

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

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

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

Publications

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

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

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

Ministerial correspondence

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

Guidelines

Guidelines referred to by the committee are published on the committee's website.⁴

General information

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

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

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

2 Regulations and Ordinances Committee, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

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

4 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

5 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

6 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

7 Regulations and Ordinances Committee, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 31 January 2018 and 28 February 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 | Amendment of List of Exempt Native Specimens – South Australian Lakes and Coorong Fishery, February 2018 [F2018L00137] |
| Purpose | Amends the List of Exempt Native Specimens Instrument 2001 to allow the export of specimens from the South Australian Lakes and Coorong Fishery without a permit, subject to certain conditions |
| Authorising legislation | <i>Environment Protection and Biodiversity Conservation Act 1999</i> |
| Portfolio | Environment and Energy |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ² |

Drafting³

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

-
- 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).

specimens that are or are derived from fish or invertebrates, other than specimens that belong to species listed under Part 13 of the EPBC Act (other than a species listed in the conservation dependent category), and specimens that belong to taxa listed under section 303CA of the EPBC Act (Australia's CITES list), taken in the South Australian Lakes and Coorong Fishery, as defined in the Fisheries Management (Lakes and Coorong Fishery) Regulations 2009 (SA) and the Fisheries Management (General) Regulations 2017 (SA) in force under the *Fisheries Management Act 2007* (SA).

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

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

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

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

| | |
|--------------------------------|---|
| Instrument | Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018 [F2018L00139] |
| Purpose | Adds two exceptions to electoral or referendum communications requiring authorisation; and sets out further details in relation to notifying particulars of authorised electoral communications |
| Authorising legislation | <i>Commonwealth Electoral Act 1918</i> |
| Portfolio | Finance |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁴ |

Drafting⁵

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

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

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

Anticipated authority⁶

Section 4 of the *Acts Interpretation Act 1901* allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made. The ability of

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

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

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

such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4).

The instrument was made on 21 February 2018 and registered on the Federal Register of Legislation on 22 February 2018.

The instrument was made under subsection 321D(7) of the *Commonwealth Electoral Act 1918* (Electoral Act). That provision was inserted into the Electoral Act by Item 10 of Schedule 1 to the *Electoral and Other Legislation Amendment Act 2017* (amendment Act). Schedule 1 to the amendment Act commenced on 14 March 2018.

The committee notes that the commencement provision of the instrument (section 2) provides that the instrument commenced on 15 March 2018.

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

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

| | |
|--------------------------------|--|
| Instrument | Export Market Development Grants (Approved Bodies) Guideline 2018 [F2018L00119] |
| Purpose | Sets out guidelines for the exercise by the CEO of Austrade of his or her powers to approve certain industry organisations as approved bodies eligible for export promotion grants |
| Authorising legislation | <i>Export Market Development Grants Act 1997</i> |
| Portfolio | Foreign Affairs and Trade |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ⁷ |

Drafting⁸

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

The previous version of the instrument—the Export Market Development Grants (Approved Body) Guidelines 2008 (2008 Guidelines), which are repealed by the present instrument, make a number of references to matters 'mentioned in' paragraph 3.3(2) of the Export Market Development Grants Regulations 2008 (2008 Regulations). The 2008 Regulations are scheduled to sunset in October 2018.¹⁰

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

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

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

10 Under section 50 of the *Legislation Act 2003*, legislative instruments are automatically repealed ('sunset'), on the first 1 April or 1 October after the tenth anniversary of their registration on the Federal Register of Legislation.

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

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

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

| | |
|--------------------------------|---|
| Instrument | Narcotic Drugs Amendment (Cannabis) Regulations 2018 [F2018L00106] |
| Purpose | Amends the Narcotic Drugs Regulation 2016 to permit exports of medicinal cannabis products, amend various requirements relating to applications for and the administration of cannabis licences, and make other minor and technical changes |
| Authorising legislation | <i>Narcotic Drugs Act 1967</i> |
| Portfolio | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 15 February 2018) Notice of motion to disallow must be given by 25 June 2018 ¹¹ |

Unclear meaning of 'connections and associations'¹²

The instrument amends the Narcotic Drugs Regulations 2016 (principal regulations), which set up the regulatory framework for licensing the cultivation and production of medicinal cannabis, and the manufacture of drugs, under the *Narcotic Drugs Act 1967* (Act). Sections 8A and 8B of the Act set out various matters that the Secretary (of the Department of Health) must take into account in determining whether a personal or corporate applicant is a 'fit and proper person' to hold a licence. These matters include their 'connections and associations...with other persons'.¹³

The principal regulations specify the information and documentation that must be provided in applications for each of the relevant licenses for the purposes of sections 8A and 8B of the Act. These include requirements to provide information about applicants' connections and associations.

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

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)(b).

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

who are natural persons, and information required about corporate connections and associates.¹⁴

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

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

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

The minister advised that:

My Department proposes to revise the Guideline document on Fit and Proper Persons and Suitable Staff to reflect the information set out in the Guidance document for completing downloadable licence applications. In addition, my Department proposes to revise both Guidance documents to ensure that they are more informative to allow the applicant determine with sufficient precision what connections and associations must be disclosed in an application for a licence.¹⁵

The committee's research indicates that the revision of these documents may not yet have occurred. The Guideline on Fit and Proper Persons and Suitable Staff on the department's Office of Drug Control website is subtitled 'Version 1.0, October 2016', and does not include the more detailed information about connections and associations which was provided in the minister's December 2016 letter to the

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

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

committee.¹⁶ It is not clear to the committee whether any revision has been made to the relevant information in the Guidance on Completing Downloadable Licence Applications, which is subtitled 'Version 1.1, February 2017'.¹⁷

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

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

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

Personal rights and liberties: privacy¹⁸

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

The instrument amends provisions in the principal regulations about information that must be provided by applicants for licences under the Act. These include the insertion of new provisions requiring applicants who are bodies corporate to provide information about the identity of each natural person who holds a relevant financial interest in the applicant's business, or who is entitled to exercise relevant power in relation to the applicant's business, or in relation to other business that provides a substantial proportion of the applicant's income. The information that must be provided includes the names and dates of birth of those natural persons.¹⁹

The ES to the instrument does not address the implications for personal privacy of these new provisions, or provide any information about how such information will be managed; what use can be made of it, including any permitted onward disclosure;

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

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

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

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

and what safeguards are in place to protect the privacy of individuals whose personal information is provided to the Secretary in accordance with the instrument.

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

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

- **how personal information collected in accordance with the instrument, about both licence applicants and their connections and associations, will be used and managed; and**
- **what safeguards are in place to protect the personal privacy of individuals in relation to that information.**

| | |
|--------------------------------|---|
| Instrument | Producer Offset Rules 2018 [F2018L00112] |
| Purpose | Provides the administrative framework for applications and issue of certificates relating to the tax offset for the production of films with significant Australian content |
| Authorising legislation | <i>Income Tax Assessment Act 1997</i> |
| Portfolio | Treasury |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ²⁰ |

Unclear basis for determining fees²¹

Part 2 of the instrument sets out the procedures and requirements for applications which may be made by film-makers to the 'film authority' (Screen Australia) for a 'provisional certificate' indicating their future eligibility for the producer offset. Section 11 sets out a table of fees payable for provisional certificate applications. The application fees for the 207/18 financial year vary from \$127 to \$4471, in a five-step scale depending on the amount of total expenditure on the film.²²

The committee's usual expectation, in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, is that the explanatory statement (ES) will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

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

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

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

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.²³

| | |
|--------------------------------|---|
| 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 <i>Australian Education Amendment Act 2017</i> |
| Authorising legislation | <i>Australian Education Act 2013</i> |
| Portfolio | Education and Training |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 ²⁴ Notice given on 15 February 2018 ²⁵ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Incorporation of document²⁶

Committee's initial comment:

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

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

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

25 See Parliament of Australia, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

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

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

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

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

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

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at 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*.²⁷

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

27 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.

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.

The committee requests the minister's advice as to:

- the manner in which the Ministerial Council disability guidelines are incorporated into the instrument, and
- how the document is or may be made readily and freely available to persons interested in or affected by the instrument.

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

Minister's response

The Minister for Education and Training advised:

Item 6 of the Australian Education Amendment (2017 Measures No. 2) Regulations 2017 (the Amendment Regulation) amended, amongst other things, the existing definition of Ministerial Council disability guidelines in subsection 4(1) of the Australian Education Regulation 2013 (the Principal Regulation), to mean the guidelines for the Nationally Consistent Collection of Data on School Students with Disability approved by the Ministerial Council for the year. This amendment to the definition of Ministerial Council disability guidelines was largely consequential to other amendments to section 58A of the Principal Regulation.

The incorporation of the Ministerial Council disability guidelines in the Principal Regulation first occurred in 2014, by way of amendments to the Principal Regulation contained in the Australian Education Amendment (2014 Measures No. 1) Regulation 2014. This was part of a suite of amendments that occurred in 2014, to impose the requirement in the Principal Regulation for the Nationally Consistent Collection of Data on School Students with Disability (NCCD).

...

The Ministerial Council disability guidelines have been incorporated in the Principal Regulation pursuant to the regulation making power contained in section 130 of the *Australian Education Act 2013* (the Act). In particular,

in reliance on subsection 130(4), which provides that despite the operation of the *Legislation Act 2003*, the regulations may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time.

The Ministerial Council disability guidelines must be approved by the Ministerial Council each year, as has occurred each year since 2015. Once approved, the Ministerial Council disability guidelines are made available on the Department of Education and Training's website. See here for the 2017 version of the guidelines, noting that the 2018 version has yet to be approved (<https://www.education.gov.au/what-nationally-consistent-collection-data-school-students-disability>).

The purpose of the Ministerial Council disability guidelines is to:

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

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

Manner of incorporation of the Ministerial Council disability guidelines

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

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

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

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

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the Ministerial Council disability guidelines have been incorporated into the Australian Education Regulation 2013 (principal regulation) by the instrument as existing from time to time, as authorised by subsection 130(4) of the *Australian Education Act 2013*. The committee also notes that the minister has provided the internet address at which the 2017 version of the Ministerial Council disability guidelines can be freely accessed.

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

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

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. Including information about incorporated documents in the ES to an instrument enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

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

The committee requests the further advice of the minister in relation to its request that the instrument or its explanatory statement be updated to provide

relevant information about the incorporation of the Ministerial Council disability guidelines. The committee requests in particular that the ES be amended to include a description of the guidelines, and indicate how they may be obtained, to ensure compliance with the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003*.

Advice only

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

| | |
|--------------------------------|---|
| Instrument | AD/BELL 206/57 Amdt 3 Horizontal Stabilizer [F2018L00079] |
| Purpose | Updates the airworthiness directive for horizontal stabilizers on Bell 206 and Leonardo (Agusta Bell) AB206 series helicopters, limiting its application to horizontal stabilizers fitted with specified inboard rib parts. |
| Authorising legislation | Civil Aviation Safety Regulations 1998 |
| Portfolio | Infrastructure, Regional Development and Cities |
| Disallowance | 15 sitting days after tabling (tabled Senate 7 February 2018) Notice of motion to disallow must be given by 10 May 2018 ²⁸ |

Access to incorporated document²⁹

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

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

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.³⁰

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

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

The instrument incorporates two Service Bulletins: Bell SB 206-01-73-7 Revision E and Agusta SB 206-75 Revision B, both as in force at the time of issue of the instrument. The ES to the instrument states that:

The Bell and Agusta Service Bulletins referred to in the AD can be obtained from Bell Helicopter Textron Canada and Leonardo Helicopters respectively. However, any Australian operator which operates the Bell 206 or Leonardo (Agusta Bell) AB206 helicopters are provided with these documents by Bell Helicopter Textron Canada and Leonardo Helicopters by subscription.

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

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The issue of access to material incorporated into the law by reference to external documents has been one of ongoing concern to Australian parliamentary scrutiny committees.

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

The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to the documents incorporated by reference in the instrument.

30 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.

| | |
|--------------------------------|---|
| Instrument | National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 2) (PB 16 of 2018) [F2018L00162] |
| Purpose | Makes changes to pharmaceuticals and related conditions prescribed under the special arrangement for pharmaceutical benefits for highly specialised drugs |
| Authorising legislation | <i>National Health Act 1953</i> |
| Portfolio | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018 ³¹ |

Drafting: legislative authority³²

The instrument cites sections 84AF, 84AK, 85, 85A, 88 and 101 of the *National Health Act 1953* (National Health Act) as the authorities under which it is made. It appears to the committee that these may not be the correct authorities for the making of this instrument.

The instrument amends the National Health (Highly specialised drugs program) Special Arrangement 2010 (principal instrument). The principal instrument was made under subsections 100(1) and 100(2) of the National Health Act, which provide for the making, variation and revocation of special arrangements for pharmaceutical benefits. It therefore appears to the committee that the appropriate authority for amending this instrument is subsection 100(2) of the National Health Act, which provides for the variation of a special arrangement made under subsection 100(1).

The committee notes that previous instruments amending the principal instrument have cited subsection 100(2) as their legislative authority. In addition, the explanatory statement and statement of compatibility to the instrument cite section 100 and subsection 100(2), respectively, as the legislative authority. It therefore appears to the committee that the citation on the instrument's cover of sections 84AF, 84AK, 85, 85A, 88 and 101 of the National Health Act as its legislative authorities, may be an error.

The committee draws to the minister's attention the possible citation of incorrect legislative authority for making the instrument.

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

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

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 | 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 | <i>Corporations Act 2001</i> |
| Portfolio | Treasury |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 Notice given on 15 February 2018 ² |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Drafting: unnecessary penalty provision³

Committee's initial comment:

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

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

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

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

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.

Minister's response

The Minister for Revenue and Financial Services advised:

The inclusion of a penalty amount in...Rule 5.3.3 of the Futures Markets Rules is the result of a drafting error, carried over from the equivalent, pre-existing Rule 4A.4.3 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011.

To address the error, it is intended to amend the legislative instrument to remove the penalty amount.

Committee's response

The committee thanks the minister for her response, and notes the minister's undertaking that ASIC will amend the instrument to remove the penalty amount.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|--|
| 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 | <i>Corporations Act 2001</i> |
| Portfolio | Treasury |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 Notice given on 15 February 2018 ⁴ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Merits review⁵

Committee's initial comment:

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 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.

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

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

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.

Minister's response

The Minister for Revenue and Financial Services advised:

In making the Securities Markets Rules, ASIC adopted Rules 2.4.10, 2.4.15 and 2.4.19 without substantive change from existing Rules 2.4.10, 2.4.15 and 2.4.19 of the ASIC Market Integrity Rules (ASX Market) 2010 (**ASX MIRs**) and ASIC Market Integrity Rules (Chi-X Australia Market) 2011 (**Chi-X MIRs**).

Since August 2010, under the equivalent ASX MIRs and Chi-X MIRs, ASIC has on three occasions made decisions rejecting applications for accreditation or renewal of accreditation and has imposed conditions on the accreditation of four advisers. In two of the cases where ASIC rejected an application, the advisers were subsequently banned by ASIC from providing financial services under section 920A of the Corporations Act. In the other case, the applying Market Participant subsequently advised that the 'adviser' did not provide financial product advice and so did not require an accreditation for his role.

In making these decisions under Rules 2.4.10, 2.4.15 and 2.4.19 of ASX MIRs and Chi-X MIRs, ASIC was and is cognisant that the decisions affect the rights and liberties of the relevant individuals and market participants. Consequently, such decisions were not made lightly. In the event that an application is to be rejected or an accreditation suspended or renewed with the imposition of conditions, these matters are discussed extensively with the applicant and the relevant market participant prior to a decision being made.

The Administrative Appeals Tribunal (AAT) only has the power to review a decision where an 'enactment' provides that an application may be made to the AAT for review of decisions made either in the exercise of powers conferred by that enactment or in the exercise of powers conferred by another enactment having effect under that enactment (section 25(1) of the *Administrative Appeals Tribunal Act 1975*) (the AAT Act).

The definition of 'enactment' in section 3 of the AAT Act includes 'an instrument (including rules, regulations or by-laws) made under an Act'. The Securities Markets Rules are instruments made under section 798G of the Corporations Act and so fall within the definition of enactment.

However, as it currently stands, there is no provision in the Securities Markets Rules which provides that an application may be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19.

ASIC has also considered whether the Corporations Act provides for an application to be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules. Section 1317B of the Corporations Act provides that 'applications may be made to the AAT for review of decisions made under this Act'. Whilst section 9 of the Corporations Act defines 'this Act' as including the regulations made under section 1364 of the Corporations Act, it makes no reference to the rules made under section 798G.

Consequently, ASIC takes the view that decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules are not subject to independent merits review by the AAT.

In considering the Committee's second question—whether there are any characteristics of the decisions under Rules 2.4.10, 2.4.15 and 2.4.19 that would justify their exclusion from merits review—guidance provided in the Australian Administrative Law Policy Guide (the Guide) issued by the Attorney-General's Department and the 1999 Administrative Review Council (ARC) publication referred to in the Guide has been considered.

On review, the characteristics of the decisions made under Rules 2.4.10, 2.4.15 and 2.4.19 do not justify their exclusion from merits review. The decisions do not fall within either of the two categories of decisions referred to in Chapter 3 of the ARC publication, nor do any of the factors referred to in Chapter 4 of the ARC publication apply so as to justify excluding merits review.

Responding to the Committee's concern, it is proposed that a further change will be made to provide that applications may be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules.

Further, ASIC has advised that it also proposes to review all types of decisions made under the Securities Markets Rules against the ARC guidance to ensure consistency.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that ASIC has examined the status of decisions made under sections 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules, and considers that the characteristics of these decisions do not justify their exclusion from merits review. The committee

notes the minister's undertaking that ASIC will amend the instrument to provide for AAT review of decisions made under these rules.

The committee also welcomes the minister's advice that ASIC will review all decisions made under the Securities Markets Rules to ensure their consistency with the Administrative Review Council's guidance on merits review.

The committee has concluded its examination of this matter.

Drafting: unnecessary penalty provision⁶

Committee's initial comment:

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.

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.

Minister's response

The Minister for Revenue and Financial Services advised:

The inclusion of a penalty amount in Rule 5A.3.3 of the Securities Markets Rules...is the result of a drafting error, carried over from the equivalent,

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

pre-existing Rule 4A.4.3 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011.

To address the error, it is intended to amend the legislative instrument to remove the penalty amount.

Committee's response

The committee thanks the minister for her response, and notes the minister's undertaking that ASIC will amend the instrument to remove the penalty amount.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|--|
| Instrument | AusCheck Amendment (System Functionality) Regulations 2017 [F2017L01664] |
| Purpose | Amends the AusCheck Regulations 2017 to allow for electronic verification of identification documents in the AusCheck system, and to replace the current manual visa checking process with a new automated process |
| Authorising legislation | <i>AusCheck Act 2007</i> |
| 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 ⁷ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

No description of consultation⁸

Committee's initial comment:

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

⁷ In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

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

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*.⁹

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*.

Minister's response

The Minister for Law Enforcement and Cyber Security advised:

The explanatory memorandum, rather than the approved explanatory statement, was registered on the Federal Register of Legislation. This error has been rectified as a matter of priority.

For the Committee's information, please see attached a copy of the explanatory statement. The correct version of the explanatory statement includes details of the consultation undertaken ...

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred. Consultation was undertaken with issuing bodies, from as early as October 2016, at joint forums hosted by the Office of Transport Security (OTS) and AusCheck Issuing Body and monthly consultative committee meetings with key industry and government stakeholders.

Consultation also occurred with relevant areas within the Attorney-General's Department, the Department of Health, the then Department of Immigration and Border Protection, and the Department of Infrastructure and Regional Development.

Relevant excerpt from the replacement ES:

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred within the department, and with the Immigration Department and Border Protection (DIBP), the Department of Infrastructure and Regional Development and with Issuing Bodies.

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

Committee's response

The committee thanks the minister for his response, and notes that the replacement ES provided to the committee, which includes a description of the consultation undertaken, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

No statement of compatibility¹⁰**Committee's initial comment:**

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*.

Minister's response

The Minister for Law Enforcement and Cyber Security advised:

The explanatory memorandum, rather than the approved explanatory statement, was registered on the Federal Register of Legislation. This error has been rectified as a matter of priority...

For the Committee's information, please see attached a copy of the explanatory statement. The correct version of the explanatory statement includes...a statement of compatibility with human rights. The statement of compatibility with human rights was prepared in consultation with the Attorney-General's Department's Human Rights Branch.

Committee's response

The committee thanks the minister for his response, and notes that the replacement ES provided to the committee, which includes a statement of compatibility with human rights, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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

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

Description of consultation¹²

Committee's initial comment:

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

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

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

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

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

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).

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

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

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

Minister's response

The Minister for Foreign Affairs advised:

The Declaration renewed designations against eleven persons and ten entities that I was satisfied met the relevant test: that the 'person or entity is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program'.

The Declaration continued in effect the designation of one person and nine entities that were first designated in 2012 (and whose designations were renewed in 2015). The Department of Foreign Affairs and Trade (DFAT) undertook public consultation through its website seeking submissions from interested parties. No submissions were received.

The Declaration also continued in effect the designation and declaration of ten persons and one entity that were first designated or declared in 2015. Due to an administrative error, these ten persons and one entity were not included in the public consultations mentioned above.

DFAT will undertake public consultation through its website with respect to those ten persons and one entity. I note in this regard that, under the Autonomous Sanctions Regulations 2011, I can revoke a designation and/or a declaration at any time on my own initiative. In the event that the public consultations brings to light factors that would justify the revocation of a designation and/ or a declaration, I would act accordingly.

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

I have instructed DFAT to draft an amended version of the explanatory statement for the Declaration, which will reference the specific consultation undertaken.

Committee's response

The committee thanks the minister for her response, and notes the minister's advice that DFAT undertook consultations via its website in relation to the instrument but that, due to an administrative error, those consultations did not include ten persons and one entity listed in the instrument.

The committee also notes the minister's advice that consultation in relation to those ten persons and one entity will be undertaken through DFAT's website.

The committee further notes the minister's undertaking to prepare a replacement ES, which will reference the consultation undertaken, for registration on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|--|
| Instrument | Basin Plan Amendment (SDL Adjustments) Instrument 2017 [F2018L00040] |
| Purpose | Amends the [Murray-Darling] Basin Plan 2012 to adjust the long-term average sustainable diversion limits for surface water |
| Authorising legislation | <i>Water Act 2007</i> |
| Portfolio | Agriculture and Water Resources |
| Disallowance | 15 sitting days after tabling (tabled Senate 5 February 2018) Notice of motion to disallow must be given by 8 May 2018 ¹⁴ |
| Previously reported in | <i>Delegated legislation monitor 2 of 2018</i> |

Compliance with authorising legislation¹⁵

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

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

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

The committee notes that a notice of motion to disallow this instrument was given in the Senate on 8 February 2018. See Parliament of Australia, *Disallowance Alert 2018*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

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

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

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

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

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

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

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

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

...

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

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

The committee requests:

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

Minister's response

The Minister for Agriculture and Water Resources advised:

As required under the *Water Act 2007*, the Notice was supplied to the former Minister for Agriculture and Water Resources, the Hon. Barnaby Joyce MP, at the same time as he was provided with the Instrument for consideration. Upon its adoption, the Instrument was then registered on the Federal Register of Legislation (FRL). The accompanying Notice, under section 23B(7)(b) is not a legislative instrument and was not registered on FRL at that time. A subsequent administrative error meant that the Notice was not supplied with the Instrument at the time it was tabled before both Houses of Parliament.

I have now arranged for the Notice to be tabled in both Houses during the next Sitting week and for it to be registered on FRL as a notifiable instrument, in accordance with your request.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the notice required by section 23B of the Water Act was provided to the (then) minister for approval with the instrument, but that an administrative error resulted in the notice not accompanying the instrument when it was registered on the Federal Register of Legislation (FRL) and subsequently tabled in Parliament.

The committee notes that the notice has now been registered on the FRL as notifiable instrument number F2018N00014, and has been tabled in both Houses of Parliament.

The committee notes, however, that the existence and location of the Notice will not be apparent to persons accessing the instrument on the FRL. In the interests of clarity and ease of reference for persons interested in or affected by the instrument, the committee recommends that future instruments made under section 23B of the Water Act provide the relevant Notice, or a link to it, on the instrument's page on the FRL,¹⁶ or indicate in the explanatory statement to the instrument where the Notice can be accessed.

The committee has concluded its examination of the instrument.

16 The committee notes, for example, that such documents can be lodged with an instrument on its FRL page as 'supporting material'.

| | |
|--------------------------------|---|
| 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 | <i>Civil Aviation Safety Regulations 1998</i> |
| Portfolio | Infrastructure and Regional Development |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 Notice given on 15 February 2018 ¹⁷ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Description of consultation¹⁸

Committee's initial comment:

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

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

The ES to 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

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

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

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*.¹⁹

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*.

Minister's response

The Minister for Infrastructure and Transport advised:

CASA has advised that in this case it did not consider consultation necessary because the instrument of concern simply extends the operation of an existing civil aviation order.

However, CASA has acknowledged that there should be an appropriate explanation regarding consultation and on 19 February 2018, it lodged a revised explanatory statement accordingly.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that CASA did not consider consultation necessary because the instrument only extends the operation of an existing civil aviation order.

The committee notes that a replacement ES, which includes a description of the consultation undertaken, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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

| | |
|--------------------------------|---|
| Instrument | Cockatoo Island Management Plan 2017 [F2018L00053] |
| Purpose | Establishes a plan to protect and manage the World, National and Commonwealth Heritage values of Cockatoo Island |
| Authorising legislation | <i>Environment Protection and Biodiversity Conservation Act 1999</i> |
| 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 ²⁰ |
| Previously reported in | <i>Delegated legislation monitor 2 of 2018</i> |

Incorporation of documents²¹

Committee's initial comment:

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

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

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

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

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

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).

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*.²²

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

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

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

22 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.

indicates that it is available for free online.²³ However, the committee considers that a best-practice approach is for the ES to provide details of the website where the document can be accessed.

- Harbour Trust's Comprehensive Plan ['Relationship with the Harbour Trust's Comprehensive Plan', p. 14; Policies 23 and 24, p. 88]
 - The instrument states at p. 14 that it must be interpreted in conjunction with the Comprehensive Plan, in particular the Outcomes in Part 5 and the Objectives and Policies in Part 3. Further, Policies 23 and 24 require that consultation be undertaken in accordance with specified Objectives in Part 3. While the Part 5 Outcomes are reproduced in the instrument, the Objectives and Policies in Part 3 are not.
No information is provided in the instrument or ES as to the manner in which the Comprehensive Plan is incorporated: that is, as in force from time to time, as at the date of commencement of the instrument, or as at an earlier date.
 - In addition, neither the instrument nor the ES provides information about how the document may be accessed. The committee's research indicates that it is available for free online.²⁴ However, the committee considers that a best-practice approach is for the ES to provide details of the website where the documents can be accessed.
- Significant Impact Guidelines 1.1 and 1.2, Department of Environment and Heritage, May 2006 [Policy 1, p. 82]
 - Policy 1 states that Significant Impact Guidelines 1.1 and 1.2 will be used to assist in reaching decisions about the level of impact. The committee's research indicates that while these guidelines are freely available online, the versions on the department's website are dated 2013.²⁵ Neither the instrument nor the ES provides information about how the May 2006 versions of the guidelines, as incorporated in the instrument, may be freely accessed.

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

24 See http://www.harbourtrust.gov.au/planning-projects/strategic-plans#comprehensive_plan.

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

The committee requests the minister's advice regarding:

- the legislative authority for incorporation in the instrument of the Australia ICOMOS Charter for Places of Cultural Significance as in force from time to time;
- the manner in which the Harbour Trust's Comprehensive Plan is incorporated into the instrument; and
- how the Department of Environment and Heritage's Significant Impact Guidelines 1.1 and 1.2, dated May 2006, are or may be made readily and freely available to persons interested in or affected by the instrument.

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

Minister's response

The Minister for the Environment and Energy advised:

The Department [of the Environment and Energy] and the [Sydney Harbour Federation] Trust note that the ICOMOS Charter for Places of Cultural Significance (the Burra Charter) cannot be incorporated in the Plan as in force from time to time. In accordance with paragraph 14(1)(b) and subsection 14(2) of the *Legislation Act 2003* (Legislation Act), the Burra Charter may only be incorporated in the Plan as in force at the time the Plan commenced. While there is wording in the Plan that suggests the Burra Charter has been incorporated from time to time, I am advised that the Legislation Act requires that the Plan be read as not including the words 'and any revisions of the Charter that might occur in the future' (see paragraph 13(1)(c) and subsection 13(2) of the Legislation Act).

The Plan will be implemented by the Department and the Trust on the basis that the Burra Charter has been incorporated as in force at the time the Plan commenced. Furthermore, the Department and the Trust have advised me that they will amend the Plan at the next available opportunity to clarify the manner in which the Burra Charter has been incorporated, noting the consultation requirements under the *Environment Protection and Biodiversity Conservation Act 1999* when amending the Plan.

I am advised that the Harbour Trust Comprehensive Plan is also incorporated as in force at the time the Plan commenced. The Significant Impact Guidelines, dated May 2006 (the Guidelines), are available at the following links:

- 1.1 Matters of National Environmental Significance: www.environment.gov.au/archive/epbc/publications/pubs/nes-guidelines2006.pdf
- 1.2 Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies: www.environment.gov.au/archive/epbc/publications/pubs/commonwealth-guidelines-2006.pdf

A supplementary explanatory statement will be prepared for the Plan and registered in due course to clarify the manner of incorporation of the Burra Charter, and also to provide the relevant information for the Harbour Trust Comprehensive Plan and the Guidelines.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the management plan will be implemented by the department and the Sydney Harbour Federation Trust on the basis that the Burra Charter has been incorporated as in force at the time the plan commenced. The committee also notes the minister's undertaking that the Plan will be amended at the next available opportunity to clarify the manner in which the Burra Charter has been incorporated.

The committee further notes the minister's undertaking to register a supplementary ES on the Federal Register of Legislation, clarifying the manner of incorporation of the Burra Charter and providing the relevant information in relation to the Harbour Trust Comprehensive Plan and the Significant Impact Guidelines.

The committee has concluded its examination of the instrument.

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|--------------------------------|--|
| 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 <i>Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Act 2017</i> |
| Authorising legislation | <i>Customs Act 1901</i> |
| Portfolio | Home Affairs |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 Notice given on 15 February 2018 ²⁶ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Incorporation of document²⁷

Committee's initial comment:

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

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

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

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.

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

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

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

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.

Minister's response

The Minister for Law Enforcement and Cyber Security advised:

I can advise you that the relevant subsection that provides the required authority is 153XD(6) of the *Customs Act 1901* (the Customs Act), to incorporate the Singapore-Australia Free Trade Agreement, as in force from time to time for regulations made for the purposes of Division 1BA of the Customs Act. This Division sets out the rules relating to the Singapore-Australia Free Trade Agreement.

The Monitor also drew my attention to the omission of a reference to this provision in the original Regulation and the associated Explanatory Statement.

I note the Committee's observations on this matter and will ensure that in future this information will be included in Explanatory Statements for similar legislative instruments.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice that subsection 153XD(6) of the *Customs Act 1901* overrides subsection 14(2) of the *Legislation Act 2003* to provide for the incorporation of SAFTA as in force from time to time.

The committee considers that it would have been useful to include this information in the ES, and welcomes the minister's undertaking to include it in future ESs for similar legislative instruments.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|--|
| 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 | <i>Extradition Act 1988</i> |
| 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 ²⁸ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

No description of consultation²⁹**Committee's initial comment:**

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.

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

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

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*.³⁰

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*.

Minister's response

The Attorney-General advised:

As I am now the responsible minister for both the *Extradition Act 1988* and [another], I have approved revised explanatory statements. These statements have been updated in accordance with the requirements of the Legislation Act. They explain why consultation was not undertaken for the Extradition Regulations...I have enclosed a copy of each of the revised explanatory statements, which in due course will be tabled in both Houses of Parliament, and lodged for registration on the Federal Register of Legislation.

Relevant excerpt from the ES:

Consultation outside the Australian Government was not undertaken for the Regulations as they relate to criminal justice and law enforcement matters. Additionally, the Regulations do not have direct, or substantial indirect, effects on business, nor do they restrict competition.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes that the replacement ES provided to the committee, which includes a description of the consultation undertaken, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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

| | |
|--------------------------------|--|
| 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 | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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 ³¹ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Merits review³²

Committee's initial comment:

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.

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.

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

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

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*.³³

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.

Minister's response

The Minister for Finance, on behalf of the Minister for Education and Training, advised:

Implementation of the quality assurance program

To date, the Department has directly engaged PricewaterhouseCoopers, under an existing panel arrangement (standing offer), in order to develop specific auditing processes and procedures for the NCCD, to be implemented from 2018, to assess the accuracy of the NCCD data collection and compliance by approved authorities with the NCCD. As this has been conducted as a procurement, under an existing panel arrangement, and for a specific entity (PricewaterhouseCoopers) and purpose, no merits review mechanism was afforded.

Further to this, the Department is also currently exploring the direct engagement of Education Services Australia (ESA), a company the membership of which consists of the Commonwealth, and State and Territory Education Ministers, to develop a single online source of information, resources and materials relating to the NCCD. The Department is currently considering providing a grant to ESA for this

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.

purpose, primarily due to ESA's unique position in the school education sector, including its long-standing objective and purpose in the provision of online resources, materials and support for schools, school leaders and teachers, and its representation of all States and Territories. No merits review is currently being considered with respect to the provision of this grant, given that it is being provided to a specific entity (ESA), for a specific purpose, and ESA's existing role in the school education sector as discussed above.

The Department is also currently developing an implementation strategy for the use of funding for the purposes of the quality assurance program...[I]n relation to quality assurance activities for the NCCD, the Department has yet to finalise its implementation arrangements, including the full breadth of specific quality assurance activities to be funded, and how much of the funding may be delivered by way of procurements or grants, including to persons other than States and Territories. The Department is still to engage in consultation with relevant stakeholders with respect to any implementation arrangements.

As such, the characteristics of any grants, and the appropriateness or applicability of merits review in relation to such grants, is still to be determined and worked through by the Department.

Having said this, where grants are provided to States and Territories, merits review will not be made available for such grants. As these grants will be for specific entities (States and Territories), for specific purposes, and with the overall intention that each State and Territory work collaboratively and cooperatively with each jurisdiction, both the government and non-government school sectors, and relevant representative organisations for non-government schools, merits review will not be available.

In closing and noting the above, any grants provided in relation to the quality assurance program will be conducted in accordance with the *Commonwealth Grants Rules and Guidelines*, will adhere to applicable grant reporting requirements, and where relevant, will be administered by the Community Grants Hub (www.communitygrants.gov.au/).

Further to this, any procurement process undertaken in relation to the quality assurance program will be subject to the requirements of the Commonwealth's resource management framework, including the *Commonwealth Procurement Rules* and the *Public Governance, Performance and Accountability Act 2013*.

Committee's response

The committee thanks the ministers for their response. The committee notes the ministers' advice that the Department of Education and Training (the department) is currently considering providing a grant to Education Services Australia (ESA) to develop a single online source of information, resources and materials relating to the NCCD. The committee notes the minister's advice that no merits review is being

considered in relation to the provision of this grant, given it is being provided to a specific entity with a unique position in the school education sector, for a specific purpose.

The committee also notes the ministers' advice that the department is yet to finalise an implementation strategy for the use of funding for the purposes of the quality assurance program, including the breadth of specific quality assurance activities to be funded, how the funding is to be delivered, and to whom. In this regard, the committee notes the advice that the appropriateness of merits review in relation to particular grants is still to be determined by the department.

The committee further notes the ministers' advice that, where grants are provided to States and Territories, merits review will not be made available, because these grants will be to specific entities (States and Territories) for specific purposes.

Finally, the committee notes the ministers' advice that any grants provided in relation to the quality assurance program will be conducted in accordance with the *Commonwealth Grants Rules and Guidelines* (Grants Rules), will adhere to applicable grant reporting requirements and, where relevant, will be administered by the Community Grants Hub. However, the committee notes that the Grants Rules do not require, nor set out relevant criteria for, subjecting decisions to appropriate merits review. As such, the committee reiterates its expectation that grants decisions should be subject to independent merits review, unless those decisions possess characteristics that would justify excluding them from merits review.³⁴

The committee also considers that the information provided by the ministers would have been useful in the ES.

The committee has concluded its examination of the instrument. However, the committee draws to the ministers' attention its expectation that grants decisions made under the 'Quality assurance of data relating to students with disabilities' program will be subject to independent merits review, unless they possess characteristics that would justify excluding them from such review.

34 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>.

| | |
|--------------------------------|--|
| 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 | <i>Financial Framework (Supplementary Powers) Act 1997</i> |
| 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 ³⁵ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Constitutional authority for expenditure³⁶

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 notes that, in *Williams No. 2*,³⁷ 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.

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*.³⁸

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).

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

38 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

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 [implementing] 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'.

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.³⁹

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.

...

Commonwealth executive power and express incidental power

The Commonwealth executive power in 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

39 *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.

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.

Minister's response

The Minister for Finance, on behalf of the Minister for Sport, advised:

External affairs power

Item 258 references the external affairs power (section 51(xxix) of the Constitution). The external affairs power supports legislation which implements a treaty to which Australia is a party. In particular, the power supports Commonwealth legislation:

- to implement the particular terms of a relevant treaty; and
- to provide for the partial implementation of a treaty.

Many treaties to which Australia is a party leave it to the individual parties to choose the precise measures they will take to fulfil their obligations.

Item 258 relates to a measure being taken to fulfil Australia's obligations under the *Convention on the Rights of the Child* [1991] ATS 4 (CRC).

Pursuant to Article 4 of the CRC, Australia is required to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'. The particular steps listed in Articles 6(2), 18(2), 24(2) and 31(2) define with a degree of specificity what the State Parties to the CRC are obliged to do with respect to the rights recognised in Articles 6(1), 24(1) and 31(1).

Article 6(1) of the CRC recognises 'that every child has the inherent right to life'. Article 6(2) refers to '[ensuring] to the maximum extent possible the survival and development of the child'. Risks associated with unsafe behaviour around water constitute a threat to the survival of children. The Water and Snow Safety program is designed in part to ameliorate

these risks through activities preventing water-related accidents or death of children.

Article 18(2) of the CRC provides that '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'. The Water and Snow Safety program is directed in part to assist parents to promote the best interests of children in ensuring water safety.

Article 24(1) of the CRC recognises the 'right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'.

The steps listed in Article 24(2) include '[ensuring] that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition ... and the prevention of accidents' (Article 24(2)(e)) and '[developing] preventive health care' (Article 24(2)(f)). The Water and Snow Safety program is directed in part to ensuring that parents and children and the broader community are aware of the risks posed to children by water, and have access to education and information on water safety.

Article 31(1) of the CRC recognises 'the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child'. The steps listed in Article 31(2) include '[encouraging] the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity'. The Water and Snow Safety program is directed in part to supporting and promoting the right to play, by giving children information about safe play in or near water, and by giving parents, caregivers and communities the tools to teach children how to play safely in such an environment.

Communications power

Item 258 references the communications power (section 51(v) of the Constitution). The communications power supports legislation with respect to 'postal, telegraphic, telephonic, and other like services'.

The Water and Snow Safety program is directed in part to the preparation and dissemination of educational materials and other information relating to water and snow safety by online means involving the use of a telecommunications service.

Commonwealth executive power and the express incidental power

Item 258 references the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with section

51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Water and Snow Safety program supports a national, coordinated approach to water and snow safety. Financial assistance is provided to national bodies established independently of government. The issues addressed and outcomes achieved by the water and snow safety activities undertaken directly by these bodies, and the associated research outcomes, are nationally significant.

Committee's response

The committee thanks the ministers for their response, and notes the government's view as to the constitutional authority for the Water and Snow Safety program, including in relation to Australia's obligations under the CRC.

The committee also notes the advice that the Water and Snow Safety program is directed 'in part' towards the fulfilment of Australia's obligations under the CRC, and towards matters captured by the communications power in section 51(v) of the Constitution. In this regard, the committee reiterates its earlier concerns that the external affairs power and the communications power may not provide sufficient constitutional authority for the full scope of the expenditure proposed in relation to the Water and Snow Safety program.

However, the committee is cognisant that questions of constitutional authority are ultimately for the High Court to determine.

Finally, the committee notes that the response does not address the discrepancy between the reliance on Australia's obligations under international human rights law as constitutional authority for the relevant expenditure, and the view expressed in the statement of compatibility that no human rights are engaged.

The committee has concluded its examination of the instrument. However, the committee draws its observations in relation to the constitutional authority for the Water and Snow Safety program to the attention of the Senate.

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|--------------------------------|--|
| Instrument | Marriage Regulations 2017 [F2017L01359] |
| Purpose | Provides for procedural and administrative matters in support of the marriage framework established by the <i>Marriage Act 1961</i> |
| Authorising legislation | <i>Marriage Act 1961</i> |
| Portfolio | Attorney-General's |
| Disallowance | 15 sitting days after tabling (tabled Senate 19 October 2017) The time to give a notice of motion to disallow expired on 7 February 2018 Notice given on 7 February 2018 ⁴⁰ |
| Previously reported in | <i>Delegated legislation monitors 15 of 2017 and 1 of 2018</i> |

Classification of legislative instruments⁴¹

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 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

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

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

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.⁴²

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 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 first 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

42 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.

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 first 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.

Minister's second response

The Attorney-General advised:

Upon consideration of the issues raised by the Committee, I agree it would be appropriate to treat the instruments made under paragraph 39C(1)(b) of the *Marriage Act 1961* and section 53 of the Marriage Regulations as legislative instruments, and to register them as such on the Federal Register of Legislation. I have approved the enclosed replacement Explanatory Statement to the Marriage Regulations to reflect the instruments' status as legislative instruments for the purposes of the *Legislation Act 2003*. The replacement Explanatory Statement will be published on the Federal Register of Legislation and tabled in Parliament as soon as practicable.

I also note the Committee's concern that subsection 53(7) of the Marriage Regulations provides that the instrument made under subsection 53(3) of the Marriage Regulations is not a legislative instrument. As you have stated, due to the operation of the *Legislation Act 2003*, subsection 53(7) has no legal effect. My department will take steps to have this subsection of the Marriage Regulations repealed at the first opportunity. I anticipate further amendments to the Marriage Regulations will occur in 2018, and this amendment will be included as part of that process.

Relevant excerpt from the replacement ES:

Section 39 – Qualifications and skills required of a marriage celebrant

This section will specify requirements the Registrar of Marriage Celebrants must meet when, under paragraph 39C(1)(b) of the Act, determining in writing the qualifications and skills a person must have to be entitled to be registered as a marriage celebrant.

A determination made under paragraph 39C(1)(b) of the Act will be treated as a legislative instrument for the purposes of the *Legislation Act 2003* and will be registered on the Federal Register of Legislation.

...

Section 53 – Professional development for marriage celebrants

This section will establish the requirements the Registrar of Marriage Celebrants must meet when specifying professional development activities marriage celebrants will be required to undertake in accordance with paragraph 39G(1)(b) of the Act.

...

Subsection 53(7) will provide that the statement published under subsection 53(3) is not a legislative instrument. Subsection 53(7) has no legal effect due to the operation of the *Legislation Act 2003*. This statement will be rectified at the first practicable opportunity, to ensure that the text of section 53 reflects the legal effect of section 8 of the *Legislation Act 2003*. A statement under subsection 53(3) will be treated as a legislative instrument for the purposes of the *Legislation Act 2003* and will be registered on the Federal Register of Legislation.

Committee's final response

The committee thanks the Attorney-General for his response and notes his agreement that it would be appropriate to treat the instruments made under paragraph 39C(1)(b) of the Marriage Act (referenced in section 39 of the regulations) and section 53 of the regulations as legislative instruments. The committee notes that the replacement ES provided to the committee has been registered on the Federal Register of Legislation.

The committee further notes the Attorney-General's undertaking to repeal subsection 53(7) of the regulations at the first practicable opportunity, likely during 2018.

The committee has concluded its examination of the instrument.

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|--------------------------------|---|
| 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 | <i>National Health Act 1953</i> |
| 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 ⁴³ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Description of consultation⁴⁴

Committee's initial comment:

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

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

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

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.

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*.⁴⁵

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*.

Minister's response

The Minister for Health advised:

[T]he explanatory statement has been updated to include information on consultation undertaken in relation to this Instrument (Attachment A). This amended explanatory statement will be uploaded onto the Federal Register of Legislati[on] in due course.

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

Relevant excerpt from the replacement ES:

Historically, the Department of Health has consulted with the State and Territory Health Departments on Commonwealth funding for specialised medicines supplied through public hospitals 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 was discontinued in 2008 on recommendations endorsed by AHMAC.

Through the HSDWP, the State and Territory Health Departments agreed to the value of out patient medication being 80 per cent of the general PBS co-payment. As per section 99G of the Act, the general PBS co-payment is indexed according to the Consumer Price Index (CPI) on 1 January each year, and the value of out-patient medication is adjusted accordingly. State and Territory Health Departments are advised of the updated fee each year.

It was considered that further consultation for this Instrument was unnecessary due to the nature of the consultation that had already taken place.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that further consultation for this instrument was considered unnecessary due to the nature of the consultation that had already taken place.

The committee also notes the minister's undertaking to register the replacement ES provided to the committee on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|---|
| 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 | <i>Private Health Insurance Act 2007</i> |
| Portfolio | Health |
| Disallowance | 15 sitting days after tabling (tabled Senate 27 November 2017) The time to give a notice of motion to disallow expired on 15 February 2018 Notice given on 15 February 2018 ⁴⁶ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Parliamentary oversight: registration of incorrect version of instrument⁴⁷

Committee's initial comment:

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'.⁴⁸

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

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

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

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

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*.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵²

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:

- 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.⁵³

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

50 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.

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

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

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

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, 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).

Minister's response

The Minister for Health advised:

Background regarding the Prosthesis Rules

The Private Health Insurance (Prosthesis) Rules (Rules), made under the *Private Health Insurance Act 2007* (Act), list over 11,000 items for which a health insurance policy that covers hospital treatment must provide a minimum benefit, and specify the minimum benefit for each listed prosthesis. The list of prostheses specified in the Rules is generally referred to as the Prosthesis List. The current Rules are the Private Health Insurance (Prosthesis) Rules 2017 (No. 2) (2017 Rules).

After the Prosthesis List Advisory Committee recommends the listing of a new or amended product on the Prosthesis List, it is included in the next amendment to the Rules. The Rules are a legislative instrument registered on the Federal Register of Legislation (FRL), and are subject to a disallowance period in accordance with the *Legislation Act 2003*. Normally the Prosthesis Rules are amended to update the Prosthesis List twice a year. However, due to the benefit reductions negotiated by the Government with the Medical Technology Association Australia in 2017, two additional amendments to update the 2017 Rules are required in 2018. The first of these, the Private Health Insurance (Prosthesis) Amendment Rules 2017 (No. 5) (Amendment Rules No. 5), was registered on 13 October 2017 and commenced on 1 February 2018.

Before tabling the Rules in the Australian Parliament, applicants for listed products (sponsors) are provided with up to four opportunities to review their products listed, or about to be listed. Currently all updates to the Prosthesis List are manually entered into my Department's information management system. My Department has commenced systems development work to reduce manual intervention.

Incorrect listing of benefit for product DD005

The initial error in this situation related to product DD005, which is a shoulder joint device. This product was incorrectly listed as an elbow joint device in the 2017 Rules. During the second review of the draft Rules, but prior to their registration, the sponsor of product DD005 identified that their product had been incorrectly categorised. The draft instrument was changed to correct the category error. However, when this occurred, the minimum benefit specified for product DD005 was not corrected, resulting in an incorrect lower benefit being specified. This is because the elbow product has a lower benefit than the shoulder product.

This error was inadvertently included in the 2017 Rules when they were registered in August 2017. Further amendments to the Private Health Insurance (Prostheses) Rules 2017 (amendments No. 3 and No. 4) were made to accommodate Trans Aortic Valve Implants and other Medical Benefits Services approved items.

To implement the agreed benefits reductions, my Department commenced work on the Amendment Rules No.5 in September 2017. As noted above, the Amendment Rules No. 5 were registered on 13 October 2017 with a commencement date of 1 February 2018. They included an update to every item in Parts A and C of the Prostheses List set out in the Rules to reflect the first tranche of benefit reductions. The Amendment Rules No. 5 replicated the error relating to the benefit amount for product DD005 that had been included in the 2017 Rules.

After the Amendment Rules No. 5 were registered on the FRL, but before the expiry of the disallowance period, the sponsor of the product notified my Department that the benefit for product DD005 was lower than all other shoulder products within the category. This was because, as outlined above, the elbow product benefit was incorrectly listed for product DD005, rather than the shoulder product benefit.

This error appeared in both the 2017 Rules and the Amendment Rules No. 5, which at that point in time had yet to commence. This meant that the benefit amount for product DD005 in the 2017 Rules would be reproduced when the Amendment Rules No. 5 commenced and amended the 2017 Rules.

Registration of incorrect version of instrument

To ensure the sponsor and private patients were not disadvantaged, the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6) (Amendment Rules No. 6) were made to correct the error. This required two amendments to the 2017 Rules: an amendment that commenced the day after the registration of the Amendment Rules No. 6 to correct the error that was in the 2017 Rules as in force at that time, and a further amendment to the 2017 Rules that commenced after the Amendment Rules No. 5 to correct the error replicated in that instrument.

Due to an administrative error, when submitting the Amendment Rules No. 6 to FRL for registration an incorrect earlier draft of the instrument that was missing one of the necessary Schedules was registered with FRL. This was quickly identified by my Department, and the correct instrument with both Schedules was registered with FRL by 6 December 2018.

To prevent this occurring in the future, my Department has commenced improved version control and quality assurance processes to ensure all documentation submitted for registration is correct. These new processes include ensuring that requirements set out in an instrument registration checklist are met in relation to each instrument, and documents checked and reviewed by several officers prior to lodgement for registration.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that an administrative error led to the registration of an incorrect, earlier draft of the instrument (missing one of the necessary schedules) on the FRL. The committee also notes the minister's advice that the administrative error was identified by his department, and that the correct instrument with both schedules was registered on the FRL by 6 December 2017.

The committee welcomes the minister's advice that his department has commenced improved version control and quality assurance processes to ensure that all documentation submitted for registration is correct.

However, the committee notes that the minister's response does not address the use of the First Parliamentary Council's power under section 15D of the Legislation Act to 'correct' the instrument on the FRL to add a new schedule to the instrument. The committee remains concerned about the use of this administrative correction power to make substantial changes to a tabled legislative instrument, and the impact that this may have on effective parliamentary scrutiny.

In particular, the committee is concerned that, because there is no statutory requirement to table a 'corrected' version of an instrument, changes made to an instrument under section 15D of the Legislation Act may not be brought to the attention of parliamentarians. Members and senators may therefore lose the opportunity to consider the correct version of the instrument during part or all of the applicable disallowance period.

The committee therefore reiterates its view that, where there are substantive errors in an instrument, consideration should be given by the relevant agency to making any necessary changes by re-making or amending the instrument, rather than relying on section 15D of the Legislation Act. The committee also considers that where section 15D is used to 'correct' an instrument that has already been tabled, a revised explanatory statement should be registered expressly stating 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.

More broadly, the committee considers that any future review of the Legislation Act should address these issues of concern arising from the terms and operation of section 15D. In particular, the committee considers that there may be value in amending section 15D to include one or both of the following measures:

- some limitation or guidance on the requirement that the FPC 'correct' instruments under section 15D. In this respect, the committee notes the detailed limitations placed on the FPC's editorial powers under sections 15V, 15W and 15X of the Legislation Act;
- a requirement that disallowable instruments corrected by the FPC under section 15D after they have been tabled in Parliament, be tabled anew.

The committee intends to seek the Attorney-General's advice as to whether these matters may be taken into consideration when the Legislation Act is next reviewed.

The committee has concluded its examination of this matter. However, the committee remains concerned about the use of the power in section 15D of the *Legislation Act 2003* to make substantial changes to a tabled instrument, and the impact of this approach on effective parliamentary scrutiny. The committee will continue to monitor this issue.

Effect of drafting error⁵⁴

Committee's initial comment:

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 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.

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

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.

Minister's response

The Minister for Health advised:

My Department took prompt action to rectify an error in the Private Health Insurance (Prostheses) Rules 2017 (No.2) once it was brought to its attention. The private health insurers, private hospitals and sponsors were made aware of the error, and subsequent correction, via the PHI Circular 53/17 published on the 23 November 2017.

<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-phicircular2017-53>

My Department is not aware of any person being disadvantaged between 28 September and 23 November 2017 by the error.

Committee's response

The committee thanks the minister for his response, and notes the minister's advice that the Department of Health took prompt action to rectify the error in the instrument once the error was brought to its attention. The committee further notes the advice that the Department of Health is not aware of any person being disadvantaged as a result of the error in the period between 28 September and 23 November 2017.

Nevertheless, the committee remains concerned that the onus should not be placed on policyholders to identify any shortfall; rather, proactive action should be taken to identify and redress any disadvantage caused by an error. The committee requests that this continuing concern be taken into account should similar circumstances arise in future.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|---|
| 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 | <i>Renewable Energy (Electricity) Act 2000</i> |
| 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 ⁵⁵ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

No statement of compatibility⁵⁶

Committee's initial comment:

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.

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*.

Minister's response

The Minister for the Environment and Energy advised:

The explanatory statement to the Regulations did not include the statement of compatibility with human rights due to an administrative oversight. A supplementary explanatory statement providing a statement

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

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

of compatibility with human rights has been prepared. The supplementary explanatory statement will be registered on the Federal Register of Legislation in due course. I have attached a copy of the approved supplementary explanatory statement.

Committee's response

The committee thanks the minister for his response, and notes that the supplementary ES provided to the committee, which includes a statement of compatibility, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

| | |
|--------------------------------|--|
| 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 | <i>Telecommunications (Interception and Access) Act 1979</i> |
| 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 ⁵⁷ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

No description of consultation⁵⁸

Committee's initial comment:

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.

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).

The committee's expectations in this regard are set out in its *Guideline on consultation*.⁵⁹

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*.

Minister's response

The Attorney-General advised:

As I am now the responsible minister for both the *Extradition Act 1988* and the *Telecommunications (Interception and Access) Act 1979*, I have approved revised explanatory statements. These statements have been updated in accordance with the requirements of the Legislation Act. They explain...the consultation that was undertaken for the TIA Regulations. I have enclosed a copy of each of the revised explanatory statements, which in due course will be tabled in both Houses of Parliament, and lodged for registration on the Federal Register of Legislation.

Relevant excerpt from the ES:

17. In drafting the updated Regulations, the department's consultation process began in late July 2017. The department sought feedback on whether the Regulations may be improved or amended to enhance the operation of the Act.

18. The law enforcement agencies consulted were:

- the police force of every state and territory
- the Australian Commission for Law Enforcement Integrity
- the Australian Criminal Intelligence Commission
- the Australian Federal Police
- the Victorian Independent Broad-based Anti-corruption Commission
- the Queensland Crime and Corruption Commission
- the Western Australian Corruption and Crime Commission
- the South Australian Independent Commissioner Against Corruption
- the New South Wales Independent Commission Against Corruption
- the New South Wales Law Enforcement Conduct Commission
- the New South Wales Crime Commission
- the Australian Securities and Investments Commission

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

- the Australian Competition and Consumer Commission, and
 - the then Department of Immigration and Border Protection.
19. The following telecommunications providers were consulted: Telstra, Optus, Vodafone, TPG and the National Broadband Network.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes that the replacement ES provided to the committee, which includes a description of the consultation undertaken, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of the instrument.

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|--------------------------------|--|
| 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 | <i>Therapeutic Goods Act 1989</i> |
| 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 ⁶⁰ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Incorporation of documents⁶¹

Committee's initial comment:

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

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

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

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

- as in force at the commencement of the instrument.

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

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

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

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

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁶²

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'*;

62 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 on the scientific data requirements for a plasma master file (PMF) EMEA/CPMP/BWP/3794/03; and
- 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.⁶³

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.⁶⁴ 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.

Minister's response

The Minister for Health advised:

The intended incorporation of the documents noted in the Committee's Monitor 1 of 2018 in relation to this instrument, and their availability, are as follows:

63 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.

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

| Incorporated document | Intended incorporation | How document may be obtained |
|--|---|--|
| <i>Australian Standard AS ISO 13485-2003 Medical devices – Quality management systems – Requirements for Regulatory purposes.</i> | As published by Standards Australia on 31 December 2003. | From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of \$211.68 pdf (a range of standards including Australian Standards are sold and distributed by SAI Global Limited). A free 9 page sample of this standard is also available on this website. |
| <i>European Standard EN 556:1994 Sterilization of medical devices – requirements for medical devices to be labelled ‘Sterile’.</i> | As published by the European Committee for Standardization on 30 June 1995. | An identical version, as published by the National Standards Authority of Ireland, is available from the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of \$64.72 (pdf). |
| <i>Guideline on the scientific data requirements for a plasma master file EMEA/CPMP/BWP/379 4/03.</i> | As published by the European Medicines Agency on 15 November 2006. | From the website of the European Medicine Agency (http://www.ema.europa.eu), free. |
| <i>Guideline for the preparation of Technical Master Files for blood, blood components and haematopoietic progenitor cells.</i> | As published by the Therapeutic Goods Administration (TGA) on 22 July 2008. | From the TGA’s website (www.tga.gov.au), free. |

The above documents incorporated in the *Therapeutic Goods (Manufacturing Principles) Determination 2018*...are adopted because they represent critical Australian or International benchmarks of safety and quality in relation to the safety of manufacturing processes...It would not be feasible from a regulatory perspective to not adopt such benchmarks because they are not available for free.

While most of these documents attract a fee for access, it is expected that the persons most affected by their adoption – manufacturers and sponsors of therapeutic goods – would have access to the documents and be familiar with their terms.

It is also noted that paragraph 15J(2)(c) of the *Legislation Act 2003* requires that an explanatory statement indicate how incorporated documents may be obtained, but does not appear to require that such documents be obtainable without charge.

[A] replacement explanatory statement, with the above clarifications, will be arranged as soon as possible for [this instrument].

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice regarding the manner in which the relevant documents are incorporated into the instrument (that is, as in force at particular dates) and where those documents may be obtained. The committee also notes the minister's undertaking that a replacement ES, which clarifies the manner in which the documents are incorporated and how they may be accessed, will be arranged as soon as possible.

The committee acknowledges that the two guidelines are available free of charge. However, the committee remains concerned that the two incorporated standards (ISO 13485-2003 and EN 556:1994) appear only to be available on payment of a fee. The committee will be concerned where documents incorporated into an instrument are not readily and freely available, because persons subject to the law may not have adequate access to its terms.

The committee acknowledges that paragraph 15J(2)(c) of the *Legislation Act* does not expressly require that documents incorporated by reference be obtainable without charge. However, the committee is not confined, in its scrutiny, to the express requirements of the *Legislation Act*. The committee is also concerned with ensuring that delegated legislation has certainty of meaning and operation, and conforms to fundamental legal principles. The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms.

In this regard, while the committee notes the minister's advice that it is expected that the persons most affected by the adoption of the incorporated standards would have access to those standards and be familiar with their terms, the committee is also interested in the broader issue of access for other parties who might be affected by, or who are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published

a detailed report on this issue.⁶⁵ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

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

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

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

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|--------------------------------|---|
| 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 | <i>Therapeutic Goods Act 1989</i> |
| 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 ⁶⁶ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Incorporation of documents⁶⁷

Committee's initial comment:

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

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

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

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

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

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

legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

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

The committee therefore expects instruments or their ESs to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the ES to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁶⁸

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 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:

68 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 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.

Minister's response

The Minister for Health advised:

The intended incorporation of the documents noted in the Committee's Monitor 1 of 2018 in relation to this instrument, and their availability, are as follows:

| Incorporated document | Intended incorporation | How document may be obtained |
|--|--|--|
| <i>ISO 8317:2015 Child-resistant packaging – Requirements and testing procedures for reclosable packages.</i> | As published by the International Organization for Standardization (ISO) on 5 November 2015. | From the ISO website: https://www.iso.org for a fee of \$121 pdf. A free preview is also available on this website. |
| <i>Australian Standard AS 1928-2007 Child-resistant packaging – Requirements and testing procedures for reclosable packages (ISO 8317:2003 MOD).</i> | As published by Standards Australia on 31 October 2007. | From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of \$130.23 pdf. A free 9 page sample of this standard is also available on this website. |
| <i>British Standards Institution Standard BS EN ISO 8317:2015 Child-resistant packaging – Requirements and testing procedures for reclosable packages.</i> | As published by the British Standards Institution on 31 December 2015. | From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of \$157.06 (hardcover) or \$309.79 pdf. A free preview is also available from the British Standards website: https://www.bsigroup.com/ . |
| <i>Canadian Standards Association Standard CSA Z76.1-16 Reclosable child-resistant packages.</i> | As published by the Canadian Standards Association on 1 December 2016. | From the website of the Canadian Standards Association: http://www.csagroup.org/ for a fee of \$111.05 pdf. A brief overview is also available on this website without charge. |

The above documents incorporated in the...*Therapeutic Goods Order No.95 Child-resistant packaging requirements for medicines 2017* are adopted because they represent critical Australian or international benchmarks of safety and quality in relation to...child-resistant packaging for medicines. It would not be feasible from a regulatory perspective to not adopt such benchmarks because they are not available for free.

While most of these documents attract a fee for access, it is expected that the persons most affected by their adoption – manufacturers and sponsors of therapeutic goods – would have access to the documents and be familiar with their terms.

It is also noted that paragraph 15J(2)(c) of the *Legislation Act 2003* requires that an explanatory statement indicate how incorporated documents may be obtained, but does not appear to require that such documents be obtainable without charge.

[A] replacement explanatory statement, with the above clarifications, will be arranged as soon as possible for [this instrument].

Committee's response

The committee thanks the minister for his response. The committee notes the minister's advice regarding the manner in which the standards are incorporated into the instrument (that is, as in force at particular dates) and where those standards may be obtained. The committee also notes the minister's undertaking that a replacement ES, which clarifies the manner in which the standards are incorporated and how they may be accessed, will be arranged as soon as possible.

However, the committee remains concerned that the incorporated standards appear only to be available on payment of a fee. The committee will be concerned where documents incorporated into an instrument are not readily and freely available, because persons subject to the law may not have adequate access to its terms.

The committee acknowledges that paragraph 15J(2)(c) of the *Legislation Act* does not expressly require that documents incorporated by reference be obtainable without charge. However, the committee is not confined, in its scrutiny, to the express requirements of the *Legislation Act*. The committee is also concerned with ensuring that delegated legislation has certainty of meaning and operation, and conforms to fundamental legal principles. The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily and freely access its terms.

In this regard, while the committee notes the minister's advice that it is expected that the persons most affected by the adoption of the standards would have access to those standards and be familiar with their terms, the committee is also interested in the broader issue of access for other parties who might be affected by, or who are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue.⁶⁹ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

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

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

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

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|--------------------------------|--|
| Instrument | Torres Strait Regional Authority Election Rules [F2017L01279] |
| Purpose | Sets rules for the conduct of elections for the Torres Strait Regional Authority |
| Authorising legislation | <i>Aboriginal and Torres Strait Islander Act 2005</i> |
| Portfolio | Prime Minister and Cabinet |
| 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 ⁷⁰ Notice given on 7 December 2017 ⁷¹ |
| Scrutiny principle | Standing Order 23(3)(a) and (b) |
| Previously reported in | <i>Delegated legislation monitors 14 and 16 of 2017</i> |

Offences: strict liability

Committee's initial comment:

The committee notes that the instrument contains two offences with elements of strict liability:

- Paragraph 154(1)(a) creates an offence where a person in a polling booth on polling day engages in conduct that disrupts, or tends to disrupt, the operation of the poll. Subrule 154(2) provides that strict liability applies to whether the conduct disrupts, or tends to disrupt, the operation of the poll; and
- Subrule 155(1) creates an offence where a person has been removed from a polling booth at the direction of the presiding officer given under subrule 154(3), and re-enters the booth without permission. Subrule 155(2) provides that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

In a criminal law offence the proof of fault is usually a basic requirement. Offences of strict liability remove the fault element that would otherwise apply. This means a person could be punished for doing something, or failing to do something, whether or not they have a guilty intent. This should only occur in limited circumstances.

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

71 See Parliament of Australia, *Disallowance Alert 2017*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2017.

Given the potential consequences for individuals of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences, that is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Offences Guide).⁷²

The explanatory statement (ES) to the instrument provides no discussion of the strict liability offences in the instrument, nor any justification for their imposition. The statement of compatibility for the instrument similarly fails to identify and address the imposition of strict liability as a human rights issue.

The committee draws the minister's attention to the discussion of strict liability offences in the Offences Guide as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

The committee requests the minister's advice in relation to the justification for each of the strict liability offences within the instrument, and requests that the ES be amended to include that information.

Minister's first response

The Minister for Indigenous Affairs advised:

I note the Committee's request and the importance of providing additional information about the use of strict liability elements in the TSRA Election Rules and consideration of any associated human rights issues.

I note the respective provisions are consistent with [the] *Guide to framing Commonwealth offences, infringement notices and enforcement powers*.

...

My Department will revise the Explanatory Statement to provide further information about the strict liability offences and the reversal of the burden of proof and consideration of any associated human rights issues.

Committee's first response

The committee thanks the minister for his response and notes the minister's advice that the strict liability offences in the instrument are consistent with the Offences Guide.

The committee also notes the minister's advice that the Department of the Prime Minister and Cabinet will revise the ES to provide further information about the strict liability offences. However, the committee notes that no information about the justification for the application of strict liability to the offences has been provided in

72 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 minister's response, and at the time of this report a replacement ES had not yet been registered on the Federal Register of Legislation.

Until such time as the committee receives further advice from the minister as to the justification for the application of strict liability to each of the offences in the instrument, or receives a replacement ES that addresses these matters, the committee is unable to be satisfied that the application of strict liability in each of the offences in the instrument is appropriate.

In the absence of a replacement explanatory statement being provided to the committee, the committee requests a further response from the minister as to the justification for the application of strict liability in subrules 154(2) and 155(2) of the instrument.

Minister's second response

The Minister for Indigenous Affairs advised:

[T]he Department of the Prime Minister and Cabinet has revised the Explanatory Statement for the TSRA Election Rules (attached) by:

1. Justifying sub-delegation powers of the Electoral Commissioner.
2. Justifying strict liability offences.
3. Justifying reversing the burden of proof for a number of offence provisions.

Relevant excerpt from the replacement ES:

Notes on offences with elements of strict liability

The instrument contains two offences with elements of strict liability:

- paragraph 154(1)(a) provides that it is an offence where a person in a polling booth on polling day engages in conduct that disrupts, or tends to disrupt, the operation of the poll. Subrule 154(2) provides that strict liability applies to whether the conduct disrupts, or tends to disrupt, the operation of the poll.
- subrule 155(1) provides that it is an offence where a person has been removed from a polling booth at the direction of the presiding officer given under subrule 154(3), and re-enters the booth without permission. Subrule 155(2) provides that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

The objective of imposing strict liability for such offences is to provide for the proper conduct of elections and ensure that voters are free to exercise their democratic rights without interference or disruption. In the interests of public safety and the broader public interest, it is reasonable that only the conduct of the accused be proved. Honest and reasonable mistake of fact remains an allowable defence, as per section 9.2 of the *Criminal Code*.

The penalties for the above offences do not include a term of imprisonment and are significantly less than the 60 penalty unit limit generally considered appropriate for strict liability offences under the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Committee's final response

The committee thanks the minister for his further response. The committee notes that the replacement ES provided to the committee, containing justification for the strict liability offences, has been registered on the Federal Register of Legislation.

The committee has concluded its examination of this matter.

Offences: evidential and legal burdens of proof on the defendant

Committee's initial comment:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in their individual capacities, this infringement on well-established and fundamental rights is justified.

The committee notes that four provisions in the instrument set out a defence to an offence, but impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence:

- Subrule 73(3), defence to unlawfully entering a polling booth without permission if the person had permission from the Presiding Officer;
- Rule 135, defence to divulging information about the vote of a voter if done for the purposes of Part 4 (scrutiny of the votes);
- Subrule 139(2), defence to distributing certain electoral advertising material if the material is of specified kinds; and
- Subrule 144(2), defence to leaving voting directions in polling booths if the document is an official instruction displayed by proper authority.

Five further offences also specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:

- Subrule 140(3), defence to offences in relation to the publication and distribution of misleading or deceptive material if the person proves that they did not know, or could not be reasonably expected to know, that the thing was likely to mislead a voter;
- Subrule 140(4), defence to offences in relation to publication of false representations of ballot papers if the person proves that they did not know, or could not be reasonably expected to know, that the representation was likely to induce a voter to vote informally;

- Subrules 153(4) and (5), defences to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority; and
- Subrule 156(2), defence to offence of defamation of candidates if the person proves that he or she had reasonable grounds for believing and did in fact believe the statement made to be true.

The ES to the instrument provides no discussion of the reversed burdens of proof in the instrument, nor any justification for their imposition. The statement of compatibility for the instrument similarly fails to identify and address the reversal of the burden of proof as a human rights issue.

The committee's expectation is that the appropriateness of provisions which reverse evidential and legal burdens of proof should be explicitly addressed in the ES, with reference to the relevant principles as set out in the Offences Guide.

The committee requests the minister's advice in relation to the justification for the placement of the evidential or legal burdens of proof upon defendants in each of the instances noted above, and requests that the ES be amended to include that information.

Minister's first response

The Minister for Indigenous Affairs advised:

I note the Committee's request and the importance of providing additional information about the reversal of the burden of proof for a number of offence provisions in the TSRA Election Rules and consideration of any associated human rights issues.

I note the respective provisions are consistent with [the] *Guide to framing Commonwealth offences, infringement notices and enforcement powers*.

My Department will revise the Explanatory Statement to provide further information about the strict liability offences and the reversal of the burden of proof and consideration of any associated human rights issues.

Committee's first response

The committee thanks the minister for his response and notes the minister's advice that the provisions reversing the burden of proof are consistent with the Offences Guide.

The committee also notes the minister's advice that the Department of the Prime Minister and Cabinet will revise the ES to provide further information about the reversal of the burden of proof and consideration of any associated human rights issues. However, the committee notes that no information about the justification for the reversal of the evidential and legal burdens of proof has been provided in the minister's response, and at the time of this report a replacement ES had not yet been registered on the Federal Register of Legislation.

Until such time as the committee receives further advice from the minister as to the justification for the reversal of the evidential and legal burdens of proof in each of the offences in the instrument, or receives a replacement ES that addresses these matters, the committee is unable to be satisfied that the reversals of the burdens of proof have been sufficiently justified.

In the absence of a replacement explanatory statement being provided to the committee, the committee requests a further response from the minister as to the justification for reversing the burden of proof in each of the provisions previously identified by the committee.

Minister's second response

The Minister for Indigenous Affairs advised:

[T]he Department of the Prime Minister and Cabinet has revised the Explanatory Statement for the TSRA Election Rules (attached) by:

1. Justifying sub-delegation powers of the Electoral Commissioner.
2. Justifying strict liability offences.
3. Justifying reversing the burden of proof for a number of offence provisions.

Relevant excerpt from the replacement ES:

Notes on offences providing a defence which imposes an evidential or stronger legal burden of proof on the defendant

Four provisions in the instrument set out a defence to an offence, but impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence:

- subrule 73(3), defence to unlawfully entering a polling booth without permission if the person had permission from the Presiding Officer;
- rule 135, defence to divulging information about the vote of a voter if done for the purposes of Part 4 (scrutiny of the votes);
- subrule 139(2), defence to distributing certain electoral advertising material if the material is of specified kinds; and
- subrule 144(2), defence to leaving voting directions in polling booths if the document is an official instruction displayed by proper authority.

An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In the above instances, the Election Rules place an evidential burden on the defendant as he or she is best placed to raise evidence of any assertions he or she are seeking to rely upon in defending the charges.

Five further offences specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:

- subrule 140(3), defence to offences in relation to the publication and distribution of misleading or deceptive material if the person proves that they did not know, or could not be reasonably expected to know, that the thing was likely to mislead a voter;
- subrule 140(4), defence to offences in relation to publication of false representations of ballot papers if the person proves that they did not know, or could not be reasonably expected to know, that the representation was likely to induce a voter to vote informally;
- subrules 153(4) and (5), defences to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority; and
- subrule 156(2), defence to offence of defamation of candidates if the person proves that he or she had reasonable grounds for believing and did in fact believe the statement made to be true.

As per the Attorney General's Department Guidance Sheet on the presumption of innocence, under international human rights law, 'a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused.'

The policy objective of the above-listed provisions is to ensure the integrity of TSRA elections, and to safeguard voters from being misled by officials or purported officials. By imposing on the defendant the evidential burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that proper care is taken in the exercise of official duties, in communicating with voters and producing material. In such cases, it is more practical for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct, than the prosecution to have to disprove it.

Subrules 140(3) and (4) – in relation to publication of deceptive material – are consistent with the burden of proof stipulated under section 329 of the *Commonwealth Electoral Act 1918* (Electoral Act), while subrule 156(2), which refers to alleged defamation, is consistent with the usual approach to defamation under the general law.

Furthermore, any decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Committee's final response

The committee thanks the minister for his further response. The committee notes that the replacement ES provided to the committee, containing justification for the placement of evidential and legal burdens of proof on the defendant, has been registered on the Federal Register of Legislation.

The committee notes the statement in the ES that four provisions impose an evidential burden of proof on the defendant to establish defences to offences 'as he

or she is best placed to raise evidence of any assertions he or she [is] seeking to rely upon in defending the charges'. However, the committee notes that the Offences Guide states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁷³

In this respect, it is not clear to the committee that the matters set out in these defences—such as whether a person had permission from a Presiding Officer to be in a polling place, or whether advertising material was of a specified kind—would be *peculiarly* within the knowledge of the defendant, and that they would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

Similarly in relation to the five provisions imposing legal burdens of proof on the defendant, the ES states that '[i]n such cases, *it is more practical* for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct, than the prosecution to have to disprove it' (emphasis added). While this may be true for some of the offences, the defences in subrules 153(4) and (5) to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority, do not relate to a defendant's reasonable belief, and would not appear to be matters peculiarly within the defendant's knowledge, or more difficult and costly for the prosecution to prove than for the defendant to establish.

In regard to the justification provided for all nine defence provisions, the committee notes that the defendant being 'best placed' to provide evidence of a matter, or it being 'more practical' for the defendant to do so, does not equate to that matter being peculiarly within the defendant's knowledge.

With regard to the five provisions reversing the legal burden of proof, the committee further notes that the Offences Guide also states that where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.⁷⁴ Such justification has not been provided in this case. In fact, the ES does not appear to acknowledge the nature of the legal burden of proof, erroneously referring to it as an 'evidential' burden.

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

74 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 52.

The committee emphasises that the general duty of the prosecution to prove all elements of an offence is an important aspect of the right to be presumed innocent until proven guilty, and that provisions that reverse the legal burden of proof and require a defendant to disprove one or more elements of an offence, interfere with this important common law right.

The committee has concluded its examination of the instrument. However, the committee draws its concerns about the reversal of the evidential and legal burdens of proof in relation to nine offences established by this instrument to the attention of the minister and the Senate.

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| <p>Instruments</p> | <p>Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 Amendment 6 [F2017L01493]</p> <p>Vehicle Standard (Australian Design Rule 19/02 – Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2005 Amendment 1 [F2017L01481]</p> <p>Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017 [F2017L01554]</p> <p>Vehicle Standard (Australian Design Rule 67/00 – Installation of Lighting and Light Signalling Devices on Three-Wheeled Vehicles) 2006 Amendment 1 [F2017L01494]</p> <p>Vehicle Standard (Australian Design Rule 74/00 – Side Marker Lamps) 2006 Amendment 1 [F2017L01479]</p> <p>Vehicle Standard (Australian Design Rule 84/00 – Front Underrun Impact Protection) 2009 Amendment 1 [F2017L01516]</p> <p>Vehicle Standard (Australian Design Rule 86/00 – Parking Lamps) 2016 [F2017L01497]</p> <p>Vehicle Standard (Australian Design Rule 87/00 – Cornering Lamps) 2016 [F2017L01484]</p> |
| <p>Purpose</p> | <p>[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</p> <p>[F2017L01554:] Makes transitional arrangements for motorcycles and mopeds to move from compliance with this standard to new braking standard 33/01</p> <p>[F2017L01516:] Amends the rules relating to underrun protection devices fitted or incorporated into heavy goods vehicles, to remove ambiguity and reduce their stringency</p> |

| | |
|--------------------------------|---|
| Authorising legislation | <i>Motor Vehicle Standards Act 1989</i> |
| Portfolio | Infrastructure and Regional Development |
| Disallowance | 15 sitting days after tabling [F2017L01493, F2017L01481, F2017L01494, F2017L01479, F2017L01497, F2017L01484, F2017L01516:] Tabled Senate 27 November 2017. The time to give a notice of motion to disallow expired on 15 February 2018. Notice given on 15 February 2018 ⁷⁵ [F2017L01554:] Tabled Senate 4 December 2017. Notice of motion to disallow must be given by 22 March 2018 ⁷⁶ |
| Previously reported in | <i>Delegated legislation monitor 1 of 2018</i> |

Incorporation of documents⁷⁷

Committee's initial comment:

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

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

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

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

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

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

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

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*.⁷⁸

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:

78 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 manner of incorporation of each of the documents incorporated by reference into each of the above instruments; 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 instruments and/or their explanatory statements be updated to include this information.

Minister's response

The Minister for Urban Infrastructure and Cities advised:

Manner of incorporation of documents

All of the subject Determinations incorporate references to United Nations (UN) Regulations. These are international standards, which specify equivalent requirements and test methods to Appendix A within each of a number of the Determinations. Specifically, UN R48, 53, 91, 93, 77 and 119 are listed as acceptable alternative standards. In addition, there [are] a number of incorporated references that sit within these primary references. These are as follows: UN R1, 3, 4, 6,7, 8, 13, 13-H, 18, 19, 20, 23, 31, 37, 38, 45, 48, 50, 57, 70, 72, 77, 78, 87, 88, 91, 97, 98, 99, 104, 107, 112, 113, 116, 119, 121, 123 and 128.

Appendix A of each of these Determinations also incorporates references to E/ECE/324-E/ECE/TRANS/505/Rev.2 and in some cases the Consolidated Resolution on the Construction of Vehicles (R.E.3).

In addition, ADR 13/00 specifically references the Guide to Meteorological Instruments and Methods of Observation, Sixth Edition, Commission Internationale de l'Eclairage (CIE) Publication 15.2, 1986 Colorimetry, CIE 1931 standard colorimetric observer, and CIE Publication No. 70, Vienna 1987, Federal Motor Vehicle Safety Standards (FMVSS) 108 Lamps, Reflective Devices and Associated Equipment. ADRs 19/02 and 67/00 reference International Standards Organisation (ISO) 2575:2004 - Road vehicles - Symbols for controls, indicators and tell-tales. ADR 84/00 refers to ISO 612:1978 Road vehicles - Dimensions of motor vehicles and towed vehicles. ADR 74/00, 86/00 and 87/00 references International Electrical Commission (IEC) publication 60061.

As these standards are not legislative instruments, Sub-sections 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 Determinations. For this reason, I instructed the Department of Infrastructure, Regional Development and Cities to amend the Explanatory Statements to explicitly state that these

standards are incorporated as in force at the commencement of the Determinations.

Access to incorporated documents

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 UN Regulations, E/ECE/324-E/ECE/TRANS/505/Rev.2 and R.E.3 are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is <http://www.unece.org/trans/main/welcwp29.html>

The Guide to Meteorological Instruments and Methods of Observation, Sixth Edition, is freely available at <https://library.wmo.int/opac/#.Woo8bkpsZaQ>.

ISO 2575:2004 is a minor standard that is available for purchase only, through the ISO. This is a highly technical standard, which specifies requirements and recommendations for measurement techniques involving the instrumentation used in lighting devices on road vehicles. It has been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years as an optional requirement. Vehicle test facilities (in particular lighting laboratories) access this standard as part of their professional library. ISO 612:1978 is also available for purchase and both ISO documents are available at www.iso.org/home.html.

FMVSS 108 is accessible free of charge via the United States Government Publishing Office website at www.gpo.gov/fdsys/search/showcitation.action.

IEC publication 60061 is a minor standard that is available for purchase only, through the IEC. This is a highly technical standard, which specifies requirements and recommendations for measurement techniques involving electrical requirements for road vehicles. It has been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years. Vehicle test facilities (in particular lighting laboratories) access this standard as part of their professional library. Documents are available at www.iec.ch/.

CIE publications are minor standards that are available for purchase only, through the CIE. These are highly technical standards, which specify requirements and recommendations for measurement techniques involving lighting requirements for 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 lighting laboratories) access these standards as part of their professional library. Documents are available at www.cie.co.at/.

In line with best-practice and consistent with section 15J of the Legislation Act, I have instructed the department to amend the Explanatory Statements to include a description of these standards as well as details of how to access them.

Marked up copies of the revised Explanatory Statements are enclosed for your information. I understand these replacement Explanatory Statements will shortly be registered on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response. The committee notes the minister's undertaking to register the replacement ESs provided to the committee, which include descriptions of the manner of incorporation and access to incorporated documents, on the Federal Register of Legislation.

However, the committee notes that in some cases, the replacement ESs have not identified all of the documents incorporated by reference in the instruments, or provided all of the relevant information in relation to the manner of their incorporation and access to them. The committee considers that continued care is required to ensure that the ES to each instrument made correctly identifies and deals with every document incorporated by reference in that instrument.

The committee also notes that the minister's response refers to paragraph 14(1)(b) and subsection 14(2) of the Legislation Act having the effect that the instruments can only incorporate the standards as in force at the time the instruments commence, and not as in force from time to time. However, as outlined in the committee's initial comment, section 7A of the *Motor Vehicle Standards Act 1989* (Motor Vehicle Standards Act) provides authority to incorporate documents in these instruments as in force from time to time. This does not appear to be recognised in the minister's response, or in the replacement ESs.

The committee therefore understands the minister's response to indicate that section 7A of the Motor Vehicle Standards Act is not intended to apply to any of the documents incorporated by reference in these instruments. The committee emphasises, however, that the existence of the power under section 7A of the Motor Vehicle Standards Act makes it all the more important that the manner of incorporation be specified in ESs to instruments made under that Act.

The committee further notes, for clarity, that where a document is reproduced in full in a legislative instrument, that document is *not* incorporated by reference. As such, the relevant requirements in relation to specifying the manner of incorporation and access to the document do not apply, since its text forms part of the legislative instrument, and therefore commences and is available accordingly. Moreover, the provisions of such documents as applied in the instrument can only be changed by amending the legislative instrument itself. With regard to the present instruments, this means that the UN Regulations reproduced in full in the schedule to each

instrument are not incorporated by reference and do not attract the requirements set out by the committee.

Finally, the committee notes the minister's advice that certain international standards incorporated by reference in some of the instruments are only available on payment of a purchase fee. The committee is concerned where documents incorporated into an instrument are not readily and freely available, because persons subject to the law may not have adequate access to its terms.

The committee notes the minister's advice that the key users of those instruments (vehicle test facilities) are likely to have access to the incorporated standards as part of their professional libraries. However, the committee is also interested in the broader issue of access for other parties who might be affected by, or who are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue.⁷⁹ The report comprehensively outlines the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.

The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document may be made available to interested or affected persons. This might, for example, involve noting the availability of the document through specific public libraries, or making the document available for viewing upon request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ESs to the relevant instruments.

The committee has concluded its examination of the instruments. However, the committee draws its comments above in relation to the incorporation of documents in these instruments to the minister's attention. The committee will continue to monitor these issues.

Senator John Williams (Chair)

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