



The Hon. Michael McCormack MP

**Deputy Prime Minister
Minister for Infrastructure and Transport
Leader of The Nationals
Federal Member for Riverina**

Ref: MC18-007644

20 NOV 2018

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

John

Dear Senator Williams

Thank you for the Committee's letter of 18 October 2018 regarding instruments listed in the Senate Standing Committee on Regulation and Ordinance's *Delegated Legislation Monitor* No. 12 of 2018.

I have sought advice from the Department of Infrastructure, Regional Development and Cities as to why the Explanatory Statements for the following instruments have not been registered on the Federal Register of Legislation: *Marine Navigation Levy Regulations 2018 [F2018L01298]*; *Marine Navigation Levy Collection Regulations 2018 [F2018L01300]*; *Marine Navigation (Regulatory Functions) Levy Regulations 2018 [F2018L01301]*; and *Marine Navigation (Regulatory Functions) Levy Collection Regulations 2018 [F2018L01302]*.

I can confirm that I approved Explanatory Statements for these instruments on 20 August 2018. These instruments were considered on 13 September 2018, by the Federal Executive Council, signed by the Governor General, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd), and lodged on the Federal Register of Legislation by the Department. The Explanatory Statements to these instruments appear not have been published successfully at this time due to an administrative or technical error or oversight.

As requested by the Committee and in accordance with paragraph 15G(4)(a) of the *Legislation Act 2003*, the Department has resubmitted Explanatory Statements for registration, which have now been published.

I will ensure a written statement explaining the lateness of lodgement is delivered to each House of the Parliament in accordance with subsection 39(3) of the *Legislation Act 2003*. The Department is currently preparing a statement for my consideration.

The Hon Michael McCormack MP

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English Language Proficiency Assessments Exemption 2018 [F2018L01214]

The Committee requested advice as to whether amendments to the Civil Aviation Safety Regulations 1998 (CASR) are being considered to resolve the difficulties associated with English language proficiency assessments; whether decisions by Civil Aviation Safety Authority (CASA) to approve, or refuse to approve, a person to conduct English language proficiency (ELP) assessments are subject to merits review, and if not, what characteristics of those decisions would justify excluding merits review.

CASA has advised that it will address the difficulties associated with ELP assessments as soon as practicable during 2019.

CASA also advised that it is unlikely that any decision to approve, or refuse to approve, a person to conduct ELP assessments under the exemption is reviewable by the Administrative Appeals Tribunal (AAT). The findings of “Seaview Lord Howe Pty Ltd and Another and Civil Aviation Authority (1995)”, determined that decisions made under the Civil Aviation Order (CAO) had to be construed as decisions under the *Civil Aviation Act 1988* (the Act), as the CAO was made under the Act. In light of this finding, the discretion to approve a person to conduct assessments of the Aviation ELP or General ELP comprises a key aspect of the exemption, which itself is made under regulation 11.245 of the CASR, which is made under the Act. As the exemption is made under the regulations, but the decision about the approval is made under the exemption, it is therefore not reviewable.

The premise of the Committee’s question assumes that by the making of the exemption, a decision to approve or to refuse to give an approval can be the subject of merits review. This is not the case, as stated in Section 25(1) of the *Administrative Appeals Tribunal Act 1975*.

In the context of the aviation legislation, without an amendment to the Act or an instrument directly made under it, such as the CASR, the exemption cannot express that a decision made under it is reviewable by the AAT.

The exemption is beneficial to the aviation industry, as it expands the group of competent persons who are authorised to conduct the ELP assessment, in the context where there is a shortage. Without the exemption, the persons who can seek approval to conduct ELP, could not otherwise conduct ELP assessment. The absence of a formal merits review mechanism enables a person dissatisfied with CASA’s approval decision to lodge a complaint with CASA’s Industry Complaints Commissioner, who reports to CASA’s Board.

Flight in Class D Airspace near Sunshine Coast Aerodrome (Sunshine Coast Sports Aviators) Instrument 2018 [F2018L01278]

The Committee requested advice as to the manner in which the Letter of Agreement (LoA) between Airservices Australia and Sunshine Coast Aviators is incorporated, and that the Explanatory Statement be amended to include this information.

CASA has advised that the instrument in Section 3 defines the LoA in general terms and includes a note pointing to the current LoA that does not purport to describe the manner of incorporation. However, paragraph 5(c) imposes a condition for a pilot to comply with the LoA that is in effect at the time of the relevant operation, which creates a 'from time to time' manner of incorporation, which is articulated in the Explanatory Statement.

Further to this, the power for the instrument to incorporate a document that does not yet exist, such as a future LoA, is expressly contemplated in Section 98(5D) of the Act. On this basis, CASA proposes to leave the Explanatory Statement unamended.

Number of Cabin Attendants (Alliance Airlines) Direction 2018 [F2018L01244]

The Committee requested advice as to whether decisions by CASA to approve or refuse to approve revisions of Alliance Airlines' operations manual are subject to merits review, and if not, what characteristics of those decisions would justify excluding merits review.

Under regulation 208 of the *Civil Aviation Regulations 1988* (CAR), CASA may give directions as to the operating crew required to be carried on an aircraft having regard to the safety of air navigation. It is unlikely that a decision to approve, or refuse to approve, a change to the operations manual affecting emergency procedures for the relevant aircraft, including procedures relating to able-bodied passengers is reviewable by the AAT, as per the previously referred findings of "Seaview Lord Howe Pty Ltd and Another and Civil Aviation Authority (1995)".

The premise of the Committee's question assumes that by the making of the exemption, a decision to approve or to refuse to give an approval can be the subject of merits review. This is not the case, as Section 25(1) of the *Administrative Appeals Tribunal Act 1975* states.

Similarly to the ELP assessments, the cabin crew direction cannot express that a decision made under it is reviewable by the AAT. In the context of the cabin crew direction, scrutiny principle 23(3)(c) can only apply to the CAR and not a direction made under it.

The cabin crew direction is beneficial to the airline, as it reduces the number of cabin crew it has to carry. A critical aspect of the direction is that it was made based on the airline's procedures at the time it was issued, providing the airline with flexibility. The airline has not raised this matter as an issue and CASA has to date not refused to approve any changes to an airline's manual in this context. A person dissatisfied with CASA's approval decision may lodge a complaint with CASA's Industry Complaints Commissioner, who reports to CASA's Board.

Thank you for raising this matter and I trust this is of assistance.

Yours sincerely

Michael McCormack



**The Hon Greg Hunt MP
Minister for Health**

Ref No: MC18-025351

20 NOV 2018

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Dear Senator Williams

I refer to your letter of 15 November 2018 concerning the *Therapeutic Goods Legislation Amendment (2018 Measure No. 3) Regulations 2018* [F2018L01434] (the Amendment Regulations) and the Committee's request for advice in its Delegated Legislation Monitor 13 of 2018 about the basis for the calculation of the fees in paragraphs (a) to (e), (g) and (h) of item 1 of Schedule 1 to the Amendment Regulations.

Those fees relate to applications to include specified kinds of medical devices in the Australian Register of Therapeutic Goods (the Register), and were included in the *Therapeutic Goods (Medical Devices) Regulations 2002* (the Medical Devices Regulations) before the making of the Amendment Regulations.

The purpose of item 1 of Schedule 1 to the Amendment Regulations was to introduce a new application fee for Class I medical devices intended by their manufacturer to be for export only. In doing so, the Amendment Regulations repealed and substituted the whole of item 1.5, including replicating the existing fees (with some minor renumbering), for greater clarity (see compilation No.37 of the Medical Devices Regulations [F2018C00490] at <https://www.legislation.gov.au/Details/F2018C00490>).

The fees in paragraphs (a) – (e) and (h) of item 1 reflect the effort involved for staff of my Department's Medical Devices Branch in processing and verifying such applications. The fee in paragraph (g) of item 1 reflects both the cost of maintaining software used to process applications to include Class 1 medical devices (other than Class 1 devices intended by their manufacturer to be for export only or that are supplied in a sterile state or that have a measuring function) in the Register, and the efforts of staff of the Medical Devices Branch in verifying the information provided by applicants for such products.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt



SENATOR THE HON MITCH FIFIELD

MINISTER FOR COMMUNICATIONS AND THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Ref No: MS18-001342

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Dear Chair

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

I thank the Standing Committee on Regulations and Ordinances (the committee) for their consideration of the advice I provided on the Australian National Maritime Museum Regulations 2018 and the National Library Regulations 2018 on 12 November 2018.

As requested by the Secretary of the committee on 15 November 2018, I am pleased to provide further advice in respect to the Australian National Maritime Museum Regulations 2018. I note in the committee's response that it considers it appropriate for decisions under section 14 of the instrument to be subject to an independent merits review because it remains possible that a person may be repeatedly prohibited from entering the premises by decisions made under this section. I will undertake, in 2019, to amend the instrument to include a provision that will subject decisions made under section 14 to an independent merits review by the Administrative Appeals Tribunal. I have instructed my Department to commence the process of amending the instrument at the earliest possible opportunity.

The Australian National Maritime Museum (the Museum) has advised that in the meantime, should any written complaints be received regarding decisions made under section 14 they will be considered by the Museum Director, and appropriate action taken.

I trust this information will be of assistance.

Yours sincerely,

MITCH FIFIELD

22/11/18