1 to the amendment Act. This is also noted in the explanatory statement (ES) to the instrument.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that are made in anticipation of their authorising provisions, and therefore rely on section 4 of the *Acts Interpretation Act 1901,* should clearly identify that the making of the instrument relies on that section.

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

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

Instrument	**Defence Force Discipline Regulations 2018 [F2018L00265]**
Purpose	Repeals and replaces the Defence Force Discipline Regulations 1985
Authorising legislation	*Defence Force Discipline Act 1982*
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[15]

Personal rights and liberties: privacy[16]

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.

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

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)(b).

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 relates[17]); 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.**

Incorporation of documents[18]

1.1 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

17 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.

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

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.

1.2 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*.[19]

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 a detailed report on the issue.[20] 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.

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19 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.

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

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.

Instrument	**Defence (Inquiry) Regulations 2018 [F2018L00316]**
Purpose	Prescribe matters providing for, and in relation to, inquiries concerning the Defence Force
Authorising legislation	*Defence Act 1903*
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[21]

Personal rights and liberties: privacy[22]

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 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

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

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

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.[23]

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

23 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.

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.**

Offences: evidential burden of proof on the defendant[24]

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

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

evidential burden of proof, requiring the defendant to raise evidence about the defence.[25]

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).[26]

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.

Subdelegation[27]

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.

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25 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.

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

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.

Personal rights and liberties: privilege against self-incrimination[29]

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. The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself, which is an important aspect of the right to be presumed innocent until proven guilty.[30]

Subsections 38(1) and 67(1) of the instrument, relating to Commissions of Inquiry and inquiry officer inquiries, respectively, provide that an individual appearing as a

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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).

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

30 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

witness at an inquiry is not excused from answering a question, when required to do so, on the ground that the answer might tend to incriminate the individual. As such, these provisions remove the privilege against self-incrimination in relation to oral evidence given by witnesses at Defence inquiries.

The committee recognises that there may be certain circumstances in which it may be appropriate for the privilege against self-incrimination to be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

The ES notes that the provisions reflect a similar provision in the previous Defence inquiry regulations, and argues that removal of the privilege against self-incrimination 'supports the…collection of any evidence relevant to an inquiry while balancing the ability of a witness to seek relief from potential criminal consequences'.

In this respect, the committee notes that subsections 38(2) and 67(2) provide a limited exception to the removal of the privilege against self-incrimination, providing that an individual is not required to answer a question where the answer might tend to incriminate the individual in respect of charges against them currently before a court or otherwise unresolved. This might be described as a limited 'use immunity' for the information, in respect of current proceedings.

Further, a note to subsections 38(1) and 67(1) draws attention to subsection 124(2C) of the *Defence Act 1903,* which provides that a statement or disclosure made by a witness before an inquiry is not admissible in evidence against the witness other than in proceedings relating to the giving of false testimony. This provides a broader 'use immunity' from direct use of the information as evidence against the individual in future criminal proceedings.

However, the ES notes that subsection 124(2C) of the Act does not contain the power for the instrument to include a 'derivative use' immunity, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

The committee considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. As such, the committee considers it would be more appropriate if a derivative use immunity were included, to ensure that information or evidence indirectly obtained from a person compelled to answer questions at a Defence inquiry could not be used in evidence against them. The committee acknowledges the advice in the ES that this is not permitted under the relevant provisions of the authorising Act; nevertheless, in the absence of a derivative use immunity, the provisions of the instrument as drafted give rise to scrutiny concerns.

The ES states that the requirement that inquiries be held in private, and prohibitions against unauthorised disclosure of information and documents, 'constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination'. In this regard, however, the committee notes its concern, discussed above, about the very broad authorisation provided in the instrument for the use and disclosure of inquiry information by Commonwealth employees and Defence Force personnel. It appears that those provisions would allow, for example, Commonwealth prosecutors and law enforcement personnel to use and disclose inquiry information regardless of prohibitions on unauthorised disclosure.

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 draws the removal of the privilege against self-incrimination in sections 38 and 67 of the instrument to the attention of the Senate.

Instrument	**Defence (Public Areas) By-laws 2018 [F2018L00349]**
Purpose	Facilitates the management of public areas declared under Part IXB of the *Defence Act 1903*
Authorising legislation	*Defence Act 1903*
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[31]

Offences: evidential burden of proof on the defendant[32]

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

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

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

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.[33]

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).[34]

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.

33 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.

34 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	**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	*Financial Framework (Supplementary Powers) Act 1997*
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[35]

Merits review[36]

Scrutiny principle 23(3)(c) of the committee's terms of reference requries the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent on adminstrative 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 Communictions and the Arts: the Regional Journalism Scholarships Program (scholarships program) and the Regional and Small Publishers Cadetship Program (cadetship program). The explanatory statemement (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.

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

36 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.[37]

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*.[38]

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.

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37 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).

38 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.

Parliamentary scrutiny: ordinary annual services of government[39]

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 appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[40] 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*.[41]

As noted above, the present instrument establishes legislative authority for Commonwealth government spending on the scholarships program and the cadetship program. The ES states that these programs are part of the government's

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39 Scrutiny principle: Senate Standing Order 23(3)(d).

40 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.

41 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.

Regional and Small Publishers Jobs and Innovation Package, announced on 14 September 2017. The ES indicates that the programs each involve the provision of two successive rounds of grant funding in 2018-19 and 2019-20, with the first grant payments expected to be made from 1 July 2018.

With respect to the Scholarships Program, the ES futher states:

> Funding of $2.4 million for 60 regional journalism scholarships was included in the 2017-18 Mid-Year Economic and Fiscal Outlook under the measure 'Broadcasting and Content Reform Package—additional funding' for a period of two years commencing in 2018-19. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2017-18*, Appendix A: Policy decisions taken since the 2017-18 Budget.

With respect to the Cadetship Program, the ES similarly states:

> Funding of $8 million for 200 cadetships was included in the 2017-18 Mid-Year Economic and Fiscal Outlook under the measure 'Broadcasting and Content Reform Package—additional funding' for a period of two years commencing in 2018-19. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2017-18*, Appendix A: Policy decisions taken since the 2017-18 Budget.

The ES also states that funding for both of the programs will come from the 'Cadetship Program and Scholarship Program', which is Part of Program 1.1: Digitial Technologies and Communications under Outcome 1. The ES indicates that details are set out in the *Porfolio Additional Estimates Statements 2017-18, Communications and the Arts Portfolio.*

It appears to the committee that the scholarships program and the cadetship program may be new policies not previously authorised by special legislation, and that the initial appropriation for the programs may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2017-18 (which is not subject to amendment by the Senate).

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	**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	*Financial Framework (Supplementary Powers) Act 1997*
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[42]

Merits review[43]

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 eligibiliy and for managing participation in the scheme, and that NEIS participants will receive notification of decisions affecting their participation.

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

43 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*.[44]

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.

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44 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.

Parliamentary scrutiny: ordinary annual services of government[45]

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 amed proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[46] 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*.[47]

As outlined above, the instrument establishes legislative authority for Commonwealth government spending on four initiatives administered by the

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

46 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.

47 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.

Department of Jobs and Small Business. One of these initiatives (item 27) is a grant to the Brotherhood of St Laurence to establish a youth employment body.

The ES notes that the body is expected to operate for two years, commencing in April 2018. The ES provides detailed information about the composition of the body (involving industry, government, service providers, researchers, local communities and young people), as well as a comprehensive list of the functions it will undertake (including service design, research, policy development and capacity-building). The body will initially be hosted by the Brotherhood of St Laurence under the guidance of an independent advisory board, with three staff recruited to assist. The ES states that the organisation will, in its first year, formalise its governance structure and membership of its advisory board.

The ES indicates that the funding will be provided in the form of a one-off grant to the Brotherhood of St Laurence, delivered in the 2017-18 financial year. The ES further states:

> Funding of $700,000 in 2017-18 for this item will come from Program 1.1: Employment Services, which is part of Outcomes 1. Program details are set out in the *Portfolio Budget Statements 2017-18, Budget Related Paper No. 1.6, Employment Portfolio*.

It appears to the committee that the establishment of the youth employment body may be new policy not previously authorised by special legislation; and that the initial appropriation for the grant 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).

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	**Fisheries Management (Small Pelagic Fishery) Fishing Method Determination 2018 [F2018L00413]**
Purpose	Determines fishing methods in the Small Pelagic Fishery
Authorising legislation	*Fisheries Management Act 1991*; 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[48]

Compliance with authorising legislation[49]

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 the Small Pelagic Fishery for the 2018-19 fishing season'.[50] The committee further

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).

50 https://www.legislation.gov.au/Details/F2018L00413.

notes that the AFMA website provides that the fishing season for the Small Pelagic Fishery is the 12-month season beginning on 1 May.[51] 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.

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 *Health Insurance Act 1973*
Authorising legislation	*Health Insurance Act 1973*
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[52]

Personal rights and liberties: privacy[53]

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.

51 http://www.afma.gov.au/fisheries/small-pelagic-fishery/

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

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

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 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.[54]

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 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.**

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

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	*International Air Services Commission Act 1992*
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]

No statement of compatibility[56]

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*.

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).

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: • 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 *Biosecurity Act 2015*; and • update the preamble to Part 1 of the list to provide that Part 1 should not contain a CITES specimen
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
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]

Legislative authority: power to make instrument[58]

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 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.

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).

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.

Parliamentary oversight: registration of incorrect version of instrument[59]

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]

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

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

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.

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 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

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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

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.

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).**

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	*Migration Regulations 1994*
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]

Unclear basis for determining fees[64]

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.

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

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).

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.

Anticipated authority[66]

Section 4 of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4).

The instrument was made on 15 March 2018 and registered on the Federal Register of Legislation on 16 March 2018. The instrument was made under 12 provisions of the Migration Regulations 1994 (Migration Regulations), with different sections of the instrument made for the purposes of different authorising provisions.

Five of the 12 authorising provisions[67] were amended or inserted by items 61 and 80 of Schedule 1 to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Complementary Reforms Regulations). The Complementary Reforms Regulations did not commence until 18 March 2018.

The committee notes that section 2 of the instrument provides for its commencement on 18 March 2018—at the same time as the Complementary Reforms Regulations.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that are made in anticipation of their authorising provisions, and therefore rely on section 4 of the Interpretation Act, should clearly identify that the making of the instrument relies on that section.

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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.

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

67 Migration Regulations 1994: subparagraph 2.61(3A)(b)(i), subparagraph 2.61(3A)(b)(ii), paragraph 2.61(3A)(ba), subsection 2.73(4), and paragraph 2.73(7)(a).

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

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	*Medical Indemnity Act 2002; Migration Act 1958*
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[68]

Merits review[69]

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 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.[70] The committee is also conscious

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

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

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.

Unclear basis for determining fees[71]

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 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,

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70 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.

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

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.

Matters more appropriate for parliamentary enactment[72]

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). This includes legislation that fundamentally changes the law.

The committee considers that this instrument, made principally under the general regulation-making power in subsection 504(1) of the *Migration Act 1958* (Migration Act), could be said to change the law in a fundamental way in relation to Australia's migration scheme. The instrument repeals the principal visa category for temporary entry to Australia by skilled workers and their families, the Temporary Work (Skilled) visa subclass 457, which had been in place since 1996.[73] The subclass 457 visa is replaced by the new Temporary Skill Shortage (Subclass 482) visa, with a number of significant changes to visa eligibility criteria, terms and conditions. The Prime Minister described the government's decision to make these changes in April 2017 as

72 Scrutiny principle: Senate Standing Order 23(3)(d).

73 John Azarias, Jenny Lambert, Prof. Peter McDonald & Katie Malyon, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme,* September 2014, p. 20.

a 'major announcement',[74] and it followed significant public policy discussion and debate relating to overseas skilled workers in Australia and the 457 visa program.[75]

In cases of significant change to the law, the committee's longstanding view has been that enactment via primary legislation is more appropriate than via delegated legislation because it ensures that significant proposed changes are subject to the full legislative processes and consideration by the Parliament prior to commencement. In these instances, the committee generally requires a detailed justification for the inclusion of such matters in delegated legislation as opposed to primary legislation. In this instance the ES provides no such justification.

The committee recognises that Australia's legal framework in the migration area, established under the provisions of the Migration Act and the Migration Regulations, provides for significant law-making via delegated legislation. In this regard, however, the committee notes that it has consistently expressed concern about ensuring appropriate parliamentary oversight of changes to migration law. In 2017 the committee exchanged extensive correspondence with the (former) Attorney-General and the Minister for Immigration and Border Protection in relation to its concerns about the exemption of the Migration Regulations, in their entirety, from the sunsetting provisions of the *Legislation Act 2003.*[76] The committee notes that the new visa scheme being inserted into the Migration Regulations by the present instrument will therefore be exempt from the review and parliamentary oversight requirements of the sunsetting regime.

The committee has also commented repeatedly on its concern that a large number of legislative instruments made under the Migration Regulations have been exempted from disallowance by Parliament, including some that cover more than administrative and technical matters.[77] The present instrument makes provision for

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74 https://www.facebook.com/malcolmturnbull/videos/10155311599176579/?t=0.

75 See, for example, Senate Standing Committee on Education and Employment, *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* 17 March 2016, at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report.

76 See *Delegated legislation monitors 1, 3, 5, 7, 8, 9, 13 and 15 of 2017*, and the included or associated ministerial correspondence, relating to the Legislation (Exemption and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] and the Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809], available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index.

77 See *Delegated legislation monitor 16 of 2015,* pp. 30-33 and Appendix 1; *Delegated legislation monitor 5 of 2016,* pp. 18-20; *Delegated legislation monitor 8 of 2017,* pp. 100-103.

specifying matters relevant to the subclass 482 visa regime via legislative instruments that will be exempt from disallowance, including some matters of a substantive nature.[78] Notable examples include instruments specifying particular applicants who will require additional skills assessments, under paragraph 1240(3)(g) of Schedule 1 of the Migration Regulations, inserted by item 135 of Schedule 1 of the instrument; and instruments specifying English language requirements, under clause 482.223 of Schedule 2 of the Migration Regulations, inserted by item 168 of Schedule 1 of the instrument.

While recognising that the instrument is lawfully made, given the significance of the changes to the law it enacts, and the committee's long-standing concerns in relation to appropriate parliamentary oversight of executive law-making in the migration area, the committee considers that it may have been more appropriate that these changes be effected via amendment to primary, rather than solely delegated, legislation.

The committee draws the making of a significant change to the law via delegated legislation to the attention of the Senate.

78 Under table item 20(b) of section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015, legislative instruments made under Parts 1, 2 and 5 of, or Schedules 1, 2, 4, 5A or 8 to the Migration Regulations, are not subject to disallowance.

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	*Norfolk Island Act 1979*
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[79]

Unclear basis for determining fees[80]

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 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 units[81] for providing copies of records of a body corporate;[82] 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

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

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

81 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.

82 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.

Community Title Act.[83] 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,[84] 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 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.

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

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

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 *Public Health Act 2010* (NSW) and the Public Health Regulation 2012 (NSW) to Norfolk Island
Authorising legislation	*Norfolk Island Act 1979*
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[85]

Immunity from liability[86]

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.[87] 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,[88] 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;
- a member of staff of the NSW Department of Health;

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

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

87 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.

88 'Chief Health Officer' means the Chief Health officer 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.

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	*Social Security (Administration) Act 1999*
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[89]

Incorporation of document[90]

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.[91]

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

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

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

91 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.

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*.[92]

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.

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.**

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92 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 also requests that the instrument and/or its explanatory statement be updated to include this information.

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	*Social Security Act 1991*
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[93]

Incorporation of document[94]

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

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

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

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. 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*.[95]

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.[96] A failure to meet these requirements may result in the suspension of the person's parenting payments.[97]

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

95 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.

96 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.

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

> employment because of the job seeker's personal circumstances and labour market skills.

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.[98]

The JSCI questionnaire appears to be an 'instrument' for the purposes of the Legislation Act.[99] It does not, however, appear to be a legislative instrument.[100] 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,[101] 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.

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98 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.

99 Pursuant to section 4 of the *Legislation Act 2003*, an 'instrument' means any document in writing, and includes an electronic instrument.

100 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.

101 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.

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.[102] Nevertheless, 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.

102 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.

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	*Wine Australia Act 2013*
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[103]

Broad delegation of administrative powers[104]

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.[105] 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 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

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

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

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

'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.

Matters more appropriate for parliamentary enactment[106]

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).

Section 33 and Schedule 1 of the instrument modify the operation of section 40RB of the *Wine Australia Act 2013* (Act), by adding an additional ground on which a person may object to the determination of a proposed Australian geographical indication for wine goods. Such modification is authorised by subsection 40PA(3) of the Act, which provides that the regulations may modify the operation of Division 4 of Part VIB of the Act (relating to Australian geographical indications) to remove any inconsistency with the operation of regulations made for the purposes of Division 4B of Part VIB, (relating to foreign geographical indications and translations).

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106 Scrutiny principle: Senate Standing Order 23(3)(d).

Subsection 40PA(3) of the Act may be characterised as a 'Henry VIII' clause, because it enables delegated legislation to modify the operation of legislation which has been passed by the Parliament. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, because such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive.

The committee draws the modification of primary legislation via delegated legislation to the attention of the Senate.

Advice only

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

Instrument	**Auditing Standard ASA 102 *Compliance with Ethical Requirements When Performing Audits, Reviews and Other Assurance Engagements* [F2018L00434]**
Purpose	Establishes ethical requirements for auditors, assurance practitioners, engagement quality control reviewers and firms when performing audits, reviews and other assurance engagements.
Authorising legislation	*Corporations Act 2001*
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[107]

Access to incorporated documents[108]

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*.[109]

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

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

With reference to these matters, the committee notes that the instrument appears to incorporate a number of documents. The majority of these are legislative instruments, which may be incorporated as in force from time to time or at a particular time[110] and are available free of charge on the Federal Register of Legislation. However, the instrument also appears to incorporate one non-legislative instrument: APES 110 *Code of Ethics for Professional Accountants*.

The instrument appears to provide for the manner in which APES 110 is incorporated (that is, the instrument specifies the December 2010 version of APES 110, incorporating all amendments to May 2017). However, neither the instrument nor the ES indicates where APES 110 may be accessed free of charge.

The committee's research indicates that APES 110 is available for free online.[111] 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 would therefore expect the ES to the present instrument to indicate how APES 110 may be obtained free of charge.

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to APES 110, which appears to be incorporated by the instrument.

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109 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.

110 See paragraph 14(1)(a) and subsection 14(3) of the *Legislation Act 2003*.

111 https://www.apesb.org.au/uploads/home/20092017152005_Compiled_APES_110_Sept17.pdf

Instrument	**Australian Bureau of Statistics – Australian Statistician — Appointment of Persons to Act in the Office of Australian Statistician – Appointment 2018 [F2018L00218]**
Purpose	Appoints three persons to act alternately in the office of the Australian Statistician while the permanent office holder is absent
Authorising legislation	*Australian Bureau of Statistics Act 1975*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[112]

Incorrect classification of the instrument as a legislative instrument[113]

The instrument was made under subsection 15(1) of the *Australian Bureau of Statistics Act 1975*. It terminates three acting appointments to the office of the Australian Statistician, and appoints three persons to act alternatively in that office while the (permanent) Australian Statistician is absent from duty or from Australia, or is, for any other reason, unable to perform the duties of the office.

Pursuant to table item 8 in subsection 6(1) of the Legislation (Exemptions and Other Matters) Regulation 2015, instruments of appointment, engagement or employment are not legislative instruments. Similarly, instruments suspending or terminating an appointment, engagement or employment are not legislative instruments. However, when the present instrument was received by Parliament and by the committee, it was classified as a disallowable legislative instrument, and tabled in the Senate and the House of Representatives on that basis.

The committee acknowledges that, in this instance, the misclassification of the instrument as a legislative instrument did not hinder parliamentary oversight. However, the committee remains concerned about the process for the classification of instruments generally, and will continue to monitor this issue.

The committee notes that its secretariat drew the misclassification of the instrument as a legislative instrument to the attention of the Office of Parliamentary Council (OPC) who advised, following consultation with the Australian Bureau of Statistics, that the misclassification occurred due to an administrative error. The committee also notes advice received from OPC that, having been made as a legislative instrument, the present instrument would need to be repealed by legislative

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

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

instrument before any changes could be made by a non-legislative instrument in the future.

The committee draws the incorrect classification of the instrument as a legislative instrument to the attention of the minister and the Senate.

Instruments	**Defence (Army Aviation Centre Oakey Defence Aviation Area) Declaration 2018 [F2018L00339]** **Defence (Nowra Airfield Defence Aviation Area) Declaration 2018 [F2018L00341]** **Defence (RAAF Base Amberley Defence Aviation Area) Declaration 2018 [F2018L00333]** **Defence (RAAF Base Darwin Defence Aviation Area) Declaration 2018 [F2018L00340]** **Defence (RAAF Base East Sale Defence Aviation Area) Declaration 2018 [F2018L00344]** **Defence (RAAF Base Edinburgh Defence Aviation Area) Declaration 2018 [F2018L00332]** **Defence (RAAF Base Learmonth Defence Aviation Area) Declaration 2018 [F2018L00356]** **Defence (RAAF Base Pearce and Gingin Defence Aviation Area) Declaration 2018 [F2018L00357]** **Defence (RAAF Base Scherger Defence Aviation Area) Declaration 2018 [F2018L00353]** **Defence (RAAF Base Tindal Defence Aviation Area) Declaration 2018 [F2018L00354]** **Defence (RAAF Base Townsville Defence Aviation Area) Declaration 2018 [F2018L00334]** **Defence (Remote ILS/TACAN Site Beermullah Defence Aviation Area) Declaration 2018 [F2018L00338]**
Purpose	Declare certain areas to be defence aviation areas for the purposes of the *Defence Act 1903* and specify height restrictions on buildings, structures and other objects that apply within those areas.
Authorising legislation	*Defence Act 1903*
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[114]

Anticipated authority[115]

Section 4 of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4) of that Act.

The instruments were made on 16 March 2018, and registered on the Federal Register of Legislation on 21 March 2018 and 22 March 2018.

The instruments were made under subsection 117AC(1) of the *Defence Act 1903*, which was inserted by item 7 of Part 2 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* (Instrument Making Act). Part 2 of Schedule 1 to the Instrument Making Act commenced on 26 March 2018, pursuant to the Defence Legislation Amendment (Instrument Making) Commencement Proclamation 2018 [F2018N00018].

The committee notes that the commencement provisions for the instruments (section 2 of each instrument) provide for commencement at the same time as Part 2 of Schedule 1 to the Instrument Making Act. The instruments therefore commenced on 26 March 2018—at the same time as the relevant empowering provisions.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that are made in anticipation of their authorising provisions, and therefore rely on section 4 of the Interpretation Act, should clearly identify that the making of the instrument relies on that section.

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

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

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2018 [F2018L00271]**
Purpose	Establishes legislative authority for Commonwealth expenditure on two activities administered by the Department of Social Services
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
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[116]

Parliamentary scrutiny: ordinary annual services of government[117]

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 amed proposed laws appropriating revenue or moneys for expenditure extends to all matters not

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

117 Scrutiny principles: Senate Standing Order 23(3)(a) and (d).

involving the ordinary annual services of the government.[118] 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*.[119]

The instrument establishes legislative authority for Commonwealth government spending on two initiatives adminstered by the Department of Social Services. One of these activities (covered by item 271) is the Social Impact Investment Sector Readiness Fund (the Fund). The explanatory statement (ES) indicates that the Fund will allow the government to build the capability of organisations with a social purpose to bring projects into the social impact investing (SII) market.

The ES states that the Fund forms part of a larger SII package, announced in the 2017-18 Budget, for which funding of $20.2 million over ten years from 2017-18 will be provided. The SII package includes $8 million over four years from 2017-18 for the Fund. The ES further states:

> Funding for the SII package, including the Fund, will come from Program 1.10: Working Age Payments, which is part of Outcome 1. Program details are set out in the *Portfolio Budget Statements 2017-18: Budget Related Paper No. 1.15, Social Services Portfolio*.

It appears to the committee that the Fund (and the SII package more generally) may be new policy not previously authorised by special legislation; and that the initial appropriation for the Fund 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).

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118 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.

119 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.

Instruments	**Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018 [F2018L00284]** **Migration (IMMI 18/035: Specification of Exempt Occupations) Instrument 2018 [F2018L00287]** **Migration (IMMI 18/040: Manner for Providing Details of an Event to Immigration) Instrument 2018 [F2018L00303]** **Migration (IMMI 18/048: Specification of Occupations—Subclass 482 Visa) Instrument 2018 [F2018L00302]**
Purpose	Specify income and earnings requirements, relevant occupations and the manner for providing certain information in relation to temporary work and related permanent residence visas
Authorising legislation	*Migration Regulations 1994*
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[120]

Anticipated authority[121]

Section 4 of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4) of that Act.

The instruments were made on 15 and 16 March 2018, and registered on the Federal Register of Legislation on 16 and 17 March 2018. The following instruments were made under section 2.72 of the Migration Regulations 1994 (Migration Regulations):

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

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

- Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018 [F2018L00284];[122]
- Migration (IMMI 18/035: Specification of Exempt Occupations) Instrument 2018 [F2018L00287];[123] and
- Migration (IMMI 18/048: Specification of Occupations—Subclass 482 Visa) Instrument 2018 [F2018L00302][124]

The Migration (IMMI 18/040: Manner for Providing Details of an Event to Immigration) Instrument 2018 [F2018L00303] was made under subparagraph 2.84(2)(b)(i) of the Migration Regulations.

Section 2.72 and subparagraph 2.84(2)(b)(i) of the Migration Regulations were inserted or amended by items 79 and 110, respectively, of Schedule 1 to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Complementary Reforms Regulations). The Complementary Reforms Regulations did not commence until 18 March 2018.

The committee notes that the commencement provisions for the present instruments (section 2 of each instrument) provide for their commencement on 18 March 2018—at the same time as the Complementary Reforms Regulations.

Nevertheless, the committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that are made in anticipation of their authorising provisions, and therefore rely on section 4 of the Interpretation Act, should clearly identify that the making of the instrument relies on that section.

The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

122 This instrument was made under subsection 2.72(17) and paragraphs 2.72(15)(b), 2.17(15)(d) and 2.79(1A)(b) of the Migration Regulations.

123 This instrument was made under subsection 2.72(13) of the Migration Regulations.

124 This instrument was made under subsection 2.72(9) of the Migration Regulations.

Instrument	**Therapeutic Goods (Permissible Ingredients) Determination No. 1 of 2018 [F2018L00260]**
Purpose	Specifies ingredients which may be contained in medicines listed on the Australian Register of Therapeutic Goods, and requirements in relation to the inclusion of those ingredients in such medicines
Authorising legislation	*Therapeutic Goods Act 1989*
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[125]

Incorporation of document[126]

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.[127]

Table items 4041 and 4514 in Schedule 1 to the instrument require, in relation to potassium chloride and sodium bicarbonate respectively, that these ingredients comply with criteria specified by the World Health Organisation (WHO) and the United Nations Children's Fund (UNICEF) in the document 'Expert consultation on

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

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

127 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.

oral rehydration salts formulation 18 July 2001'. However, neither the instrument nor the ES indicates where that document can be freely accessed.

In this case the committee has observed that the document appears to be available for free online.[128] 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 a document incorporated by reference in the instrument.

128 See http://rehydrate.org/ors/expert-consultation.html.

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	**Amendment of List of Exempt Native Specimens – South Australian Lakes and Coorong Fishery, February 2018 [F2018L00137]**
Purpose	Amends the List of Exempt Native Specimens Instrument 2001 to allow the export of specimens from the South Australian Lakes and Coorong Fishery without a permit, subject to certain conditions
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[2]
Previously reported in	*Delegated legislation monitor 3 of 2018*

Drafting[3]

Committee's initial comment:

The instrument amends the list of exempt native specimens established under section 303DB of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) by including in the list the following:

> specimens that are or are derived from fish or invertebrates, other than specimens that belong to species listed under Part 13 of the EPBC Act (other than a species listed in the conservation dependent category), and specimens that belong to taxa listed under section 303CA of the EPBC Act (Australia's CITES list), taken in the South Australian Lakes and Coorong

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).

> Fishery, as defined in the Fisheries Management (Lakes and Coorong Fishery) Regulations 2009 (SA) and the Fisheries Management (General) Regulations 2017 (SA) in force under the *Fisheries Management Act 2007* (SA).

The committee considers that the above description of the specimens included on the list may be confusing to readers of the instrument. In particular, given the structure of the provision and the placement of the words 'other than' in the previous phrase, it is not clear to the committee whether 'specimens that belong to taxa listed under section 303CA of the EPBC Act (Australia's CITES list)' are included or not included in the list of exempt native specimens.

The committee notes that, for those familiar with the EPBC Act, it would appear likely that specimens covered by Australia's CITES list would not be included in the list, given that section 303CC of the EPBC Act prohibits the export of such specimens without an export permit, except in limited circumstances.

Nevertheless, the committee considers that instruments should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. The committee therefore considers that this listing should be clarified, to remove any potential for confusion or misunderstanding as to what items are and are not included in the list.

The committee requests the minister's advice in relation to whether 'specimens that belong to taxa listed under section 303CA of the EPBC Act (Australia's CITES list)' are included in, or excluded from, the list of exempt native specimens, and requests that the relevant provision be clarified to avoid any potential confusion in that regard.

Minister's response

The Assistant Minister for the Environment advised:

> I am advised by the rule-maker that species listed under section 303CA of the *Environment Protection and Biodiversity Conservation Act 1999* (Australia's CITES List) are excluded from the list. The Department of the Environment and Energy has advised me that it notes the Committee's comments about the potential confusion caused by the existing wording and will ensure that future instruments amending the list and their explanatory statements clearly describe the inclusion and exclusion of specimens in the list. The explanatory statement for the South Australian Lakes and Coorong Fishery will be updated in due course to clarify the provision to avoid any confusion on what is included or excluded from the list.

Committee's final response

The committee thanks the assistant minister for her response. The committee notes the advice that species listed under section 303CA of the EPBC Act (Australia's CITES list) are excluded from the list of exempt native specimens. The committee further notes the minister's undertaking to update the ES to clarify the provision.

The committee also welcomes the minister's advice that future instruments amending the CITES list and their ESs will be drafted in such a way as to clearly describe the inclusion and exclusion of specimens in the list.

The committee has concluded its examination of the instrument.

Instrument	**Australian Education Amendment (2017 Measures No. 2) Regulations 2017 [F2017L01501]**
Purpose	Amends the Australian Education Regulation 2013 to implement reforms to Commonwealth schools funding arrangements made by the *Australian Education Amendment Act 2017*
Authorising legislation	*Australian Education Act 2013*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 The committee gave a notice of motion to disallow on 15 February 2018. The committee withdrew the notice on 22 March 2018[4]
Previously reported in	*Delegated legislation monitors 1 and 3 of 2018*

Incorporation of document[5]

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.

4 See Parliament of Australia, *Disallowance Alert 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts*.

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

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 other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existing 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 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*.[6]

With reference to the above, the committee notes that item 6 of Schedule 1 appears to incorporate the 'Ministerial Council disability guidelines' (the guidelines). Item 6 inserts the definition of the guidelines into subsection 4(1) of the principal regulations, and defines them as 'the guidelines for the Nationally Consistent Collection of Data on School Students with Disability approved by the Ministerial Council *for the year*' (emphasis added).

The committee notes that this appears to indicate that the version of the guidelines incorporated by reference into the instrument would change as it is amended or updated from year to year. In this regard, the committee notes that section 130(4) of the *Australian Education Act 2013* provides that despite subsection 14(2) of the

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6 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.

Legislation Act, the regulations may incorporate any matter contained in any other instrument or other writing as in force or existing from time to time.

However, neither the instrument nor its ES clarifies the manner of incorporation or the relevant legislative authority. Moreover, no information is provided in the instrument or the ES regarding where the document may be freely accessed.

The committee requests the minister's advice as to:

- the manner in which the Ministerial Council disability guidelines are incorporated into the instrument, and
- how the document 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 updated to include this information.

Minister's first response

The Minister for Education and Training advised:

> Item 6 of the Australian Education Amendment (2017 Measures No. 2) Regulations 2017 (the Amendment Regulation) amended, amongst other things, the existing definition of Ministerial Council disability guidelines in subsection 4(1) of the Australian Education Regulation 2013 (the Principal Regulation), to mean the guidelines for the Nationally Consistent Collection of Data on School Students with Disability approved by the Ministerial Council for the year. This amendment to the definition of Ministerial Council disability guidelines was largely consequential to other amendments to section 58A of the Principal Regulation.
>
> The incorporation of the Ministerial Council disability guidelines in the Principal Regulation first occurred in 2014, by way of amendments to the Principal Regulation contained in the Australian Education Amendment (2014 Measures No. 1) Regulation 2014. This was part of a suite of amendments that occurred in 2014, to impose the requirement in the Principal Regulation for the Nationally Consistent Collection of Data on School Students with Disability (NCCD).
>
> ***…***
>
> The Ministerial Council disability guidelines have been incorporated in the Principal Regulation pursuant to the regulation making power contained in section 130 of the *Australian Education Act 2013* (the Act). In particular, in reliance on subsection 130(4), which provides that despite the operation of the *Legislation Act 2003*, the regulations may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time.
>
> The Ministerial Council disability guidelines must be approved by the Ministerial Council each year, as has occurred each year since 2015.

Once approved, the Ministerial Council disability guidelines are made available on the Department of Education and Training's website. See here for the 2017 version of the guidelines, noting that the 2018 version has yet to be approved (https://www.education.gov.au/what-nationally-consistent-collection-data-school-students-disability).

The purpose of the Ministerial Council disability guidelines is to:

- set threshold requirements for which students at a school must be included in the NCCD;
- set additional data categories (if any) that must be reported about those students, in addition to what is already specified in subsection 58A(2) of the Principal Regulation; and
- define the terms 'category of disability' and 'levels of adjustment' for the purposes of the NCCD.

Accordingly, the Ministerial Council disability guidelines provide additional context around the requirements for the NCCD each year, and enable elements of the NCCD to have input from the Ministerial Council each year.

Manner of incorporation of the Ministerial Council disability guidelines

As discussed above, this occurs pursuant to the regulation making power contained in subsection 130(4) of the Act.

How the Ministerial Council disability guidelines are made readily and freely available to persons interested in or affected by the NCCD

As also discussed above, once approved, the Ministerial Council disability guidelines are made available on the Department of Education and Training's website. See here for the 2017 version of the guidelines, noting that the 2018 version has yet to be approved (https://www.education.gov.au/nationally-consistent-collection-data-students-disability-guidelines).

In closing, I note that given the Ministerial Council disability guidelines have been incorporated in the Principal Regulation since 2014, that the guidelines have been available on the Department of Education and Training's website each year since 2015, and the general awareness of the NCCD (including the Ministerial Council disability guidelines) in the government and non-government school sector, I do not consider it necessary for either the Amendment Regulation or associated explanatory statement to be updated.

Committee's first response

The committee thanks the minister for his response, and notes the minister's advice that the Ministerial Council disability guidelines have been incorporated into the Australian Education Regulation 2013 (principal regulation) by the instrument as existing from time to time, as authorised by subsection 130(4) of the *Australian Education Act 2013*. The committee also notes that the minister has provided the

internet address at which the 2017 version of the Ministerial Council disability guidelines can be freely accessed.

The committee notes the minister's advice that he does not consider it necessary that the instrument or its explanatory statement be updated to include this information, because the ministerial guidelines have been incorporated into the principal regulations since 2014, have been available on the department's website since 2015, and there is general awareness of the guidelines within the school sector.

In this regard, the committee reiterates its expectation, as previously stated, that instruments or their ESs should provide information about any document incorporated by reference, including the manner in which it is incorporated, and where it may be obtained free of charge. The committee acknowledges that information about the guidelines is publicly available elsewhere, and that users of the instrument within the school sector may be aware of those details. However, in addition to access for specific persons subject to the instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

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. Including information about incorporated documents in the ES to an instrument 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, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Moreover, the committee notes that the inclusion of certain information about an incorporated document in the ES to an instrument is not only a matter of principle, but is a legislative requirement under paragraph 15J(2)(c) of the Legislation Act. Specifically, paragraph 15J(2)(c) requires the ES to a legislative instrument that incorporates any documents by reference to 'contain a description of the incorporated documents and indicate how they may be obtained'.

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that instruments are made in accordance with relevant statutory requirements. The committee remains concerned that, without amendment, the explanatory statement to the instrument may not comply with the requirements of paragraph 15J(2)(c) of the Legislation Act.

The committee requests the further advice of the minister in relation to its request that the instrument or its explanatory statement be updated to provide relevant information about the incorporation of the Ministerial Council disability guidelines. The committee requests in particular that the ES be amended to include a description of the guidelines, and indicate how they may be obtained, to ensure compliance with the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003.*

Minister's second response

The Minister for Education and Training advised:

> As indicated in my earlier response, the Ministerial Council disability guidelines have been incorporated into the Australian Education Regulation 2013 since 2014 (as such the instrument does not incorporate the guidelines by reference), are publically available on my department's website, and I consider that there is general awareness of the guidelines within the school education sector. I note that the Ministerial Council disability guidelines are more readily available to the public than the Explanatory Statement.
>
> Notwithstanding the above, as the Committee has expressed the need to include further information in the Explanatory Statement to ensure other parties, who might be interested in or affected by the Ministerial Council disability guidelines, are able to access those guidelines, a revised Explanatory Statement has been prepared. The revised Explanatory Statement will be registered in due course.

Committee's final response

The committee thanks the minister for his response, and notes that a revised ES, which includes a description of the incorporated Ministerial Council disability guidelines and indicates how they may be obtained, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

Instrument	**Cheques Regulations 2018 [F2018L00211]**
Purpose	Remakes the Cheques Regulations 1987, removing redundant provisions, updating language, and reflecting current drafting practice
Authorising legislation	*Cheques Act 1986*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[7]
Previously reported in	*Delegated legislation monitor 4 of 2018*

Unclear basis for determining fees[8]

Committee's initial comment:

Section 10 of the instrument provides that, if a person asks the eligible authority to provide information contained in the register of notices established by section 8, and pays the fee determined under subsection 10(2) or (3), the authority must, as soon as possible, provide the information. Section 10(2) prescribes a fee of $20 for providing information from one notice in the register, while subsection 10(3) sets out a formula for determining a (higher) fee for providing information contained in more than one such notice.

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 paragraph 65A(5)(d) of the *Cheques Act 1986* provides that the regulations may make provision for fees to be charged in relation to providing information from the register of notices. However, the ES to the instrument does not specify the basis on which the fees in section 10 have been calculated. It merely states that sections 8 to 10 of the instrument replicate the corresponding provisions in the previous version of the instrument (the Cheques Regulations 1987), with minor changes.

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).

The committee requests the minister's advice as to the basis on which each of the fees in section 10 of the instrument has been calculated.

Minister's response

The Treasurer advised:

> By way of background, an eligible authority means the Australian Payments Clearing Association Limited (APCA) or a person approved in writing by the Minister. APCA has recently changed its name and is now known as the Australian Payments Network Limited (APN). The register of notices contains information in relation to notified places for internal presentment of cheques. Financial institutions may provide to an eligible authority such information and specify a place as a notified place in relation to cheques.
>
> When a person requests information contained in the register of notices and pays the associated fee, APN incurs an administrative cost in retrieving this information for the requesting person. The fee has been calculated to reflect the administrative cost of staff time and effort involved in responding to the request. The fee also ensures only serious requests for information are made and deters unnecessary requests for information.
>
> The Cheques Regulations 2018 remake the Cheques Regulations 1987. The explanatory statement for the Cheques Regulations 2018 did not explain the basis of the fee because the Cheques Regulations 2018 replicated the corresponding provisions in the Cheques Regulations 1987, with only a few minor changes that are not intended to change the operation of the provisions. An explanation was not provided in relation to provisions which were not changing to avoid unintentionally changing the meaning of the original provisions. The fee for an eligible authority to provide information contained in the register of notice to a person has not changed.

Committee's response

The committee thanks the Treasurer for his response and notes the Treasurer's advice that the fee for information contained in the register of notices has been calculated to reflect the administrative cost of staff time and effort involved in responding to requests.

The committee notes the Treasurer's advice that the ES to the instrument did not explain the basis of the fee because it replicated the corresponding provisions in the previous instrument. The committee nevertheless considers as a general rule that for transparency, information about the basis on which fees have been calculated should be contained in the ES to any instrument imposing fees or charges, even where those fees are unchanged from a previous instrument or provision.

The committee has concluded its examination of the instrument.

Instrument	**Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018 [F2018L00139]**
Purpose	Adds two exceptions to electoral or referendum communications requiring authorisation; and sets out further details in relation to notifying particulars of authorised electoral communications
Authorising legislation	*Commonwealth Electoral Act 1918*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[9]
Previously reported in	*Delegated legislation monitor 3 of 2018*

Drafting[10]

Committee's initial comment:

Section 9 of the instrument sets out requirements for notifying particulars of authorisation for various, specified forms of electoral communication. While most of these, such as 'digital banner advertisement', 'social media', 'text message' and 'video sharing' are defined in section 4 of the instrument, 'search advertising' is not defined.

The committee considers that the meaning and scope of the term 'search advertising' may not be self-evident to persons interested in or affected by the instrument. In the interests of promoting the clarity and intelligibility of instruments, the committee considers that consideration might be given to including an appropriate definition of 'search advertising' in the instrument.

The committee requests the minister's advice in relation to the intended meaning and scope of the term 'search advertising', and whether it may be appropriate to include a definition of 'search advertising' in the instrument.

Minister's response

The Minister for Finance advised:

> Subsection 321 D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Electoral Commissioner may make a legislative instrument to…determine further requirements in relation to

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

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

the particulars which are to be notified as part of the authorisation, across a number of pieces of legislation…

Item 5 of the table at section 9 of the Determination establishes how the particulars must be notified if the communication is search advertising. In the Determination, it sets out that it must be in the footer of the landing page from the URL; or if the particulars are too long to be included in the word limit of the search advertising – in a website that can be accessed by a URL included in the search advertising.

Search advertising is a commonly used term in the advertising space and used in online and internet marketing. It is the term used to capture the method of using advertisements generated when an internet user types in specific key words or phrases in search of a product or service in a search engine. From the user's perspective, they will see advertisements listed above organic search results.

The way search advertising works is that an entity will 'bid' for terms, and then if the entity wins that term their advertisement will appear when that term is typed into the search engine. The term does not necessarily have to relate exactly to your advertisement – for example, the AEC quite often bids on the term 'moving house' during the enrolment phase of the election to try and capture those who are moving with an 'update your enrolment' message…

It is noted that the definitions provided at section 4 of the Determination are broad and in many cases provide a meaning for a term by way of including a non-exhaustive list of examples. As search advertising is a commonly used term by those in an advertising and marketing space it is believed that users of the Determination would be able to determine the meaning of the term by reading it as is and without the need for any further explanation.

In response to your question, I am advised that during the extensive consultation that the Australian Electoral Commission (AEC) undertook with the stakeholders identified on pages 1 and 2 of the Explanatory Statement, no issues were raised or questions asked in relation to the use of the term, and as such, no further clarification was considered in the drafting of the Determination or the Explanatory Statement.

I am advised that it is not the intention of the Electoral Commissioner at this stage to update the Determination or the Explanatory Statement with a definition for search advertising, as it understood to be a widely understood and known term.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that 'search advertising' is a commonly used term in the advertising sector, and that during the consultation process which preceded the making of the instrument, no questions were raised in relation to the use of the term. The committee further

notes the minister's advice that the definitions provided in section 4 of the instrument are broad and not intended to be exhaustive.

The committee notes that for these reasons, the Electoral Commissioner does not propose to update the instrument or its ES with a definition of 'search advertising'.

The committee has concluded its examination of the instrument.

Instrument	**Export Market Development Grants (Approved Bodies) Guidelines 2018 [F2018L00119]**
Purpose	Sets out guidelines for the exercise by the CEO of Austrade of his or her powers to approve certain industry organisations as approved bodies eligible for export promotion grants
Authorising legislation	*Export Market Development Grants Act 1997*
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[11]
Previously reported in	*Delegated legislation monitor 3 of 2018*

Drafting[12]

Committee's initial comment:

The instrument sets out guidelines for the exercise by the CEO of Austrade of powers under the *Export Market Development Grants Act 1997* relating to the approval of a person as an approved body.[13] Section 6 of the instrument makes a number of references to matters 'mentioned in' subsection 9(2) of the Regulations. Section 5 of the instrument defines 'Regulations' as the Export Market Development Grants Regulations 2018 (2018 Regulations). It does not appear that the 2018 Regulations have been made. The committee's research indicates that the 2018 Regulations

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 'Approved body' status is a special approval granted to non-profit, export focussed industry bodies which, while not exporting themselves, undertake export promotion on behalf of their particular industry or membership. Approved bodies may apply for grants with respect to certain promotional activities. See Austrade, *Export Market Development Grants: Who can apply?* https://www.austrade.gov.au/Australian/Export/Export-Grants/About/who-can-apply.

have not been registered on the Federal Register of Legislation or tabled in either House of Parliament.

The previous version of the instrument—the Export Market Development Grants (Approved Body) Guidelines 2008 (2008 Guidelines), which are repealed by the present instrument, make a number of references to matters 'mentioned in' paragraph 3.3(2) of the Export Market Development Grants Regulations 2008 (2008 Regulations). The 2008 Regulations are scheduled to sunset in October 2018.[14]

The committee considers it likely that the 2018 Regulations (to which the present instrument refers) are intended to be made during 2018, to replace the sunsetting 2008 Regulations. However, neither the instrument nor its accompanying explanatory statement (ES) explains whether this is the case, or provides any information in relation to the 2018 Regulations. The committee acknowledges that the present instrument does not commence until 1 July 2018, and that the references to the 2018 Regulations will therefore have no legal effect until that date. However, the committee remains concerned that the references in the instrument to regulations that have not yet been made could generate confusion for readers.

The committee considers that, in the interests of promoting the clarity and intelligibility of the instrument for persons who may be interested or affected by it, the ES should clarify any reference to another legislative instrument that has not yet been made.

The committee requests the minister's advice in relation to whether the instrument refers to regulations that have not yet been made, and if so, information as to when it is anticipated that those regulations will be made and registered.

Minister's response

The Minister for Trade, Tourism and Investment advised:

> The Committee has raised concerns of principle regarding the clarity and intelligibility of the instrument to readers because, at the time the 2018 Guidelines were registered on the Federal Register of Legislation (on 15 February 2018), the Export Market Development Grants Regulations 2018 ('the Regulations') had not yet been made or registered.
>
> This was an administrative error by the Australian Trade and Investment Commission. The 2018 Guidelines were not intended to precede the 2018 Regulations and both the Guidelines and Regulations will commence on 1 July 2018.
>
> I understand the Committee is now aware the Regulations were made by the Governor General on 2 March 2018 and registered on 8 March 2018.

14 Under section 50 of the *Legislation Act 2003*, legislative instruments are automatically repealed ('sunset'), on the first 1 April or 1 October after the tenth anniversary of their registration 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 instrument was not intended to precede the 2018 Regulations to which it referred, and that this occurred due to administrative error. The committee also notes the minister's advice that the 2018 Regulations have now been made, and that the instrument and regulations will both commence on 1 July 2018.

The committee has concluded its examination of the instrument.

Instrument	**Narcotic Drugs Amendment (Cannabis) Regulations 2018 [F2018L00106]**
Purpose	Amends the Narcotic Drugs Regulation 2016 to permit exports of medicinal cannabis products, amend various requirements relating to applications for and the administration of cannabis licences, and make other minor and technical changes
Authorising legislation	*Narcotic Drugs Act 1967*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 15 February 2018) Notice of motion to disallow must be given by 25 June 2018[15]
Previously reported in	*Delegated legislation monitor 3 of 2018*

Unclear meaning of 'connections and associations'[16]

Committee's initial comment:

The instrument amends the Narcotic Drugs Regulations 2016 (principal regulations), which set up the regulatory framework for licensing the cultivation and production of medicinal cannabis, and the manufacture of drugs, under the *Narcotic Drugs Act 1967* (Act). Sections 8A and 8B of the Act set out various matters that the Secretary (of the Department of Health) must take into account in determining whether a personal or corporate applicant is a 'fit and proper person' to hold a licence. These matters include their 'connections and associations…with other persons'.[17]

The principal regulations specify the information and documentation that must be provided in applications for each of the relevant licenses for the purposes of sections

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)(b).

17 *Narcotic Drugs Act 1967,* subsections 8A(d) and 8B(e).

8A and 8B of the Act. These include requirements to provide information about applicants' connections and associations.

The present instrument expands the 'connections and associations' specified in the principal regulations about whom applicants for licences must provide information, by amending the relevant sections of the regulations to encompass 'connected persons' who may be either natural persons or bodies corporate, and inserting separate provisions on information required about connections and associates who are natural persons, and information required about corporate connections and associates.[18]

In its *Delegated legislation monitor 9 of 2016*, the committee raised concerns about the failure to define the terms 'connections' and 'associations' in the principal regulations. The committee considered that this may make it difficult for applicants to determine with sufficient precision what connections or associations they needed to disclose in order to obtain a licence or permit.

In response, the minister provided guidance about the nature and scope of the connections and associations who would need to be identified in a licence application. The minister noted that a guidance document for completing downloadable application forms published on the department's website provided more details about the connections and associations that would be relevant for a licence application, including examples. The minister also referred to a guideline document published by the department on fit and proper persons and suitable staff, however, which did not include this information.

The minister agreed with the committee that applicants for a licence under the Act must be given sufficient information and guidance to ensure that they can determine with sufficient precision what connections and associations must be disclosed, and noted that this would also assist law enforcement agencies consulted by the Secretary for information about an applicant.

The minister advised that:

> My Department proposes to revise the Guideline document on Fit and Proper Persons and Suitable Staff to reflect the information set out in the Guidance document for completing downloadable licence applications. In addition, my Department proposes to revise both Guidance documents to ensure that they are more informative to allow the applicant determine with sufficient precision what connections and associations must be disclosed in an application for a licence.[19]

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18 These amendments are effected by the following provisions in the instrument: in respect of medicinal cannabis licences, items 2-7 and 10-12; in respect of cannabis research licences, items 15-20 and 23-25; and in respect of manufacture licences, items 34-39 and 42-44.

19 See *Delegated legislation monitor 1 of 2017*, pp. 87-91.

The committee's research indicates that the revision of these documents may not yet have occurred. The Guideline on Fit and Proper Persons and Suitable Staff on the department's Office of Drug Control website is subtitled 'Version 1.0, October 2016', and does not include the more detailed information about connections and associations which was provided in the minister's December 2016 letter to the committee.[20] It is not clear to the committee whether any revision has been made to the relevant information in the Guidance on Completing Downloadable Licence Applications, which is subtitled 'Version 1.1, February 2017'.[21]

Given that this instrument expands the information requirements in the principal regulations in relation to 'connections and associations', the committee reiterates the concerns it previously raised in relation to ensuring that applicants can determine with sufficient precision what connections and associations must be disclosed.

The committee notes that the ES to this instrument provides no further information about the meaning of 'connections' and 'associations' nor any indication of where such information may be found.

With reference to the undertaking given to the committee in December 2016 by the former minister, the committee requests the minister's advice as to what action has been taken to revise the information provided in relevant guidance documents about the meaning of 'connections and associations' in the instrument.

Minister's response

The Minister for Health advised:

> Since the introduction of the regulatory scheme for the cultivation, production and manufacture of medicinal cannabis in late 2016, my Department has been working with stakeholders, including applicants and potential applicants, for the various cannabis licences and permits to ensure that applicants can determine with sufficient precision what connections and associations must be disclosed. An application for a licence or permit has not been refused for the applicant's failure to include sufficient information about its connections and associations; additional information has often been sought.
>
> In August 2017, my Department examined the requirements for information specified in each of the notices given to applicants and made by the Secretary under section 14J of the *Narcotic Drugs Act 1967* (the Act) over the previous twelve months. The purpose of the exercise was to identify refinements to the application forms requiring information

20 See https://www.odc.gov.au/publications/guideline-fit-and-proper-persons-and-suitable-staff (accessed 1 March 2018).

21 See https://www.odc.gov.au/publications/guidance-completing-downloadable-licence-applications (accessed 1 March 2018).

relevant to the applicant's connections and associations; in turn, this would assist applicants understand how they might meet the requirement to be 'a fit and proper person'. The forms were amended to include requests for information about persons who have the capacity to influence the finances or activities of a body corporate applicant. It is mandatory for the applicant to include this information in the form.

Experience has dictated that often the precise nature of the applicant's relationships is best understood through discussion with the applicants, having regard to the information included in the application form or information provided by the applicant under further request for information by the delegate of the Secretary for my Department. For example, my Department will interview applicants to understand the nature of the relationships to the body corporate applicant of persons that the applicant has identified as a connection or association or that my Department has independently identified using alternative sources of information available to it. There is no 'one size fits all'.

Building on this work, my Department is in the course of revising the relevant guidance documents and application forms and expects that they will be published in August 2018.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that the Department of Health has been working since the regulatory scheme was introduced in late 2016 to ensure that applicants can determine with sufficient precision what connections and associations must be disclosed, to review the information requirements for licence applications, and to refine relevant documentation accordingly.

With reference to the committee's previous correspondence with the (former) minister, the committee notes in particular the minister's advice that the department is currently revising the relevant guidance documents and application forms, and expects that these will be published in August 2018. The committee will continue to monitor this issue.

The committee has concluded its examination of this matter.

Personal rights and liberties: privacy[22]

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.

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

The instrument amends provisions in the principal regulations about information that must be provided by applicants for licences under the Act. These include the insertion of new provisions requiring applicants who are bodies corporate to provide information about the identity of each natural person who holds a relevant financial interest in the applicant's business, or who is entitled to exercise relevant power in relation to the applicant's business, or in relation to other business that provides a substantial proportion of the applicant's income. The information that must be provided includes the names and dates of birth of those natural persons.[23]

The ES to the instrument does not address the implications for personal privacy of these new provisions, or provide any information about how such information will be managed; what use can be made of it, including any permitted onward disclosure; and what safeguards are in place to protect the privacy of individuals whose personal information is provided to the Secretary in accordance with the instrument.

The committee acknowledges that these expanded provisions form part of the broader regime for information provision set out in the principal regulations, which already includes similar requirements for the provision of personal information about other natural persons. However, the committee notes that the ES to the principal regulations did not acknowledge the privacy implications of the licensing regime or provide any information in that regard.

The committee requests the minister's advice in relation to:

- how personal information collected in accordance with the instrument, about both licence applicants and their connections and associations, will be used and 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 Health advised:

> The information about persons associated or connected to the applicant or licence holder can be provided by the applicant as part of the application process for a licence, or by relevant Commonwealth, State and Territories' law enforcement agencies and other regulatory agencies. The application forms filled in by the applicants, in effect, inform the applicant that the information they provide, including personal information, will be provided to law enforcement agencies and other regulatory agencies for the purposes of assessing their application. Applicants are also asked to provide consent to the disclosure of information to relevant law enforcement and regulatory agencies.

23 These provisions are inserted in respect of medicinal cannabis licences, by item 12; in respect of cannabis research licences, by item 25; and in respect of manufacture licences, by item 44.

The Secretary is also empowered to require information from any other source including heads of state or territory agencies. Personal information collected in this way is taken to be authorised for the purpose of the *Privacy Act 1988* (sections 14 and 14L).

Personal and other information relevant to the application or the licence can only be used in the assessment of the person's application for a licence or the person's suitability to continue to hold a licence under the Act, subject to other provisions under the Act that allows disclosure of that information in specified circumstances. Disclosure of personal information obtained and held by the Secretary is prohibited unless disclosure is consistent with the circumstances set out in section 14N of the Act. Disclosure of information in those circumstances is authorised for the purposes of the *Privacy Act 1988*.

The circumstances set out in section 14N include:

> (a) disclosure is in the course of perfonning functions or duties, or exercising powers under the Act; or
>
> (b) disclosure is for the purposes of the Act; [or]
>
> (c) disclosure is required or authorised by or under a law of the Commonwealth, State or Territory; or
>
> (d) the person to whom the information relates consents to the disclosure; or
>
> (e) disclosure is to a Commonwealth, State or Territory law enforcement agency; or
>
> (f) disclosure [is] to an agency of the Commonwealth, a State or Territory that is responsible for, or deals with, matters relating to health, therapeutic goods, poisons, industrial chemicals, land management or the registration of pharmacies or the regulation of pharmacies.

The collection, obtaining, holding and disclosure of personal information is otherwise subject to the requirements under the Privacy Act and any sanctions available under that Act for breaches of those requirements.

My Department's information management system for cannabis licences and permits, TRIM, is only accessible to employees of my Department working in the Office of Drug Control (ODC) whose duties include considering applications for cannabis licences and permits.

For information specifically relating to the criminal review element of the fit and proper person assessment of applicants and their connections and associates, additional controls are in place such that only the Directors and Assistant Directors within ODC have access to the outcomes of requests for information to law enforcement entities. The information is stored within limited access TRIM containers and, in some cases, on my Department's PROTECTED offline environment.

In the few circumstances where sensitive law enforcement information has been provided (rating a classification of PROTECTED), the delivery of that information has been by secure hard copy courier rather than over email. That material is subsequently stored in locked containers within the ODC secure room (access controlled and audited).

The ODC takes an 'onion' approach to physical security, with:

- access controls into the building including physical guarding
- swipe entry into the ODC work area – limited to ODC staff and Departmental senior executive staff only
- a separately 'access controlled' secure room within this secure work area with limited numbers of staff having access, and
- Class C containers within that secure room.

Committee's response

The committee thanks the minister for his response and notes the minister's advice about the legal framework governing personal information collected as part of the licence application process, including restrictions on use and disclosure set out in the *Narcotic Drugs Act 1967,* and relevant safeguards otherwise provided by the *Privacy Act 1988*. The committee also notes the minister's advice that licence applicants are requested to consent to the disclosure of information to relevant law enforcement and regulatory agencies. The committee further notes the minister's advice regarding the physical and information security practices implemented by the department to protect personal information.

The committee has concluded its examination of the instrument.

Instrument	**National Gallery Regulations 2018 [F2018L00212]**
Purpose	Makes provision for a range of matters relating to the National Gallery of Australia including financial limits for the purchase and disposal of assets, security arrangements and offences to protect the gallery, and rules for the service of liquor
Authorising legislation	*National Gallery Act 1975*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[24]
Previously reported in	*Delegated legislation monitor 4 of 2018*

Offences: evidential burden of proof on the defendant[25]

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.

Subsection 9(1) of the instrument makes it an offence for a person to sell or supply liquor on Gallery land or in a Gallery building.[26] Subsection 9(2) sets out a defence, which provides that subsection 9(1) does not apply if:

- the person selling or supplying liquor is authorised to do so by the Gallery's Council under subsection 8(1); or
- the person supplying liquor (other than by way of sale) obtained the liquor on Gallery land or in a Gallery building from an authorised liquor supplier.

Subsection 21(1) of the instrument makes it an offence for a person to allow an animal belonging to the person, or under the person's control, to enter or remain in a Gallery building. Subsection 21(2) sets out a defence, which provides that subsection 21(1) does not apply if:

- the person is a person with a disability (within the meaning of the *Disability Discrimination Act 1992*), and the animal is an assistance animal; or

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)(b).

26 Section 3 of the *National Gallery Act 1975* defines 'Gallery' as the National Gallery of Australia established by that Act.

- the person is a member of a police force acting in accordance with the person's duties.

Section 25 of the instrument sets out two general defences, which provide that it is a defence to a prosecution for any offence under Parts 3 or 4 that:

- when the relevant conduct was engaged in, the Council had consented in writing to the conduct; or
- the person accused of the offence is a member of the Council, the Director of the Gallery or a Gallery staff member, acting in accordance with the person's duties.

In relation to each of the provisions above, the defendant bears the evidential burden of raising the relevant defence or exemption.[27]

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. In relation to the above defences, the explanatory statement (ES) states that it is appropriate that the evidential burden be reversed because the matters to be established are 'within the knowledge' of the defendant.

However, the committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers*[28] states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it 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.[29]

In this case, it is not apparent to the committee that the matters set out in the defences in subsections 9(2) and 21(2), and section 25, are matters that would be peculiarly within the defendant's knowledge. For example, whether a person had been authorised by the Council to sell liquor would appear to be a matter of which

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

28 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf, pp. 50-52.

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

the Council would be particularly apprised, as would whether the Council had consented in writing to particular conduct.

Further, the committee notes that a matter being 'within the knowledge' of a person does not equate to the matter being *peculiarly* within that person's knowledge. In this respect, the committee notes that, for a number of other defences established by the instrument,[30] the ES expressly states that the reversal of the evidential burden of proof is justified because relevant matters would be peculiarly within the knowledge of the defendant.

The committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in subsections 9(2) and 21(2), and section 25, of the instrument. The committee's assessment would be assisted if the minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

Minister's response

The Minister for Communications and the Arts advised:

> Subsection 9(2)
>
> The reversal of the evidential burden of proof in subsection 9(2) is appropriate, having regard to the principles in the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide).
>
> In regard to paragraph 9(2)(a), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.
>
> In regard to paragraph 9(2)(b), it is within the peculiar knowledge of a person supplying liquor (other than by way of sale) that they obtained the liquor on Gallery land or in a Gallery building from an authorised liquor supplier. There may well be no way for the Gallery Council or staff members to know with certainty the origin of liquor supplied by a person, including the circumstances in which it was first supplied to that person by another party. It would be significantly and disproportionately (given the low penalty) more difficult for the prosecution to prove, for example, that relevant liquor was not supplied to a person on gallery land, than it would be for the person to raise evidence that his or her conduct fell within the defence.
>
> I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

30 See, for example, the defences in subsections 12(6) and 24(2).

In addition to the above matters, in accordance with the Guide, creating the defence is more readily justified as the offence carries a relatively low penalty of 5 penalty units and the conduct proscribed by the offence aims to achieve the important public health and safety objective of preventing unauthorised supply of liquor, including to minors.

Subsection 21(2)

The reversal of the evidential burden of proof in subsection 21(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved. These matters are whether the person has a disability (within the meaning of the *Disability Discrimination Act 1992*); whether an animal belonging to that person or in their charge is an assistance animal; and whether the person is a member of a police force acting in accordance with their duties.

It would again be significantly and disproportionately more difficult for the prosecution to prove that a person is not a person with a disability and that their animal is not an assistance animal, than it would be for any accused to raise the relevant defence by providing evidence of their own status (and that of their assistance animal). This is similarly the case in relation to proving that a person is not a police officer acting in accordance with their duties.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 21(2) is the relatively low amount of five penalty units, which tends to support a defence provision in these circumstances.

Section 25

The reversal of the evidential burden of proof in section 25 is similarly appropriate. It would again be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Council had not consented in writing to a person engaging in conduct that contravenes Part 3 or 4 of the instrument, than for the person to raise evidence of the written consent.

It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not a member of the Council, the Director or a staff member acting in accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

Any accused could cheaply and readily raise evidence of their written consent, or of their appointment or employment and associated duties.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

> In accordance with the Guide, creating the defence is more readily justified as the offence carries a relatively low penalty of 5 penalty units.
>
> In addition, I note that the defence provisions in section 25 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Portrait Gallery of Australia (see for example section 24 of the National Portrait Gallery Regulation 2013 which is framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural institutions is desirable, where possible, and the framing of proposed section 25 supports this approach.

Committee's response

The committee thanks the minister for his response and notes the minister's advice in relation to the justification for reversing the evidential burden of proof in each of subsections 9(2) and 21(2) and section 25 of the instrument. The committee notes the minister's view that the reversal of the burden of proof in each of these provisions is appropriate.

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

The committee notes that the minister's advice in relation to the defences in paragraph 9(2)(a) and section 25 of the instrument relies on the assessment that it would be disproportionately difficult and costly for the prosecution to disprove these matters. The minister has not provided any advice in relation to these defences that would indicate that the matters in question are peculiarly within the knowledge of the defendant, as required by the Offences Guide.[31] The committee remains of the view that these matters do not appear to be matters which would be peculiarly within the defendant's knowledge.

In addition, while the committee notes the minister's assessment that the defence set out in subsection 21(2) in relation to a person with a disability asssistance animal would be likely to be within the peculiar knowledge of the defendant, the committee does not regard it as likely that the alternative defence in that subsection, that a person was a police officer acting on duty, would be a matter peculiarly within the defendant's knowledge.

Finally, the committee notes the minister's advice that the defence provisions in section 25 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions. On this point 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

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

scrutiny concerns. This is particularly the case where those concerns relate to the protection of individual rights and liberties.

The committee has concluded its examination of the instrument. However, the committee draws its concerns about the reversal of the evidential burdens of proof in paragraph 9(2)(a), subsection 21(2) (as it relates to police officers) and section 25 of the instrument to the attention of the minister and the Senate.

Instrument	**Producer Offset Rules 2018 [F2018L00112]**
Purpose	Provides the administrative framework for applications and issue of certificates relating to the tax offset for the production of films with significant Australian content
Authorising legislation	*Income Tax Assessment Act 1997*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[32]
Previously reported in	*Delegated legislation monitor 3 of 2018*

Unclear basis for determining fees[33]

Committee's initial comment:

Part 2 of the instrument sets out the procedures and requirements for applications which may be made by film-makers to the 'film authority' (Screen Australia) for a 'provisional certificate' indicating their future eligibility for the producer offset. Section 11 sets out a table of fees payable for provisional certificate applications. The application fees for the 2017–18 financial year vary from $127 to $4471, in a five-step scale depending on the amount of total expenditure on the film.[34]

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.

While the ES advises that the imposition of these fees is authorised by subsection 6(4) of the *Screen Australia Act 2008,* it does not provide any information about the basis upon which the fee amounts set out in section 11 of the instrument have been determined.

The committee requests the minister's advice in relation to the basis on which the fees set out in section 11 of the instrument have been calculated.

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

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

34 Section 12 provides for the fees to increase in future financial years, by an indexation factor linked to the Consumer Price Index.

Minister's response

The Minister for Communications and the Arts advised:

> Screen Australia, in its administration of the Producer Offset, is required to undertake the final certificate assessment process. However, the provisional certificate application process is a service provided to industry at a significant administrative cost to Screen Australia. Consequently Producer Offset Rules impose a modest fee on applicants for provisional certificates, with the level of the fee scaled to reflect the size of the production.
>
> The rate of application fees for a provisional certificate is charged at a level below full cost recovery. This is because provisional certificates are often used to assist with financing and loans and there would be criticism from the sector if charges were increased.
>
> The Producer Offset Rules 2018 have effectively adopted the same fees and structure as the 2007 Rules, which are sunsetting. The fee structure has not changed since being introduced. The fee levels contained in the Rules are the fees as charged under the last year of the 2007 Rules, and continue the mechanism to adjust the fees for CPI.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the rate of application fees for a provisional certificate is charged at a level below full cost recovery, for a service provided to industry at a significant administrative cost to Screen Australia. The committee also notes the advice that the 2018 rules continue the fee structure established in the previous (2007) rules.

The committee has concluded its examination of the instrument.

Instrument	**Sea Installations Regulations [F2018L00214]**
Purpose	Remakes the Sea Installations Regulations 1989, updating them to remove obsolete references relating to obtaining a new sea installations permit
Authorising legislation	*Sea Installations Act 1987*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[35]
Previously reported in	*Delegated legislation monitor 4 of 2018*

Unclear basis for determining fees[36]

Committee's initial comment:

Section 8 of the instrument prescribes fees payable in relation to applications to renew a permit to operate sea installations and prescribed vessels. For sea installations, the fee amounts vary based on installation costs. For prescribed vessels, the fee is determined by reference to a formula set out in subsection 8(2).

Sections 9, 10 and 11 of the instrument prescribe fees payable for applications to vary permits relating to sea installations and prescribed vessels. For sea installations, the fee amounts vary based on installation costs, with additional fees prescribed for applications to vary a permit to make additions to the installation or to permit additional members of the public to visit the sea installation. For prescribed vessels, the fee is determined by reference to a formula set out in subsection 11(2).

The explanatory statement (ES) to the instrument does not specify the basis on which the application fees have been calculated, merely restating the operation and effect of the relevant provisions.

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.

Consequently, the committee's expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale

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

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

or rate of costs or payment is that the relevant explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated.

The committee requests the minister's advice as to the basis on which the application fees in sections 8, 9, 10 and 11 of the instrument have been calculated.

Minister's response

The Minister for the Environment and Energy advised:

> The Sea Installations Regulations 1989 (the previous regulations), made on 25 October 1989, were subject to the sunsetting provisions of the *Legislation Act 2003* and were due to sunset on 1 April 2018.
>
> A review of the previous regulations was conducted by the Department of the Environment and Energy (Department) to ascertain whether the previous regulations continued to be fit for their intended purpose, and if so, whether they should be re-made with or without revisions or whether they should be allowed to sunset.
>
> The review, finalised in February 2018, recommended that the previous regulations be remade with minor revisions to modernise language and remove obsolete references that relate to obtaining new sea installations permits. This was determined to be the most cost effective and least burdensome method of ensuring, among other purposes, that the regulated community would continue to have legal certainty around the administration of the one remaining permit that continues to have legal effect under the *Sea Installations Act 1987* (the Act).
>
> The decision to remake the previous regulations included retaining the existing fee structure; as a result, the provisions of the previous regulations imposing application fees were remade without amendment. The Department advises that the fees payable for an application to renew or vary a sea installations permit (set out in sections 8, 9, 10 and 11 of the Sea Installations Regulations 2018 (SI Regulations)) are calculated on a cost recovery basis:
>
> - The explanatory statement for the previous regulations confirms that fees were imposed to recover the costs associated with processing applications and issuing permits. For example, that explanatory statement states that the purpose of the regulations is to, amongst other matters, "provide for the charging of application fees for new permits, and renewal and variation of permits under the *Sea Installations Act 1987*; these application fees are to cover the administrative costs of considering such applications and issuing the permit".
> - The explanatory statement for the previous regulations also states "application fees will be calculated on the basis of a percentage of the costs of constructing, transporting and installing the installation in all cases except for simple variations".

- In relying on the fee calculations from the previous regulations, the Department's intention is that the existing sea installation permit holder's cost recovery fees for either a renewal or a variation will be a portion of what it will cost the Great Barrier Reef Marine Park Authority (GBRMPA) to process an application.
    - The cost recovery fees for a renewal of the permit is capped at $1000 (subsection 12(1)). While *prima facie* the fees to be charged for any variation will be a percentage of the cost of constructing, transporting and installing an addition to the permanently moored vessel (for example, subsection 9(1)), the fees are reasonably related to the costs associated with the GBRMPA renewing the permit and will not be a tax.
    - The cost of updating the basis for fee payments in the SI Regulations to a contemporary cost recovery system, which would by necessity include additional regulatory drafting costs, when only one permit remains and the Australian Government has demonstrated its clear intention to minimise duplication by removing the permit provisions from the SI Act, would exceed the public benefit.

In summary, the fee will be imposed to recover the cost associated with processing applications to renew or vary the remaining sea installations permit still in effect. The fees payable under the SI Regulations therefore do not extend beyond cost recovery.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the fees in the instrument will be imposed to recover the cost associated with processing applications to renew or vary the remaining sea installations permit still in effect, and therefore do not extend beyond cost recovery. The committee also notes the detailed information provided by the minister in relation to the calculation of the relevant fees.

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

The committee notes the minister's advice that the present instrument is a remake of the Sea Installations Regulations 1989 (previous regulations), and that the provisions of the previous regulations imposing application fees have been remade without amendment. However, on this point 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. Where provisions of an instrument impose fees, the committee expects the basis on which those fees have been calculated to be fully explained—regardless of whether the provisions retain an existing fee structure.

The committee has concluded its examination of the instrument.

Instrument	**Telecommunications Code of Practice 2018 [F2018L00171]**
Purpose	Sets out conditions to be complied with by carriers undertaking inspection, installation and maintenance activities covered by Divisions 2, 3, and 4 of Schedule 3 to the *Telecommunications Act 1997*
Authorising legislation	*Telecommunications Act 1997*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[37]
Previously reported in	*Delegated legislation monitor 4 of 2018*

Drafting: references to industry standards[38]

Committee's initial comment:

Sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the instrument each provide that, when engaging in the activity to which the relevant chapter relates,[39] a carrier must conduct the activity in accordance with any standard that relates to the activity, is recognised by the Australian Communications and Media Authority (ACMA) as a standard for use in that industry, and is likely to reduce a risk to the safety of the public if the carrier complies with the standard.

In relation to section 2.7, the explanatory statement (ES) states:

> This section requires a carrier which engages in an authorised activity to do so in accordance with any relevant industry standard recognised by the Australian Communications and Media Authority (ACMA) that is likely to reduce a risk to the safety of the public. This section is a restatement of clause 12 of Schedule 3 to the [*Telecommunications Act 1997*].
>
> This section deals primarily with safety standards but is related to the more general requirement for compliance with standards and codes in section 2.13 [which relates to compliance with standards and codes under Part 6 of the Act].

The ES contains virtually identical statements (with minor additions to reflect the purpose of the relevant chapter) in relation to sections 3.7, 4.7, 5.7 and 6.7.

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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 For example, chapter 2 of the instrument relates to the inspection of land. Section 2.7 therefore imposes obligations in relation to land entry activities.

While sections 2.7, 3.7, 4.7, 5.7 and 6.7 appear to be restatements of clause 12 of Schedule 3 to the *Telecommunications Act 1997* (Telecommunications Act), the committee notes that there is no indication in the instrument or the ES as to the standards to which those provisions refer, and where the standards may be obtained.

The committee's research indicates that the ACMA is required under section 136 of the Telecommunications Act to maintain registers of codes and standards, and that these registers (and the standards they contain) may be accessed for free online.[40] However, in the interests of promoting the clarity and intelligibility of legislative instruments for persons interested in or affected by them, the committee considers that a best-practice approach would be for the instrument or its accompanying ES to indicate that the standards and codes to which the instrument refers may be accessed on the ACMA registers, and to provide a web address where those registers may be accessed.

Additionally, the instrument makes reference (in notes) to standards that may not appear on the ACMA registers[41] and neither the instrument nor its ES appears to indicate what those standards are (aside from the one example given in the notes) or how they may be obtained. Again, in the interests of promoting clarity and intelligibility for readers, and ensuring that everyone interested in or affected by the law has access to its terms, the committee's preference would be that the instrument or its ES indicate what the relevant standards are and where they may be obtained free of charge. If it is not possible to list all the standards that relate to obligations under the instrument, the ES should provide assurances as to where the relevant standards can be identified and accessed.

The committee requests the minister's advice as to the standards to which sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the instrument refer, and how those standards may be accessed free of charge.

Minister's response

The Minister for Communications and the Arts advised:

> The provisions provide that when engaging in a low-impact activity, a carrier must conduct the activity in accordance with any standard that relates to the activity, is recognised by the Australian Communications and Media Authority (ACMA) as a standard for use in that industry, and is likely to reduce a risk to the safety of the public if the carrier complies with the

40 See https://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telecommunications-industry-codes-and-standards.

41 For example, the notes to sections 2.7, 4.7 and 6.7 refer to the Australian Radiation Protection Standard for Maximum Exposure Levels in Radiofrequency Fields – 3kHz to 300GHz (RPS3), available at https://www.arpansa.gov.au/sites/g/files/net3086/f/legacy/pubs/rps/rps3.pdf.

standard. The provisions replicate clause 12 in Schedule 3 to the Act, but also include examples of applicable standards.

I can advise the Committee that two standards are recognised by the ACMA, both of which are included in the examples provided in sections 2.7, 4.7, 5.7 and 6.7 of the Code. Section 3.7 only references 'a relevant standard or code under Part 6 of the Act'.

The first example is the *Australian Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3kHz to 300GHz (RPS3)*. The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) developed RPS3, which sets the electromagnetic energy (EME) exposure limit standard. The ACMA recognises the limits in RPS3 in its two standards that regulate EME from telecommunications facilities and wireless communications devices. The standards are the Radiocommunications (Electromagnetic Radiation – Human Exposure) Standard 2014 and the Radiocommunications Licence Conditions (Apparatus Licence) Determination 2015. Both of the standards are freely available on the Federal Register of Legislation. RPS3 is freely available from ARPANSA's website at: www.arpansa.gov.au/regulation-and-licensing/regulatory-publications/radiation-protection-series/codes-and-standards/rps3.

The second example is a relevant standard or code under Part 6 of the Act. The Industry Code for Mobile Phone Base Station Deployment C564:2011 (the Industry Code) sets out additional processes that mobile carriers are to follow when they are installing low-impact facilities. The Industry Code was developed by the Communications Alliance and is registered by the ACMA under Part 6 of the Act. It is freely available on the ACMA's Codes information webpage at: www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes.

The structure of sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the Code was carried over from the Telecommunications Code of Practice 2018. At the next available opportunity, the sections will be amended in accordance with the best practice approach suggested by the Committee.

The minister further advised that he intends to address the concerns raised by the committee in amendments expected to be made to the instrument later this year.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that there are presently two ACMA standards applicable for the purposes of sections 2.7, 3.7, 4.7, 5.7 and 6.7 of the instrument, both of which are referenced as examples in the instrument. The committee also notes the minister's advice about where these standards are freely available.

The committee welcomes the minister's undertaking to amend the instrument to accord with the best-practice approach recommended by the committee.

The committee has concluded its examination of this matter.

Drafting: reference to a provision that has been repealed[42]

Committee's initial comment:

Subsection 2.14(1) of the instrument provides information on carriers' obligations under clause 55 of Schedule 3 to the Telecommunications Act. The subsection states that clause 55 requires the Environment Secretary to be notified where a carrier proposes to install a facility before 1 January 1999, if the installation is not authorised and there are special Commonwealth environment or heritage concerns. Subsection 2.14(2) then states that if a land entry activity includes the installation of a facility, the relevant carrier must comply with clause 55 of Schedule 3 to the Telecommunications Act.

However, clause 55 was repealed in 2014 by the *Omnibus Repeal Day (Autumn 2014) Act 2014*,[43] on the basis that the clause 'ceased to have practical effect on 1 January 2001'.[44] Section 2.14 of the instrument therefore appears to reference obligations in relation to a provision that no longer exists. Moreover, there does not appear to be another provision in the Telecommunications Act that is equivalent to former clause 55. The ES provides no further information in this regard, merely restating the operation and effect of the relevant provisions.

Compliance with ministerial Codes of Practice is a licence condition imposed on telecommunications carriers.[45] A failure to comply with licence conditions may result in the imposition of a civil penalty, and may ultimately lead to the cancellation of the carrier's licence.[46] The committee notes that the obligations referred to in section 2.14 appear to be historical, given the reference to activities undertaken before 1 January 1999. Nevertheless, given the importance of compliance with licence conditions, and the potential consequences of noncompliance, the committee is concerned that the references in section 2.14 of the instrument to a repealed provision—and particularly the imposition of a requirement in relation to that provision—could generate confusion for carriers in relation to their obligations under the instrument.

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

43 See item 244, Schedule 2 to the *Omnibus Repeal Day (Autumn 2014) Act 2014*.

44 See Explanatory Memorandum, Omnibus Repeal Day (Autumn 2014) Bill 2014, p. 47.

45 See clause 15 of Schedule 3 to the *Telecommunications Act 1997*.

46 See Australian Communications and Media Authority, *ACMA Compliance and Enforcement Policy,* August 2010 (updated December 2017), https://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/compliance-enforcement-policy.

The committee requests the minister's advice as to why section 2.14 of the instrument appears to require compliance with a legislative provision that has been repealed, and whether this section should be removed or clarified.

Minister's response

The Minister for Communications and the Arts advised:

> Section 2.14 of the Telecommunications Code of Practice 2018 does not impose a requirement on carriers. Subsections 2.14(1) and (3) do not impose a requirement on carriers – they note that other provisions may apply. While subsection 2.14(2) is framed as requiring carriers to comply with clause 55 of Schedule 3 to the Act, as the Committee notes, clause 55 was repealed in 2014. To the extent that a provision in subordinate legislation is stated to require compliance with a repealed provision of an Act, the provision in the subordinate legislation has no force or legal effect.
>
> Section 2.14 should have been repealed when clause 55 of Schedule 3 was repealed in 2014, however this did not occur. I thank the Committee for identifying the issue and I will remove section 2.14 at the next available opportunity.

The minister further advised that he intends to address the concerns raised by the committee in amendments expected to be made to the instrument later this year.

Committee's response

The committee thanks the minister for his response and notes the minister's advice that section 2.14 should have been repealed when clause 55 of Schedule 3 was repealed in 2014. The committee notes the minister's undertaking to remove the section at the next available opportunity.

The committee has concluded its examination of the instrument.

Senator John Williams (Chair)