The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-023240

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

24 OCT 2018

Dear Senator Williams

I refer to the letter from Ms Anita Coles, Committee Secretary, Senate Regulations and Ordinances Committee (the Committee) of 18 October 2018 concerning *the National Health Security Regulations 2018* [F2018L01247].

I note that 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.

I note that the Committee has requested further advice in relation to sharing personal information under Part 2 of the *National Health Security Act 2007,* specifically to the Australian Federal Police (AFP) and the Australian Secret Intelligence Organisation (ASIO), which are specific prescribed entities under Section 6 of the *National Health Security Regulations 2018* for the purposes of section 23(2)(b) of the *National Health Security Act 2007.*

Three specific questions were posed by the Committee and further information is provided below to assist to provide clarification around this important consideration.

The committee has requested my advice as to:

(1) *Why it is considered necessary and appropriate to allow persons to disclose protected information (which could include significant personal information) to the Australian Federal Police and the Australian Security Intelligence Organisation.*

There may be extraordinary, unforeseen circumstances related to National Security or criminal activity that may require the disclosure of protected information (including personal information) to the AFP or ASIO to prevent harm to the Australian community under Part 2 of the *National Health Security Act 2007* which relates to public health surveillance. Some examples of when this may occur include the following situations:

- the National Focal Point, within my Department, could conceivably be notified by another country that an individual who has intentionally infected or contaminated themselves with a biological, radiological or chemical agent or other serious infectious disease, is travelling to Australia and intends to cause widespread harm;

- a state or territory health authority has identified a patient infected or contaminated with a security sensitive biological, radiological or chemical agent and the circumstances are unusual, for example a patient has presented with inhalational anthrax and the source is unknown; or
- there is evidence that suggests that an individual who has means to access, infect or contaminate themselves with, and spread a security sensitive agent or serious infectious disease, intends to deliberately infect or contaminate others.

(2) The type of protected information that it is envisaged would be disclosed to those agencies, and how that information would be used and managed.

The type of information disclosed would depend on the situation, however could include, name, date of birth, passport number, State of residence, possibly matching Incoming Passenger Card if available, which contains an accommodation address, telephone number and emergency contact. In addition, any other personal information that may have been provided by the original notifier may be disclosed to assist in locating the threat e.g. workplace or recent movements.

Intelligence agencies would use the protected information to locate, prevent or interrupt the threat to minimise harm to the Australian community. Early intervention is critical to ensure harm prevention and/or minimisation.

(3) What safeguards are in place to protect individuals' privacy?

The information disclosed would be handled in accordance with the Protective Security Policy Framework and would only be shared over an appropriately classified network, to authorised individuals, that hold an appropriate security clearance, on a need-to-know basis.

Where personal information is required to be shared with the AFP or ASIO, my Department would share the information over either the Commonwealth Protected or Australian Secret Network, depending on the classification of the information. Personal information would also be sent in two parts i.e. disease specific information would be sent separately to personal identifiers and could also be encrypted.

I further note that it is the Committee's view that significant matters, such as the intelligence agencies to which protected information may be disclosed, are more appropriately enacted via primary rather than delegated legislation. A review of the *National Health Security Act 2007* has commenced and consideration will be given to this through that process.

Thank you for bringing these concerns to my attention.

Yours sincerely

Greg Hunt

SENATOR THE HON MATHIAS CORMANN
Minister for Finance and the Public Service
Leader of the Government in the Senate

REF: MS18-001605

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter, dated 13 September 2018, which was sent to my office seeking further information about the item for the Regional Employment Trials program that is in the following instrument:

- the *Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 2) Regulations 2018*.

The Minister for Jobs and Industrial Relations, the Hon Kelly O'Dwyer MP, who is responsible for the item in the instrument, has provided the attached response to the Committee's request. I trust that this advice will assist the Committee with its consideration of the instrument. I have copied this letter to the Minister for Jobs and Industrial Relations.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance and the Public Service

24 October 2018

Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 2) Regulations 2018

Response provided by the Minister for Jobs and Industrial Relations, the Hon Kelly O'Dwyer MP

Decisions in relation to participation in projects funded under the Regional Employment Trials program

The Senate Standing Committee on Regulations and Ordinances (the Committee) has requested detailed advice as to the characteristics of decisions in relation to participation in projects funded under the Regional Employment Trials (RET) program that would justify excluding merits review.

The Committee is concerned that 'a decision to refuse to allow a job seeker to participate in a project may substantially affect their interests – particularly where the job seeker is seeking to fulfil requirements under a social security program'.

Job seekers who are participating in *jobactive*, ParentsNext or Transition to Work within a trial region may participate in projects funded under the RET program.

Employment services providers may make decisions about whether particular job seekers can participate in RET projects, such as a project involving mentoring or an internship. In practice, providers are very likely to encourage job seekers to participate in RET projects, rather than prevent them from doing so, as the projects will be generally relevant to their need to find and keep paid work.

Participating in projects funded under the RET program may assist job seekers to maintain their eligibility for their Newstart Allowance, Youth Allowance (other) or Parenting Payment under the social security law. These payments, sometimes known as participation payments, involve participation requirements which recipients need to meet to maintain eligibility to receive their payment.

However, participation in a RET project is not the only way a job seeker could meet their participation requirements - there is a wide range of other ways in which they could do so.

These ways include, for example, engaging in voluntary work; the National Work Experience Programme; the New Enterprise Incentive Scheme; the Skills for Education and Employment Program; Work for the Dole; part-time work; part-time study in an eligible course; participation in accredited language, literacy and numeracy training; drug and alcohol treatment and other non-vocational treatments; and involvement in the Australian Defence Force Reserves.

A decision to deny a job seeker access to participation on a RET project, which as noted above is unlikely to occur in practice, would not substantially affect that job seeker's interests, whether or not the job seeker was subject to participation requirements at the time.

This is because of the availability of other activities and programs that provide employment experience and training opportunities. Examples of these activities and programs are above. These may be used not only to help the job seeker find and keep paid work, but also to assist the job seeker meet any applicable participation requirements and therefore maintain their eligibility to receive participation payments while looking for work.

In practice, there is no realistic prospect that denying a job seeker access to a RET project would affect their eligibility to receive participation payments, for the reason above.

However, if a job seeker nonetheless considered that their ability to meet their participation requirements had been impacted by non-access to a RET project, for example because they considered that none of the alternative activities were suitable for them, and they were subject to compliance action for failing to participate, they could seek review by the Department of Human Services (DHS) of any decision to reduce, cancel or suspend their payment. If dissatisfied by the DHS decision, they could seek review of the decision by the Administrative Appeals Tribunal, both on the merits and in relation to questions of law, if any.

Decisions in relation to early access to the Relocation Assistance to Take up a Job Programme

The Committee requested 'detailed advice as to the characteristics of decisions in relation to early access to the Relocation Assistance to Take up a Job Programme, that would justify excluding merits review'. The Committee also sought identification of the criteria on which these decisions are based.

The Relocation Assistance to Take up a Job Programme is an Australian Government program that provides financial assistance to eligible participants who need to relocate to take up ongoing, full-time employment. Relocation assistance helps participants find work outside of their local area and assists to remove some of the barriers that prevent them from relocating for work. Funding is flexible and can be used for a range of relocation related costs.

Generally, job seekers are eligible to access the Relocation Assistance to Take up a Job Programme if they:

- apply before they move and start their job;
- are registered as a fully eligible job seeker with a *jobactive* provider, an Intensive Stream participant with a ParentsNext provider or participating in Disability Employment Services;
- have activity test or participation requirements under social security law; and
- have been receiving Newstart Allowance, Youth Allowance (other) or Parenting Payment for the last 12 months.

Participants in Structural Adjustment Programmes, as well as the Stronger Transitions package, have immediate access to this assistance as long as they are registered with a *jobactive* provider as a fully eligible participant.

Under the RET program, rather than needing to meet the 12 month requirement outlined in the fourth dot point above, Stream A job seekers will be able to access relocation assistance after three months of being on a participation payment. This is an objective matter, not involving discretion. Streams B and C job seekers will be able to access assistance immediately after commencement in *jobactive*. This is also an objective matter, not involving discretion.

Job seekers are placed in Stream A, Stream B and Stream C within *jobactive* depending on their needs using a classification and assessment tool called the Job Seeker Classification Instrument (JSCI). Stream A job seekers need the least support and Stream C job seekers need the most support. The JSCI is a questionnaire conducted by DHS or employment services providers.

Whether a job seeker is in Stream A, Stream B or Stream C can be objectively determined and does not involve discretion. There is only a need to ascertain which stream they have been placed in as a result of the JSCI assessment. Such a determination is therefore not suitable for merits review as it is mandatory or procedural in nature.

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS AND THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Ref No: MS18-001230

Senator John Williams
Chair
Senate Committee on Regulations and Ordinances
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Dear Senator John

Disallowable Legislative Instrument - Radiocommunications (Invictus Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018

I refer to correspondence from Ms Anita Coles, Secretary of the Senate Committee on Regulations and Ordinances (the Committee) dated 18 October 2018, about the Radiocommunications (Invictus Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018 (the determination).

I am advised that in making the determination, the Australian Communications and Media Authority (the Authority) intended that the Radiocommunications (Radionavigation-Satellite Service) Class Licence 2015 and the Australian Radiofrequency Spectrum Plan 2017 would be incorporated into the determination as in force at the time they were made. This is consistent with the effect of paragraph 6(a) of the determination and therefore no amendments to the determination are required.

The explanatory statement to the determination incorrectly states, however, that the instruments mentioned above are incorporated as in force from time to time. I am advised that the Authority plans to lodge an updated explanatory statement that will correct this error, on or before Friday 26 October.

Thank you for bringing this matter to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD
25/10/18

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The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-023242

Senator John Williams
Chair
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25 OCT 2018

Dear Senator John

Thank you for your letter of 18 October 2018 on behalf of the Standing Committee on Regulations and Ordinances (the Committee) requesting information on the *National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018* (No. 9) (PB 74 of 2018) [F2018L01223].

My responses to the Committee's questions are set out below:

1. Incorporation of other documents

I can advise that the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) is referenced by the above instrument, but only to the extent that it is relevant in the diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) for patients eligible to receive pharmaceutical benefits available for guanfacine or atomoxetine under the Pharmaceutical Benefits Scheme (PBS).

2. Manner of incorporation

The above Instrument incorporates DSM-5 as part of the Authority Required (Streamlined) benefits for two medicines on the PBS for the treatment of ADHD. It is intended that the Instrument incorporates the DSM-5 as the current edition of the DSM.

The purpose of incorporating the DSM-5 as the current edition of the DSM is to ensure that the provision of pharmaceutical benefits under the PBS reflects current clinical practice. To this end, based on expert clinical advice from the Pharmaceutical Benefits Advisory Committee (PBAC), the DSM-5 is a key resource utilised by health professionals treating ADHD patients to diagnose and classify mental disorders.

a. Legislative authority for incorporation

I refer the Committee to section 101(3C) of the *National Health Act 1953* (the Act). Under this provision the Pharmaceutical Benefits Advisory Committee (PBAC) is able to recommend that pharmaceutical benefits shall only be available in the circumstance set out in its recommendation.

As part of its recommendation documented in the Public Summary Document for guanfacine from the PBAC July 2017 meeting (accessible online at www.pbs.gov.au), the PBAC recommended that the pharmaceutical benefits for guanfacine should be restricted in circumstances that include a positive diagnosis of ADHD in accordance with DSM-5 criteria made by a treating doctor who must be a paediatrician or psychiatrist.

The PBAC also recommended that the restrictions for atomoxetine be aligned with guanfacine and is reflected by an amendment to the restrictions for atomoxetine to change the reference to DSM-IV to DSM-5 and this change is also reflected in the above Instrument.

In accordance with section 88A of the Act, I or my delegate determined under subsection 85(7) that pharmaceutical benefits for guanfacine and atomoxetine are authorised only in the specified circumstances as recommended above by the PBAC.

3. Description and access to incorporated documents

The DSM-5 may be accessible free of charge to affected persons, being the patients at the point of care, as it is expected the medical practitioners involved in the treatment of ADHD have access to the DSM-5 to consult the relevant diagnostic criteria. Alternatively, a person affected by the above Instrument may access the document through specialist biomedical libraries at most major universities.

I trust that this information is of assistance.

Yours sincerely

Greg Hunt

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-023243

Senator John Williams (Chair)
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CANBERRA ACT 2600

25 OCT 2018

Dear Senator

Therapeutic Goods Order No.98 – Microbiological Standards for Medicines 2018
[F2018L01287]

I refer to your letter of 18 October 2018 concerning the Senate Regulations and Ordinances Committee's queries about the above disallowable legislative instrument, and set out below advice in relation to this instrument.

Therapeutic Goods Order No.98 – Microbiological Standards for Medicines 2018
[F2018L01287]

Consultation

Therapeutic Goods Order No.98 – Microbiological Standards for Medicines 2018 (TGO 98) was principally designed to replace *Therapeutic Goods Order No.77 – Microbiological Standards for Medicines* (TGO 77), which was repealed on 1 October 2018 under the sunsetting provisions of the *Legislation Act 2003*, without substantial changes.

The TGA undertook consultation on the proposal to remake TGO 77 without substantially altering the arrangements for microbiological standards for medicines that were in place under that instrument, with the proposal available on the TGA web site (www.tga.gov.au) for public comment between 6 February and 6 March 2018. Eight submissions were received, with most supporting the action on the basis that TGO 77 continued to be efficient and effective. One submission disagreed with the proposal, and several requested a small number of technical modifications. Some of those were not able to be implemented in TGO 98 for microbiological safety reasons. However, a request to exclude multidose low water activity preparations from the need to comply with requirements relating to preservative efficacy was considered not to raise safety concerns and was reflected in TGO 98.

A replacement explanatory statement, including the above explanation, will be arranged as soon as possible.

Incorporation

In relation to each of the British Pharmacopoeia (BP), European Pharmacopoeia (EP) and the United States Pharmacopeia-National Formulary (USP), those documents are defined in section 4 of TGO 98 as having the same meaning as in the *Therapeutic Goods Act 1989* (the Act). The definitions of those documents in subsection 3(1) of the Act refer, as the Committee has noted, to the publications of each of those documents as in effect immediately before the commencement of the relevant definition, and to any subsequent amendments or editions (the definition of 'default standard' in subsection 3(1) also points – in effect - to a

monograph of any of those three pharmacopoeia, as defined). So the intention was that, by including those definitions, the instrument would (when read alongside the Act), make the intended manner of incorporation clear.

However, it has since been identified that at the time of its making, incorporating these documents as in force from time to time in TGO 98 was precluded by subsection 14(2) of the *Legislation Act 2003*. An amendment to section 10 of the Act to allow such instruments to adopt matters contained in an instrument or other writing as in force or existing from time to time commenced on 22 September 2018 (item 2 of Part 1 of Schedule 2 to the *Therapeutic Goods Amendment (2018 Measures No.1) Act 2018* refers), but TGO 98 was made before that amendment commenced (TGO 98 was made on 12 September 2018).

Information will therefore be included in the replacement explanatory statement to identify that those pharmacopoeia are adopted by reference to the editions in place at the time of TGO 98's commencement (separately, it is likely that TGO 98 will be replaced by a similar instrument that is able to utilise the recent amendment to section 10, following specific consultation).

The replacement explanatory statement will also include information about how the pharmacopoeia may be accessed (https://www.pharmacopoeia.com/ for the BP, http://online.edqm.eu/EN/entry.htm for the EP and https://www.uspnf.com/ for the USP).

Unfortunately these publications are not available for free (a range of prices may apply depending on whether a person wishes to take out a subscription (and if so how many users would be involved), or purchase a particular edition). However, it is expected that the persons most affected by their adoption – in this case, medicines sponsors and manufacturers – would be aware of their terms and have access to them. As important international benchmarks for the safety and quality of therapeutic goods, it would not be feasible from a regulatory perspective (particularly in relation to such an important area as ensuring that medicines are free from microorganisms that might cause harm) to not adopt such benchmarks because they are not available for free.

It should also be noted that the National Library's Trove online system (https://trove.nla.gov.au/) allows users to identify libraries in Australia that are open to the public where (in most cases, earlier) editions of these pharmacopoeia may be viewed (for example, the University of Tasmania or the University of Western Australia in relation to the BP). Members of the public may also approach any library that participates in inter-library loans to request an inter-library loan with such university libraries, to obtain a photocopy of a particular part or monograph for personal study or research (but not for commercial purposes), at a usual cost of $16.50 per request (enquiries should be made with local libraries, State libraries and the National Library).

The Committee's remarks in relation to the *Medical Devices Standards Order (Endotoxin Requirements for Medical Devices) 2018* and the *Therapeutic Goods (Permissible Ingredients) Determination No.3 of 2018* are also noted, and replacement explanatory statements will also be arranged for both as soon as possible.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

29 OCT 2018

The Hon Stuart Robert MP
Assistant Treasurer

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
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CANBERRA ACT 2600

Dear Senator John

Thank you for your request for further information in the Committee's *Delegated legislation monitor 12 of 2018* about the **Census and Statistics (Information Release and Access) Determination 2018 [F2018L01114]** (the Determination).

The Committee has requested advice as to:

- the nature of each of the decisions that may be made by the Australian Statistician under paragraphs 11(1)(a) to (e) of the Determination and how, in each instance, such decisions are purely factual and do not require the Australian Statistician to form an opinion or make a determination; and

- the grounds on which it is considered appropriate to exclude merits review of the Australian Statistician's decision to impose conditions on the disclosure of statistical information.

The Determination

Before addressing your questions specifically, I would like to provide further background to the Determination and how it is used by the Australian Bureau of Statistics.

The Determination complements the *Census and Statistics Act 1905* (the Act) by setting out the circumstances under which the Australian Statistician may release statistical information collected under the Act. The Act places strict secrecy requirements on the information collected under the Act, and upholding this secrecy is critical to the social compact that the ABS has with the broader community.

The Determination replaces the *Statistics Determination 1983* (the previous Determination). The previous Determination ensured that the ABS could release detailed statistical information for identified policy, analytical and research purposes set out in the Determination, while maintaining the confidentiality of the information as required by the Act.

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The Determination is a critical piece of legislation which enables detailed information about Australian business and organisations to be released, on a public or limited basis, to support decision making by governments and a broad range of users. For example, the Determination enables the Australian Bureau of Statistics to release components of key economic indicators such as International Trade in Goods and Services, Building Approvals and the National Accounts. The determination also enables researcher access to detailed microdata, such as for government work on productivity.

Without a Determination in place, some current activities of the Australian Bureau of Statistics which are important to government decision-making, such as the two examples above, would not be able to be undertaken.

Extensive consultation was conducted in remaking the Determination, in two phases from 7 December 2017 to 16 February 2018 and from 12 June to 6 July 2018. Stakeholders did not raise any concerns about the nature of decisions or the need for merits review.

Nature of decisions under Section 11(1)(a) to (e)

In relation to the Committee's first question, the classes of statistical information that are covered by these subsections in the Determination are statistics that relate to:

- an official body;
- foreign trade, being statistics derived wholly or in part from customs or import documents;
- interstate trade, being statistics which are the result of compilation and analysis of information provided by Tasmania;
- building and construction, not being the costs or net returns of individual builders or contractors;
- agriculture, apicultural, poultry, dairying and pastoral activities not being the costs or net returns of individual operators.

The only decision that the Australian Statistician must make under subsections 11(1)(a) to (e) is whether the particular piece of information to be disclosed is of a kind specified in one of those subsections.

Whether or not a particular piece of information is covered by one of the above classes is a question of fact. Such decisions rely on classifications of information which are determined on an objective basis, having regard to the nature of the information, and for certain classes, the manner in which it was collected. For example, if the Australian Statistician were considering release of information about the poultry industry under subsection 11(1)(e), he/she would need to be satisfied that the information related to organisations that are classified by the Australian and New Zealand Standard Industrial Classification (ANZSIC) to the poultry farming industry and did not disclose the costs or net returns of individual operators.

These types of considerations by the Australian Statistician are subject to judicial review under *Administrative Decisions (Judicial Review) Act 1977*, which ensures that the classification of a particular piece of information can be reviewed by the Courts.

Of note, in addition to the decisions that the Committee referred to under subsections11(1)(a) to (e), the Australian Statistician is prohibited by subsection 11(2) from releasing information where an individual or the responsible officer of an organisation has shown that the disclosure of the

information would be likely to enable the identification of the individual or organisation. Where an objection of this kind is satisfied based on factual evidence, the Australian Statistician cannot authorise the disclosure of information under section 11, irrespective of whether it is of the kind referred to in subsections 11(1)(a) to (e).

Conditions on disclosure of statistical information

The various conditions that the Australian Statistician imposes on individuals and organisations allow the disclosure of information on a confidential basis, to be accessed through a safe and controlled environment. In practice, the Australian Statistician seeks to understand requests to disclose information and applies the most appropriate conditions to balance user requirements with compliance with the Act. Such requirements can relate to, for example, the manner in which the information can be accessed (such as only through a secure data laboratory facility), the specific individuals who can access the data and the use to which it can be put.

The Australian Statistician has demonstrated a willingness to agree to appropriate terms and conditions governing access arrangements with users, insofar as the conditions do not conflict with the general requirements imposed on the Australian Statistician under the Act. The general requirements of the Act (such as the general requirement in section 13 which prohibits the disclosure of information that would likely to enable the identification of particular persons) take precedence over any provision in the Determination.

A merits review of the conditions proposed by the Australian Statistician may be ineffective as, given the general requirements in the Act, there may be no appropriate remedy. For example, a remedy may require a variation to a condition imposed by the Australian Statistician in an undertaking. Any suggested variation to the conditions may result in information not being able to be disclosed at all because such conditions were imposed to ensure compliance with the Act. Further, the costs associated with a merits review process may be disproportionate to the potential limited benefits such a process could deliver.

On this basis, I consider the Determination strikes an appropriate and accepted balance between the disclosure of information and the critical protections enshrined in the *Census and Statistics Act 1905*, and that the Australian Statistician's decision to impose conditions on the disclosure of information under should not be subject to merits review.

I trust that this information is of assistance to the Committee.

Yours sincerely

Stuart Robert

TREASURER

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Chair

Thank you for your correspondence on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice in relation to the *Australian Prudential Regulation Authority (APRA) Banking (prudential standard) determination No. 4 of 2018* (the instrument). The instrument requires authorised deposit-taking institutions (ADIs) to implement prudent measures and to set prudent limits to monitor and control their large exposures and risk concentrations. Its purpose is to limit the potential for large losses in the event of a counterparty failure, and to ensure that ADIs monitor, manage and control the concentration of exposures, loans or investments to counterparties, industries, countries or particular asset classes.

I note the Committee's question whether decisions made by APRA to set limits on particular exposures (exercising power under paragraph 31 of Prudential Standard APS 221 Large Exposures (APS 221)) and to approve exposures that would exceed certain exposure limits (exercising power under paragraph 36 of APS 221) are subject to merits review.

I have raised the Committee's concerns with APRA. They have advised me that APS 221 was determined pursuant to section 11AF of the *Banking Act 1959* (Banking Act). Part V of the Banking Act sets out mechanisms for reconsideration and review of decisions, including a right to apply to the Administrative Appeals Tribunal (AAT). Reconsideration and review is only available in relation to decisions that are specified in the Banking Act to be "reviewable decisions". The Banking Act does not specify that decisions made under paragraphs 31 or 36 of APS 221 are reviewable decisions, nor does APS 221 itself do so. Consequently, decisions made under either paragraph are not subject to merits review.

Paragraph 31 of APS 221 is considered by APRA to be a "reserve power". If APRA were to use this power, it would be strongly of the view that the ADI was exposed to significant losses such that if specific limits were not set on particular exposures of the ADI, the viability of the ADI, deposits in the ADI and financial stability could be materially impacted. This decision would be supported by detailed research, analysis and careful consideration by decision makers within APRA.

Under paragraph 36, an "ADI must obtain approval from APRA prior to undertaking any proposed exposures which would exceed the large exposure limits under paragraph 30" of APS 221. The decision by APRA to grant a higher exposure limit to an ADI would represent a concession to the ADI. A decision to approve higher exposure limits to an ADI is to be made on an exceptions basis, only. Such a decision would involve assessments of the specific

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circumstances of the ADI and the ability for APRA to achieve its mandate of financial stability whilst balancing other factors.

I note that under the scrutiny principle 23(3)(c) of the committee's terms of reference the Committee must ensure that legislative 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. APRA protects the Australian community by establishing and enforcing prudential standards through exercising powers under the Banking Act. Furthermore, ADIs are consulted when APRA determines prudential standards and consultation on APS 221 occurred in 2017. APRA received a number of submissions in response, none of which suggested that the powers under paragraphs 31 and 36 of APS 221 should be subject to merits review.

Under the *Australian Prudential Regulation Authority Act 1998*, APRA's primary objectives in regulating ADIs are to protect financial safety and financial system stability in Australia. To achieve this mandate, APRA adopts a prudential supervision approach where it may be necessary to adjust requirements for an ADI taking into account the particular circumstances. APRA advises that if decisions taken in respect of powers under paragraph 31 and 36 were subject to AAT review, this may result in delays and uncertainty that could jeopardise APRA's ability to deal with an emerging problem before it becomes a pressing crisis.

APRA's decisions under APS 221 are subject to judicial review, and it is suggested that this provides an adequate safeguard for ADIs (which are all corporations) that are subject to decisions under paragraphs 31 and 36.

Consequently, it could reasonably be concluded that while ADIs do not have access to merits review, that this was not an undue imposition upon the rights of ADIs.

I hope this information will be of use to the Committee.

Yours sincerely

Josh Frydenberg

2 / 11 / 2018

TREASURER

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite 1.111
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Canberra ACT 2600

Dear Chair John

Thank you for your correspondence on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice in relation to the *Australian Prudential Regulation Authority Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2018* (the instrument). The objective of reporting standard ARS 221.0, the instrument in question, is to determine the requirements for the provision of information to APRA relating to an authorised deposit-taking institution's (ADIs) large exposures.

I note the Committee's question whether the ISO standards 3166 and 17442 are intended to be incorporated in the instrument. I have raised the Committee's concerns with APRA. They have advised me that the ISO standards are not intended to be incorporated in the instrument because the contents of these standards are not relevant to understanding the terms of the instrument.

APRA advises ARS 221.0 requires ADIs to report the counterparty country as 'the English name of the relevant country as assigned by the ISO 3166 Maintenance Agency to a country code defined under [ISO 3166]' and the Legal Entity Identifier (LEI) as 'the 20-digit, alpha-numeric code issued by a Local Operating Unit in accordance with [ISO 17442]'.

APRA further advises the ISO 3166 Maintenance Agency assigns the country names and country codes under ISO 3166, however, up-to-date information about the names and codes is only available online via the Online Browsing Platform or by purchasing the Country Codes Collection. Consequently, for the purpose of reporting the counterparty country in ARS 221.0, an ADI is expected to refer to the information online and not to ISO 3166. Similarly, Local Operating Units (LOUs) provide registration services for entities that wish to be issued an LEI code. LEIs are only searchable via an online database. LEIs are not contained in ISO 17442, and it would not be possible for an ADI to determine an entity's LEI by referring to the standard.

I hope this information will be of use to the Committee.

Yours sincerely

Josh Frydenberg
2 / 11 / 2018

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The Hon Stuart Robert MP
Assistant Treasurer

Ref: MS18-0003653

Senator John Williams (Chair)
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Dear Senator Williams

Thank you for your letter on behalf of the Senate Regulations and Ordinances Committee (the Committee) dated 18 October 2018, drawing my attention to the Committee's comments in *Delegated Legislation Monitor 12 of 2018*. The Committee seeks further advice on the following:

- *Corporations (Passport) Rules 2018*
- *Taxation (Interest on Overpayments and Early Payments) Regulations 2018*
- *ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751*
- *ASIC Corporations (Amendment) Instrument 2018/825*

My response in relation to those instruments is at Attachment A. I appreciate the Committee's further consideration of these instruments.

I trust that this information will be of assistance to the Committee.

Yours sincerely

Stuart Robert

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7230

ATTACHMENT A

Corporations (Passport) Rules 2018

Incorporation by reference

The Committee has requested the Minister's advice about:

- the manner in which each of the documents identified at paragraph 1.69 above is incorporated by the instrument (that is, as in force from time to time or as in force at a particular time);
- where it is intended to incorporate a document as in force from time to time, the specific provision in the *Corporations Act 2001* or other Commonwealth legislation that permits incorporation in this manner; and
- where each of the documents identified above may be accessed free of charge.

Manner of incorporation

Parts 1, 4 and 9 of the *Corporations (Passport Rules) 2018* (the Passport Rules) include tables which refer to the laws in other participating economies.

In Part 1, the table at section 4 lists the types of documents that are 'constituent documents' of a passport fund under the laws of each of the participating economies. In relation to the table at section 4, the explanatory statement states, on page 2:

> The table…does not seek to incorporate the laws of the participating economies by reference. Instead, the provision merely turns on whether, as a matter of fact, the document has a particular status under the law of another jurisdiction.

In Part 4 of the Passport Rules, tables referring to the laws of other participating economies are used in section 7 and sections 13 to 16.

The table at section 7 is relevant for determining whether the operator of a passport fund meets the financial resources test. An operator meets the financial resources test if its equity is greater than USD 1,000,000 plus an additional capital amount. Equity is calculated by using the operator's 'balance sheet prepared in accordance with relevant accounting standards'. The table at section 7 then lists the relevant accounting standards in each of the participating economies and is used to determine whether the financial record has the status of a 'balance sheet prepared in accordance with relevant accounting standards'. The table is designed to assist in determining whether, as a matter of fact, a document is a 'balance sheet' under section 7. It is not designed to incorporate those foreign accounting standards into Australian law.

The table at section 13 is used to determine which entity has the status of 'the responsible holding party' for a passport fund. As subsection 13(1) notes, this entity holds the status of a responsible holding party under the laws of the participating economy. The table does not seek to incorporate the laws of the participating economy into Australian law.

The table at section 14 is relevant for determining which entity is the 'independent oversight entity'. Again, the independent oversight entity holds its status under the laws of the participating economy and the table does not incorporate those foreign laws into Australian law.

Similarly, the table at section 15 is used to determine which entity has the status of the 'implementation reviewer'. This depends on whether the entity holds a particular designation or accreditation under the laws of the fund's home economy. Again, the section does not seek to incorporate those foreign laws into Australian law.

Section 16 includes two tables at subsections (4) and (6). These tables operate differently to the other tables in the Passport Rules. Under section 16, the operator of a passport fund must prepare financial statements that are in accordance with the financial reporting requirements in their home economy. The operator must also ensure that the financial statements are audited and that an audit report is prepared in accordance with the audit requirements in their home economy. The tables in section 16 therefore incorporate the laws of a foreign economy. These laws are incorporated from time to time, rather than at a particular point in time.

In relation to the tables in Part 2 of the Passport Rules, page 6 of the explanatory statement explains that:

> [Part 2] includes tables which refer to the laws of another jurisdiction. In most instances, the laws of another jurisdiction are only relevant for determining whether or not, as a matter of fact, a party has a particular status. One exception is section 16 which incorporates the financial reporting and auditing requirements in certain specified international instruments as in force from time to time.

The explanatory statement, on page 6, then sets out two reasons why incorporation from time to time is necessary:

> First, section 16 of the Rules mirrors the corresponding section in Annex 3 which is also intended to incorporate certain specified international instruments as in force from time to time. If the Rules did not incorporate the specified international instruments as in force from time to time, the rules in Australia would not be substantially the same as Annex 3 [of the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport(MOC)] and the requirements of section 1211 could not be met. As a result, Australia could not give effect to its commitments under the MOC.
>
> Second, Annex 3 and the Rules would become unworkable if the instruments were not incorporated as in force from time to time. Amendments to the specified instruments are likely to be made with reasonable frequency. If these amendments were not automatically incorporated, the Joint Committee would need to undertake the potentially lengthy process for changing Annex 3 set out in paragraph 9 of the MOC. The participating economies would also need to take the necessary steps to incorporate the amendments into their domestic laws.

Section 56 in Part 9 includes a table which lists the entity that is the operator for different collective investment schemes. This table includes references to foreign laws but this is only for the purpose of identifying, as a matter of fact, which entity is the

operator for particular types of collective investment schemes. For example, if a scheme is registered in New Zealand under the *Financial Markets Conduct Act 2013*, the operator is the entity licensed to be the manager of the investment scheme licensed under that Act. Section 56 does not incorporate the *Financial Markets Conduct Act 2013* or any other laws into Australian law.

If section 56 or any of the other sections in Parts 1 or 2 are taken to incorporate the laws of a foreign economy by reference, the same logic would apply. That is, the instruments would need to be incorporated from time to time, rather than at a point in time.

Power to incorporate

The power to make the Passport Rules is contained in subsection 1211(1). The subsection only gives me, as the relevant Minister, the power to make rules which are substantially the same as Annex 3 of the MOC. This limitation on my power to make rules is required to give effect to the MOC which Australia signed on 28 April 2016. The MOC envisages that there will be a single set of uniform rules that apply in all participating economies. The benefits of the Asia Region Funds Passport Regime would be lost if there were substantial differences between the passport rules that apply in each participating economy.

Annex 3 of the MOC is the same as the Passport Rules in all material respects. It also includes tables in Parts 1 and 2 which refer to the laws in the participating economies. In relation to the tables at section 16, Annex 3 seeks to incorporate the foreign laws as they are in force from time to time.

Therefore, I only have power to make passport rules which incorporate the foreign laws as in force from time to time in the same way as in Annex 3 of the MOC. The rules that I made would not be substantially the same as Annex 3 of the MOC if they did not include the tables which list the foreign laws in Parts 1 and 2. Nor would the rules be substantially the same if they caveated the way in which these tables were to operate. For this reason, the footnote on page 6 of the explanatory statement suggests that ‘section 1211 can be seen as manifesting by necessary implication, an intention that the Rules may incorporate other instruments as in force from time to time as required by section 14 of the *Legislation Act 2003*’.

Accessing the foreign laws

The explanatory statement includes a table which lists where each of the foreign laws in section 16 can be accessed online free of charge. The table lists only the foreign laws in section 16 because this is the only section which seeks to incorporate the laws of another country by reference.

The table below lists the foreign laws which are mentioned in other sections in the Passport Rules and where those foreign laws can be accessed free of charge.

Foreign Law	***Sections in the Passport Rules***	***Jurisdiction***	***Link to English version***
Act on Investment Trusts and Investment Corporations	4, 13, 14, 15 and 56	Japan	http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjJn9erjKDeAhUKLY8KHaeqCo8QFjAAegQICRAC&url=http%3A%2F%2Fwww.japaneselawtranslation.go.jp%2Flaw%2Fdetail_download%2F%3Fff%3D09%26id%3D1903&usg=AOvVaw22sewPJVd7bMo0_bJZ5Zgz
Certified Public Accountants Act	15	Japan	http://www.japaneselawtranslation.go.jp/law/detail/?id=1900&vm=04&re=02
Companies Act	14 and 15	Japan	http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02
Financial Instruments and Exchange Act and accounting standards made under that Act	7 and 16	Japan	https://www.fsa.go.jp/common/law/fie01.pdf
Financial Investment Services and Capital Markets Act and general accounting principles made under that Act	4, 7, 13, 15 and 16	Korea	http://law.go.kr/LSW/eng/engLsSc.do?menuId=1&query=Financial+Investment+Services+and+Capital+Markets&x=0&y=0#liBgcolor13
Financial Investment Business and Capital Markets Act	14	Korea	http://www.moleg.go.kr/english/korLawEng;jsessionid=BRNffEPu46saMSGt13fp5t9lQSDV8Al2bDzIXIC31azWNOsegdm0S1tRaQ1j9vIb.moleg_a2_servlet_engine2?pstSeq=47650&searchCondition=AllButCsfCd&searchKeyword=financial+investment

Act on External Audit of Stock Companies and accounting standards made under that Act	7	Korea	http://www.moleg.go.kr/english/korLawEng?pstSeq=52594
Auditor Regulation Act 2011	15	New Zealand	http://www.legislation.govt.nz/act/public/2011/0021/latest/whole.html
Financial Markets Conduct Act 2013	4, 16 and 56	New Zealand	www.legislation.govt.nz/act/public/2013/0069/latest/whole.html
Financial Reporting Act 2013 and accounting standards made under that Act	7	New Zealand	http://www.legislation.govt.nz/act/public/2013/0101/latest/DLM4632829.html?search=ts_act%40bill%40regulation%40deemedreg_Financial+Reporting+Act_resel_25_a&p=1
Financial Markets Supervisors Act 2011	13, 14 and 15	New Zealand	http://www.legislation.govt.nz/act/public/2011/0010/latest/DLM2651118.html?src=qs
Securities and Futures Act	4, 13, 14 and 15	Singapore	https://sso.agc.gov.sg/Act/SFA2001
Accountants Act	15	Singapore	https://sso.agc.gov.sg/Act/AA2004
Accounting Standards Act (Chap. 2B) and accounting standards made under that Act	7 and 16	Singapore	https://sso.agc.gov.sg/Act/ASA2007
Recommended Accounting Practices	7 and 16	Singapore	https://isca.org.sg/tkc/fr/financial-reporting-standards/singapore/recommended-accounting-practices-rap/
Singapore Standards on Auditing	16	Singapore	https://isca.org.sg/tkc/aa/standards/standards/
Accounting Guidelines for Investment Management business	7 and 16	Thailand	http://oldweb.aimc.or.th/keepfile/announce_attachment/assom841533627945.pdf (Thai version) The Guidelines are currently being translated into English and the English version will be made available on the AIMC's webpage.

Thai Standards on Auditing	16	Thailand	http://www.fap.or.th/en/Article/Detail/67426
Securities and Exchange Act B.E. 2535 (1992)	4, 13, 14, 15 and 56	Thailand	https://www.sec.or.th/EN/SECInfo/LawsRegulation/Pages/SECSection.aspx
Trust for Transactions in Capital Market Act B.E. 2550 (2007)	4, 13 and 14	Thailand	https://www.sec.or.th/EN/SECInfo/LawsRegulation/Documents/actandroyal/5the%20trust.pdf

Alternatively, a person may contact the Australian Securities and Investments Commission (ASIC) to source a copy of the foreign laws that are mentioned in the Passport Rules. ASIC's Customer Contact Centre may be contacted on 1 300 300 630 within Australia or +61 3 5177 3988 outside Australia during standard business hours (8:30am to 5:00pm Monday to Friday). ASIC is also preparing guidance on these foreign laws and this will be made available on ASIC's website at https://asic.gov.au before the official start date of the ARFP regime in February 2019.

The explanatory statement will be amended to include the additional information sought by the Committee.

ATTACHMENT B

Taxation (Interest on Overpayments and Early Payments) Regulations 2018

The Committee has requested more detailed advice as to the nature of the consultation undertaken in relation to the *Taxation (Interest on Overpayments and Early Payments) Regulations 2018*.

Consultation undertaken on the draft regulations

As stated in the Explanatory Statement to the instrument, targeted consultations were undertaken on the exposure draft regulations and the exposure draft Explanatory Statement. This occurred between 24 July 2018 and 1 August 2018. Stakeholders who participated in this consultation included relevant members of the Tax Treaties Advisory Panel (TTAP). These members were contacted in their capacity as representatives of professional bodies (accounting and legal) as they were likely to have an interest in these regulations. The TTAP is a consultative panel established to assist Treasury in the development of tax treaty policy and it is made up of representatives from the peak industry bodies. The Australian Taxation Office (ATO) was also consulted on the draft regulations. No significant issues were raised as a result of consultation. However, feedback on several minor issues from the TTAP and the ATO was taken into account. This resulted in minor changes to the new instrument and the Explanatory Statement.

References to the international double tax agreements

As stated in the subsection 5(2) of the instrument, and as also noted by the Committee, the *Taxation (Interest on Overpayments and Early Payments) Regulations 2018* provide (under section 5 – definitions) that a reference to a double tax agreement by name is a reference to the agreement so described in section 3AAA or 3AAB of the *International Tax Agreements Act 1953*. As also noted by the Committee, the *International Tax Agreements Act 1953* incorporates these double tax agreements and provides a reference pointing users to where they can find these agreements in the Australian Treaty Series. As provided in a note to subsection 3(1) of this Act:

> Most of the conventions, protocols and other agreements described in these sections are set out in the Australian Treaty Series. In 2011, the text of an agreement in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Australia's treaties (including double tax agreements) continue to all be publicly available in the Australian Treaties Library, which is free to access for users and can be found online at the above website.

The explanatory statements will be amended to include additional information about the nature of consultation undertaken.

ATTACHMENT C

ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751

The Committee has requested advice as to:

- whether decisions by ASIC to notify a group purchasing body that it cannot rely on the exemption provided by section 5 of the instrument are subject to merits review; and

- if not, what characteristics of those decisions would justify excluding merits review.

ASIC's view is that decisions made under section 7 of Instrument 2018/751 are not subject to independent merits review by the AAT because the instrument does not provide for it.

The 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 exercise of powers conferred by that enactment or in the exercise of powers conferred by another enactment having effect under the 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'. Instrument 2018/751 is an instrument made under subsections 601QA(1), 926A(2), 951B(1) and 992B(1) of the *Corporations Act 2001* (Corporations Act) and so falls within the definition of 'enactment'. However, as it is currently worded, Instrument 2018/751 does not provide for applications to be made to the AAT for a review of decisions by ASIC under section 7 of Instrument 2018/751.

ASIC has also considered whether the Corporations Act provides for an application to be made to the AAT for review of decisions made under section 7. Section 1317B of the Corporations Act provides that 'applications may be made to the AAT for review of decisions made under this Act'. While section 9 of the Corporations Act defines 'this Act' as including regulations, it makes no reference to legislative instruments issued by ASIC (such as the Instrument). Further, ASIC holds the view that an exercise of power under section 7 of Instrument 2018/751 is an exercise of incidental powers under s11(4) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Exercise of this ASIC Act power is not a decision made under the Corporations Act (as required by section 1317B) so is not reviewable by the AAT. Section 244 of the ASIC Act identifies decisions under the ASIC Act which are reviewable by the AAT. These do not include decisions under s11(4) of the AAT Act.

In response to the Committee's concern ASIC has reviewed whether decisions made under section 7 of Instrument 2018/751 should be excluded from merits review, and advised that it will progress amendments to the instrument to enable applications to the AAT to review these decisions.

ATTACHMENT D

ASIC Corporations (Amendment) Instrument 2018/825

The Committee has requested more detailed advice as to:

- the appropriateness of extending for a further three years, an exemption in relation to employee redundancy funds from requirements in the *Corporations Act 2001*(Corporations Act), noting that the exemption has now been in force for more than 18 years;

- when a new regulatory regime for employee redundancy funds is likely to be implemented; and

- what steps are currently being taken to amend the Corporations Act and the Australian *Securities and Investments Act 2001*(ASIC Act) to permanently remove employee redundancy funds from the managed investment scheme and associated provisions.

ASIC Corporations (Amendment) Instrument 2018/825 and earlier ASIC instruments provide relief to the operators of employee redundancy funds from the managed investment and associated provisions of the Corporations Act. In light of the industrial relations character and the practices and objectives of these funds which diverge so fundamentally from conventional managed investment schemes it is not clear whether Parliament intended that these funds should be caught by the managed investment scheme framework of the Corporations Act. This framework imposes considerable compliance burdens on persons operating the funds and the protections for persons benefiting from these funds under the managed investment regime are not tailored for the circumstances of these beneficiaries.

Every public consultation undertaken by ASIC has confirmed that an exemption should continue and regulation under the Corporations Act and ASIC Act of employee redundancy funds is not appropriate. The alternative to continuing the exemption, regulation under the managed investment provisions of the Corporations Act, does not appear to have any public support (although ASIC was asked to consider this by the Royal Commission into Trade Union Governance and Corruption). In essence, doing so would involve regulating redundancy funds as an investment vehicle.

ASIC considered a 36-month extension to the relief provided by ASIC Instrument 2015/1150 was necessary to allow sufficient time for the passage of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill) which will introduce a new regulatory regime for worker entitlement funds. The Bill has been passed by the House of Representatives and is currently in the Senate. The timing of its passage is a matter for Parliament. When the Bill commences, worker entitlement funds will be subject to the new regulation under the *Fair Work (Registered Organisations) Act 2009* and will be permanently excluded from regulation under the Corporations Law and no further changes will be required to the Corporations Act or ASIC Act.

The new regulatory regime for worker entitlement funds will commence on a day to be fixed by Proclamation within six months from the date of Royal Assent.

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MS18-001998

05 NOV 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

The Senate Standing Committee on Regulations and Ordinances (Committee) has requested further information about provisions in the *Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018.* The enclosure sets out my response to the question raised by the Committee.

I thank the Committee for their consideration of the instrument to improve the regulation of the export of plants and plant products, to maintain and grow Australia's market access.

Yours sincerely

DAVID LITTLEPROUD MP

Enc: Response to a request for information from the Senate Standing Committee on Regulations and Ordinances

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

Response to a request for information from the Senate Standing Committee on Regulations and Ordinances

The Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018

No invalidity clause

The committee requests the minister's more detailed advice as to why a failure by the Secretary to provide notice to an applicant of a decision to refuse to grant, renew or vary a property accreditation, or to alter an accredited property, would not affect the validity of the relevant decision.

The provisions operate to ensure that a failure to notify, in those situations described above, does not in and of itself give rise to invalidity of that decision. That is, its inclusion in the instrument ensures that the decision remains valid notwithstanding the communication or otherwise of that decision.

In making decisions whether to accredit a property, renew or vary a property accreditation or alter an accredited property the Secretary must reach a level of satisfaction having regard to matters that the Secretary considers relevant, as provided for in the instrument. This is a lengthy process, based on the considerations that the Secretary must take into account, set out in subsections 9B.2, 9G.3 and 9K.5. These include:

- that the Secretary is satisfied that the prescribed goods will meet importing country requirements;
- that conditions of accreditation have been met and are being complied with; and
- that the manager of the property has complied with the requirements of the *Export Control Act 1982* and the *Export Control (Plant and Plant Products) Order 2011*.

The instrument contains express requirements for the Secretary to notify applicants of decisions, in subsections 9D.2, 9J.2 and 9L.3. The inclusion of these provisions imposes a positive obligation on the Secretary to communicate adverse decisions. It is expected that applicants will in all cases receive notice in accordance with these subsections.

Subsections 9D.3, 9J.3 and 9L.4 are intended to ensure that, in a rare case where there is an unintended failure to provide written notice, the validity of the Secretary's decision is unaffected. This is because the Secretary's decision will have been based on the relevant matters as set out above.

Australia's two billion dollar horticulture export industry relies heavily on ensuring the high standards of our exported goods. If a decision made by the Secretary to refuse to grant, renew or vary a property accreditation, or to alter an accredited property, could be invalidated due to a failure to notify, it could have significant consequences for ensuring the appropriate regulation of the export of goods.

Retrospective effect

The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of the transitional provisions in section 53 to 57 of the instrument; and, if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness.

The transitional provisions of the *Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018* (the Order), including sections 53 to 57, are intended to ensure that there is minimal disadvantage resulting from the commencement the Order.

The transitional provisions ensure that managers making applications to be export listed properties or have their export listing renewed continue to be eligible to participate in the production and preparation of goods for the relevant export season(s) and the export of horticulture products from Australia in accordance with legislative requirements will not be disrupted during the transition away from administered policy arrangements of export listed properties.

The receipt and processing of applications for accreditation and renewal prior to each horticulture commodity export season is time critical to ensure that all applications can be considered, and the Department of Agriculture and Water Resources can undertake physical assessments of properties to which each application relates, prior to the commencement of the export season(s). Paragraphs 53.3(b), 54.3(b) and 55.3(b) intend to limit any disadvantage caused by the commencement of the Order by providing that the relevant applications will be taken to comply with the application requirements in subsection 9ZG.1. Furthermore, paragraphs 53.3(a), 54.2(a) and 55.3(a) provide that applications are taken to be applications to which Division 7 of Part 2A applies. The operation of these paragraphs provides the Secretary with the power to request that the applicant give the Secretary further information or documents relevant to the application to assist with consideration of the application (paragraph 9ZJ.1(a)). Due to the high value of horticulture exports to protocol markets and the timing of export seasons, the department, on behalf of the Secretary, works closely with industry and managers, and utilises the section 9ZJ powers for dealing with applications, to ensure that all information and documentation, necessary to support consideration of applications and timely decision making, is available.

The criteria for consideration by the Secretary, set out in subsections 9B.2, 9G.2 and 9K.5 of the Order, are the same as the criteria that were applied to the consideration of applications to export list a property, renew or vary an export listing, or alter an export listed property under administrative arrangements, prior to the commencement of the instrument. The exception to this is the criterion provided at paragraphs 9G.2(c) and 9K.5(c) relating to compliance with the requirements of the *Export Control Act 1982* (Act), the *Export Control (Plants and Plant Products) Order 2011,* and any other instrument in force under the Act that applies in relation to the accreditation, the operations, and prescribed goods covered by the accreditation. Any disadvantage imposed as result of including this additional criterion is justified by:

- avoiding disadvantage that would otherwise be imposed on a manager if they were required to submit an additional application to the Secretary following commencement of the instrument; and

- the importance of the Secretary being able to consider this criterion to achieve the objects of the Act and the Order—to protect Australia's trade reputation and market access from adverse impacts.

Guidance on how to meet the conditions and requirements for accreditation, and the criteria for approval are detailed in publicly available documents that were developed in consultation with relevant horticulture industries. The transitional provisions reflect the outcomes of this consultation with stakeholders on both the publicly available documents and the instrument. These steps were taken to further mitigate any disadvantage imposed by the retrospective effect of the transitional provisions.

As sections 53, 54 and 55 provide that the applications are taken to be applications under the instrument, the Secretary's decision in relation to the application is subject to notice requirements specified in the Order. Furthermore, the Secretary's decision in relation to the application is also subject to reconsideration and review provisions under Part 16 of the *Export Control (Prescribed Goods—General) Order 2005*. As such, these provisions provide formal procedural fairness to those managers who had applied for export listing of their properties, to renew or vary the export listing of their property, or alter an export listed property, prior to commencement of the Order.

A manager's application can be withdrawn at any time prior to a decision being made on the application under the Order. Even if a property is accredited or an accreditation renewed as a result of the application, subsection 9X.3 provides that the Secretary must revoke the accreditation where the manager requests that the Secretary revoke the accreditation of the property.

Sections 55, 56 and 57 are intended to minimise disadvantage, caused by the commencement of the Order, to a manager who has requested that the Secretary vary, suspend or revoke the accreditation or a property, or approve an alteration to an accredited property. The provisions intend to reduce the time that it takes to receive and process a manager's application or request to limit disadvantage to the manager and ensure a manager will have certainty regarding the legal obligations, conditions and requirements they will and will not be required to meet in relation to their accreditation, as soon as possible. The extent that sections 55, 56 and 57 impose a disadvantage on the manager of an accredited property through their operation is justified by assisting the Australian Government to protect Australia's trade reputation and market access. The intention is that the provisions will contribute to achieving this outcome by reducing the likelihood of non-compliant behaviour by managers or exporters that may otherwise occur if the Secretary's decision making was delayed.

Additionally, as sections 56 and 57 provide that the relevant request is taken to be a request under the instrument, the Secretary must suspend or revoke the accreditation as requested, and the suspension or revocation must be undertaken through written notice to the manager in accordance with subsections 9R.1 and 9X.3.

It is rare that managers make requests to suspend or revoke their accreditation, or apply to vary their approval or alter their property, because export listed property approvals and accreditations are made annually. Immediately prior to commencement of this instrument the Secretary had not received any applications from managers seeking approval to vary the export listing of the property or alter the export listed property, or requests from managers for

their export listing to be suspended or revoked. Irrespective, the department has processes in place to ensure managers who apply to vary their export listing or alter their property, or request that that the export listing be suspended or revoked, are contacted to confirm their intention before a decision is made by the Secretary. These steps were taken in consultation with industry to avoid any disadvantage that would be caused by the retrospective effect of the transitional provisions.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance and the Public Service
Leader of the Government in the Senate

REF: MS18-001664

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 18 October 2018, which was sent to my office seeking further information about the item for supporting sustainable access to drinking water that is in the following instrument:

- the *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2018.*

The Minister for Defence, the Hon Christopher Pyne MP, who is responsible for the item in the instrument, has provided the attached response to the Committee's request. I trust that this advice will assist the Committee with its consideration of the instrument. I have copied this letter to the Minister for Defence.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance and the Public Service

7 November 2018

Response to a request for information from the Senate Standing Committee on Regulations and Ordinances

Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2018 [F2018L01128]

Response provided by the Minister for Defence, the Hon Christopher Pyne MP

The Committee requested further advice as to why decisions in relation to the provision of support under the Sustainable Access to Drinking Water program would not be subject to independent merits review. The Committee's discussion refers specifically to review processes undertaken by the Administrative Appeals Tribunal (AAT), and why such review should not be available in relation to decisions under the program.

In our previous advice to the Committee, we outlined the largely objective criteria that will apply in relation to this program, and the measures in place to provide for internal review in the unlikely event a request is refused and a resident seeks reconsideration. Review by the AAT, or any other independent merits review tribunal, is not feasible or appropriate for a number of reasons:

- The Sustainable Access to Drinking Water program is not a statutory scheme. It is an administrative scheme established within the Department of Defence.

- The program has been included in the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations) to provide absolute certainty that there is legal authority for the expenditure of funds for this program. The FF(SP) Regulations ensure that there is legal authority to make and administer arrangements and grants for the purposes of the programs listed, but do not otherwise establish or regulate the programs. The Regulations are made under subsection 32B(1) of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), which provides:

> *If:*
> *(a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:*
> *(i) an arrangement under which relevant money or other CRF money is, or may become, payable by the Commonwealth; or*
> ...
> *(iii) a grant of financial assistance to a person other than a State or Territory; and*
> *(b) the arrangement or grant, as the case may be:*
> ...
> *(iii) is for the purposes of a program specified in the regulations;*
> *the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be.*

- There is therefore no appropriate legislative vehicle to provide for review of the decisions in this program by the AAT (see subsection 25(1) of the *Administrative Appeals Tribunal Act 1975*). The FF(SP) Act does not provide for this: it neither confers such a function on the AAT generally nor provides for the FF(SP) Regulations to do so specifically.

- Decisions under the FF(SP) Act relating to programs specified in the FF(SP) Regulations are expressly excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (see paragraph (he) in Schedule 1 to that Act).

- There is no intention to establish the Sustainable Access to Drinking Water program on a statutory basis at this time. The program is one of a number of actions being taken in Defence to mitigate the possible effects of per- and poly-fluoroalkyl substance contamination resulting from activities at several Defence Force bases. Defence's actions need to be responsive to residents' requirements and the developing scientific evidence. The delivery of this program is advanced, with the majority of affected properties in Williamtown, Oakey, Katherine and Pearce having already received support to ensure sustainable access to drinking water.

While independent merits review by the AAT will not be available, the Commonwealth Ombudsman is able to investigate any complaints made in relation to the administration of the program, and make recommendations to Defence.

THE HON MELISSA PRICE MP
MINISTER FOR THE ENVIRONMENT

MC18-021278

09 NOV 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Thank you for your correspondence concerning issues identified in relation to the *Historic Shipwrecks Regulations 2018* (the Regulations) by the Senate Regulations and Ordinances Committee.

A response that addresses the Committee's issues has been prepared and is enclosed with this correspondence. I have also included a copy of the replacement explanatory memorandum for the Regulations, as requested by the Committee, which includes additional information relating to the consultation undertaken while reviewing the *Historic Shipwrecks Act 1976* and the *Historic Shipwreck Regulations 1978*.

Thank you for bringing your concerns to my attention.

Yours sincerely

MELISSA PRICE

Enc

HISTORIC SHIPWRECK REGULATIONS 2018

Response to issues raised by the
Senate Standing Committee on Regulations and Ordinances

Background information

The *Historic Shipwreck Regulations 2018* (the **Regulations**) replace the *Historic Shipwrecks Regulations 1978* (the **1978 Regulations**) which were due to sunset on 1 October 2018 in accordance with the *Legislation Act 2003*. The 1978 Regulations needed to be remade to maintain the current regulatory arrangement under the *Historic Shipwrecks Act 1976* (the **Act**) until the commencement of the new scheme provided for under the *Underwater Cultural Heritage Act 2018* (the **Underwater Cultural Heritage Act**). The Underwater Cultural Heritage Act received the Royal Accent on 24 August 2018 and is due to commence on a single day fixed by Proclamation within 12 months of receiving the Royal Assent or on the day after the 12-month period ends at the latest. It is anticipated the Underwater Cultural Heritage Act will commence at the start of the 2019-20 financial year.

Consultation

Paragraph 1.100: *The committee requests the minister's advice as to:*

(a) *The nature of the consultation undertaken in relation to the instrument.*

Public consultation was undertaken as part of the review of the Act carried out in 2009. The review encouraged and received submissions from the general public, non-government organisations, collecting institutions (museums, etc.) and Commonwealth, state and territory government departments. A review website was established and a discussion paper was publicly available. Received submissions were posted on the web and can be accessed at: http://environment.gov.au/heritage/historic-shipwrecks/review-act-1976

Of particular relevance to the Regulations, was the broad support in submissions for the establishment and regulation of protected zones as a mechanism for protecting historic shipwrecks.

(b) *Whether more recent consultation was undertaken and if so, the nature of that consultation; or if more recent consultation was not undertaken, why not.*

As the Regulations are due to be repealed when the Act is repealed by the commencement of the Underwater Cultural Heritage Act and the regulatory landscape has not significantly changed since public consultation was conducted in 2009, further public consultation was considered unnecessary.

Paragraph 1.101: *The committee also requests that the explanatory statement be amended to include this information.*

An approved replacement explanatory statement to the Regulations has been enclosed with this correspondence to include the additional information requested about consultation. The replacement explanatory statement will be published on the Federal Register of Legislation in due course.

Reversal of evidential burden of proof

Paragraph 1.107: *The committee requests the minister's advice in relation to the justification for reversing the evidential burden of proof in the defences set out in subsection 8(3) of the instrument. The committee's assessment would be assisted if the minister's response would expressly address the principles set out in the Guide to Framing Commonwealth Offences.*

Subsection 8(1) of the Regulations prohibit various conduct within protected zones declared under the Act unless the person is acting in accordance with a permit or has a reasonable excuse. Part 4.3 of the *Guide to Framing Commonwealth Offences* (the Guide) provides that it may be appropriate for a matter to be included in an offence-specific defence where the matter is peculiarly within the knowledge of the defendant and where it would be difficult, burdensome or costly for the prosecution to raise evidence about a matter.

A defendant would have peculiar knowledge about the details of their conduct, and whether the conduct was engaged in accordance with the permit. Further, there may be situations where a person may need to allow a vessel to enter a protected zone without a permit for the purposes of safe navigation, saving human life, preventing serious environmental harm or securing the safety of an endangered vessel. In these circumstances, a defendant would be best placed to raise matters concerned as they would be peculiarly within the knowledge of the defendant. Additionally, defendants will likely be able to easily and inexpensively present evidence relating to the matters relevant to the defences.

Matters more appropriate for parliamentary enactment

Paragraph 1.114: *The committee requests the minister's advice as to the appropriateness of imposing a penalty of imprisonment in regulations, and whether the Attorney-General's Department was consulted in relation to the imposition of this penalty, by reference to the Attorney-General's Department's Guide to Framing Commonwealth Offences.*

As noted by the Committee, section 14 of the Act provides that the regulations may make provisions prohibiting or restricting certain activities in protected zones and prescribe penalties for any contravention of those provisions. The Act limits the penalty to a maximum fine of $1000, or imprisonment for one year, or both.

The Guide notes that offences should generally not be delegated from an Act to a subordinate instrument if it would be more appropriate for that content to receive the full consideration and scrutiny of the Parliament. Nonetheless, it notes that offence content may be more acceptable in Regulations than other kinds of subordinate instruments as they are considered by the Federal Executive Council and subject to scrutiny, and therefore disallowance, by the Parliament (part 2.3.4 of the Guide).

I note that equivalent offences are provided for in section 29 of the Underwater Cultural Heritage Act. Further, the Underwater Cultural Heritage Act provides for 5 years imprisonment, or 300 penalty units, or both, as a deterrent against those offences. The Attorney-General's Department was consulted on the imposition of imprisonment as a penalty against prohibited conduct in protected zones under the Underwater Cultural Heritage Act.

The Underwater Cultural Heritage Act is due to commence on a day fixed by Proclamation within the 12 months following receipt of the Royal Assent, or by 25 August 2019 at the latest.

I am advised by the Department that, while not ideal, it considered it was appropriate to maintain the offence provision in the Regulations until the Underwater Cultural Heritage Act commences and the Act and Regulations are repealed. This will ensure the continuity of the existing regulatory regime while the new underwater cultural heritage protection legislation is implemented.

Unclear basis for determining fees

Paragraph 1.118: *The committee draws to the attention of the minister and the Senate the absence of information in the explanatory statement about how the fee in section 7 of the instrument is determined.*

I note the Committee's comments that the basis for determining the fees in section 7 of the Regulations is unclear. The Department has advised me that it considered section 12 of the Act when drafting the Regulations and it was not clear from the wording of the provision whether it was appropriate, or possible, to not prescribe a fee, or to prescribe a zero-sum fee. As such, rather than prescribe a different fee on an arbitrary basis, the Department considered the most appropriate approach in the circumstances was to maintain the existing fee. While these Regulations prescribe a fee, no fee is prescribed for access to the equivalent register under section 48 of the Underwater Cultural Heritage Act.

As noted in the explanatory statement, the provision relating to the fee to access the register is now redundant as the information is provided free of charge through the Australian National Shipwrecks Database. The link to the Database has been provided in the explanatory statement so that it is clear for readers who wish to access the register for the purposes of the Act.

REPLACEMENT EXPLANATORY STATEMENT

Issued by authority of the Minister for the Environment

Historic Shipwrecks Regulations 2018

The *Historic Shipwrecks Act 1976* (the Act) establishes a scheme to protect the remains of historic shipwrecks and their associated relic located in Australian waters adjacent to the coast of Australian states and territories and extending to the limits of Australia's continental shelf.

Section 32 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The purpose of the *Historic Shipwrecks Regulations 2018* (the Regulations) is to remake the *Historic Shipwrecks Regulations 1978* (the 1978 Regulations), which are due to sunset on 1 October 2018.

The remaking of the 1978 Regulations is proposed to maintain the current regulatory arrangement until the commencement of the new scheme provided for in the *Underwater Cultural Heritage Act 2018* (the Underwater Cultural Heritage Act), which received the Royal Assent on 24 August 2018. The Act is due to commence on a day to be fixed by Proclamation within the next 12 months, or at the end of the 12-month period at the latest. It is anticipated the Underwater Cultural Heritage Act will commence at the start of the 2019-20 financial year.

On its commencement, the Underwater Cultural Heritage Act will provide a new framework for protection of underwater cultural heritage, replacing the current protection for historic shipwrecks and their associated relics under the Act. The Underwater Cultural Heritage Act retains the general principles of the Act and creates a regulatory system for all types of underwater cultural heritage that meets international best practice, establishes a fairer penalty regime and reduces the burden on the regulated community.

No major amendments have been made in the proposed Regulations due to their short term nature and because the 1978 Regulations mirror wording and penalties in the Act that must continue to be enforced until repealed on the commencement of the Underwater Cultural Heritage Act. The only significant changes to the 1978 Regulations are:

- a reduction in the penalty unit amount under section 8; and
- changes to the format of inspector identity cards under section 10.

A review of the Act and the Regulations was conducted in 2009. Public consultation was included as part of the review. The review received submissions from the general public, non-government organisations, collecting institutions (museums, etc.) and Commonwealth, state and territory government departments. A review website was established and a discussion paper was publicly available. Received submissions were posted on the web and can be accessed at: http://environment.gov.au/heritage/historic-shipwrecks/review-act-1976

The submissions received were supportive of changes to modernise and improve the Act and the Regulations.

As the Regulations are made under primary legislation that is scheduled to be repealed and the regulatory landscape has not significantly changed since the review was conducted in 2009, further public consultation for the 1978 Regulations was not undertaken.

The Office of Best Practice Regulation (OBPR) was consulted concerning any necessity to prepare a Regulatory Impact Statement (RIS) for the Regulations (OBPR reference ID 24000). OBPR advised that the impacts of the Regulations are minor or machinery in nature and no RIS or self-assessment is required.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Historic Shipwrecks Regulations 2018

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Historic Shipwrecks Regulations 2018* (the Regulations) is to remake the *Historic Shipwrecks Regulations 1978*, which are due to sunset on 1 October 2018. The Regulations:

- prescribe fee amounts for obtaining copies of the register of historic shipwrecks;
- prohibit certain activities in protected zones declared under the *Historic Shipwrecks Act 1976* (the Act);
- prescribe the maximum amount for rewards given under the Act; and
- specify the format of shipwreck inspector identity cards.

No charges or fees imposed under the Act and prescribed by the Regulations have been increased or decreased in the remade Regulations.

Human rights implications

The Regulations do not engage with any of the applicable rights or freedoms.

Conclusion

The Regulations are compatible with human rights as they do not raise any human rights issues.

The Hon Melissa Price MP, Minister for the Environment

ATTACHMENT

Details of the *Historic Shipwrecks Regulations 2018*

Part 1 - Preliminary

Section 1 – Name

1. This section provides that the name of this instrument is the *Historic Shipwrecks Regulations 2018* (the Regulations).

Section 2 – Commencement

2. This section provides that the Regulations commence on the day after the instrument is registered.

Section 3 – Authority

3. This section provides that the Regulations are made under the *Historic Shipwrecks Act 1976* (the Act).

Section 4 – Schedule 1

4. This section refers the reader to Schedule 1 which prescribes the form of identity cards for the purposes of subsection 22(2) of the Act.

Section 5 – Schedule 2

5. This section provides that each instrument that is specified in Schedule 2 to the Regulations is amended or repealed as set out in the applicable terms in that Schedule, and any other item in that Schedule has effect according to its terms.

Section 6 – Definitions

6. This section defines key terms used in the Regulations and in the Act.

7. This section provides that 'the Act' means the *Historic Shipwrecks Act 1976*.

8. This section defines the term 'ship'.

Section 7 – Prescribed fee for copy of the Register

9. This section prescribes the fee amount for obtaining copies of the register of historic shipwrecks for the purposes of subsection 12(3) of the Act.

10. This section is now redundant as the register has been publicly available online through the Australian National Shipwrecks Database since 2002 and can be freely downloaded from https://dmzapp17p.ris.environment.gov.au/shipwreck/public/wreck/search.do.

Section 8 – Prohibition of certain activities in protected zones

11. This section specifies the actions that are prohibited within a protected zone, except in accordance with a permit granted under subsection 15(1) of the Act.

12. The penalty for a contravention of subsection 8(1) is 4 penalty units. This aligns the maximum penalty for an offence under this section with paragraph 14(1)(b) of the Act, which provides that the fine prescribed in the Regulations must not exceed $1000.

13. At the time the 1978 Regulations were made, the penalty units regime did not exist. The penalty units regime was introduced in 1992. At that time, a penalty unit was prescribed at $110 under the *Crimes Act 1914*. The equivalent provision to subsection 8(1) in the 1978 Regulations provided for 10 penalty units.

14. Section 4AA of the *Crimes Act 1914* now provides that the amount of a penalty unit is $210. Due to the mathematical imprecision of the value of a penalty unit, the amount of penalty units has been reduced to 4 penalty units so that the maximum penalty able to be imposed by the new subsection 8(1) does not exceed $1000 as required by paragraph 14(1)(b) of the Act. The maximum penalty that can now be imposed is $840.

15. The penalty option of one year's imprisonment in subsection 4(1) of the 1978 Regulations has been retained in the Regulations as it is still appropriate to the higher level of offences that may be committed against section 8 of the Regulations. A period of imprisonment will also be available for similar offences under the *Underwater Cultural Heritage Act 2018*.

Section 9 – Prescribed amount for rewards

16. This section prescribes the maximum amount of reward payment that may be granted under section 18 of the Act, to persons who report the discovery of ship remains under section 17 of the Act.

Section 10 – Identity card

17. This section specifies how shipwreck inspector identity cards issued under subsection 22(2) of the Act are to be formatted and recorded.

18. The requirement for identity cards to be 'substantially in accordance' with the form in the schedule in the 1978 Regulations has been removed as section 25C of the *Acts Interpretation Act 1901* provides that substantial compliance with a form is sufficient.

19. Subsection 10(2) provides that the Minister must keep a record of each identity card issued and the number of the card so issued. Subsection 10(2) is an administrative detail that relies on section 32 of the Act as proper recordkeeping is an ancillary task necessary for the proper administration of the issue of identity cards in relation to the Minister's power to appointment a person to be an inspector for the purposes of section 23 the Act.

20. The details of all inspector identity cards issued are recorded in the Australian National Shipwrecks Database along with the details of inspectors' appointments under the Act.

Schedule 1 – Form of identity cards

21. For subsection 10(1) of the Regulations, Schedule 1 specifies the form that identity cards must take when the Minister issues an identity card under subsection 22(2) of the Act.

22. A minor amendment has been made to the specified form to remove the reference to the Minister of Home Affairs, who is no longer the responsible minister.

Schedule 2 – Repeals

23. Schedule 2 provides for the repeal of the *Historic Shipwrecks Regulations 1978*.

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS AND THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Ref No: MS18-001241

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Senate
Parliament House
CANBERRA ACT 2600

Dear Chair

Reply to Standing Committee on Regulations and Ordinances - Australian National Maritime Museum Regulations 2018 and National Library Regulations 2018

As requested by the Secretary of the Standing Committee on Regulations and Ordinances (the Committee) on 18 October 2018, I am pleased to provide further advice on the Australian National Maritime Museum Regulations 2018 and the National Library Regulations 2018 at Attachments A.1 and A.2 respectively. I thank the Committee for identifying these issues.

Australian National Maritime Museum Regulations 2018

The Australian National Maritime Museum Regulations 2018 would replace the *Australian National Maritime Museum Regulations 1991*, which sunsetted on 1 October 2018 in accordance with the *Legislation Act 2003*. The regulations, which support the *Australian National Maritime Museum Act 1990*, include specific provisions for matters such as offences, security, and service of alcohol, among others.

The Committee has sought detailed advice regarding the absence of merits review in section 14, the reversal of the evidential burden of proof in paragraph 10(2)(a), subsections 25(2) and 26(2) and section 32, and the use and management of personal information collected by security officers in accordance with subsection 15(2) of the instrument. A response is included at Attachment A.1.

National Library Regulations 2018

The National Library Regulations 2018 would replace the *National Library Regulations 1994*, which sunsetted on 1 October 2018 in accordance with the *Legislation Act 2003*. The regulations, which support the *National Library Act 1960*, include specific provisions for matters such as offences, security, and service of alcohol, among others.

The Committee has sought detailed advice regarding the reversal of evidential burden of proof in paragraph 9(2)(a), subsections 24(2), (4) and (6), subsections 28(2) and 29(2), and section 32 of the instrument. A response is included at Attachment A.2.

I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

7/11/18

Encl.

The Committee requests the minister's advice as to:

- **whether decisions by security officers under section 14 of the instrument to prohibit entry to museum premises are subject to merits review; and**
- **if not, what characteristics of those decisions would justify excluding merits review.**

Response:

Section 14

Decisions by security officers under section 14 of the instrument to prohibit entry to the Australian National Maritime Museum (the Museum) premises are not subject to merits review. Decisions made by security officers appointed under the previous *Australian National Maritime Museum Regulations 1991* were similarly not subject to merits review.

It is intended that security officers would exercise powers under section 14 of the instrument flexibly, to ensure the safety of the public and museum staff, and to prevent the commission of offences under the instrument. It is intended that decisions to prohibit entry would be made on a case by case basis, rather than to permanently exclude individuals from entering the Museum. On this basis, the effect of such decisions on the interests of individuals is expected to be minimal, and would be unlikely to justify the costs of review. However, if the Committee is of the strong opinion that merits review should be provided for decisions under section 14 of the instrument, I would be willing to consider providing for merits review in a future amendment to the instrument.

The Committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 10(2)(a), subsections 25(2) and 26(2) and section 32 of the instrument. The Committee's assessment would be assisted if the Minister's response expressly addresses the principles set out in the Guide to Framing Commonwealth Offences.

Response:

Paragraph 10(2)(a)

The reversal of the evidential burden of proof in paragraph 10(2)(a) is appropriate, having regard to the principles in the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide).

In addition to the position that it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, the matters in paragraph 10(2)(a) are also peculiarly within the knowledge of the accused person. While I acknowledge that the question of whether a person held the appropriate authorisation may not be solely within the knowledge of that person, the person would nevertheless be best placed to quickly and easily demonstrate that fact.

Subsection 25(2)

The reversal of the evidential burden of proof in subsection 25(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved, including whether the animal is under the control of the Museum.

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

The intention, in the case of 25(2)(c), is to account for situations where the museum has under its control an animal that assists in the day-to-day running of the Museum or partners with organisations to allow animals on the premises for the purposes of a public attraction. It would be significantly and disproportionately more difficult for the prosecution to prove that an animal is not under the control of the Museum than it would be any accused to raise the relevant defence by providing evidence of their control of the animal at the relevant time.

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

In accordance with the Guide, as noted, the penalty for contravention of subsection 25(2) is the relatively low amount of five penalty units, which tends to support a defence provision in these circumstances.

Subsection 26(2)

The reversal of the evidential burden of proof in subsection 26(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved including whether the food or liquid was brought into or consumed by that person within an area designated for consuming food or liquid. That person would be best placed to identify where they were located while possessing or consuming the relevant food or liquid.

It would again be significantly and disproportionately more difficult for the prosecution to prove that the food or liquid was not brought or consumed in an area designated for consuming food or liquid.

I note that once the evidential burden is discharged, the legal burden of proof remains with the prosecution which would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 26(2) is the relatively low amount of five penalty units, which lends support to a defence provision in these circumstances.

In addition, I note that the defence provision in paragraph 26(2)(e) is consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia (see for example paragraph 25(2)(e) of the *National Gallery Regulations 2018* which is framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural

institutions is desirable, where possible, and the framing of proposed subsection 26(2) supports this approach.

Section 32

The reversal of the evidential burden of proof in section 32 is similarly appropriate. It would again be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Council had not consented in writing to a person engaging in conduct that contravenes Part 4 of the instrument, than for the person to raise evidence of the written consent.

It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not one of the categories of persons listed in subsection 32(2) and was not acting in accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

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

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

In accordance with the Guide, creating the defence is more readily justified as the offence carries a relatively low penalty of five penalty units.

In addition, I note that the defence provisions in section 32 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia and the National Portrait Gallery of Australia (see for example section 25 of the *National Gallery Regulations 2018* and section 24 of the *National Portrait Gallery Regulations 2013* which are framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural institutions is desirable, where possible, and the framing of proposed section 32 supports this approach.

The committee requests the Minister's advice as to:

- **how personal information collected in accordance with subsection 15(2) of the instrument will be used and managed; and**
- **what safeguards are in place to protect the personal privacy of individuals in relation to that information.**

Response:

Subsection 15(2)

The Museum is subject to the *Privacy Act 1988* and all personal information collected by the Museum must be dealt with according to the Australian Privacy Principles (APPs), which are set out in Schedule 1 of the Privacy Act. Personal information collected in accordance with subsection 15(2) of the instrument will be used and managed in accordance with the APPs. I am advised that the Museum is implementing appropriate safeguards to protect the personal privacy of individuals in relation to any personal information collected by the Museum under subsection 15(2). The Museum has a Privacy Policy, Privacy Management Plan and Data Breach Procedures and is currently compiling a record of its personal information holdings.

The collection and use of personal information (including photographs) under section 15(2) of the instrument will be included in the record of holdings.

The Museum provides training to security officers about the instrument, including the collection, security, use and disclosure of information collected under subsection 15(2). This complements other privacy training provided to the Museum's security officers. The Museum's security officers are required to complete a "Privacy Awareness Declaration" certifying awareness of the handling of personal information consistent with the APPs.

The committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 9(2)(a), subsections 24(2), (4) and (6), subsections 28(2) and 29(2), and section 32 of the instrument. The committee's assessment would be assisted if the minister's response expressly addressed the principles set out in the Guide to Framing Commonwealth Offences.

Response:

Paragraph 9(2)(a)

The reversal of the evidential burden of proof in paragraph 9(2)(a) is appropriate, having regard to the principles in the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide).

In addition to the position that it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. The matters in paragraph 9(2)(a) are also peculiarly within the knowledge of the accused person. While I acknowledge that the question of whether a person held the appropriate authorisation may not be solely within the knowledge of that person, the person would nevertheless be best placed to quickly and easily demonstrate the relevant authorisation.

Subsections 24(2), (4) and (6)

The reversal of the evidential burden of proof in subsections 24(2), (4) and (6) is appropriate, having regard to the principles in the Guide.

In regard to subsection 24(2), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person removed an item of library material from a storage area or reading room or placed something on an item of library material to copy or trace the library material without being authorised to do so in writing by an authorised officer than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.

In regard to subsection 24(4), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person removed an item of library material from library property without being authorised to do so in writing by an authorised officer or through a loan record for the item approved by an authorised officer than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation or loan record. An accused could cheaply and readily raise evidence of the authorisation or loan record.

In regard to subsection 24(6), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person handled library material in a way that was likely to damage the library material without being authorised to do so by the Director-General to undertake work for the purposes of maintaining and developing library collection material than it would be for a person raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.

Subsection 28(2)

The reversal of the evidential burden of proof in subsection 28(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved. These matters are whether the person has a disability (within the meaning of the *Disability Discrimination Act 1992*); whether an animal belonging to that person or in their charge is an assistance animal; and whether the person is a member of a police force acting in accordance with their duties.

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

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

In accordance with the Guide, as noted, the penalty for contravention of subsection 28(2) is the relatively low amount of five penalty units, which tends to support a defence provision in these circumstances.

Subsection 29(2)

The reversal of the evidential burden of proof in subsection 29(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved, including whether the food or liquid was brought into or consumed by that person in an area designated for consuming food or liquid. That person would be best placed to identify where they were located while possessing or consuming the relevant food or liquid.

It would again be significantly and disproportionately more difficult for the prosecution to prove that the food or liquid was not brought or consumed in an area designated for consuming food or liquid.

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

In accordance with the Guide, as noted, the penalty for contravention of subsection 29(2) is the relatively low amount of five penalty units, which lends support to a defence provision in these circumstances.

Section 32

The reversal of the evidential burden of proof in section 32 is similarly appropriate. It would again be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Director-General had not consented in writing to a person engaging in conduct that contravenes Part 3 of the instrument, than for the person to raise evidence of the written consent.

It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not one of the categories of persons listed in subsection 32(2) and was not acting in

accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

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

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

In addition, I note that the defence provision in section 32 is consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia (see for example section 25 of the *National Gallery Regulations 2018* which is framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural institutions is desirable, where possible