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Standing 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 of personal rights and parliamentary propriety.

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

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

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

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.[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 15 November 2017 and 8 January 2018 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing 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	**ASIC Market Integrity Rules (Futures Markets) 2017 [F2017L01475]**
Purpose	Sets rules regulating activities and conduct relating to the ASX 24 Market and FEX Market
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[2]

Drafting: unnecessary penalty provision[3]

A number of rules within the instrument set out civil penalty amounts, which may be imposed for breach of the relevant rule, pursuant to sections 798H and 1317E of the *Corporations Act 2001* (Corporations Act). Section 5.3.2 of the instrument requires that a Market Participant that operates a 'Crossing System' must ensure that the

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).

system deals 'fairly' and in due turn with certain orders. The provision includes a penalty of $1 million.

Section 5.3.3 sets out 'relevant factors' in considering whether section 5.3.2 has been complied with. It appears to the committee that section 5.3.3 does not require or prohibit any additional conduct to section 5.3.2; rather, it sets out factors which go to determining whether conduct covered by section 5.3.2 has, or has not, breached that rule. However, section 5.3.3 also includes a penalty of $1 million.

The committee considers that including a penalty in section 5.3.3 appears to be unnecessary and may have the effect of creating uncertainty as to the potential penalty for conduct which is in breach of section 5.3.2. The committee considers that it may not be appropriate that section 5.3.3 includes a penalty amount.

The committee requests the minister's advice in relation to why a $1 million penalty has been included in section 5.3.3 of the instrument, when that section only sets out factors relevant to conduct already subject to a $1 million penalty under section 5.3.2.

Matters more appropriate for parliamentary enactment[4]

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).

A number of rules within the instrument set out civil penalty amounts, which may be imposed for breach of the relevant rule, pursuant to sections 798H and 1317E of the Corporations Act. Penalties of $1 million are included in 30 provisions of the instrument; a further 41 provisions include $100,000 penalties, and two provisions include penalties of $20,000.

The committee acknowledges that subsection 798G(2) of the Corporations Act expressly authorises the inclusion of penalties not exceeding $1 million in market integrity rules, and that this is noted in the explanatory statement (ES) to the instrument. The committee's longstanding view, however, is that enactment of significant penalties is more appropriately undertaken via primary legislation than delegated legislation.

In this regard, the committee further notes the views expressed by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) when it considered the provisions of the *Corporations Amendment (Financial Market*

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

Supervision) Act 2010, which inserted section 798G into the Corporations Act. The Scrutiny of Bills committee expressed its preference that matters of such significance as the making of market integrity rules, including penalties of up to $1 million, be identified in more detail in the primary legislation and be subject to full parliamentary scrutiny. The Scrutiny of Bills committee acknowledged that there were exceptional circumstances relating to these types of instruments, and left to the Senate as a whole the question of whether it was appropriate for ASIC to have the ability to make market integrity rules.[5]

The committee draws the imposition of high civil penalties of up to $1 million in delegated legislation to the attention of the Senate.

Instrument	**ASIC Market Integrity Rules (Securities Markets) 2017 [F2017L01474]**
Purpose	Sets rules regulating activities and conduct relating to the ASX Market, Chi-X Market, IR Plus Market, NSXA Market, APX Market and SSX Market
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[6]

Merits review[7]

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.

Part 2.4 of the instrument provides for the accreditation by ASIC of retail client advisers. Under section 2.4.1, any representative of a market participant who

5 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.2 of 2010,* pp. 19-20.

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

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

provides advice to retail clients in relation to specified financial products must hold the relevant accreditation required by the rules.

The committee notes three provisions under which ASIC has a discretion to make a decision potentially detrimental to an individual in relation to their accreditation as an adviser:

- section 2.4.10, providing for rejection of an application for accreditation;
- section 2.4.15, providing for rejection of an application for renewal of accreditation, or imposition of conditions on such renewal; and
- section 2.4.19, providing for suspension or withdrawal of accreditation.

The committee notes that section 1317B of the *Corporations Act 2001* (Corporations Act) provides that applications may be made to the Administrative Appeals Tribunal (AAT) for review of decisions made by ASIC under the Act. It is not clear to the committee, however, whether the application of section 1317B extends to AAT review of decisions made by ASIC under any or all legislative instruments made under the Corporations Act. The explanatory statement (ES) to the instrument does not provide any information about whether the above decisions are subject to independent merits review by the AAT or any other body.

The committee requests the minister's advice as to whether decisions made by ASIC under sections 2.4.10, 2.4.15 and 2.4.19 of the instrument are subject to independent merits review; and if not, the characteristics of each of those decisions that would justify their exclusion from merits review.

Drafting: unnecessary penalty provision[8]

A number of rules within the instrument set out civil penalty amounts, which may be imposed for breach of the relevant rule, pursuant to sections 798H and 1317E of the Corporations Act. Section 5A.3.2 of the instrument requires that a Market Participant that operates a 'Crossing System' must ensure that the system deals 'fairly' and in due turn with certain orders. The provision includes a penalty of $1 million.

Section 5A.3.3 sets out 'relevant factors' in considering whether section 5A.3.2 has been breached. It appears to the committee that section 5A.3.3 does not require or prohibit any additional conduct to section 5A.3.2; rather, it sets out factors which go to determining whether conduct covered by section 5A.3.2 has, or has not, breached that rule. However, section 5A.3.3 also includes a penalty of $1 million.

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

The committee considers that including a penalty in section 5A.3.3 appears to be unnecessary and may have the effect of creating uncertainty as to the potential penalty for conduct which is in breach of section 5A.3.2. The committee considers that it may not be appropriate that section 5A.3.3 includes a penalty amount.

In this regard, the committee also notes that sections 5.1.3 and 5.1.4 of the instrument are drafted in identical terms to sections 5A.3.2 and 5A.3.3 respectively (applying in the former sections to trading rather than the operation of Crossing Systems). However, unlike section 5A.3.3, section 5.1.4 does not include a penalty.

The committee requests the minister's advice in relation to why a $1 million penalty has been included in section 5A.3.3 of the instrument, when that section only sets out factors relevant to conduct already subject to a $1 million penalty under section 5A.3.2.

Matters more appropriate for parliamentary enactment[9]

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).

A number of rules within the instrument set out civil penalty amounts, which may be imposed for breach of the relevant rule, pursuant to sections 798H and 1317E of the Corporations Act. Penalties of $1 million are included in 79 provisions of the instrument; a further 77 provisions include $100,000 penalties, and 12 provisions include penalties of $20,000.

The committee acknowledges that subsection 798G(2) of the Corporations Act expressly authorises the inclusion of penalties not exceeding $1 million in market integrity rules, and that this is noted in the explanatory statement (ES) to the instrument. The committee's longstanding view, however, is that enactment of significant penalties is more appropriately undertaken via primary legislation than delegated legislation.

In this regard, the committee further notes the views expressed by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) when it considered the provisions of the *Corporations Amendment (Financial Market Supervision) Act 2010,* which inserted section 798G into the Corporations Act. The Scrutiny of Bills committee expressed its preference that matters of such significance as the making of market integrity rules, including penalties of up to

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

$1 million, be identified in more detail in the primary legislation and be subject to full parliamentary scrutiny. The Scrutiny of Bills committee acknowledged that there were exceptional circumstances relating to these types of instruments, and left to the Senate as a whole the question of whether it was appropriate for ASIC to have the ability to make market integrity rules.[10]

The committee draws the imposition of high civil penalties of up to $1 million in delegated legislation to the attention of the Senate.

Instrument	**AusCheck Amendment (System Functionality) Regulations 2017 [F2017L01664]**
Purpose	Amends the AusCheck Regulations 2017 to allow for electonric verification of identification docouments in the AusCheck system, and to replace the current manual visa checking process with a new automated process
Authorising legislation	*AusCheck Act 2007*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[11]

No description of consultation[12]

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

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

10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2010,* pp. 19-20.

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 committee's expectations in this regard are set out in its *Guideline on consultation*.[13]

With reference to the matters above, the committee notes that the ES to the instrument provides no information regarding consultation.

The committee requests the minister's advice as to what consultation was undertaken in relation to the instrument; and requests that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.

No statement of compatibility[14]

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*.

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

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

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) Notice of motion to disallow must be given by 15 February 2018[15]

Incorporation of document[16]

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

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

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

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

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

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

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

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*.[17]

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 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.

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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.

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.

Instrument	**Civil Aviation Order 20.91 Amendment Instrument 2017 (No. 1) [F2017L01471]**
Purpose	Extends the date for the expiry of certain directions in Civil Aviation Order 20.91 (Instructions and directions for performance-based navigation), from 30 November 2017 to 30 November 2024
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[18]

Description of consultation[19]

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

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

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

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

The ES to this instrument provides the following information regarding consultation:

> CASA is satisfied that no consultation is appropriate or reasonably practicable for the instrument under section 17 of the [Legislation Act].

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this case, the committee considers that the ES has not met the requirement in the Legislation Act to explain why no consultation was undertaken.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[20]

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

Timetable for making substantive amendments[21]

The instrument extends the date for the expiry of anything in Civil Aviation Order 20.91 (CAO 20.91) that is a direction under regulation 11.245 of the Civil Aviation Safety Regulations 1998 (CASR), from 30 November 2017 to 30 November 2024. The ES states that:

> When CAO 20.91 was made, it was anticipated that, before 30 November 2017, the replacement Part 91 of CASR and the Part 91 Manual of Standards would be made to replicate anything in CAO 20.91 that is a direction under regulation 11.245 of CASR. An extension of CAO 20.91 is required while CASA completes its work on the Part 91 documents.

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

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

The committee acknowledges this explanation, but notes that the extension is a lengthy one, of seven years—particularly given the indication in the ES that work to substantively update the relevant instruments is already in progress. The committee considers that, while there may be reasons for this timeline, further justification of the need for such a long extension would have been useful in the ES.

The committee draws the extension of directions under the instrument for a further seven years to the attention of the minister and the Senate.

Instrument	**Customs (International Obligations) Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Regulations 2017 [F2017L01486]**
Purpose	Amends the Customs (International Obligations) Regulation 2015 to implement amendments to the Singapore-Australia Free Trade Agreement agreed in 2016 and enacted for Australia in the *Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Act 2017*
Authorising legislation	*Customs Act 1901*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[22]

Incorporation of document[23]

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.

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

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

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

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

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

With reference to the above, the committee notes that item 2 of Schedule 1 to the instrument inserts into the Customs (International Obligations) Regulation 2015 (principal regulations) a definition of 'SAFTA', defined as 'the Singapore-Australia Free Trade Agreement done at Singapore on 17 February 2003, as amended from time to time'. The definition is then used in relation to reporting and record-keeping obligations under sections 6 and 9 of the principal regulations.

The explanatory statement (ES) to the instrument states that the definition is being inserted into the principal regulations because the (same) definition which was previously in section 153UA of the *Customs Act 1901,* is to be repealed from the Act by item 9 of Schedule 2 of the *Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Act 2017*.

However, neither the instrument nor the ES identifies a legislative provision overriding subsection 14(2) of the Legislation Act which would authorise the incorporation of the SAFTA treaty into the instrument as in force from time to time.

The committee requests the minister's advice as to the legislative authority for incorporation in the instrument of the Singapore-Australia Free Trade Agreement as in force from time to time.

Instrument	**Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575]**
Purpose	Amends the Extradition (Commonwealth countries) Regulations 2010 to remove India from the list of extradition countries; and amends the Extradition (Physical Protection of Nuclear Material) Regulations 1988 and the Extradition Regulations 1988 to capture amendments made in 2005 to the *Convention on the Physical Protection of Nuclear Material 1979*
Authorising legislation	*Extradition Act 1988*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 6 December 2017) Notice of motion to disallow must be given by 27 March 2018[24]

No description of consultation[25]

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

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

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

With reference to the matters above, the committee notes that the ES to the instrument provides no information regarding consultation.

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

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

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

The committee requests the minister's advice as to what consultation was undertaken in relation to the instrument; and requests that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 6) Regulations 2017 [F2017L01667]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a number of spending activities administered by the Department of Education and Training
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[27]

Merits review[28]

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.

The instrument adds five new items to the table in Part 2 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997, establishing legislative authority for expenditure on activities related to education and training. One of these is item 255: 'Quality assurance of data relating to students with disabilities' (quality assurance program), which authorises the funding of activities that improve quality assurance for data collected under the Nationally Consistent Collection of Data on School Students with Disability (NCCD) framework.

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

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

The explanatory statement (ES) to the instrument explains that the quality assurance program will include the provision of grants to state and territory governments and to representative organisations for non-government schools, and that information with respect to any grants will be contained in NCCD quality assurance grants guidelines. The ES further notes that grants made under the quality assurance program are anticipated to be provided on a competitive basis.

The ES states that '[w]here grants are provided on a competitive basis, the department will actively consider the applicability and appropriateness of review mechanisms for decisions relating to such grants'.

The committee's expectation is that, where grants are proposed to be awarded under a program, the ES to the relevant instrument should indicate whether independent review of grant decisions is available; and if not, the characteristics of those decisions that would justify excluding them from merits review. In the committee's view, indicating that the department will 'actively consider' the applicability of review mechanisms for grant decisions made under the quality assurance program is insufficient to establish whether those decisions will be appropriately subject to merits review.

The committee's expectations in this regard are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[29]

The committee requests the minister's advice as to whether grant decisions made under the 'Quality assurance of data relating to students with disabilities' program will be subject to merits review; and if not, what characteristics of those decisions justify their exclusion from merits review.

29 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.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017 [F2017L01669]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a number of spending activities administered by the Department of Health
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[30]

Constitutional authority for expenditure[31]

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 2*,[32] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee expects that the explanatory statements (ES) for all instruments specifying programs or grants for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program or grant, the constitutional authority for the relevant expenditure.

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

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

32 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

The committee's expectations in this regard are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[33]

The instrument adds two new items to the table in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997, establishing legislative authority for particular health initiatives. One of these is item 258: 'Water and Snow Safety'. The ES indicates that item 258 relies on the communications power in subsection 51(v) of the Constitution, the external affairs power in subsection 51(xxix), and the executive power and express incidental power in section 61 and subsection 51(xxxix) respectively.

With regard to reliance on the external affairs power, the ES states that the initiative promotes rights contained in the Convention on the Rights of the Child (CRC). The ES states that:

> Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementating treaties to which Australia is a party.
>
> Australia has obligations in relation to children's rights under the Convention on the Rights of the Child. Article 4 requires that States Parties take 'all appropriate legislative, administrative, and other measures' to implement the rights set out in the Convention. In particular:
>
> - Article 6 requires that 'States Parties shall ensure to the maximum extent possible the survival and development of the child';
> - Article 18 requires States Parties to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities';
> - Article 24 requires States Parties to take appropriate measures to implement the rights of the child to health. In particular, States Parties are required to 'ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in…the prevention of accidents', and 'to develop…guidance for parents'; and
> - under Article 31, States Parties 'recognize the right of the child to rest and leisure, and to engage in play and recreational activities appropriate to the age of the child'.

33 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 Program will fund water and snow safety activities in relation to children that are designed to implement these obligations.

The committee emphasises that, in order to rely on the external affairs power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under a treaty. The High Court set out this position in *Victoria v Commonwealth*:

> When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[34]

It is unclear to the committee that the proposed 'Water and Snow Safety' program in item 258 is appropriately adapted to implement specific obligations under the CRC. In particular, the committee notes that the program appears to fund water and snow safety activities generally, rather than funding programs designed specifically to promote safety for children.

The committee further notes that the statement of compatibility with human rights included in the ES states that the instrument 'do[es] not engage any of the applicable rights or freedoms' and 'do[es] not raise any human rights issues.' The committee finds it difficult to reconcile reliance on an international human rights convention (the CRC) as constitutional authority for proposed expenditure with the assessment in the statement of compatibility that the instrument does not engage any human rights.

With regard to reliance on the communications power, the executive power and the express incidental power, the ES states:

> *Communications power*
>
> Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'. The Program will provide funding for online communications. For example, marketing, education and public awareness materials will be disseminated through online services such as the internet.
>
> …

34 *Victoria v Commonwealth* (1996) 187 CLR 416, 486. For further discussion of this point, see Glenn Ryall, 'Commonwealth Executive Power and Accountability following *Williams (No. 2)',* in Parliament of Australia, *Papers on Parliament no. 63*, July 2015, 109 at 120-121, available online at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop63/c07.

Commonwealth executive power and express incidental power

The Commonwealth executive power in section section 61 of the Constitution, together with section 51(xxxix), supports activities that are particularly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

The Program will provide funding for independent national bodies to provide national water and snow safety programs and ensure that there are consistent water and snow safety practices, including some forms of accreditation, across the nation.

The committee acknowledges a connection between the communications power and the program in item 258. However, in the committee's view the power is unlikely, on its own, to be sufficient to establish authority for the full scope of the proposed expenditure for that program. The ES indicates that activities contemplated by the program include enhancing the physical safety of water and snow environments, and the training and accreditation of instructors. It is not apparent to the committee that activities such as these would be delivered entirely through postal, telegraphic, telephonic or other like services.

With regard to the executive power and express incidental power, it is unclear to the committee why water and snow safety activities could only be carried out by the Commonwealth for the benefit of the nation, such as would engage the executive power. In this regard, the committee notes that a range of programs and initiatives relating to public safety are undertaken by state and territory governments.

Consequently, the committee is concerned that there may not be sufficient constitutional authority for the full scope of the expenditure proposed under item 258.

The committee requests the minister's more detailed advice as to the constitutional authority for the Water and Snow Safety program in light of the discussion above.

Instrument	**National Health (Supplies of out-patient medication) Determination 2017 [F2017L01631]**
Purpose	Revokes the National Health (Supplies of out-patient medication) Determination 2016 (PB 107 of 2016) and determines the outpatient medication co-payment rates applying from 1 January 2018
Authorising legislation	*National Health Act 1953*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[35]

Description of consultation[36]

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

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

Under the heading of consultation, the ES states:

> Historically, the Department of Health has consulted with the State and Territory Health Departments through the Highly Specialised Drugs Working Party (HSDWP). The HSDWP was a working party of the Australian Health Ministers' Advisory Council (AHMAC) and was made up of representatives from each State and Territory Health Department and the Australian Government. This Working Party has now been discontinued as a second tier committee of the Hospitals Principal Committee on recommendations endorsed by AHMAC.

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).

> Through the HSDWP, the State and Territory Health Departments agreed to the value of out-patient medication being 80% of the general co-payment each year.

However, the ES does not indicate when the HSDWP was discontinued, nor does it indicate when agreement was reached on the value of out-patient medication which is implemented by the instrument. The committee notes that the description of consultation for this instrument is identical to that contained in the explanatory statement to the previous version of the instrument, made in 2016.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this case, the committee considers that while the ES provides a description of the process by which agreement was reached on the value of out-patient medication (possibly some years ago), it does not provide sufficient information to establish whether consultation was undertaken in relation to the present instrument and, if consultation was undertaken, the nature of that consultation—or, if no consultation was undertaken in relation to the present instrument, why not.

The committee's expectations in this regard are set out in its *Guideline on consultation*.[37]

The committee requests the minister's advice as to what consultation was undertaken in relation to this instrument; and requests that the explanatory statement be updated to include that information in accordance with the requirements of the *Legislation Act 2003*.

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

Instrument	**Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6) [F2017L01513]**
Purpose	Amends the Private Health Insurance (Prostheses) Rules 2017 (No. 2) to correct errors against billing code DD005 in Part A of the Schedule
Authorising legislation	*Private Health Insurance Act 2007*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[38]

Parliamentary oversight: registration of incorrect version of instrument[39]

The instrument was initially registered on 22 November 2017. It was tabled in the Senate on 27 November 2017, and in the House of Representatives on 4 December 2017. On 5 December 2017, the instrument was 'corrected' by the Office of Parliamentary Counsel (OPC) on the Federal Register of Legislation (FRL), primarily to add a new Schedule to the instrument. The new Schedule repeals an existing health billing code and inserts a new code setting out the minimum benefits payable in respect of prostheses in certain product categories. Other consequential and technical changes were also made to the instrument's text.

The replacement explanatory statement (ES), which was registered on the same date as the instrument was corrected, contains no explanation of why such changes were made to the instrument. The only information available as to why the changes were made appears in a note by the OPC on the FRL, which states that the changes were made 'to reflect the original instrument as made by the rule-maker'.[40]

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

A corrected version of the instrument was tabled in the Senate on 7 December 2017. However, the Senate Table Office has advised that this did not alter the applicable disallowance period, which commenced when the original instrument was tabled on 27 November 2017.

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

40 See www.legislation.gov.au/Details/F2017L01513/Download.

The committee notes that section 15D of the *Legislation Act 2003* (Legislation Act) provides the authority for OPC to make corrections to legislative instruments. 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 Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered the power of correction in section 15D of the Legislation Act when it was first inserted by the *Acts and Instruments (Framework Reform) Act 2015*.[41] The Scrutiny of Bills committee called attention to concerns raised by the (then) Clerk of the Senate regarding why, when the FPC corrects an instrument under section 15D, the FPC is only required to outline that correction in general, rather than specific, terms.[42] The Scrutiny of Bills committee requested the advice of the Attorney-General in relation to this matter.

The Attorney-General advised that providing a general explanation of a correction ensures clarity for users (who may investigate further if interested), whereas a more detailed explanation may impede users from finding relevant information about the law.[43] In relation to the scope of powers under section 15D, and when those powers may be exercised, the Attorney-General advised that:

> The FPC only corrects the existing Federal Register of [Legislation] in very clear cases [such as] the removal or insertion of text to correct an obvious oversight in the compilation process. In such cases it is considered imperative to act swiftly after the identification of an error to preserve the integrity of the Federal Register of [Legislation] and ensure proper access to a correct statement of the law.[44]

In this regard, the committee also notes that the explanatory memorandum to the Acts and Instruments (Framework Reform) Bill 2014 stated:

> [Section 15D] is important to enable corrections to be made, if, for example:

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41 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, pp. 11-13.

42 See Dr Rosemary Laing, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Acts and Instruments (Framework Reform) Bill 2014*, p. 2.

43 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, pp. 12-13.

44 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, p. 12.

- an instrument contains a special symbol, mathematical formula or other formatting that is incompatible with the technology used to make documents available online; or
- an error is found to have been made in the content of a compilation.[45]

It therefore appears to the committee that the power of correction in section 15D of the Legislation Act was intended to allow the FPC to correct errors of a technical nature in the text of an Act or an instrument, or to correct obvious errors or oversights in the compilation process. The committee is concerned that the addition of a entirely new schedule to the present instrument is a significant change to the instrument and does not appear to fit within the circumstances envisaged by the explanatory memorandum to section 15D of the Legislation Act, or the then Attorney-General's comments to the Scrutiny of Bills Committee.

Further, the committee notes that the disallowance period for the instrument commenced, in accordance with section 42 of the Legislation Act, when the incorrect version of the instrument was tabled in the Senate on 27 November 2017. While the corrected version of the instrument was subsequently tabled in the Senate on 7 December 2017, the tabling of the correct version of the instrument does not affect the applicable disallowance period.

The committee considers that using an administrative process to 'correct' an instrument on the Federal Register of Legislation (by adding an entirely new schedule to the instrument) after it has been tabled in Parliament has the potential to seriously undermine effective parliamentary scrutiny.

This is because, in the period between the initial tabling of the incorrect version of the instrument and the subsequent tabling of the corrected version, members and senators did not have the opportunity to consider the correct version of the instrument. Further, after having considered the original tabled version, members and senators may not have been aware that the original version was subsequently corrected via an administrative process. The committee notes there is no legislative requirement that any 'corrected' instrument be tabled in Parliament, and therefore brought to the attention of parliamentarians.

The committee recognises that the requirement placed on the FPC under section 15D of the Legislation Act is expressed in broad terms, and that speedy correction of errors in instruments is desirable. The committee nevertheless considers that where the errors in the original instrument are substantive, and where the instrument has already been tabled in Parliament, consideration should be given by the relevant agency to effecting the necessary changes by re-making or amending the instrument,

45 Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014, pp. 36-37.

to ensure that the correct version of the instrument is subject to the full parliamentary scrutiny and disallowance process. Where section 15D of the Legislation Act is used to 'correct' an instrument which has already been tabled, the committee considers that, at a minimum, the revised version of the instrument should be required to be tabled in Parliament, the explanatory statement should expressly state what changes have occurred and why, and a process should be put in place to ensure parliamentarians are alerted to the change in the originally tabled instrument.

The committee 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;**
- **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).**

Effect of drafting error[46]

Item 1 of Schedule 1 to the instrument increases the benefit payable against billing code DD005 from $1325 to $3969. The ES to the instrument states that this increase is to correct an error in the Private Health Insurance (Prostheses) Rules 2017 (principal rules). The principal rules commenced on 28 September 2017.

The instrument commenced on 23 November 2017. It therefore appears possible that, between 28 September and 23 November 2017, individuals receiving services covered by billing code DD005 could have received a lower benefit from their private health insurer than that to which they were entitled. This could have the effect of increasing out-of-pocket expenses for those individuals.

The committee will generally be concerned about the effect, if any, on individuals during periods in which instruments containing errors are in force. In this case, the committee notes that the potential disadvantage persisted for a period of two months and, had an application been made in relation to the affected billing code, the disadvantage could have been substantial (a denial of $2744 in benefits). In this regard, the committee notes that the ES to the instrument does not contain

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

any information as to whether any individuals were disadvantaged by the error, and if so, what, if any, action was taken to redress such disadvantage.

The committee emphasises the importance of ensuring that individuals are not disadvantaged by drafting errors. The committee also considers that the onus should not be placed on policyholders to identify any such errors.

The committee requests the minister's advice as to whether any persons were disadvantaged by the error in the principal rules prior to its correction by this instrument; and if so what steps, if any, were taken to identify and redress the disadvantage.

Instrument	**Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017 [F2017L01639]**
Purpose	Amends the Renewable Energy (Electricity) Regulations 2001 to introduce a new method for determining the amount of exemption for emissions-intensive trade-exposed activities
Authorising legislation	*Renewable Energy (Electricity) Act 2000*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[47]

No statement of compatibility[48]

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 above instrument does not include a statement of compatibility.

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

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

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*.

Instrument	**Telecommunications (Interception and Access) Regulations 2017 [F2017L01701]**
Purpose	Replaces the existing regulations, due to sunset on 1 April 2017, with minor modifications and updates
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[49]

No description of consultation[50]

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

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

The committee's expectations in this regard are set out in its *Guideline on consultation*.[51]

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

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

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

With reference to the matters above, the committee notes that the ES to the instrument provides no information regarding consultation.

The committee requests the minister's advice as to what consultation was undertaken in relation to the instrument; and requests that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Therapeutic Goods (Manufacturing Principles) Determination 2018 [F2017L01574]**
Purpose	Replaces and updates the manufacturing principles for therapeutic goods to reflect current international requirements
Authorising legislation	*Therapeutic Goods Act 1989*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 6 December 2017) Notice of motion to disallow must be given by 27 March 2018[52]

Incorporation of documents[53]

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

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)(a).

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*.[54]

With reference to the matters above, the committee notes that the instrument incorporates the following documents:

- Australian Standard AS ISO 13485-2003 *Medical devices – Quality management systems – Requirements for Regulatory purposes*;
- European Standard EN 557:1994 *Sterilization of medical devices – requirements for medical devices to be labelled 'Sterile'*;
- Guideline on the scientific data requirements for a plasma master file (PMF) EMEA/CPMP/BWP/3794/03; and

54 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.

- Guideline for the Preparation of Technical Master Files for Blood, Blood Components and Haematopoietic Progenitor Cells.

Neither the instrument nor its accompanying ES indicates the manner in which the documents are incorporated.

In addition, with regard to the two standards documents, neither the instrument nor its accompanying ES indicates where the documents may be obtained free of charge. The committee's research indicates that the documents are available from the SAI Global website, but only on payment of a fee.[55]

The committee's research indicates that the document entitled 'Guideline on the scientific data requirements for a plasma master file' is available for free online.[56] However, the committee considers that a best-practice approach is for the ES to provide details of the website where the documents can be accessed. The committee notes that the ES to the instrument does indicate where the 'Guideline for the Preparation of Technical Master Files for Blood, Blood Components and Haematopoietic Progenitor Cells' may be accessed free of charge.

The committee requests the minister's advice as to:

- **the manner in which each of the documents identified above is incorporated into the instrument; and**
- **how each of those documents is or may be made readily and freely available to persons interested in or affected by the instrument.**

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

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55 For EN 556:1994, see https://infostore.saiglobal.com/en-au/Standards/NS-EN-556-1994-456448; For AS ISO 13485-2003, see https://infostore.saiglobal.com/en-au/Standards/AS-ISO-13485-2003-342373. The committee also notes that AS ISO 13485-2003 appears to have been withdrawn, as it has been revised by AS ISO 13485-2016. In this regard, see www.iso.org/standard/36786.html.

56 See http://www.ema.europa.eu/docs/en_GB/document_library/Scientific_guideline/2009/09/WC500003663.pdf.

Instrument	**Therapeutic Goods Order No. 95 – Child-resistant packaging requirements for medicines 2017 [F2017L01577]**
Purpose	Succeeds Therapeutic Goods Order No. 80, which is due to sunset on 1 October 2018, with some updates and amendments
Authorising legislation	*Therapeutic Goods Act 1989*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 6 December 2017) Notice of motion to disallow must be given by 27 March 2018[57]

Incorporation of documents[58]

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

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

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

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

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

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).

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*.[59]

With reference to the matters above, the committee notes that the instrument incorporates the following Australian and international standards:

- Australian Standard AS 1928-2007 *Child-resistant packaging – Requirements and testing procedures for reclosable packages* (ISO 8317:2003, MOD)
- International Standards Organisation Standard ISO 8317:2015 *Child-resistant packaging – Requirements and testing procedures for reclosable packages*;
- British Standards Institution Standard BS EN ISO 8317:2015 *Child-resistant packaging – Requirements and testing procedures for reclosable packages*; and
- Canadian Standards Association Standard CSA Z76.1-16 *Reclosable Child-Resistant Packages*.

Neither the instrument nor its accompanying ES indicates the manner in which these standards are incorporated.

Further, while the ES to the instrument provides a website reference for each of the incorporated standards, it states that the standards are only available on payment of

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

a fee, and does not provide any information about how the documents may be accessed free of charge by persons interested in or affected by the instrument.

The committee requests the minister's advice as to:

- **the manner in which each of the documents identified above is incorporated into the instrument; and**
- **how each of those documents is or may be made readily and freely available to persons interested in or affected by the instrument.**

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

Instrument	**Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 Amendment 6 [F2017L01493]** **Vehicle Standard (Australian Design Rule 19/02 – Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2005 Amendment 1 [F2017L01481]** **Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017 [F2017L01554]** **Vehicle Standard (Australian Design Rule 67/00 – Installation of Lighting and Light Signalling Devices on Three-Wheeled Vehicles) 2006 Amendment 1 [F2017L01494]** **Vehicle Standard (Australian Design Rule 74/00 – Side Marker Lamps) 2006 Amendment 1 [F2017L01479]** **Vehicle Standard (Australian Design Rule 84/100 – Front Underrun Impact Protection) 2009 Amendment 1 [F2017L01516]** **Vehicle Standard (Australian Design Rule 86/00 – Parking Lamps) 2016 [F2017L01497]** **Vehicle Standard (Australian Design Rule 87/00 – Cornering Lamps) 2016 [F2017L01484]**
Purpose	[F2017L01493, F2017L01481, F2017L01494, F2017L01479, F2017L01497, F2017L01484:] Introduce or amend Australian Design Rules to improve the quality and clarity of the suite of rules associated with vehicle lighting [F2017L01554:] Makes transitional arrangements for motorcycles and mopeds to move from compliance with this standard to new braking standard 33/01 [F2017L01516:] Amends the rules relating to underrun protection devices fitted or incorporated into heavy goods vehicles, to remove ambiguity and reduce their stringency
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling. [F2017L01493, F2017L01481, F2017L01494, F2017L01479, F2017L01497, F2017L01484, F2017L01516:] Tabled Senate

	27 November 2017. Notice of motion to disallow must be given by 15 February 2018[60] [F2017L01554:] Tabled Senate 4 December 2017. Notice of motion to disallow must be given by 22 March 2018[61]

Incorporation of documents[62]

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

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

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

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

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

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

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

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

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*.[63]

In relation to these instruments, the committee notes that section 7A of the *Motor Vehicle Standards Act 1989* permits vehicle standards made under the Act to incorporate standards produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia, or by any other organisation determined by the minister by legislative instrument, as in force from time to time.

The committee notes that all of the instruments above incorporate various other documents, including Commonwealth disallowable legislative instruments (Australian Design Rules), UN vehicle regulations (where not appended in full but incorporated by reference), international standards and guidelines. However, neither the instruments nor their ESs consistently clarify the manner of incorporation of the various documents into each of these instruments.

Further, the committee notes that while in some cases website references are provided for the incorporated documents, in the case of other incorporated documents there is no information in the instrument or ES describing them or indicating where they can be freely accessed.

The committee requests the minister's advice as to:

- **the manner of incorporation of each of the documents incorporated by reference into each of the above instruments; and**

63 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.

- **how each of those documents is or may be made readily and freely available to persons interested in or affected by the instrument.**

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

Further response required

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

Correspondence relating to these matters is published on the committee's website.[64]

Instrument	**Marriage Regulations 2017 [F2017L01359]**
Purpose	Provides for procedural and administrative matters in support of the marriage framework established by the *Marriage Act 1961*
Authorising legislation	*Marriage Act 1961*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 19 October 2017) Notice of motion to disallow must be given by 7 February 2018[65]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Classification of legislative instruments[66]

Committee's initial comment:

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation as well as any constitutional or other applicable legal requirements.

The committee has concerns in relation to the status of two provisions of the instrument, which authorise the Registrar of Marriage Celebrants (Registrar) to make determinations or written statements, and which the instrument or the explanatory

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

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

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

statement (ES) state are not legislative instruments for the purposes of the *Legislation Act 2003* (Legislation Act).

Section 39C of the *Marriage Act 1961* (Marriage Act) sets out requirements a person must meet to be registered as a marriage celebrant. One of these requirements, pursuant to paragraph 39C(1)(b), is that the person 'has all the qualifications, and/or skills, determined in writing to be necessary by the Registrar in accordance with regulations made for the purposes of this paragraph'.

Section 39 of the regulations provides that for the purposes of paragraph 39C(1)(b) of the Marriage Act, a determination by the Registrar must specify certain matters relating to qualifications. Subsection 39(5) of the regulations requires the Registrar to publish that determination on the internet, and in any other way the Registrar considers appropriate.

In its discussion of section 39 of the regulations, the ES states that 'a determination made under paragraph 39C(1)(b) of the Act is administrative in character only, and as such is not a legislative instrument for the purposes of the *Legislation Act 2003'.*

In addition, section 39G of the Marriage Act sets out obligations of each marriage celebrant. These include, at paragraph 39G(1)(b), that a celebrant 'undertake all professional development activities required by the Registrar of Marriage Celebrants in accordance with regulations made for the purposes of this paragraph'. Under section 39I, failure to comply with these obligations can result in disciplinary action by the Registrar against a celebrant, including their suspension or deregistration.

Subsection 53(3) of the regulations provides that the Registrar must, as soon as possible after the start of each calendar year, publish a written statement setting out details of the required professional development activities for the year, including compulsory activities. Subsection 53(5) requires the Registrar to publish the statement on the internet and in any other way the Registrar considers appropriate. Subsection 53(7) provides that 'a statement published under subsection (3) is not a legislative instrument'. The ES states that the written statement is not a legislative instrument because it is 'administrative in character only'.

With regard to the written instruments prescribed by both section 39 and section 53 of the regulations, the committee notes that the character of an instrument as a legislative instrument, or not, is determined by the Legislation Act. Relevantly, subsection 8(4) of the Legislation Act provides that:

> An instrument is a legislative instrument if:
>
> (a) the instrument is made under a power delegated by the Parliament; and
>
> (b) any provision of the instrument:

> (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Subsection 8(6) of the Legislation Act provides that:

> Despite subsections (4) and (5), an instrument is not a legislative instrument if it is:
>
> (a) declared by an Act not to be a legislative instrument; or
>
> (b) prescribed by regulation for the purposes of this paragraph.

The committee further notes guidance from the Office of Parliamentary Counsel (OPC) which states that:

> As a result of paragraph 8(6)(a) of the [Legislation Act], only an Act can declare an instrument not to be a legislative instrument (whether because it does not fall within the definition of legislative instrument or because the instrument is to be wholly exempted from the [Legislation Act]). If, in a subordinate instrument, you are including an instrument-making power, and the instrument (the relevant instrument) being made under that power is not of legislative character, you will need to remain silent on the relevant instrument's status as not being a legislative instrument or consider whether it is appropriate to make the relevant instrument a notifiable instrument.[67]

It appears to the committee that the written instruments provided for under both sections 39 and 53 of the regulations may satisfy the criteria in section 8 of the Legislation Act for classification as legislative instruments. Both determine the content of the law, in detailing mandatory qualifications and professional development requirements, respectively, which are necessary for persons' initial or ongoing registration as marriage celebrants. In doing so, they would also appear to affect the interests and obligations of prospective and registered marriage celebrants.

As such, the committee is concerned that the statement in the ES that a determination made under section 39 is not a legislative instrument, and the

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67 Office of Parliamentary Counsel, *Drafting Direction No. 3.8 Subordinate Legislation*, http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf (accessed 24 November 2017), paragraph 78.

provision in subsection 53(7) that a statement made under subsection 53(3) is not a legislative instrument, may not be in compliance with the Legislation Act.

The committee requests the minister's advice regarding the appropriate classification of the written instruments prescribed by sections 39 and 53 of the regulations, in the context of the definition of 'legislative instrument' in the *Legislation Act 2003*.

Minister's response

The (former) Attorney-General advised:

> There is no general requirement under the Legislation Act for legislation to state on its face the nature of an instrument to be made under that legislation. Where legislation does not state the nature of a particular instrument, subsection 8(4) of the Legislation Act sets out the characteristics that indicate whether the instrument will be a legislative instrument. In particular, an instrument will be a legislative instrument if it is made under a power delegated by Parliament and any provision in the instrument: determines the law or alters the content of the law (as opposed to determining particular cases or circumstances in which the law applies); or *[sic]* has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> The instruments made under paragraph 39C(1)(b) of the *Marriage Act 1961* and section 53 of the Marriage Regulations do not meet the criteria for a legislative instrument under subsection 8(4) of the Legislation Act.
>
> Under paragraph 39C(1)(b) of the Marriage Act, the Registrar is to make a 'determination in writing'. In accordance with section 39 of the Marriage Regulations, this determination will not impose obligations on marriage celebrants in a way that could be said to alter the content of the law. The determination made by the Registrar lists the qualifications and skills a celebrant must have, but it does not require celebrants to satisfy those requirements. It is subsection 39C(1) of the Marriage Act that imposes an obligation on the Registrar to be satisfied that a person has the appropriate qualifications and skills to be registered as a marriage celebrant. As such, a determination made by the Registrar pursuant to paragraph 39C(1)(b) of the Marriage Act does not satisfy the criteria in subsection 8(4) of the Legislation Act.
>
> Under subsection 53(3) of the Marriage Regulations, the Registrar must publish a written statement setting out a list of compulsory and optional activities for ongoing professional development. The statement will not impose an obligation on marriage celebrants in a way that could be said to alter the content of the law. Rather, the content of the law, being the obligation imposed on marriage celebrants to undertake professional development activities, is set out in paragraph 39G(1)(b) of the Marriage Act and subsection 53(1) of the Marriage Regulations. A statement setting out a list of professional development activities that could be undertaken

in fulfilment of the obligation, as required by subsection 53(3) of the Marriage Regulations, is not legislative in character, as it merely determines the particular professional development activities in which the law (being the obligation to undertake those activities) is to apply. Subsection 53(7) of the Marriage Regulations confirms that the subsection 53(3) statement is administrative in character and does not fall within the definition of 'legislative instrument' in subsection 8(4) of the Legislation Act.

The statements in the Explanatory Statement for the Marriage Regulations are intended to assist a reader, unfamiliar with the requirements of the Legislation Act, to understand the nature of these instruments.

Committee's response

The committee thanks the former Attorney-General for his response. The committee notes the Attorney-General's view that the written instruments prescribed under sections 39 and 53 of the Marriage Regulations do not meet the criteria for a legislative instrument under subsection 8(4) of the Legislation Act.

The committee remains of the view that instruments made under both these provisions of the regulations provide substantive detail which goes to determining whether legal requirements imposed on marriage celebrants by the Marriage Act have been met. As such, the committee considers that while they may not alter the law, both instruments would have the character of determining the content of the law, as defined by subparagraph 8(4)(b)(i) of the Legislation Act (and not merely determining particular cases or particular circumstances in which those provisions of the Act would or would not apply).

It also appears to the committee that instruments made under both provisions of the regulations are capable of affecting a privilege or interest of a marriage celebrant, as defined by subparagraph 8(4)(b)(ii) of the Legislation Act. In both cases, the relevant instruments would detail mandatory requirements for marriage celebrants which, if not observed, could affect their initial or ongoing registration as celebrants under the Marriage Act. The committee does not consider that an instrument must itself directly impose obligations upon a person to be legislative in character.

The committee further notes that the Attorney-General's response has not addressed the issue of the inconsistency between subsection 53(7) of the regulations and the OPC's formal guidance that 'only an Act can declare an instrument not to be a legislative instrument'.

The committee requests a further response from the Attorney-General regarding:

- **whether instruments made under sections 39 and 53 of the regulations would play any role in determining a person's compliance with sections 39C and 39G of the *Marriage Act 1961,* respectively, and therefore affect the**

privileges or interests of persons desiring initial or continued registration as marriage celebrants; and

- **the justification for the inclusion in this instrument of subsection 53(7), contrary to the guidance provided by the Office of Parliamentary Counsel (OPC) that only an Act can declare an instrument not to be legislative in character.**

Advice only

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

Instrument	**ASIC Market Integrity Rules (Futures Markets – Capital) 2017 [F2017L01478]** **ASIC Market Integrity Rules (Securities Markets – Capital) 2017 [F2017L01476]**
Purpose	Set out rules relating to capital requirements in the ASX-24 Market and FEX Market; and the ASX Market, Chi-X Market, IR Plus Market, NSXA Market, SSX Market and APX Market, respectively
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[68]

Matters more appropriate for parliamentary enactment[69]

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).

A number of rules within these instruments set out civil penalty amounts, which may be imposed for breach of the relevant rule, pursuant to sections 798H and 1317E of the *Corporations Act 2001* (Corporations Act). These include three penalties of $1 million in each instrument, as well as several penalties of $100,000 and $20,000.

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)(d).

The committee acknowledges that subsection 798G(2) of the Corporations Act expressly authorises the inclusion of penalties not exceeding $1 million in market integrity rules, and that this is noted in the explanatory statement (ES) to each of the instruments. The committee's longstanding view, however, is that enactment of significant penalties is more appropriately undertaken via primary legislation than delegated legislation.

In this regard, the committee further notes the views expressed by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) when it considered the provisions of the *Corporations Amendment (Financial Market Supervision) Act 2010,* which inserted section 798G into the Corporations Act. The Scrutiny of Bills committee expressed its preference that matters of such significance as the making of market integrity rules, including penalties of up to $1 million, be identified in more detail in the primary legislation and be subject to full parliamentary scrutiny. The Scrutiny of Bills committee acknowledged that there were exceptional circumstances relating to these types of instruments, and left to the Senate as a whole the question of whether it was appropriate for ASIC to have the ability to make market integrity rules.[70]

The committee draws the imposition of high civil penalties of up to $1 million in delegated legislation to the attention of the Senate.

70 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.2 of 2010,* pp. 19-20.

Instrument	**Copyright Regulations 2017 [F2017L01649]**
Purpose	Remakes the Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969 into a single consolidated instrument, and updates certain provisions
Authorising legislation	*Copyright Act 1968*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[71]

Unclear basis for determining fees[72]

Section 119 of the instrument sets the fees payable by a person for the Registrar of the Copyright Tribunal, or a member of staff assisting the Tribunal, to make a copy of all or part of a document that:

- is filed or lodged with the Tribunal in connection with an application or reference to the Tribunal; or
- sets out the reasons for an order made by the Tribunal.

The fee is set at $0.80 for the first page of the document copied, and $0.20 for each extra page.

The committee's longstanding view is that, unless there is specific authority in primary legislation to impose fees in delegated legislation, fees imposed by 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 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.

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

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

The committee acknowledges that, in this instance, the fees imposed by the instrument are low, and appear consistent with fees imposed for copying documents lodged with other courts and tribunals. The committee therefore considers it unlikely that the fees amount to more than cost recovery. However, the committee would still expect the basis on which the fees have been calculated to be specified in the ES. The committee notes that the ES to the instrument does not include this information.

The committee draws the minister's attention to the imposition of fees in the instrument, without any explanation in its explanatory statement as to the basis on which those fees are calculated.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulations 2017 [F2017L01665]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Infrastructure and Regional Development
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[73]

Parliamentary scrutiny – ordinary annual services of the government[74]

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

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

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

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.[75] 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*.[76]

The present instrument establishes legislative authority for the Commonwealth to provide a concessional loan to the University of the Sunshine Coast (USC) to finance the construction of foundation facilities for a new Moreton Bay campus in Queensland. The amount of the loan is currently unknown, pending negotiation between the Commonwealth and USC on its final terms.

The explanatory statement (ES) to the instrument states that the concessional loan was included in the 2017-18 Budget, under the measure 'University of the Sunshine Coast, Moreton Bay Campus – concessional loan', and that funding for the loan will come from Program 3.1: Regional Development, which is part of Outcome 3.

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75 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.

76 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.

It appears to the committee that the concessional loan may be a new policy not previously authorised by special legislation; and that the initial appropriation for it 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 government, to the attention of the minister, the Senate and relevant Senate committees.

Instrument	**Industry Research and Development (Gas Acceleration Program) Instrument 2017 [F2017L01655]**
Purpose	Establishes legislative authority for funding the Gas Acceleration Program, a grants scheme for the development of onshore natural gas for Australian users
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[77]

Parliamentary scrutiny – ordinary annual services of the government[78]

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 section 33 of the *Industry Research and Development Act 1986* (Industry Act), executive spending may be authorised by specifying schemes in instruments made

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

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

under that Act.[79] The money that funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of relevant instruments. Once the details of the scheme are outlined in the instruments, 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.[80] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under section 33 of the Industry 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 consistent with those set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*.[81]

The present instrument authorises Commonwealth expenditure in relation to the Gas Acceleration Program ($26 million over three years from 2017-18). The program will provide grants of up to $6 million to companies to undertake eligible projects to bring new gas flow to domestic gas consumers in target markets.

While the program was announced by the government as a new initiative in July 2017,[82] the explanatory statement (ES) to the instrument states that funding for

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79 In this regard, authorising Commonwealth spending by instruments made under the Industry Act is an approach consistent with authorising spending by regulations made pursuant to the *Financial Framework (Supplementary Powers) Act 1997*. For more extensive comment on this issue, see *Delegated legislation monitor* 2 of 2017, pp. 19-21; and Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016,* pp. 571-574.

80 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.

81 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 program has been secured through the Department of Industry, Innovation and Science's 2017-18 Budget, and will be funded from Program 2: Growing Business Investment and Improving Business Capability.

It appears to the committee that the Gas Acceleration Program may be a new policy not previously authorised by special legislation; and that the initial appropriation in relation to this policy 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 government, to the attention of the minister, the Senate and relevant Senate committees.

82 Senator the Hon Matt Canavan, Minister for Resources and Northern Australia, '$26 million to fast track new east coast gas projects', Media Release, 14 July 2017, http://minister.industry.gov.au/ministers/canavan/media-releases/26-million-fast-track-new-east-coast-gas-projects.

Instrument	**Legislation (Native Title Instruments) Sunset-altering Declaration 2017 [F2017L01718]**
Purpose	Aligns the sunsetting dates of four instruments which support the operation of key mechanisms under the *Native Title Act 1993* relating to native title applications and agreement-making
Authorising legislation	*Legislation Act 2003*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[83]

Deferral of sunsetting[84]

Under section 50 of the *Legislation Act 2003* (Legislation Act) all legislative instruments registered on the Federal Register of Legislation[85] after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.[86] This process is called 'sunsetting'.

Section 51A of the Legislation Act allows the Attorney-General to align the sunsetting of instruments where two or more instruments are to be reviewed together. The Attorney-General must be satisfied that all the instruments to be reviewed would, apart from section 51A, be repealed by section 50 or 51 of the Legislation Act; that they are the subject of a single review; and that making the declaration to align their sunsetting dates will facilitate the undertaking of the review and the implementation of its findings. The new sunsetting date must not be more than five years after the earliest day on which any of the relevant instruments would have been repealed.

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

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

85 It is noted that prior to the commencement of the *Acts and Instruments (Framework Reform) Act 2015* on 5 March 2016, the Federal Register of Legislation was known as the Federal Register of Legislative Instruments.

86 The sunsetting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the date of sunsetting determined by the table set out in subsection 50(2).

This declaration aligns the sunsetting dates of four legislative instruments which would otherwise sunset between 1 October 2018 and 1 April 2021. The explanatory statement (ES) to the declaration states that the instruments 'will be more efficiently and effectively reviewed together' and that such a review will allow the Attorney-General's Department to assess and potentially amend them consistently, with a view to improving and streamlining native title processes. The ES indicates that the review process will be comprehensive and span a four-year period, including a transitional period for stakeholders to adjust to any changes.

The committee notes that the declaration has the effect of deferring the sunsetting of all of the instruments, for the maximum period permitted by section 51A of the Legislation Act. They will now have a new sunsetting date of 1 October 2023.

With reference to the above, the committee notes that the 2017 report of the Attorney-General's Department's Sunsetting Review Committee emphasised that agencies should commence planning for sunsetting legislative instruments 'well before the sunsetting date' and take 'early action to review and, where necessary, begin the process of remaking the legislative instruments'.[87]

The committee draws the extension of the sunsetting dates for four instruments, to 1 October 2023, to the attention of the Senate.

87 Sunsetting Review Committee, *Report on the Operation of the Sunsetting Provisions in the* Legislation Act 2003, Attorney-General's Department, September 2017, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Report-on-the-Operation-of-the-Sunsetting-Provisions-in-the-Legislation-Act-2003.pdf, pp. 10-11.

Instrument	**Linkage Program – Special Research Initiative: PFAS (per- and poly-fluoroalkyl substances) Remediation Research Program Grants Guidelines [F2018L00020]**
Purpose	Specifies matters relating to grant funding under the Linkage Program of the Australian Research Council's National Competitive Grants Program
Authorising legislation	*Australian Research Council Act 2001*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[88]

Incorrect classification of instrument as disallowable[89]

The instrument was made under section 60 of the *Australian Research Council Act 2001* (Research Council Act). That section provides that, after receiving a set of rules from the Chief Executive Officer (CEO) of the Australian Research Council, the minister must either approve the rules or return the rules to the CEO for revision. The committee understands that, although the instrument is titled 'Guidelines', it was validly made as rules under section 60 of the Research Council Act.

Pursuant to table item 7 in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015, rules made under section 60 of the Research Council Act are not subject to disallowance. However, when the instrument was received by Parliament and by the committee, it was classified as disallowable.

The committee understands that the instrument has since been reclassified as exempt from disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat. The committee also acknowledges that, in this instance, the misclassification of the instrument did not have the effect of hindering parliamentary oversight. However, the committee remains concerned about the process for the classification of instruments more generally, and continues to monitor this issue.

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

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

The committee brings the incorrect classification of the instrument as disallowable to the attention of the minister and the Senate.

Instrument	**My Health Records (National Application) Rules 2017 [F2017L01558]**
Purpose	Implements an opt-out model nationally so that consumers will automatically get a My Health Record, unless they request not to have one
Authorising legislation	*My Health Records Act 2012*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 5 December 2017) Notice of motion to disallow must be given by 26 March 2018[90]

Matters more appropriate for parliamentary enactment[91]

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).

The 'My Health Record' system is the Australian government's digital health record system. It is administered under the *My Health Records Act 2012* (MHR Act). Under the My Health Record system, an individual's health information, including medical conditions and treatments, medications and allergies are recorded online, and may be accessed by certain health professionals. Until recently, the My Health Record system was administered on an 'opt-in' basis, under which an individual would have a digital record created only if they registered to do so. However, following a review of the My Health Records system, the MHR Act was amended to permit trials of an 'opt-out' model and, following such trials, to allow rules to be made to apply the opt-out model to all Australian healthcare recipients.

Section 5 of the instrument applies Part 2 of Schedule 1 to the MHR Act (the 'opt-out' model) to all healthcare recipients in Australia. That section was made

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

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

under clause 2 of Schedule 1 to the MHR Act, which permits the minister to make rules applying the opt-out model of the My Health Records system to all healthcare recipients in Australia. Subclause 2(1) of Schedule 1 of the MHR Act requires that trials of the opt-out model be undertaken before this rule-making power is exercised. The explanatory statement (ES) to the instrument states that such trials were undertaken in 2016.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) previously considered the rule-making power in clause 2 of Schedule 1 to the MHR Act when it was inserted by the Health Legislation Amendment (eHealth) Bill 2015.[92] The Scrutiny of Bills committee emphasised that the difference between an opt-out system and an opt-in system is substantial and that, given that such a change is central to the regulatory design of the My Health Records system, it would be more appropriately made by the Parliament than delegated to a minister.

Following correspondence with the minister, the Scrutiny of Bills committee concluded its examination of the instrument, but remained of the view that a general change from an opt-in model to an opt-out model is a matter for parliamentary enactment, rather than delegation to a minister. Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of making the change to an opt-out model through delegated legislation, and drew its scrutiny concerns to the attention of senators and the committee.[93]

The committee's views regarding the making of significant policy changes in delegated legislation accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that enable significant changes to the law to be made through delegated legislation. In the committee's view, significant changes to the law (including changes to how the law applies) are more appropriate for enactment in primary legislation**.**

The committee draws the application of the 'opt-out' model of the My Health Records system to all healthcare recipients in Australia via legislative instrument to the attention of the Senate.

92 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2015*, pp. 696-709.

93 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2015*, pp. 705-706.

Instrument	**National Transmission Network Sale (Exemption from Restrictions on Transfer of Assets – Kelso) Notice 2017 [F2017L01597]** **National Transmission Network Sale (Exemption from Restrictions on Transfer of Assets – Shepparton) Notice 2017 [F2017L01598]**
Purpose	Exempt a specified asset from the operation of section 18 of the National Transmission Network Sale Act 1998, so that after the specified date any owner of the asset need not seek written Ministerial consent before transferring the asset
Authorising legislation	*National Transmission Network Sale Act 1998*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[94]

No statement of compatibility[95]

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 neither of the ESs to the above instruments included a statement of compatibility when they were registered on the Federal Register of Legislation (FRL) on 7 December 2017 and provided to the committee and to Parliament for tabling. Replacement ESs for the instruments, containing statements of compatibility, were subsequently registered on the FRL on 1 February 2018, just prior to their tabling in both Houses of Parliament on 5 February 2018.

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

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

The committee notes that, in this instance, the instruments do not appear to raise any human rights issues. However, the committee emphasises that preparing statements of compatibility, and including them in ESs, are statutory requirements with respect to *all* legislative instruments. In this regard, the committee is concerned that the instruments were in effect for approximately eight weeks before the omission of the statements of compatibility was rectified.

The committee draws the omission of statements of compatibility with human rights from the explanatory statements to the above instruments, during the first eight weeks of their operation, to the minister's attention.

Instrument	**Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017 [F2017L01499]**
Purpose	Amends the Norfolk Island Continued Laws Ordinance 2015 to update the criminal law of Norfolk Island with new procedures and offences relating to child welfare and domestic violence
Authorising legislation	*Norfolk Island Act 1979*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 27 November 2017) Notice of motion to disallow must be given by 15 February 2018[96]

Matters more appropriate for parliamentary enactment[97]

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).

The instrument is made under section 19A of the *Norfolk Island Act 1979* (Norfolk Island Act), which provides that the Governor-General may make ordinances for the peace, order and good government of the territory of Norfolk Island. The ordinance effectively amends Norfolk Island's *Child Welfare Act 2009* and *Criminal Code 2007* (Criminal Code). It does so by amending relevant provisions of the Norfolk Island

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

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

Continued Laws Ordinance 2015 (principal ordinance), which in turn amended laws, originally made by the Norfolk Island Legislative Assembly, which were continued in force by section 16A of the Norfolk Island Act.

The amendments to the Criminal Code made by the ordinance include the creation of two new offences and the expansion of an existing offence. Item 5 of Schedule 2 amends the offence of endangering health in section 87 of the Criminal Code, to include conduct amounting to non-fatal strangulation. The offence is one of strict liability and attracts a maximum penalty under the Criminal Code of five years' imprisonment. Item 6 of Schedule 2 inserts sections 121A and 121B into the Code, establishing the new offences of procuring a young person for a child sex offence, and grooming a person for a child sex offence, respectively. Each of the new offences attracts a penalty of 12 or (for a more aggravated form of the offence) 15 years' imprisonment.

The explanatory statement (ES) acknowledges that the instrument does not comply with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Offences Guide),[98] which states that regulations should not be authorised to impose fines exceeding 50 penalty units or create offences that are punishable by imprisonment. The ES states that '[g]iven the special nature of the Principal Ordinance and the legislative framework in which it operates, the offences created by the Ordinance depart from the Guide in several respects', one of which is that '[r]egulations should not be authorised to impose fines exceeding 50 penalty units'.

The ES also acknowledges the following guidance set out in the Offences Guide:

> If it is intended that an offence is to be included in a legislative instrument, the empowering Act for the instrument must include express power for the instrument to provide for offences, and should also include the maximum penalty that is considered appropriate to contain offences. In general, a regulation is the only kind of legislative instrument that is considered appropriate to contain offences.

In this regard, the ES refers to 'special features' of this instrument, including the Governor-General's ordinance-making power under section 19A of the Norfolk Island Act, which, it states, '*clearly* authorises the making of Ordinances that impose penalties exceeding a fine of 50 penalty units' (emphasis added). The ES states that:

98 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

> The Ordinance is made pursuant to a plenary legislative power conferred on the Governor-General under section 19A of the Act for the government of Norfolk Island. It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making power that is commonly found in Commonwealth Acts, which authorises the Governor-General to make regulations prescribing matters that are 'required or permitted' to be prescribed by the Act, or that are 'necessary or convenient' for carrying out or giving effect to the Act.
>
> The Parliament has conferred plenary legislative power on the Governor-General for the external territories and the Jervis Bay Territory…The power is designed to enable the Governor-General to legislate for state-level matters, including criminal law. This is particularly relevant during the current period in which the operation of NSW laws [is] suspended pursuant to the Norfolk Island Applied Laws Ordinance 2016.

The ES also highlights the unusual circumstances applying to the continuation and amendment of Norfolk Island laws:

> Many of the criminal offences under the laws in force in Norfolk Island are set out in the Criminal Code, which was made by the former Norfolk Island Legislative Assembly and has been continued in force by section 16A of the [Norfolk Island] Act. At present, the only way to amend these offences, or create new offences in the Criminal Code, is either through a section 19A Ordinance or through an Act of Parliament.

The ES states the view that:

> While it is generally more appropriate for an Act of Parliament to create offences, particularly those that impose penalties greater than 50 penalty units, given the legislative framework for Norfolk Island that Parliament has established under the Act, it is more appropriate for the new procurement and grooming offences to be created by a section 19A Ordinance. Similarly, it is more appropriate for the new non-fatal strangulation offence to be created by section 19A Ordinance.

The committee recognises the special nature of the principal ordinance and the legislative framework in which it operates. The committee nevertheless considers that—particularly in light of the change to Norfolk Island's status in 2015, and the consequent likelihood of further need to update and amend its criminal laws via ordinance in the future—it would be more appropriate to consider the enactment by Parliament of an express power in primary legislation, authorising the inclusion of appropriate offences and criminal penalty provisions in such ordinances.

The committee notes that it raised similar concerns in 2017 regarding the imposition of offences with high civil and criminal penalties via ordinance in relation to the Jervis Bay Territory.[99]

The committee draws the imposition of significant criminal penalties in a legislative instrument to the attention of the Senate.

Instrument	**Parliamentary Business Resources Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01647]** **Parliamentary Business Resources (Consequential and Transitional Provisions) Regulations 2017 [F2017L01650]** **Parliamentary Business Resources (Office Holder) Determination 2017 [F2017L01690]** **Parliamentary Business Resources Regulations 2017 [F2017L01512]**
Purpose	[F2017L01647:] Facilitates the provision of a Canberra-based self-drive vehicle to members in appropriate circumstances, and enables the Commonwealth to provide additional Commonwealth transport for members where there is a security reason to do so [F2017L01650:] Modifies transitional rules in the *Parliamentary Business Resources (Consequential and Transitional Provisions) Act 2017* to provide for the transition between the old and new frameworks for parliamentary business resources [F2017L01690:] Determines which members of Parliament are 'office holders' for relevant purposes under the Act and regulations [F2017L01512:] Details the Commonwealth-provided resources that may be made available to parliamentarians, and related persons such as their staff and family members, for the conduct of members' parliamentary business, and related matters
Authorising legislation	[F2017L01647], [F2017L01690], [F2017L01512]: *Parliamentary Business Resources Act 2017*

99 See *Delegated legislation monitor 1 of 2017,* pp. 29-31.

	[F2017L01650]: *Parliamentary Business Resources (Consequential and Transitional Provisions) Act 2017*
Portfolio	Finance
Disallowance	[F2017L01647], [F2017L01650] and [F2017L01690]: 15 sitting days after tabling (tabled Senate 5 February 2018). Notice of motion to disallow must be given by 8 May 2018[100] [F2017L01512]: 15 sitting days after tabling (tabled Senate 27 November 2017). Notice of motion to disallow must be given by 15 February 2018[101]

Anticipated authority[102]

Section 4 of the *Acts Interpretation Act 1901* (Interpretation Act) 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 Parliamentary Business Resources Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01647] were made on 14 December 2017 and registered on 18 December 2017. The instrument was made under section 61 of the *Parliamentary Business Resources Act 2017* (PBR Act). The PBR Act did not commence until 1 January 2018.

The Parliamentary Business Resources (Consequential and Transitional Provisions) Regulations 2017 [F2017L01650] were also made on 14 December 2017 and registered on 18 December 2017. This instrument was made under item 11 of Schedule 3 to the *Parliamentary Business Resources (Consequential and Transitional Provisions) Act 2017*, which commenced at the same time as section 3 of the PBR Act: that is, on 1 January 2018.

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

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

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

The Parliamentary Business Resources (Office Holder) Determination 2017 [F2017L01690] was made on 14 December 2017 and registered on 20 December 2017, under section 7 of the PBR Act. The PBR Act did not commence until 1 January 2018.

The Parliamentary Business Resources Regulations 2017 [F2017L01512] were made on 16 November 2017 and registered on 21 November 2017, under section 61 of the PBR Act. The PBR Act did not commence until 1 January 2018.

The committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that 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 to section 4 of the *Acts Interpretation Act 1901* in the explanatory statements to these instruments to the minister's attention.

Instrument	**Product Emissions Standards Rules 2017 [F2018L00021]**
Purpose	Prescribes non-road engines and propulsion marine engines as 'emissions-controlled products', sets emission standards for emissions-controlled products, and provides for the certification of emissions-controlled products and related issues
Authorising legislation	*Product Emissions Standards Act 2017*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[103]

Matters more appropriate for parliamentary enactment[104]

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).

The instrument was made under the *Product Emissions Standards Act 2017* (Standards Act). Part 2 of the Standards Act provides that the rules may prescribe a product as an 'emissions-controlled product', and may provide for the certification of emissions-controlled products that meet specified emissions standards.

The instrument prescribes propulsion marine engines and non-road engines as 'emissions controlled products', and makes provision for their certification as such, subject to certain conditions and requirements, including compliance with specified emissions standards.

The committee notes that concerns were raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) in relation to these provisions of the Standards Act, when introduced to Parliament in the Product Emissions Standards Bill 2017 (Standards Bill).[105] The Scrutiny of Bills committee expressed

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)(d).

105 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, pp. 57-69.

the view that the prescription of products as emissions controlled products, and the certification of such products, were core elements of the emissions standards framework. In this regard, the Scrutiny of Bills committee drew attention to the fact that the explanatory memorandum to the Standards Bill stated that prescribing a product as an emissions controlled product 'has the effect of triggering key requirements of the Bill', while certification 'is a key concept in the Bill, and underpins its operation'.[106]

The Scrutiny of Bills committee emphasised that core elements of the emissions standards framework should be included in primary, rather than delegated legislation. The Scrutiny of Bills committee also drew attention to the fact that these significant matters would be included in rules, which are subject to a lower level of executive scrutiny than regulations.

Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of leaving core elements of the emissions standards framework to delegated legislation (and to rules rather than regulations), and drew its scrutiny concerns to the attention of the Senate and the committee.[107]

The committee's views regarding the making of significant policy changes in delegated legislation accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that leave significant elements of a regulatory scheme, or significant changes to the law, to delegated legislation. In the committee's view, significant matters such as these are more appropriate for enactment in primary legislation.

In light of the matters raised by the Scrutiny of Bills committee, the committee draws the Senate's attention to the specification of significant elements of the emissions standards framework in delegated legislation.

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.

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106 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, p. 57.

107 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, p. 65.

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

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

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[109]

With reference to these matters, the committee notes that the instrument incorporates two international standards (ISO/IEC 17025:2005 and ISO/IEC 17011:2004). While the ES provides a website reference for the two documents, it indicates that the documents may only be accessed for a fee. The ES states that:

> [t]hese standards are technical documents only likely to be relevant to those organisations engaged in the commercial aspects of emissions testing and such organisations would be expected to already have, or easily access, a copy of these documents as part of conducting their normal business.

The committee acknowledges the advice that anticipated users of the instrument are likely to be in possession of, or able to access, the incorporated standards. However, in addition to access for organisations engaged in commercial aspects of emissions testing, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[110]

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

The committee further notes that the instrument incorporates the following foreign emissions standards, without indicating where they may be accessed free of charge:

- Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft;[111]
- Title 40 (several parts) of the United States Code of Federal Regulations;[112]
- Marine Spark-Ignition Engine, Vessel and Off-Road Recreational Vehicle Emission Regulations (SOR/2011-10) (Canada);[113]
- Emission Standards and Test Procedures for 2001 Model Year and Later Spark-Ignition Marine Engines (California);[114]
- Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 November 2013 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery;[115]
- Off-Road Small Spark Ignition Engine Emission Regulations (SOR/2003-355) (Canada);[116] and
- California Exhaust Emission Standards and Test Procedures for New 2013 and Later Small Off-Road Engines (Part 1054) (California).[117]

The committee has observed that the above documents appear to be available for free online (website references for each document are provided above). However, 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 documents incorporated by reference in the instrument.

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111 http://eur-lex.europa.eu/eli/dir/2013/53/oj.

112 https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40tab_02.tpl.

113 http://www.ec.gc.ca/lcpe-cepa/eng/regulations/detailReg.cfm?intReg=109.

114 https://www.arb.ca.gov/msprog/offroad/recmarine/marinectp/marinectp.htm.

115 http://eur-lex.europa.eu/eli/reg/2016/1628/oj.

116 https://www.ec.gc.ca/lcpe-cepa/eng/regulations/detailReg.cfm?intReg=81.

117 https://www.arb.ca.gov/msprog/offroad/sore/sorectp/sorectp.htm.

Instrument	**Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017 [F2017L01687]**
Purpose	Modifies the operation of section 40-340 of the Income Tax Assessment Act 1997 and any other provision of a taxation law which is affected by the operation of that section (as modified by this instrument) in relation to certain assets
Authorising legislation	*Taxation Administration Act 1953*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018[118]

Delegation of legislative power – Commissioner of Taxation's remedial power[119]

The instrument modifies the operation of section 40-340 of the *Income Tax Assessment Act 1997* (Assessment Act), and any other provision of a taxation law[120] that is affected by the operation of that section in relation to an asset covered by table item 8 in subsection 40-340(1) of the Assessment Act. The effect of the modification is to provide that, where the restructure of a small business satisfies the conditions for roll-over under subdivision 328-G of the Assessment Act, the transfer of a depreciating asset in the course of that restructure will have no direct income tax consequences.

The instrument was made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* (Administration Act), which was inserted into that Act by the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2016.* Section 370-5 of the Administration Act confers on the Commissioner of Taxation (Commissioner) a 'remedial power' to modify, by legislative instrument, the operation of a taxation law. This provision was referred to the committee by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee),

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

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

120 'Taxation law' is defined broadly in section 995.1 of the *Income Tax Assessment Act 1997,* and includes an Act of which the Commissioner has the general administration, legislative instruments made under such an Act, and the *Tax Agent Services Act 2009* or regulations made under that Act.

which noted that the Commissioner's remedial power is akin to a 'Henry VIII clause', as it enables a legislative instrument to modify the operation of primary legislation. In this regard, the Scrutiny of Bills committee's concern was that such provisions impact on levels of parliamentary scrutiny, and may subvert the appropriate relationship between the Parliament and the Executive branch of government.

In its consideration of the Commissioner's remedial power, the Scrutiny of Bills committee noted advice from the minister that the power would in practice only be used as a measure of last resort, and that its use would be subject to strict limitations. However, the Scrutiny of Bills committee remained concerned that the full breadth of the power may not be necessary and that there may be scope for further legislative guidance on its use. The Scrutiny of Bills committee drew its concerns to the attention of this committee.

The Scrutiny of Bills committee also sought information from the minister about any consultation that would take place before the remedial power was exercised, and whether specific obligations to consult before exercising the power could be included in the Administration Act. The Scrutiny of Bills committee noted the minister's advice that he considered the consultation requirements in the *Legislation Act 2003* (Legislation Act) to be sufficient, and that it was expected that consultation would include those directly affected by the remedial power's use, their representatives, or relevant industry bodies. The Scrutiny of Bills committee drew its concerns to the attention of this committee.

The committee notes that the explanatory statement (ES) to the instrument sets out the limitations on the use of the Commissioner's remedial power identified in explanatory material on the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016, and indicates how they are complied with in this instance. This includes explaining that the modification is not inconsistent with the intended purpose of the provision that is modified, that the Commissioner considers the modification to be reasonable, and that the Department of the Treasury has advised that the impact on the budget associated with the use of the remedial power is expected to be negligible.

The committee further notes that the ES provides the following information in relation to consultation that occurred in relation to the making of the instrument:

> Broad consultation has been undertaken. The draft determination and draft explanatory statement were published on the ATO [Australian Taxation Office] Legal database http://www.ato.gov.au seeking feedback and comments for a period of four weeks. Notice of the draft determination was also published on http://www.ato.gov.au and subscription alerts issued. Tax professionals and tax associations regularly review both the Legal database and http://www.ato.gov.au and further promulgate advice of new drafts issued in their internal news bulletins. The major legal publishers also publish news of the drafts in their key tax

> alerting services – such as the Weekly Tax Bulletin (published by Thomson Reuters Australia) and Tax Tracker and Tax Week (published by CCH Australia). Additionally, draft determinations and draft explanatory statements were published on the ATO Consultation Hub.
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> Public consultation resulted in one submission from a tax practitioner, who supported the use of the CRP [Commissioner's remedial power] to resolve this issue. At the suggestion of the stakeholder, minor amendments have been made to this Explanatory Statement to better explain the scope of the determination.
>
> In addition, targeted consultation was undertaken with the CRP Panel, a body comprised of private sector specialists, Treasury and ATO representatives. This Panel provided feedback on the draft legislative instrument and explanatory statement.
>
> The Board of Taxation was also consulted on the use of the CRP to resolve this issue, the draft legislative instrument and explanatory statement. The Board supported the CRP use.

In light of the issues raised by the Scrutiny of Bills committee in relation to the delegation of legislative power through the establishment of the Commissioner's remedial power, the committee takes the opportunity to note the use of the power to make the present instrument.

The committee notes the concerns raised by the Senate Standing Committee on the Scrutiny of Bills regarding the breadth of the Commissioner of Taxation's remedial power, and draws the use of that power to make the present instrument to the attention of the Senate.

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	**Aviation Transport Security Amendment (Airside Security – 2017 Measures No. 1) Regulations 2017 [F2017L01369]**
Purpose	Amends the Aviation Transport Security Regulations 2005 to introduce strengthened airside security measures at Australia's designated major international airports
Authorising legislation	*Aviation Transport Security Act 2004*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[2]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Legislative authority: penalties[3]

Committee's initial comment:

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation as well as any constitutional or other applicable legal requirements. This may include any limitations or conditions on the power to make the instrument conferred by the authorising legislation.

Subsection 3.16D(6) of the instrument creates an offence of failing to comply with a requirement in subsection 3.16D(1) or (4).[4] The offence applies to an aviation

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).

industry participant who controls an access control point into a security restricted area at a designated airport. Where the offence is committed by an airport operator or aircraft operator, subsection 3.16D(6) imposes a penalty of 200 penalty units. In any other case where the offence is committed, a penalty of 100 penalty units is imposed.

Subsection 3.16D(6) of the instrument was made under section 36 of the *Aviation Transport Security Act 2004* (ATS Act). Subsection 36(3) of the ATS Act provides that regulations made under section 36 may prescribe penalties for offences against those regulations, and that the penalties may not exceed:

> (b) for an offence committed by an airport operator or aircraft operator – 200 penalty units;
>
> (c) for an offence committed by an aviation industry participant, other than an accredited air cargo agent or a participant covered by paragraph (a) – 100 penalty units; or
>
> (d) for an offence committed by an accredited air cargo agent or any other person – 50 penalty units.

In regard to the entities that may be captured by the offence in subsection 3.16D(6) of the instrument, the explanatory statement (ES) to the instrument states:

> An offence of 200 penalty units applies if an airport operator or aircraft operator fail to comply with these requirements.
>
> For another type of aviation industry participant who fails to comply with the requirements under regulation 3.16D, the offence is 100 penalty units. This includes any kind of business that controls an access point into the security restricted area other than from a cleared (sterile) area. Examples of these businesses are:…regulated air cargo agents, ground handling operators, catering providers, government agencies, charter operators or any other airport tenant.

It is not clear to the committee from this description whether it is possible that an accredited air cargo agent could commit the offence in subsection 3.16D(6). The committee notes that, if the offence was committed by an accredited air cargo agent, paragraph 36(3)(c) of the ATS Act only permits the regulations to impose a maximum penalty of 50 penalty units. Consequently, if there were cases where the offence could be committed by an accredited air cargo agent, subsection 3.16D(6) would appear to exceed the power conferred by the ATS Act.

The committee requests the minister's advice as to:

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4 Subsections 3.16D(1) and (4) relate to performing checks on persons and vehicles seeking to enter a security restricted area at a designated airport through an access control point.

- whether it is possible that an accredited air cargo agent could commit the offence in subsection 3.16D(6) of the instrument; and
- if so, the legislative authority for the potential imposition on such an agent of the penalty set out in that subsection.

Minister's response

The (former) Minister for Infrastructure and Transport advised:

> The Office of Transport Security (OTS) within my Department has consulted with the Office of Parliamentary Counsel (OPC) and has confirmed that there was an error in the drafting of the instrument. Although uncommon, it is possible for an accredited air cargo agent (AACA) to control an access point into the security restricted area at a designated airport. Further, there is no legislative authority under the *Aviation Transport Security Act 2004* to impose a penalty of the size in subsection 3.16D(6) on an AACA, for whom a penalty must not exceed 50 penalty units.
>
> To address this error, OTS will work with OPC to prepare a further administrative amendment to the Aviation Transport Security Regulations 2005 to amend the offence so that a separate penalty of 50 units applies if the industry participant is an AACA.
>
> I note that under the transitional provisions of the instrument (regulations 10.27 and 10.29) industry participants other than airport or aircraft operators (including AACAs) are not required to comply with the provision in question until 21 July 2018. The OTS will work with OPC to ensure the necessary amendments are completed prior to this date. OTS will advise the Committee once the amendments are complete.
>
> As OTS is transitioning to the Home Affairs portfolio, I have copied this to the Hon Peter Dutton MP, Minister for Immigration and Border Protection.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that an error in the drafting of the instrument led to the potential application of the offence beyond the power conferred by the enabling Act.

The committee notes the minister's undertaking that the Office of Transport Security (OTS) will work with OPC to amend the instrument so that a maximum penalty of 50 penalty units will apply if the relevant offence is committed by an accredited air cargo agent.

The committee has concluded its examination of the instrument.

Instrument	**Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456]**
Purpose	Amends the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] to add two new documents issued by a committee of the UN Security Council in August and September 2017
Authorising legislation	*Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008*
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[5]
Previously reported in	*Delegated legislation monitor 16 of 2017*

Unclear meaning of export and import sanctioned goods[6]

Committee's initial comment:

The instrument amends the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] (primary instrument), to replace Schedule 1 in the primary instrument with a new Schedule 1. The new schedule contains the same list of documents as the previous Schedule 1, with the addition of two documents issued by the United Nations Security Council Committee Established Pursuant to UNSC Resolution 1718 (2006) in August and September 2017.

Goods described in the documents in Schedule 1 are included in the definition of 'export and import sanctioned goods' for the purposes of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008, which establishes offences for the export or import of sanctioned goods.

The committee previously considered the primary instrument, and noted that the documents listed in Schedule 1 to the primary instrument did not contain a precise description of the sanctioned goods, such as would generally meet the committee's

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

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

expectations in relation to appropriate drafting standards for the framing of an offence.

The committee noted advice previously provided by the minister in relation to a similar UN sanctions instrument,[7] that such documents were an internationally accepted reference standard for the industries, persons and companies that trade in such goods, and that the Department of Foreign Affairs and Trade (the department) provides a free service which, in doubtful cases, can make a determination as to whether a good is an import or export sanctioned good. The committee requested that the minister confirm that that advice also applied to the principal instrument.[8]

The minister provided such a confirmation, and the committee noted that this information would have been useful in the explanatory statement (ES) to the instrument. The committee also requested that ESs to future similar instruments include a statement that:

- the goods listed in the documents specified by the instrument are an internationally accepted reference for those industries, persons and companies that trade in such goods; and
- the department provides a free service which can make determinations as to whether a good is an import or export sanctioned good under the instrument.[9]

With reference to the present instrument, the committee notes that Schedule 1 lists the same documents previously listed in Schedule 1 to the primary instrument, along with two new documents, in the same form as had previously caused the committee to raise the above concerns. The committee notes that the ES to the instrument does not include a statement of the kind requested by the committee.

The committee requests the minister's advice as to why the statement previously requested by the committee was not included in the explanatory statement to the instrument; and requests that the ES be updated to include such a statement.

Minister's response

The Minister for Foreign Affairs advised:

> The explanatory statement for this instrument did not include the statement previously requested by the Committee due to an administrative oversight by the Department of Foreign Affairs and Trade (DFAT). DFAT will amend the explanatory statement as required, and will

7 Charter of the United Nations (Sanctions – Iran) Document List Amendment 2016 [F2016L00116]. See *Delegated legislation monitor 5 of 2016*, p. 53.

8 *Delegated legislation monitor 7 of 2017,* pp. 1-3.

9 *Delegated legislation monitor 8 of 2017,* pp. 80-83.

ensure that the explanatory statements for future similar instruments include the relevant text.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that the omission of the statement previously requested by the committee was due to an administrative oversight by the department.

The committee also notes the minister's undertaking to amend the ES to include this statement, and to ensure that future similar instruments contain the relevant information regarding export and import sanctioned goods.

The committee has concluded its examination of the instrument.

Instrument	**Child Care Subsidy Minister's Rules 2017 [F2017L01464]**
Purpose	Deals with matters prescribed, permitted, necessary or convenient to enable the operation of the new child care subsidy payment and approval regime introduced by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*
Authorising legislation	*A New Tax System (Family Assistance) (Administration) Act 1999; A New Tax System (Family Assistance) Act 1999; Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 15 November 2017) Notice of motion to disallow must be given by 13 February 2018[10]
Previously reported in	*Delegated legislation monitor 16 of 2017*

Manner of incorporation of documents[11]

Committee's initial comment:

Section 14 of the *Legislation Act 2003* (Legislation Act) allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from

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

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

time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that paragraph 13(7)(c)(ii) of the instrument appears to incorporate the Skills Shortage List maintained by the department administered by the minister administering the *Fair Work Act 2009;* and subsection 49(9) appears to incorporate the *National Quality Standard of the National Quality Framework*. However, neither the instrument nor its explanatory statement (ES) specifies the manner in which these documents are incorporated.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying ESs, to clearly state the manner in which they are incorporated (that is, either as in force from time to time, as in force at the commencement of the legislative instrument or as in force or existing at an earlier date). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[12]

The committee requests the minister's advice in relation to the manner of incorporation of the above documents, and requests that the instrument and/or explanatory statement be updated to include information regarding the manner of incorporation.

Minister's response

The Minister for Education and Training advised:

> I confirm that the both the Skills Shortage List and the National Quality Standard were to be incorporated as they existed at the time the Minister's Rules were made. I am advised that this approach is consistent with section 14 of the *Legislation Act 2003*. Of course, as the Committee would be aware, the Skills Shortage List is a living document that is publicly available and updated according to labor market analysis. On this basis the relevant Rule is likely to be amended to reflect changes to the list in future if this is required to maintain the policy intent.
>
> …
>
> As requested by the Committee, I will ensure that the Explanatory Statement is revised to refer to the manner of incorporation. The manner

12 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.

in which the documents may be accessed will also be clarified in the revised Explanatory Statement.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the Skills Shortage List and the National Quality Standard are incorporated as at the commencement of the instrument.

The committee also notes the minister's undertaking to register a replacement ES on the Federal Register of Legislation specifying the manner in which the Skills Shortage List and National Quality Standard are incorporated, and also how those documents may be obtained free of charge.

The committee has concluded its examination of the instrument.

Instrument	**Commercial Broadcasting (Tax) (Individual Transmitter Amounts) Determination 2017 [F2017L01375]**
Purpose	Sets the amount of tax payable, in relation to individual transmitters, by licensees on whom tax is imposed under the *Commercial Broadcasting (Tax) Act 2017*
Authorising legislation	*Commercial Broadcasting (Tax) Act 2017*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[13]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Incorrect classification of instrument as exempt from disallowance[14]

Committee's initial comment:

The instrument is a determination made under subsection 8(2) of the *Commercial Broadcasting (Tax) Act 2017* (CB (Tax) Act). It was classified as exempt from disallowance when received by Parliament and by the committee, and was tabled in the House of Representatives and the Senate on that basis.

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

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

Subsection 13(5) of the CB (Tax) Act provides that subsection 42 of the *Legislation Act 2003* (Legislation Act) — which provides for the disallowance of legislative instruments — does not apply to determinations made under subsection 8(2) of the CB (Tax) Act.

However, subsection 13(2) of the CB (Tax) Act replaces disallowance under the Legislation Act with an alternative disallowance procedure, under which either House of Parliament may pass a resolution disallowing an instrument made under subsection 8(2). Consequently, although the instrument is not disallowable under the Legislation Act, it is a disallowable instrument. In this regard, the committee notes that the explanatory statement (ES) to the instrument states that 'the Determination is subject to disallowance under section 13 of the Tax Act'.

While the committee understands that the instrument has since been reclassified as subject to disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the committee is concerned that its initial misclassification as exempt from disallowance has potentially hindered the effective oversight of delegated legislation by Parliament.

This is because section 42 of the Legislation Act allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow that instrument. Where an instrument is initially and incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument during the period that it is incorrectly classified.

The committee remains concerned about the process for the classification of instruments and continues to monitor this issue.

The committee requests the minister's advice as to the incorrect classification of the instrument as exempt from disallowance.

Minister's response

The Minister for Communications advised:

> I am advised that due to an administrative error, the Determination was wrongly classified as exempt from disallowance. I understand the error was rectified by the Office of Parliamentary Counsel (OPC) on 23 November 2017, after the Committee's Secretariat drew it to OPC's attention.
>
> I also understand that the Senate Table Office updated its Disallowable Instruments List on the same day to give notice to Senators of the correct classification of the Determination as being disallowable under the alternative disallowance procedure contained in section 13 of the *Commercial Broadcasting (Tax) Act 2017*. The House Table Office confirmed that it did likewise on the next available sitting day of the House of Representatives (4 December 2017). I conclude from this that,

> unfortunately, a period of three disallowable sitting days in each House expired before the Determination was correctly listed.
>
> I agree that this is a serious issue, and I thank the Committee for drawing it to my attention. I am confident that officers in my Department understand the significance of ensuring that instruments tabled in the Parliament are correctly classified, so as not to hinder the Parliament's effective oversight of delegated legislation.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that the misclassification of the instrument as exempt from disallowance was due to an administrative error, and his assurance that his department understands the significance of ensuring that instruments are correctly classified.

The committee has concluded its examination of this instrument. However, the committee remains concerned that the initial incorrect classification of the instrument as exempt from disallowance may have hindered the effective oversight of the instrument by Parliament.

In these circumstances, the committee has resolved to place a protective notice of motion on the instrument to extend the disallowance period by 15 sitting days. The committee will continue to monitor the classification of instruments.

Instrument	**Competition and Consumer Amendment (Competition Policy Review) Regulations 2017 [F2017L01431]**
Purpose	Makes consequential amendments to the Competition and Consumer Regulations 2010 following amendments made to the *Competition and Consumer Act 2010* by a number of amending Acts
Authorising legislation	*Competition and Consumer Act 2010*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[15]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Unclear basis for determining fees[16]

Committee's initial comment:

The instrument makes consequential amendments to the Competition and Consumer Regulations 2010 (Competition Regulations), following a suite of amendments made to the *Competition and Consumer Act 2010* (Competition Act).

Section 37 of the instrument repeals Schedule 1B of the Competition Regulations, which currently sets the fees payable to the Australian Competition and Consumer Commission or the Australian Competition and Consumer Tribunal (the Tribunal) for certain applications and notices, and replaces it with a new Schedule 1B. The new schedule removes or alters a number of fees payable under the Competition Regulations, and adds one additional fee.

In relation to these matters, the explanatory statement (ES) to the instrument states:

> Item 37 updates the table of fees payable in relation to applications and notices, at Schedule 1B to the [Competition Regulations].
>
> The table is updated to:
>
> - remove reference to the Tribunal, as the Tribunal will no longer receive applications for merger authorisation;
> - update references to the relevant provisions under which authorisation may be sought or notification given, following changes

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

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

> [made] by the [*Competition and Consumer Amendment (Competition Policy Review) Act 2017*];
>
> - remove the concessional fee for additional applications for authorisation, on the basis that subsection 88(5) of the [Competition Act] now allows for a single application to seek authorisation for several types of conduct;
> - add a fee for notification of resale price maintenance conduct, and set that fee at $1,000 ($0 for an additional notice); and
> - apply the same fee and concessional fee to all notifications for exclusive dealing, consistently with the fact that third line forcing is now assessed under the same test as other types of exclusive dealing.

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 ES will make clear the specific basis on which an individual imposition or change has been calculated.

The committee notes that sections 89, 93 and 93AB of the Competition Act appear to have the effect of authorising the imposition of fees via regulations, and acknowledges that the majority of the changes made by section 37 of the instrument appear to consolidate existing fees or remove obsolete references.

However, the committee notes that while the ES explains the substantive effect of section 37 of the instrument, it does not specify the basis on which any changes to relevant fees have been calculated; for example, whether they are calculated on the basis of cost recovery, or on another basis. Further, the ES states that one new fee has been added by this regulation (a fee for notification of resale price maintenance conduct), without specifying the basis on which this new fee has been imposed.

It is unclear to the committee exactly what fees in Schedule 1B are new and what changes are being made. The committee expects that the ES should specify the basis on which all of the fees included in new Schedule 1B (as inserted by section 37) have been calculated.

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

Minister's response

The Treasurer advised:

> Generally, the fees in Schedule 1B aim to at least partially cover the costs of considering an application for authorisation or a notification; deter unnecessary applications and notifications; and ensure that fees are not onerous.
>
> The fee for lodging a non-merger authorisation under section 88 of the CCA is unchanged ($7,500). However, as section 88 no longer contains

several sub-sections each providing for authorisation for a different type of conduct prohibited by Part IV of the CCA, Schedule 1B no longer prescribes a $7,500 fee for each sub-section. Rather, a single $7,500 fee is listed for non-merger authorisations under section 88.

Schedule 1B previously included a concessional fee of $1,500 for non-merger authorisations which, in practice, applied where persons lodged multiple applications for conduct which might breach multiple provisions of Part IV. The concessional fee applied to all but the first application. However, a single authorisation may now be granted for conduct which might breach multiple provisions of Part IV. Consequently, the concessional fee is no longer needed.

The fees for merger authorisations and for revocation and substitution of merger authorisations are unchanged ($25,000 with no concessional fee). However, Schedule 1B previously listed separate fees for merger authorisation applications under section 50 (domestic mergers) and applications under section 50A (overseas mergers). This reflected the fact that applications under section 50 were made to the Australian Competition Tribunal and applications under section 50A were made to the Australian Competition and Consumer Commission (ACCC). However, all merger authorisation applications are now made to the ACCC. Consequently, Schedule 1B now lists a single merger authorisation application fee.

The fee for revocation and substitution of non-merger authorisations is unchanged ($2,500 with a $0 concessional fee).

The fee for lodging exclusive dealing notifications under section 93 remains unchanged ($2,500 with a concessional fee of $500), with the exception of third line forcing notifications. Third line forcing notifications previously attracted a $100 fee. Third line forcing is a type of exclusive dealing involving, for example, selling a product on condition that the buyer purchase another product from a third party (see subsections 47(6), (7), (8)(c) and (9)(d) of the CCA). A special $100 fee for third line forcing notifications was set because it was the only type of exclusive dealing that was prohibited outright, although in most cases it did not raise competition concerns. However, like all other forms of exclusive dealing, third line forcing is now prohibited only where it has the purpose or likely effect of substantially lessening competition. Consequently, the special fee has been removed and the general fee for exclusive dealing notifications applies.

The $100 fee for notifications for private disclosure of price information – which was prohibited by section 44ZZW of the CCA – is no longer required as this prohibition has been abolished (and replaced by a new prohibition added to section 45 on concerted practices that have the purpose or likely effect of substantially lessening competition).

The fee for lodging a collective bargaining notification is unchanged ($1,000 with a $0 concessional fee).

Schedule 1B no longer includes fees for merger clearances, which have been abolished.

Persons may now lodge notifications for resale price maintenance, which is prohibited by section 48 of the CCA. Schedule 1B sets a $1000 fee for this type of notification, with a concession fee of $0, consistent with the fees for collective bargaining notifications.

Committee's response

The committee thanks the Treasurer for his response, and notes the Treasurer's advice that the fees included in Schedule 1B to the instrument are intended to at least partially cover the costs of considering an application for authorisation or notification. The committee further notes the Treasurer's detailed explanation regarding the basis on which the changes included in Schedule 1B have been made.

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

The committee has concluded its examination of the instrument.

Instrument	**Norfolk Island Continued Laws Amendment (2017 Measures No. 2) Ordinance 2017 [F2017L01360]**
Purpose	Amends a number of Norfolk Island enactments (continued in force under the *Norfolk Island Act 1979)* in relation to the management of Norfolk Island airport, airport fees and charges, and related airport arrangements. Also amends Norfolk Island laws relating to the absentee landowners' levy, and the Norfolk Island Health and Residential Aged Care Service Facility
Authorising legislation	*Norfolk Island Act 1979*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 19 October 2017) Notice of motion to disallow must be given by 7 February 2018[17]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Unclear basis for determining fees[18]

Committee's initial comment:

This ordinance amends the Norfolk Island Continued Laws Ordinance 2015 [F2017C01078] (Principal Ordinance) to further amend a number of enactments made by the former Norfolk Island Legislative Assembly, which were 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 (or repeal) of a continued law by an ordinance made under section 19A of the Act.

Items 2M, 2N and 2Q of this ordinance increase certain fees levied on aircraft operators at Norfolk Island airport under one such continued law, the Airport Regulations 1992 (Norfolk Island), as follows:

- item 2M, fee for embarking and disembarking passengers on regular services, from $23.10 to $45.00 per person;
- item 2N, fee for after hours attendance by airport staff in relation to regular passenger services, from $41.10 to $45.00 per person per hour; and

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

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

- item 2Q, passenger facilitation fee for certain charter services, from $25.70 to $45.00 per person.

The explanatory statement (ES) states that the increases in airport fees made by items 2M, 2N and 2Q 'are intended to ensure the costs associated with maintaining the airport, including the need for future capital investment, are recovered from the airport users'.

The committee's longstanding view is that, unless there is specific authority in primary legislation to impose fees in delegated legislation, fees imposed by 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 in this instance, the committee understands that the effect of section 16A of the Norfolk Island Act is to make those laws Commonwealth laws, meaning any taxes imposed under them would now constitute Commonwealth taxation. The committee notes that there is no provision in the Norfolk Island Act which expressly authorises the imposition of taxation under that Act.

With reference to the above, the ES does not provide any details about what 'future capital investment' is envisaged to be funded by the increased airport fees. If such investment is intended to go beyond recovering the costs of operating and maintaining the airport, the committee considers that the increased fees may constitute a tax. If that is the case, it is not clear to the committee what legislative power enables the imposition of taxation (in this case, the increase in taxation) in the ordinance.[19]

If the relevant fees are not taken to be taxation, where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, the committee expects that the relevant ES will make clear the specific basis on which an individual imposition or change has been calculated. In this instance, the committee is concerned that the ES does not explain the basis on which the specific amount of the increase in each of the fees has been calculated, with reference to the costs of maintaining the airport.

The committee requests the minister's advice as to:

- whether the airport fees increased by items 2M, 2N and 2Q of the ordinance go beyond cost recovery and so constitute taxes, and if so, what is the legislative authority for the imposition of taxation by the ordinance; or

19 The committee notes that section 6 of the Principal Ordinance provides that the minister may make rules amending the Ordinance so as to amend or repeal a continued law, but paragraph 6(2)(c) provides that such rules may not impose a tax. In this instance, however, the amendments to the Principal Ordinance have been made by an ordinance under section 19A of the Norfolk Island Act, rather than by rules under section 6 of the Principal Ordinance.

- if not, what is the specific (cost recovery) basis on which the increases to each of the fees were calculated.

Minister's response

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

> I can advise the fees do not extend beyond recovering routine costs associated with operating the airport. For items 2M and 2Q of the Ordinance, the increase was calculated to reflect the true cost to the airport operator of processing passengers. The fee in item 2N was calculated to recover increased staff costs in attending regular passenger services.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the increases in fees under items 2M, 2N and 2Q do not go beyond recovering routine costs associated with operating the airport, including staff costs related to processing passengers.

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

The committee has concluded its examination of the instrument.

Instrument	**Privacy (Australian Government Agencies – Governance) APP Code 2017 [F2017L01396]**
Purpose	Sets out how Australian Privacy Principle 1.2 (contained in Schedule 1 to the *Privacy Act 1988*) is to be complied with by Australian government agencies
Authorising legislation	*Privacy Act 1988*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2017) Notice of motion to disallow must be given by 8 February 2018[20]
Previously reported in	*Delegated legislation monitor 15 of 2017*

Legislative authority: power to make instrument[21]

Committee's initial comment:

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under section 26G of the *Privacy Act 1988* (Privacy Act). Section 26G provides for the development of Australian Privacy Principle (APP) codes by the Information Commissioner (Commissioner). Subsection 26G(1) of the Privacy Act provides that section 26G applies (that is, the Commissioner may develop an APP code) if the Commissioner has made a request under section 26E for an APP code developer[22] to develop an APP code, and either:

- the request has not been complied with; or
- the request has been complied with but the Commissioner has decided not to register the APP code that was developed as requested.

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

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

22 Under section 6 of the Privacy Act, 'APP code developer' means an APP entity, a group of APP entities, or a body or organisation representing one or more APP entities; and 'APP entity' means an agency or organisation.

It appears to the committee that subsection 26G(1) is a precondition to the exercise of the Commissioner's power to make an APP code under subsection 26G(2). This view is supported by the explanatory memorandum to the bill that inserted section 26G into the Privacy Act, which stated:

> The Commissioner can only develop an APP code in circumstances where a code developer has failed to comply with a request to develop a code, or where a code developer has produced a code as requested by the Commissioner, and the Commissioner has decided not to register the code.[23]

In relation to compliance with subsection 26G(1) of the Privacy Act, the explanatory statement (ES) to the instrument only states that 'the Commissioner has developed this APP code in compliance with section 26G of the Privacy Act'.

Neither the instrument nor the ES clarifies whether the Commissioner made a request, under subsection 26E of the Privacy Act, for an APP code developer to develop an APP code prior to making the instrument under subsection 26G(2). It is therefore unclear to the committee whether the precondition in subsection 26G(1) to the exercise of the Commissioner's power to develop a Code under subsection 26G(2) was satisfied.

The committee requests the minister's advice as to:

- whether the Commissioner made a request under section 26E of the *Privacy Act 1988* for an APP code developer to develop an APP code prior to making the instrument under section 26G; and
- if the Commissioner did not make such a request, the legislative authority relied on to make the instrument.

Minister's response

The (former) Attorney-General advised:

> The Commissioner has advised that, on 27 March 2017, he issued a request under section 26E of the Privacy Act to the Department of the Prime Minister and Cabinet (PM&C) to develop an APP code. This request set out the effect of section 26A of the Privacy Act, and specified that the request must be complied with by 25 July 2017 (a period of 120 days). It also specified the matters that the APP code must deal with, and the class of APP entities that should be bound by the code. The request, together with the letter which accompanied the request (and which outlined why the Commissioner was satisfied that the request was in the public interest), were both published on the Office of the Australian Information

23 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p. 205.

Commissioner (OAIC) website on 18 May 2017,[24] in accordance with the publication requirement in subsection 26E(7) of the Privacy Act.

On 17 May 2017, the Secretary of PM&C, Dr Martin Parkinson AC PSM, wrote to the Commissioner advising that, in his view, the OAIC would be uniquely placed to provide the expertise needed to develop the Code. Dr Parkinson stated that he would support the OAIC undertaking the development of the Code. The Commissioner then commenced developing the Code under section 260 of the Privacy Act. As set out in the explanatory statement that accompanied the Code, a draft version of the code was released for public consultation on 30 June 2017, and a final version was registered with the Office of Parliamentary Counsel (OPC) on 27 October 2017.

Dr Parkinson's response to the Commissioner can be found on the OAIC's website along with the Commissioner's correspondence to PM&C.[25] These documents are also attached for the committee's reference.

Committee's response

The committee thanks the former Attorney-General for his response, and notes his advice that, prior to making the instrument, the Commissioner made a request under section 26E of the Privacy Act to the Department of the Prime Minister and Cabinet to develop an APP code, and received a response from the Secretary of that department, effectively declining to do so. The committee also notes that the relevant correspondence is published on the Commissioner's website.

Noting that the matter relates to express legislative preconditions which must be satisfied for the instrument to be lawfully made, the committee considers that this information would have been useful in the ES.

The committee has concluded its examination of this matter.

Drafting: unclear meaning of 'senior official'[26]

Committee's initial comment:

Subsection 11(1) of the instrument provides that an agency must, at all times, have a designated Privacy Champion. Subsection 11(3) provides that the Privacy Champion must be a senior official within the agency.

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24 See https://www.oaic.gov.au/media-and-speeches/statements/developing-an-aps-wide-privacy-code, https://www.oaic.gov.au/resources/media-and-speeches/statements/developing-an-aps-wide-privacy-code/letter-from-oaic.pdf and https://www.oaic.gov.au/resources/privacy-law/privacy-registers/privacy-codes/aps-privacy-code-formal-request.pdf.

25 See https://www.oaic.gov.au/resources/media-and-speeches/statements/developing-an-aps-wide-privacy-code/letter-from-pmc.pdf

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

The committee notes that neither the instrument nor the accompanying ES provides any definition of 'senior official', nor any guidance in relation to the level of official that the agency may designate as Privacy Champion under section 11 of the instrument. The committee also notes that 'senior official' is not defined in the Privacy Act.

The committee is concerned that agencies may have different understandings of the term 'senior official'. For example, some agencies may consider that officers at the APS 5 and APS 6 levels (or equivalent) are sufficiently senior to be designated as Privacy Champion,[27] while others may view the term 'senior official' as restricting the role of Privacy Champion to SES officers.[28]

It is unclear to the committee whether the instrument envisages that an officer at or above a particular APS level (or equivalent) would be designated as Privacy Champion. The committee is concerned that the lack of clarity regarding the meaning of 'senior official' may make it difficult for agencies to ensure they comply with their obligations under section 11 of the instrument.

The committee requests the minister's advice as to the intended meaning of 'senior official' in section 11 of the instrument, and whether guidance in that regard could be included in the explanatory statement.

Minister's response

The (former) Attorney-General advised:

> The Commissioner has advised that he did not define the term 'senior official' in the code. This term is intended to have its ordinary meaning and to be sufficiently flexible to apply to all the agencies bound by the code (which have varying organisational structures).
>
> The Commissioner considers that it is a matter for agencies to determine what level of seniority is required to effectively perform the 'Privacy Champion' functions set out in section 11 of the code, in the context of the particular agency. However, given the strategic and cultural nature of the functions, the Commissioner would generally expect the Privacy Champion to be an SES employee, or a staff member of equivalent seniority (in agencies where the SES classification is not used or relevant).

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27 The Australian Public Service Commission (APSC) indicates that APS 5 and 6 officers hold 'senior administrative, technical, project and service positions, which may have supervisory roles'. See APSC, *Fact sheet 3: Understanding APS jobs* (May 2012), www.apsc.gov.au/publications-and-media/current-publications/cracking-the-code/factsheet-3.

28 Under subsection 11(4) of the instrument, the functions of the Privacy Champion include promoting a culture of privacy within the agency, providing strategic leadership on privacy issues, reviewing and/or approving the agency's privacy management plan. These functions appear broadly consistent with those of SES officers. See e.g. APSC, *Senior Executive Service (SES)* (July 2017), www.apsc.gov.au/managing-in-the-aps/ses.

The Commissioner did consider whether it was appropriate to define this term, for example, with reference to the definition of 'senior official' or 'SES employee' as used in the *Public Service Act 1999*. However, during the consultation period the Commissioner was reminded that not all agencies bound by the Code employ their staff under the Public Service Act (and therefore do not classify their senior staff as SES employees as per the terms of that Act). For this reason, it would not have been appropriate to define the term in this way, as certain agencies would not have been able to comply with such a requirement.

In light of the committee's question, on 6 December 2017 the Commissioner registered a replacement explanatory statement for the Code. The replacement explanatory statement contains the following additional statement in relation to section 11:

> The term senior official is not defined in the code, and is intended to have its ordinary meaning. It is a matter for agencies to determine the appropriate level of seniority required to effectively perform the functions set out in section 11, within the context of the particular agency and having regard to its specific organisational structure. However, given the strategic and cultural nature of the functions, the Commissioner would generally expect the Privacy Champion to be an SES employee, or a staff member of equivalent seniority (in agencies where the SES classification is not used or relevant).

Committee's response

The committee thanks the former Attorney-General for his response, and notes the advice of the Commissioner that the term 'senior official' was deliberately left undefined to ensure that it remained sufficiently flexible to apply to all agencies bound by the code.

The committee notes that the replacement ES, clarifying the Commissioner's expectations as to the level of official who would be designated as Privacy Champion, has been registered on the Federal Register of Legislation. The committee welcomes this clarification and considers that it is likely to assist agencies to ensure that appropriate decisions are made on this matter when implementing the Code.

The committee has concluded its examination of the instrument.

Instrument	**Vehicle Standard (Australian Design Rule 3/04 – Seats and Seat Anchorages) 2017 [F2017L01344]**
Purpose	Specifies requirements for seats, their attachment assemblies, installation and any head restraint fitted, to minimise the possibility of occupant injury as a result of vehicle impact
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) The time to give a notice of motion to disallow expired on 7 December 2017 Notice given on 7 December 2018[29] Motion must be resolved by 28 March 2018
Previously reported in	*Delegated legislation monitor 15 of 2017*

Manner of incorporation of documents[30]

Committee's initial comment:

Section 14 of the *Legislation Act 2003* (Legislation Act) allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

In relation to this instrument, the committee notes that section 7A of the *Motor Vehicle Standards Act 1989* permits vehicle standards made under the Act to incorporate standards produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia, or by any other organisation determined by the minister by legislative instrument, as in force from time to time.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying explanatory statements (ES), to clearly state the manner in which they are incorporated (that is, either as in force from time to time, as in force at the commencement of the legislative instrument or as in force or existing at an

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

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

earlier date). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

In this regard, the committee notes that the instrument appears to incorporate a number of documents which are not disallowable legislative instruments:

- Consolidated Resolution on the Construction of Vehicles (R.E.3), document ECE/TRANS/WP.29/78/Rev.3 [Appendix A, paragraphs 1(a) and (b), footnote 1, Annex 3];
- Regulation No.21 "Uniform Provisions concerning the Approval of Vehicles with regard to their Interior Fittings" (E-ECE/324-E/ECE/TRANS/505/Rev.1/ Add.20/Rev.2, as last amended) [Appendix A, paragraphs 5.2.3.2 and 5.2.4.1.2];
- 'Regulation No. 80' [Appendix A, paragraph 5.3];
- 'Regulation No. 25, as amended by 04 series of amendments' [Appendix A, paragraph 5.4.2];
- the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2) [Appendix A, paragraph 7];
- ISO Standard 6487 (1980) [Appendix A, Annex 6, paragraph 1.3.1]; and
- International Standard ISO 6487 (2002) [Appendix A, Annex 7, paragraph 1.5].

Neither the instrument nor the ES states the manner in which these documents are incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[31]

The committee requests the minister's advice in relation to the manner of incorporation of the above documents, and requests that the instrument and/or explanatory statement be updated to include information regarding the manner of incorporation.

Minister's response

The Minister for Urban Infrastructure advised:

> Appendix A of the Determination incorporates references to the Consolidated Resolution on the Construction of Vehicles (R.E.3), a number of other UN Regulations, ISO 6487 (1980) and ISO 6487 (2002).

31 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.

> As these standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced, and not 'as in force or existing from time to time'.
>
> I note the Committee's comments on facilitating the public's ability to understand the operation of the Determination. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that these standards are incorporated as in force at the commencement of the Determination.
>
> Appendix A, Section 7 of the Determination also incorporates the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2). However, in accordance with clause 6 (Exemptions and Alternative Procedures) of the Determination, compliance with Appendix A Section 7 is not required.
>
> …
>
> A marked up copy of the revised ES, as amended by the department, to address the issues raised by [the committee] is provided for your information…I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the documents identified by the committee are incorporated as in force at the commencement of the instrument. The committee understands the minister's response to indicate that section 7A of the *Motor Vehicle Standards Act 1989* is therefore not intended to apply to any of the documents incorporated by reference in this instrument.

The committee notes that the proposed revised ES contains a description of the manner in which the relevant documents are incorporated, and notes the minister's undertaking to register the replacement ES on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Description of and access to incorporated documents[32]

Committee's initial comment:

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

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

With reference to the above, the committee notes that the instrument incorporates several documents. However, neither the instrument nor the ES provides a description of the following documents, nor an indication as to where they can be freely accessed:

- Regulation No.21 "Uniform Provisions concerning the Approval of Vehicles with regard to their Interior Fittings" (E-ECE/324-E/ECE/TRANS/505/Rev.1/ Add.20/Rev.2, as last amended) [Appendix A, paragraphs 5.2.3.2 and 5.2.4.1.2];
- 'Regulation No. 80' [Appendix A, paragraph 5.3];
- 'Regulation No. 25, as amended by 04 series of amendments' [Appendix A, paragraph 5.4.2];
- the Agreement, Appendix 2 (E/ECE/324-E/ECE/TRANS/505/Rev.2) [Appendix A, paragraph 7];
- ISO Standard 6487 (1980) [Appendix A, Annex 6, paragraph 1.3.1]; and
- International Standard ISO 6487 (2002) [Appendix A, Annex 7, paragraph 1.5].

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document may fail to satisfy the requirements of the Legislation Act.

The committee's expectations regarding access to documents incorporated by a legislative instrument generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[33]

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

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33 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.

Minister's response

The Minister for Urban Infrastructure advised:

> I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents.
>
> The Consolidated Resolution on the Construction of Vehicles (R.E.3.) and the UN Regulations are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is www.unece.org/trans/main/welcwp29.html.
>
> ISO 6487 (1980) and ISO 6487 (2002) are available for purchase only, through the International Organization for Standardization (ISO). These are highly technical standards, which specify requirements and recommendations for measurement techniques involving the instrumentation used in impact tests carried out on road vehicles. They have been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years. Vehicle test facilities (in particular crash test laboratories) access these standards as part of their professional library.
>
> In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the department to amend the ES to include a description of these standards as well as details of how to access them.
>
> A marked up copy of the revised ES, as amended by the department, to address the issues raised by [the committee] is provided for your information…I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response. The committee notes that the proposed revised ES contains information about access to the incorporated documents, in most cases free of charge, and notes the minister's undertaking to register the replacement ES on the Federal Register of Legislation.

In relation to the incorporated standards ISO 6487 (1980) and ISO 6487 (2002), the committee notes the minister's advice that anticipated users of the instrument are likely to be in possession of the incorporated documents. However, in addition to access for vehicle test facilities, the committee is interested in the broader issue of access to incorporated material for other parties who might be affected by, or are otherwise interested in, the law.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. In 2016 the Joint Standing

Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[34]

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

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

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

Instrument	**Vehicle Standard (Australian Design Rule 34/03 – Child Restraint Anchorages and Child Restraint Anchor Fittings) 2017 [F2017L01351]**
Purpose	Specifies requirements for child restraint anchorages and anchor fittings in specified vehicle types
Authorising legislation	*Motor Vehicle Standards Act 1989*
Portfolio	Infrastructure and Regional Development
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2017) The time to give a notice of motion to disallow expired on 7 December 2017 Notice given on 7 December 2018[35] Motion must be resolved by 28 March 2018
Previously reported in	*Delegated legislation monitor 15 of 2017*

Manner of incorporation of documents[36]

Committee's initial comment:

Section 14 of the *Legislation Act 2003* (Legislation Act) allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

In relation to this instrument, the committee notes that section 7A of the *Motor Vehicle Standards Act 1989* permits vehicle standards made under the Act to incorporate standards produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia, or by any other organisation determined by the minister by legislative instrument, as in force from time to time.

Where documents are incorporated, the committee expects instruments, and ideally their accompanying explanatory statements (ES), to clearly state the manner in which they are incorporated (that is, either as in force from time to time, as in force at the commencement of the legislative instrument, or as in force or existing at an

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

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

earlier date). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

In this regard, the committee notes that the instrument appears to incorporate a number of documents which are not disallowable legislative instruments:

- technical drawings produced by the TNO (Research Institute for Road Vehicles) – Netherlands for a *50th Percentile 6 Year Old Child* [paragraph 10.1.3.1];
- Society of Automotive Engineers J879b Motor Vehicle Seating Systems, July 1968 [paragraph 11.1.1.3];
- Consolidated Resolution on the Construction of Vehicles (R.E.3) – (Document TRANS/WP.29/78/Rev.4) [paragraph 12.2, footnote 1]; and
- United Nations Regulation No. 44 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF RESTRAINING DEVICES FOR CHILD OCCUPANTS OF POWER-DRIVEN VEHICLES ("CHILD RESTRAINT SYSTEMS"), incorporating the 04 series of amendments [paragraph 13.1].

Neither the instrument nor the ES states the manner in which these documents are incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[37]

The committee requests the minister's advice in relation to the manner of incorporation of the above documents, and requests that the instrument and/or explanatory statement be updated to include information regarding the manner of incorporation.

Minister's response

The Minister for Urban Infrastructure advised:

> The Determination incorporates references to the Consolidated Resolution on the Construction of Vehicles (R.E.3), a number of United Nations (UN) Regulations, technical drawings produced by the TNO (Research Institute for Road Vehicles) – Netherlands, and the Society of Automotive Engineers (SAE) J879b Motor Vehicle Seating Systems, July 1968 (SAE J879b) standard.
>
> As these standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force

37 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.

> at the time the Determination commenced, and not 'as in force or existing from time to time'.
>
> I note the Committee's comments on facilitating the public's ability to understand the operation of the Determination. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that these standards are incorporated as in force at the commencement of the Determination.
>
> …
>
> A marked up copy of the revised ES, as amended by the department, to address the issues raised by [the committee] is provided for your information…I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the documents identified by the committee are incorporated as in force at the commencement of the instrument. The committee understands the minister's response to indicate that section 7A of the *Motor Vehicle Standards Act 1989* is therefore not intended to apply to any of the documents incorporated by reference in this instrument.

The committee notes that the proposed revised ES contains a description of the manner in which the relevant documents are incorporated, and notes the minister's undertaking to register the replacement ES on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Description of and access to incorporated documents[38]

Committee's initial comment:

Paragraph 15J(2)(c) of the Legislation Act requires the 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 notes that the instrument incorporates the four documents set out above. However, neither the instrument nor the ES indicates where those documents can be freely accessed.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document may fail to satisfy the requirements of the Legislation Act.

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

The committee's expectations regarding access to documents incorporated by a legislative instrument generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

The committee's expectations in this regard are set out in the guideline on incorporation of documents published on the committee's website.[39]

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

Minister's response

The Minister for Urban Infrastructure advised:

> I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents.
>
> The technical drawings produced by the TNO (Research Institute for Road Vehicles) – Netherlands define a test dummy which corresponds to the 6-year manikin described in Annex 8 – Appendix 1 of the UN Regulation No. 44 (R 44) – (Document E/ECE/324/Rev.1/Add.43/Rev.3). Compliance with these drawings is an option to another criterion directly specified in the ADR.
>
> The SAE J879b standard is available for purchase only, through SAE International. Vehicle manufacturers and test facilities (in particular crash test laboratories) access this SAE standard as part of their professional library and it has been referenced in the ADRs for over 30 years. In addition, compliance with the test referencing SAE J879b is an option to another test directly specified through the ADR.
>
> The Consolidated Resolution on the Construction of Vehicles (R.E.3.), the UN Regulations and the UN Global Technical Regulations are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is www.unece.org/trans/main/welcwp29.html.

39 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.

> In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the department to amend the ES to include a description of these standards as well as details of how to access them.
>
> A marked up copy of the revised ES, as amended by the department, to address the issues raised by [the committee] is provided for your information…I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response. The committee notes that the proposed revised ES contains information about access to the incorporated documents, in most cases free of charge, and notes the minister's undertaking to register the replacement ES on the Federal Register of Legislation.

In relation to the incorporated international standard SAE J879b, the committee notes the minister's advice that anticipated users of the instrument are likely to be in possession of the document, and also that the instrument provides another option for compliance that does not require reference to that standard. However, in addition to access for vehicle manufacturers and test facilities, the committee is interested in the broader issue of access to incorporated material for other parties who might be affected by, or are otherwise interested in, the law.

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[40]

The committee's expectation, at a minimum, is that consideration be given by the department to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing upon request to the department. 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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40 Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Thirty-Ninth Parliament, Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3.

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

Senator John Williams (Chair)