

The Senate

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Committee on
Regulations and
Ordinances

Delegated Legislation Monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

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

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

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

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

Publications

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

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

legislation detailed 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

Agency correspondence

The committee undertakes informal correspondence with relevant agencies via the committee secretariat to attempt to resolve minor, technical scrutiny issues. This correspondence is not published; however, a record of the instrument, scrutiny issue and status of the correspondence is included in Appendix A (ongoing matters) and Appendix B (concluded matters) in the monitor.

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

Instruments considered in this monitor

The committee examined 78 disallowable legislative instruments registered on the Federal Register of Legislation between 22 May 2019 and 20 June 2019. This monitor identifies the instruments registered in this period in relation to which the committee has or had scrutiny concerns. It also contains instruments registered before this period in relation to which the committee has concluded its examination.

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 2019*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

Committee comments

1.1 This chapter details the committee's most significant, unresolved scrutiny concerns.

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

Immigration (Guardianship of Children) Regulations 2018

FRL No.	F2018L01708 ²
Purpose	To provide for a range of matters relating to the custodianship of non-citizen minors in Australia, including: duties and obligations applying to custodians, state governments, state authorities and other persons; placement and transfer of non-citizen minors; and the application of state child welfare laws.
Authorising legislation	<i>Immigration (Guardianship of Children) Act 1946</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Significant matters in delegated legislation³

1.3 Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

1.4 The instrument was made under the *Immigration (Guardianship of Children) Act 1946* (Guardianship of Children Act), which provides for the minister to become the legal guardian of non-citizen children in certain circumstances. Section 12 of the Act provides that the Governor-General may make regulations prescribing all matters

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

2 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed to give effect to the Act.⁴

1.5 In accordance with section 12 of the Guardianship of Children Act, Part 2 of the instrument sets out the principles which must be observed in deciding whether to direct a non-citizen under the age of 18 to become the minister's ward.⁵ Section 6 of the instrument provides that a direction must not be given unless the relationship between the child and adult relative has broken down irretrievably, and the direction is necessary to protect the child from 'moral danger', to enable the child to have the benefit of adequate direction and guidance, or for any other reason that the minister or delegate considers to be in the interests of the child.

Initial consideration

1.6 The committee initially scrutinised the instrument in [Delegated Legislation Monitor 1 of 2019](#). The committee noted that the instrument has the effect of prescribing the grounds on which a non-citizen child may become the ward of the minister, and as such could be said to affect the rights and interests of non-citizen children in a significant way. The committee therefore requested the minister's advice as to why significant matters relating to the circumstances in which a non-citizen child may become the ward of the minister should be included in delegated legislation, rather than primary legislation.⁶

Further consideration

1.7 The committee considered the minister's response in [Delegated Legislation Monitor 2 of 2019](#). In summary, the minister advised that the key grounds to be met before the minister may make a guardianship order in relation to a non-citizen child are set out in section 4AA of the Guardianship of Children Act, and that any principles prescribed for the purposes of section 4AA must be consistent with, and must not affect the rights and interests of children in a manner contrary to, that section.

1.8 While noting this advice, the committee reiterated its concerns that the broad discretionary power to issue a guardianship order does not appear to be governed by any other specific criteria. Rather, it is left to the regulations to prescribe principles to be observed in considering whether or not an order should be made.⁷ In this respect, the committee observed that the instrument appears to be the mechanism by which broad criteria *must* be satisfied before a guardianship order

4 Such regulations may include, but are not limited to, prescribing principles to be observed in deciding whether the child is to become the minister's ward under section 4AA of the Act (paragraph 12(aa)) and in placing children with custodians (paragraph 12(a)).

5 Part 2.

6 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 46-47.

7 See paragraph 12(aa) of the Guardianship of Children Act.

(which may affect the rights and interests of non-citizen children in a significant manner) may be made.

1.9 The committee therefore sought the minister's advice as to whether consideration had been given to amending the Guardianship of Children Act to ensure that specific criteria setting out the basis on which a non-citizen child may become the ward of the minister are included on the face of the Act, rather than left to delegated legislation.⁸

Minister's further response⁹

1.10 The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs advised:

As the Committee would be aware, it is not unusual for primary legislation to give Ministers and other persons broad discretionary powers particularly in situations where the circumstances under which the powers are to be exercised may vary considerably and flexibility is required to deal appropriately with specific cases. Policy guidelines are usually given for the exercise of broad discretionary powers, but while decision makers are required to consider such guidelines, they are not binding.

The legislative scheme for orders for guardianship was inserted in the Act by the *Statute Law (Miscellaneous Provisions) Act (No 1) 1985*. The effect of this scheme is that while section 4AA gives the Minister a broad discretionary power to direct that certain children shall become the Minister's ward, the exercise of that power is subject to the preconditions in section 4AA and also subject to any principles that may be prescribed under paragraph 12(aa). All of the requirements in the legislation, both in the Act and in the regulations, are binding on the Minister, unlike policy guidelines not made by legislative instrument.

The use of a legislative instrument (regulations) for prescribing the principles for exercise of the power in section 4AA therefore allows for closer regulation of the power but also allows flexibility for the principles to be updated if changing circumstances make it necessary to do so.

Under the Act, such a direction can only be given in relation to a child where, among other things:

- the child enters Australia as a non-citizen in the charge of, or for the purpose of living in Australia under the care of, a relative;

8 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 2 of 2019*, pp. 54-57.

9 The minister responded to the committee's comments in a letter dated 23 July 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 4 of 2019* available at www.aph.gov.au/regords_monitor.

- the Minister is satisfied it is necessary to make the direction in the child's best interests; and
- the relative consents to the Minister giving the direction.

Only a small proportion of children become wards of the Minister as a result of a direction made under section 4AA of the Act. Most children who come under the Act are covered automatically without any direction needed. Currently the Minister is the guardian of 96 individuals under the Act, only two of whom became wards as a result of a direction given under section 4AA. The principles prescribed in the Regulations therefore apply to only a small cohort of children.

In addition, a direction under section 4AA of the Act would generally only be given if:

- the Minister or delegate holds serious concerns about actual harm or the risk of harm arising from the minor's existing care arrangements;
- to the extent possible, these concerns have been brought to the attention of the relevant State/Territory child welfare/protection agency;
- in addition to any services and support available from the State/Territory child protection authorities or the minor's relatives, the minor would benefit from the Minister's guardianship and the Minister would be able to effectively carry out the ministerial guardianship responsibilities; and
- the relationship between the relative and the minor appears to have irretrievably broken down to the extent that the minor and relative should not live together for the foreseeable future.

The Committee has observed that a legislative instrument 'is unamendable and made by the executive' and 'is not subject to the full extent of parliamentary scrutiny inherent in bringing about proposed changes in the form of an amending bill'. I acknowledge this concern, but note that any changes to the principles prescribed in the regulations would be tabled in both houses of the Parliament and would be subject to disallowance by either House. This allows an additional element of parliamentary scrutiny of the legislative scheme which would not be available if the power in section 4AA were exercisable subject only to policy guidelines.

Having turned my mind to the concerns raised by the Committee, I consider that the current legislative scheme is effective and appropriate. Consideration has not been given to amending the Act in the way the Committee describes.

Committee's comment

1.11 The committee thanks the minister for this response. The committee notes the minister's advice that it is not unusual for primary legislation to confer broad discretionary powers on ministers and other persons, and the advice that such

powers are usually exercised by reference to non-binding policy guidelines. In this respect, the committee notes the minister's advice that the power to direct that a non-citizen child is to become the ward of the minister is subject to the conditions set out in the Guardianship of Children Act and those in the present instrument which, unlike policy guidelines, are binding on the minister.

1.12 The committee further notes the minister's advice that only a small proportion of children become wards of the minister as a result of a direction given under the Guardianship of Children Act, and the advice that a direction for a non-citizen child to become a ward of the minister would generally only be given in limited circumstances relating to the welfare of the relevant child.

1.13 Finally, the committee notes the minister's advice that any changes to the principles set out in the present instrument would be tabled in both Houses of Parliament and would be subject to disallowance, and the advice that this ensures a level of parliamentary scrutiny which would not be available if the directions power were subject only to policy guidelines.

1.14 While noting this advice, the committee remains concerned that the instrument includes a number of significant matters with the potential to affect the rights and liberties of non-citizen children.¹⁰ As outlined in previous comments, the committee's consistent view is that significant policy matters, and matters affecting fundamental rights and liberties, should be set out in primary legislation.¹¹

1.15 Additionally, the committee notes that the majority of the controls on the exercise of the minister's power are set out in regulations (that is, in the present instrument).¹² While noting that including such controls in regulations may set stronger limits on the exercise of the minister's powers than the use of policy guidance alone, the committee emphasises that such significant matters should be set out in primary legislation. In this regard, the committee is concerned that regulations may be amended or repealed by the executive on a virtually unilateral basis. Further, while regulations are subject to a degree of parliamentary scrutiny,

10 For example, the instrument specifies that a guardianship order may not be made unless it is necessary to protect the relevant child from certain risks or from 'moral danger', or to enable the child to 'have the benefit of adequate direction and guidance'. The instrument also provides that the custodian of a child must 'provide for the care and welfare of the child' and must not, without the minister's consent, place the child in the care of another person.

11 In this regard, see Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report, 112th Parliament* (June 2005), p. 59.

12 In this respect, the Guardianship of Children Act provides that a guardianship order may only be made where the minister is satisfied that the order is necessary in the interests of the relevant child, and where a relative of the child gives consent. However, these appear to be the only controls in the Act on the issue of a guardianship order. All other controls appear to be set out in regulations.

they are not subject to the full extent of parliamentary control and oversight associated with primary legislation.

1.16 The committee has concluded its examination of the instrument. However, the committee draws the attention of the Senate to the inclusion of significant matters, which may affect the rights and liberties of non-citizen children, in delegated legislation. The committee considers that such significant matters are more appropriately set out in primary legislation (for example, in the *Immigration (Guardianship of Children) Act 1946*).

1.17 In these circumstances, the committee has resolved to place a notice of motion to disallow the instrument, to provide the Senate with additional time to consider the instrument with the benefit of the committee's comments.

Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018

FRL No.	F2018L01674 ¹³
Purpose	To amend the <i>Water Act 2007</i> to formalise the commitments of contracting governments to the Murray-Darling Basin Agreement, alter powers of the Murray-Darling Basin Authority and add a new review process for the <i>Basin Salinity Management 2030</i> strategy.
Authorising legislation	<i>Water Act 2007</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation¹⁴

1.18 Subsection 14(1) of the *Legislation Act 2003* (Legislation Act) provides that if enabling legislation authorises or requires provision to be made in relation to any matter by legislative instrument, the instrument may make provision in relation to that matter by applying, adopting or incorporating other documents.

1.19 An instrument may apply, adopt or incorporate provisions of an Act, provisions of a disallowable legislative instrument, or provisions of rules of court, as in force from time to time or as in force at a particular time.¹⁵ An instrument (first instrument) may also apply, adopt or incorporate any matter contained in any other instrument or writing, as in force or existing at or before the time the first instrument commences.¹⁶

1.20 Subsection 14(2) further provides that, unless the contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or writing as in force or existing from time to time.

13 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

15 Paragraph 14(1)(a) of the Legislation Act.

16 Paragraph 14(1)(a) of the Legislation Act.

1.21 The committee therefore expects an instrument or its explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. Where an instrument incorporates a document as in force from time to time, the committee also expects the explanatory statement to identify the power in the enabling Act or other Act of Parliament that is relied on to incorporate the document in that manner. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁷

Initial consideration

1.22 The committee initially scrutinised the instrument in [Delegated Legislation Monitor 1 of 2019](#). The instrument incorporates Basin Salinity Management (BSM) procedures.¹⁸ However, the committee noted that neither the instrument nor the explanatory statement which initially accompanied the instrument appeared to indicate the manner in which the principles are incorporated or where they may be accessed free of charge. The committee sought the minister's advice as to:

- whether the BSM procedures may be accessed free of charge, and if so where;
- the manner in which the BSM procedures are incorporated (that is, as in force from time to time or as in force at a particular time); and
- if it is intended to incorporate the BSM procedures as in force from time to time, the power relied on to incorporate the BSM procedures in this manner.

Further consideration

1.23 In response to the committee's request, the minister circulated a replacement explanatory statement, which included additional information about the incorporation of the BSM procedures. The committee considered that document in [Delegated Legislation Monitor 2 of 2019](#).

1.24 The replacement explanatory statement indicated that the BSM procedures are incorporated as in force from time to time, and noted that the procedures may be freely accessed on the website of the Murray-Darling Basin Authority (Authority).

1.25 As to the authority to incorporate documents as in force from time to time, the explanatory statement explained that the instrument makes amendments to the

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

18 The explanatory statement explains that some functions 'are to be carried out in accordance with BSM procedures made by the Basin Officials Committee'. See explanatory statement, p. 2. It also provides that this applies to items 10, 70, 74, 75, 76, 79, 90, 91, 92, 94, 96, 97, 98, 101, 103, 106, 108, 110, 111, 113, 114, 115, 116, 123, 124, 125, 128, 130, 133, 137, 161, 162, 163, 172, and 181 of the instrument.

text of the Murray-Darling Basin Agreement (Agreement) in Schedule 1 to the *Water Act 2007* (Water Act). In this respect, it asserted that it is the Agreement, not the instrument, that incorporates the BSM procedures, and consequently the restrictions in section 14 of the Legislation Act on incorporating documents as in force from time to time do not apply.

1.26 The committee acknowledged that the effect of the instrument is to amend the Water Act, and that ultimately the Water Act requires particular functions to be carried out in accordance with the BSM procedures. However, the committee also noted that the restrictions in section 14 of the Legislation Act apply in circumstances where 'enabling legislation authorises or requires provision to be made in relation to any matter by legislative instrument'. Noting that the Water Act appears to authorise amendments to the Agreement to be made by legislative instrument, it appeared to the committee that the restrictions in section 14 of the Legislation Act would apply.

1.27 The committee therefore requested further advice from the minister as to why the minister considered that the BSM procedures were not incorporated by the instrument, but rather only by Schedule 1 to the Water Act—such that section 14 of the Legislation Act would not apply.

1.28 The committee also requested the minister's advice as to the power relied on to incorporate the BSM procedures as in force from time to time, if the minister considered that the procedures were incorporated by the instrument.

Department's further response¹⁹

1.29 The Assistant Secretary, Murray-Darling Basin Policy Branch responded on the minister's behalf as, at the time, the Parliament was prorogued for the 2019 Federal election. The Assistant Secretary advised:

The Department refers to the Minister's advice provided by letter of 4 March 2019 and provides the following additional information to assist in explaining why the Agreement can be considered to incorporate the BSM procedures, rather than the Amendment Regulations.

The legal status of the Murray-Darling Basin Agreement is relevant to this issue. The Agreement is, itself, not a Commonwealth law. Rather, it is an agreement between the parties that is given further effect by a Commonwealth law - namely the *Water Act 2007* (the Water Act). For instance, the Note to the definition of 'Agreement' in section 18A states that:

The Murray Darling Basin Agreement operates as an agreement between the parties. The text of the Agreement is set out in

19 The Assistant Secretary, Murray-Darling Basin Policy Branch responded to the committee's comments in a letter dated 18 April 2019. A copy of the letter is available on the committee's website: see correspondence relating to Delegated Legislation Monitor 4 of 2019 available at www.aph.gov.au/regords_monitor.

Schedule 1, and as such it has further effect as provided for by this Act (for example, see sections 18E and 18F).

The Note to section 18E also states that:

The conferral of functions, powers and duties on the Authority by this section does not otherwise give the Agreement any effect as a law of the Commonwealth.

While the text of the Agreement is set out in Schedule 1 of the Water Act, as amended by regulations made for section 18C, this does not alter the legal status of the Agreement (see, for example, Note 2 to subsection 18(1)). Given this, the Department's view is that, while the Legislation Act 2003 (the Legislation Act) generally applies to the Amendment Regulations, section 14 does not. This is because, it is the Agreement rather than the Amendment Regulations which 'makes provision in relation to' the matters contained in the BSM procedures (as in force from time to time).

However, if an alternate view is taken that the Amendment Regulations do, themselves, incorporate the BSM procedures and that section 14 of the Legislation Act is therefore relevant, the Department provides the further information for the Committee's assistance below.

...

The Department draws the Committee's attention to the advice provided by the Minister by letter 4 March 2019 which provided the following information:

Alternatively, to the extent that section 14 of the Legislation Act does apply to the Amendment Regulations, the limitation in subsection 14(2) is subject to a contrary intention appearing in the Water Act. By enabling the regulations to amend Schedule 1 'by incorporating into the Agreement amendments made to, and in accordance with' the Agreement, section 18C, read in the context of Part 1A of the Water Act, provides a contrary intention. The Murray-Darling Basin Agreement is not a Commonwealth law that is subject to the limitation in subsection 14(2) of the Legislation Act. Accordingly, it is possible, under clause 5 to the Agreement, for that agreement to be amended to incorporate a matter in an instrument or other writing from time to time. In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act.

To assist the Committee, the Department also notes that further evidence of a contrary intention in the Water Act, for the purposes of subsection 14(2) of the Legislation Act, is provided by considering the text of the Agreement, as it was originally included in the Water Act by *Water Amendment Act 2008* (the 2008 Amendment Act). Section 18C was also

included, relevantly in the same form as present, by the 2008 Amendment Act. The text of the Agreement in Schedule 1 of the Water Act, following the commencement of the 2008 Amendment Act, made provision for a number of matters by reference to an instrument or other writing as in force or existing from time to time. (See, for example, clause 2 of Schedule B to the Agreement which defined 'Strategy' as meaning 'the *Basin Salinity Management Strategy 2001-2005* as adopted and amended by the Ministerial Council from time to time'; see also the reference to the 'Living Murray Environmental Watering Plan 2006-2007' in subclause 20(2) of Schedule F, which could be amended from time to time by the Ministerial Council under subclause 20(2).)

Section 14 of the Legislation Act was not relevant to the inclusion of such provisions in the text of the Agreement in Schedule 1 to the Water Act, as this was done by primary legislation, ie the 2008 Amendment Act. Nonetheless, the fact that the text of the Agreement contained such provisions, at the time that section 18C was included in the Water Act, provides a further indication that section 18C was not intended to be subject to the limitation in subsection 14(2) of the Legislation Act. Otherwise, subsection 14(2) would, in effect, prevent the Ministerial Council from agreeing to amendments to the Agreement which incorporate by reference documents as in force from time to time (because subclause 5(2) of the Agreement would then prevent such amendments to the Agreement from coming into effect).

Accordingly, on the view that the BSM procedures are incorporated by the Amendment Regulations, the source of the regulation-making power to do so is in sections 18C and 256 of the Water Act.

The explanatory statement has been revised to include a paragraph specifying the source of this regulation-making power:

... In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act. **Accordingly, sections 18C and 256 of the Water Act provide the power for the Amendment Regulations to incorporate the BSM procedures as in force from time to time, by amending the text of the Agreement in Schedule 1 of the Water Act.**

Committee's comments

1.30 The committee thanks the Assistant Secretary for this response, and notes the Assistant Secretary's advice that it is the Agreement, not the amending regulations (that is, the present instrument), that 'makes provision in relation to' the matters contained in the BSM procedures. The committee notes the advice that, as a consequence, section 14 of the Legislation Act does not apply in relation to the BSM procedures.

1.31 The committee also notes the Assistant Secretary's advice that, if the view is taken that the present instrument *does* incorporate the BSM procedures, section 14 of the Legislation Act is subject to contrary intention in sections 18C and 256 of the Water Act. In this respect, the committee notes the advice that section 18C was included in the Water Act by the *Water Amendment Act 2008*, which also amended Schedule 1 to the Water Act to make provision for a number of matters by reference to instruments and other writings as in force from time to time. The committee further notes the Assistant Secretary's advice that the fact that the text of the Agreement contained such provisions at the time section 18C was included in the Water Act indicates that section 18C was not intended to be subject to the limitations in subsection 14(2) of the Legislation Act.

1.32 Finally, the committee notes the Assistant Secretary's advice that if subsection 14(2) of the Legislation Act were to apply, this would prevent the Ministerial Council from agreeing to amendments to the Agreement which incorporate by reference documents in force from time to time. The committee notes the advice that it is therefore necessary for section 18C of the Water Act to be read as permitting time-to-time incorporation.

1.33 The committee acknowledges that it is ultimately the Agreement in Schedule 1 to the Water Act that requires particular functions to be carried out in accordance with the BSM procedures. However, as noted in the committee's previous comments, section 14 of the Legislation Act applies where 'enabling legislation authorises or requires provision to be made in relation to any matter by legislative instrument'. In this respect, the committee reiterates that sections 18C and 256 of the Water Act permit regulations to amend Schedule 1 of that Act by incorporating amendments made to, and in accordance with, the Agreement. Those sections would therefore appear to authorise provision to be made in relation to a matter (that is, amending Schedule 1 to the Water Act) by legislative instrument. Consequently, the committee remains of the view that section 14 of the Legislation Act (including the restrictions in subsection 14(2)) would apply.

1.34 Further, the committee does not consider that sections 18C and 256 of the Water Act evince a contrary intention to subsection 14(2) of the Legislation Act in relation to regulations made for the purposes of section 18C. In this regard, the committee considers that such an intention should be expressed in clear and unambiguous language. By contrast, the committee notes that subsection 256(3) of the Water Act appears to expressly permit regulations made for the purposes of Part 7 of that Act to incorporate documents as in force from time to time. Subsection 18C(3) also expresses a clear intention to exempt regulations made for the purposes of section 18C from sunseting.

1.35 In light of these matters, and noting that it may be necessary for the Ministerial Council to agree to amendments to the Agreement that incorporate documents as in force from time to time, the committee considers that it may be

appropriate to amend the Water Act to expressly authorise the incorporation of documents in this manner.

1.36 The committee has concluded its examination of the instrument. However, the committee draws the attention of the Senate to the apparent incorporation into the instrument of the Basin Salinity Management (BSM) procedures, as those procedures exist from time to time, in the absence of authority in the enabling legislation to incorporate documents in this manner.

1.37 In these circumstances, the committee has resolved to place a notice of motion to disallow the instrument, to provide the Senate with additional time to consider the instrument with the benefit of the committee's comments.

Appendix A

Ongoing matters

2.1 The committee engages in correspondence with relevant ministers and/or agencies in order to address its concerns regarding scrutiny issues raised by disallowable legislative instruments. The following table documents the committee's ongoing correspondence.

Ministerial engagement

2.2 The committee is engaging in formal correspondence with the relevant minister to resolve scrutiny concerns about the instruments listed below.

Instrument	Issue	Status
Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]	Principle (a) Unclear basis for determining fees Principle (a) Incorporation Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Air Navigation (International Airline Licence Exemption) Determination 2019 [F2019L00375] Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 [F2019L00378]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Air Services Regulations 2019 [F2019L00371]	Principle (b) Privacy Principle (b) Reversal of evidential burden of proof Principle (b) Immunity from liability Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Archives (Records of the Parliament) Regulations 2019 [F2019L00282]	Principle (d) Significant matters in delegated legislation	Seeking advice from the Attorney-General.
ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148 [F2019L00290]	Principle (d) Significant matters in delegated legislation	Seeking advice from the Assistant Treasurer.

Instrument	Issue	Status
Corporations Amendment (Name Exemption) Regulations 2019 [F2019L00271]	Principle (d) Significant matters in delegated legislation	Seeking advice from the Assistant Treasurer.
Corporations Amendment (Proprietary Company Thresholds) Regulations 2019 [F2019L00538]	Principle (d) Significant matters in delegated legislation	Seeking advice from the Treasurer.
Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 [F2019L00352]	Principle (a) Broad delegation of power Principle (c) Merits review	Seeking advice from the minister.
Farm Household Support (Forced Disposal of Livestock) Minister's Rules 2019 [F2019L00523]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Fisheries Management Regulations 2019 [F2019L00383]	Principle (b) Reversal of evidential burden of proof	Seeking advice from the minister.
Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019 [F2019L00615]	Principle (d) Significant matters in delegated legislation	Seeking advice from the Attorney-General.
Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]	Principle (c) Merits review	Seeking advice from the minister.
Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]	Principle (d) Significant matters in delegated legislation	Drawing to the attention of the Senate.
Migration Amendment (New Skilled Regional Visas) Regulations 2019 [F2019L00578]	Principle (a) Imposition of fees (taxation) Principle (c) Merits review Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 [F2019L00551]	Principle (a) Unclear basis for determining fees Principle (b) Privacy Principle (c) Merits review Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.

Instrument	Issue	Status
Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019 [F2019L00273]	Principle (b) Privacy Principle (b) Retrospective effect	Seeking advice from the minister.
Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546]	Principle (b) reversal of legal burden of proof	Seeking advice from the minister.
Privacy (Disclosure of Homicide Data) Public Interest Determination 2019 [F2019L00322]	Principle (b) Privacy Principle (d) Significant matters in delegated legislation	Seeking advice from the Attorney-General.
Public Order (Protection of Persons and Property) Regulations 2019 [F2019L00272]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00340]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Quality of Care Amendment (Minimising Use of Restraints) Principles 2019 [F2019L00511]	Principle (b) Personal rights and liberties Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532] Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604]	Principle (c) Merits review Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Regional Investment Corporation Operating Mandate (Amendment) Direction 2019 [F2019L00434]	Principle (d) Significant matters in delegated legislation	Seeking advice from the minister.
Road Vehicle Standards Rules 2018 [F2019L00198]	Principle (a) Incorporation	Seeking advice from the minister.
Underwater Cultural Heritage Rules 2018 [F2019L00096]	Principle (a) Incorporation	Seeking advice from the minister.
Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]	Principle (a) Incorporation	Drawing to the attention of the Senate.

Agency engagement

2.3 The committee is engaging in informal correspondence with the relevant agencies via its secretariat to resolve scrutiny concerns about the instruments listed below.

Instrument	Issue	Status
Aged Care Legislation Amendment (Reducing Home Care Fees) Instrument 2019 [F2019L00844]	Principle (a) Unclear basis for determining fees	Seeking advice from the agency.
AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00840]	Principle (a) Broad legislative powers	Seeking advice from the agency.
Financial sector (Collection of Data) (reporting standard) determinations – various instruments [F2019L00730] [F2019L00731] [F2019L00738] [F2019L00739] [F2019L00766] [F2019L00769] [F2019L00754] [F2019L00756] [F2019L00780] [F2019L00782] [F2019L00733] [F2019L00735]	Principle (a) In accordance with statute	Seeking advice from the agency.
Health Insurance Legislation Amendment (Flood Affected Areas) Determination 2019 [F2019L00734]	Principle (a) Consultation	Seeking advice from the agency.
Private Health Insurance (Data Provision) Amendment Rules 2019 [F2019L00817]	Principle (a) Incorporation	Seeking advice from the agency.
Private Health Insurance (Health Insurance Business) Amendment Rules 2019 [F2019L00815]		
Radiocommunications (Digital Radio Channels – Western Australia) Plan Variation 2019 (No. 1) [F2019L00726]	Principle (a) Incorporation	Seeking advice from the agency.
Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650]	Principle (a) Consultation Principle (a) Sub-delegation Principle (c) Merits review	Seeking advice from the agency.
Transport Security Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00829]	Principle (b) Reversal of evidential burden of proof Principle (b) Retrospective effect	Seeking advice from the agency.
Treatment Benefits (Special Access) (Claims, Applications and Lodgements Procedures) Determination 2019 [F2019L00825]	Principle (a) In accordance with statute (clarity of drafting)	Seeking advice from the agency.
Veterans' Affairs (Treatment Principles – Electric Mobility Aids and Other Measures) Amendment Instrument 2019 [F2019L00678]	Principle (c) Merits review	Seeking advice from the agency.

Appendix B

Concluded matters

3.1 The following table records the instruments in relation to which the committee has satisfactorily concluded its inquiries, following correspondence with the relevant minister and/or agency. A copy of the correspondence is available on the committee's website.

Ministerial engagement

3.2 The committee engaged in formal correspondence with the relevant ministers in relation to the instruments listed below.

Instrument	Issue	Status
Charter of the United Nations (Sanctions—South Sudan) Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00112]	Principle (b) Strict liability Principle (d) Significant penalties Principle (b) Reversal of evidential burden of proof	Concluded following response. The committee will continue to monitor this issue.
Child Care Subsidy Minister's Amendment Rules (No. 1) 2019 [F2019L00107]	Principle (a) Consultation Principle (d) Significant matters in delegated legislation	Concluded following satisfactory response.
Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018 [F2018L01723]	Principle (c) Merits review	Concluded following satisfactory response.

Agency engagement

3.3 The committee engaged in informal correspondence with the relevant agencies via its secretariat in relation to the instruments listed below.

Instrument	Issue	Status
Fuel Quality Standards (Petrol) Determination 2019 [F2019L00455] Fuel Quality Standards (Automotive Diesel) Determination 2019 [F2019L00456]	Principle (a) Incorporation	Concluded following satisfactory response. The agency undertook to amend the instrument on 18/07/2019.
Insurance (Prudential Standard) Determination No. 3 of 2019 [F2019L00621]	Principle (a) In accordance with statute	Concluded following satisfactory response.
Insurance (Prudential Standard) Determination No. 1 of 2019 [F2019L00624]	Principle (c) Merits review	
Insurance (Prudential Standard) Determination No. 2 of 2019 [F2019L00625]		
Insurance (prudential standard) determination No. 4 of 2019 [F2019L00631]		
Insurance (prudential standard) determination No. 5 of 2019 [F2019L00632]		
Insurance (prudential standard) determination No. 9 of 2019 [F2019L00643]		
Life insurance (prudential standard) determination No. 1 of 2019 [F2019L00646]		
Insurance (prudential standard) determination No. 8 of 2019 [F2019L00648]		
Health Insurance (prudential standard) determination No. 1 of 2019 [F2019L00649]		
Insurance (prudential standard) determination No. 6 of 2019 [F2019L00656]		
Insurance (prudential standard) determination No. 7 of 2019 [F2019L00659]		
Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 2 of 2019 [F2019L00662]		
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 4) (PB 31 of 2019) [F2019L00661] National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2019 (No. 4) (PB 28 of 2019) [F2019L00663]	Principle (a) Incorporation	Concluded following satisfactory response. The agency undertook to amend the explanatory statement on 19/07/2019.

Instrument	Issue	Status
Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Non-Quota Species) Determination 2019 [F2019L00414] Southern and Eastern Scalefish and Shark Fishery (Overcatch and Undercatch) Determination 2019 [F2019L00415] Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Quota Species) Determination 2019 [F2019L00416]	Principle (a) Compliance with authorising legislation	Concluded following satisfactory response.
Telecommunications (Carrier Licence Conditions - Telstra Corporation Limited) Declaration 2019 [F2019L00443]	Principle (a) Incorporation Principle (c) Merits review	Concluded following satisfactory response.
Water Charge Amendment Rules 2019 [F2019L00521]	Principle (c) Merits review	Concluded following satisfactory response.

Appendix C

Outstanding undertakings

4.1 From time to time, the relevant minister or agency may commit to an undertaking to address the committee's concerns. The committee expects that, when a minister has undertaken to amend a legislative instrument or explanatory statement, or to review an Act or departmental practice, this is done in a timely manner.

4.2 The following table records undertakings that remain outstanding, and draws them to the Senate's attention.

Instrument	Undertaking
Aged Care Single Legislation Amendment (Single Quality Framework Consequential Amendments and Transitional Provisions) Instrument 2019 [F2019L00515]	On 16 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Amendment to List of Exempt Native Specimens - Commonwealth Southern and Eastern Scalefish and Shark Fishery, February 2019 [F2019L00151]	On 15 July 2019, the Minister for the Environment undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018 [F2019L00015]	On 15 July 2019, the Minister for the Environment undertook to amend the explanatory statement to the instrument at the committee's request
Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018 [F2018L01611]	On 4 July 2019, the Assistant Minister for Regional Development and Territories undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019 [F2019L00320]	On 26 July 2019, the Attorney-General's Department undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Customs Amendment (Collecting Tobacco Duties) Regulations 2019 (No. 1) [F2019L00350]	On 11 July 2019, the Department of Home Affairs undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 2) Regulations 2019 [F2019L00347]	On 28 June 2019, the Department of Finance undertook to amend the explanatory statement to the instrument in response to the committee's concerns.

Instrument	Undertaking
Financial Framework (Supplementary Powers) Amendment (Treasury Portfolio Measures No. 1) Regulations 2019 [F2019L00566]	On 17 July 2019, the Department of Finance undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Fuel Quality Standards Regulations 2019 [F2019L00560]	On 17 July 2019, the Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Fuel Quality Standards (Automotive Diesel) Determination 2019 [F2019L00456] Fuel Quality Standards (Petrol) Determination 2019 [F2019L00455]	On 18 July 2019, the Department of the Environment and Energy undertook to amend the explanatory statements to the instruments in response to the committee's concerns.
Greenhouse and Energy Minimum Standards (Air Conditioners up to 65kW) Determination 2019 [F2019L00490]	On 16 July 2019, the Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Amendment Instrument 2019 [F2019L00316]	On 5 July 2019, the Department of Home Affairs undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019) [F2019L00081]	On 19 June 2019, the Minister for Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10) [F2018L01646]	On 10 April 2019, the Minister for Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 4) (PB 31 of 2019) [F2019L00661] National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2019 (No. 4) (PB 28 of 2019) [F2019L00663]	On 19 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546]	On 19 July 2019, the Department of Infrastructure, Transport, Cities and Regional Development undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018 [F2018L01730]	On 15 July 2019, the Minister for the Environment undertook to amend the explanatory statement to the instrument in response to the committee's concerns.

Instrument	Undertaking
Taxation Administration – Single Touch Payroll – Exemption for Employers Having a Seasonal Workforce (Repeal) [F2019L00458]	On 18 July 2019, the Australian Taxation Office undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Therapeutic Goods (Conformity Assessment Standard for Quality Management Systems) Order 2019 [F2019L00426]	On 12 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Therapeutic Goods (Standard for Tampons) (TGO 103) Order 2019 [F2019L00428]	On 12 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Therapeutic Goods (Standard for Disinfectants and Sanitary Products) (TGO 104) Order 2019 [F2019L00482]	On 12 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Therapeutic Goods (Standard for Tablets, Capsules and Pills) (TGO 101) Order 2019 [F2019L00369]	On 12 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.
Therapeutic Goods (Permissible Ingredients) Determination (No. 2) 2019 [F2019L00834]	On 17 July 2019, the Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns regarding the Therapeutic Goods (Permissible Ingredients) Determination (No. 1) 2019 [F2019L00620].

Appendix D

Instruments specifying Commonwealth expenditure

5.1 The *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act) and the *Industry Research and Development Act 1986* (Industry Act) authorise the Commonwealth to spend public money on policies, programs and schemes specified in instruments made under those Acts. The scrutiny of such instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.¹

5.2 To facilitate such scrutiny, this Appendix draws the Senate's attention to the nature and extent of Commonwealth expenditure that is specified by delegated legislation.

5.3 There were no instruments specifying expenditure registered in the period covered by *Monitor 4 of 2019* (22 May to 20 June 2019).

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

1 For further information about instruments specifying Commonwealth expenditure see Chapter 7 of the report of the committee's inquiry, [Parliamentary scrutiny of delegated legislation](#).