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

REF: MS18-001778

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

Dear Senator Williams

I refer to the Committee's request of 14 November 2018 for 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 the advice will assist the Committee with its consideration of the item. 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

21 November 2018

Response to a further 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 has acknowledged that review by the Administrative Appeals Tribunal may not be feasible for a non-statutory program, but has asked whether it would be possible to engage an independent contractor to conduct external merits review.

While Defence appreciates the Committee's concerns about the availability of external merits review, there is no intention at this time to engage an independent contractor to conduct external merits review.

In relation to the program, Defence notes that:

- The Sustainable Access to Drinking Water program is advanced. Provision of support under the program has been provided in relation to almost all affected properties identified at three of the four sites (RAAF Base Williamtown, the Army Aviation Centre Oakey and RAAF Base Tindal), covering close to 500 properties. Provision of support at RAAF Base Pearce is ongoing.

- There has been one complaint to the Commonwealth Ombudsman arising from the program at RAAF Base Williamtown. The complainant was outside the geographic boundaries of the program, which were based on the investigation area determined by the New South Wales Environment Protection Agency. During the course of the Ombudsman's investigation, the boundaries of the investigation area were changed by the NSW EPA, and the complaint was thereby resolved.

- The support provided under the program has varied. In some cases, support has been provided on an individual basis, for example through the installation of water tanks. In other cases, support has been provided through the development of infrastructure connecting multiple properties to town water supplies. The support provided depends on a range of factors, including the views of affected property owners.

Defence notes that, while engaging an independent contractor would provide an independent source of advice to Defence into its administration of the program, authority to spend money under the program would necessarily remain with delegated Defence officials. This is to ensure appropriate levels of accountability for the expenditure of relevant money in accordance with the *Public Governance, Performance and Accountability Act 2013*. That is, an independent contractor could only make non-binding recommendations to Defence about the expenditure of relevant money. The Commonwealth Ombudsman can also provide an independent source of advice about the administration of the program, and its recommendations are treated as highly persuasive.

It is considered that the expense of engaging an independent contractor to conduct independent merits review would be disproportionate to the number and type of complaints that have been received, and are likely to be received in the future, under the program. This is particularly so given that an independent contractor can, at most, provide recommendations to Defence, which is also within the Commonwealth Ombudsman's powers.

Defence undertakes to follow any recommendations from the Commonwealth Ombudsman in relation to complaints about the Sustainable Access to Drinking Water program, unless to do so would be inconsistent with the *Public Governance, Performance and Accountability Act 2013*. In the event that the Sustainable Access to Drinking Water program significantly expands (for example if there are changes to the Australian Drinking Water Guidelines), or there are an unexpected number of complaints about the program, Defence will re-consider its position on engaging an independent contractor to conduct external merits review.

Defence also notes that the Department of the Environment and Energy (DoEE) is designated as the program owner of the Sustainable Access to Drinking Water program, while Defence is a responsible, or implementing entity. Where a responsible entity is unable to resolve a policy query, the intention is that it will refer the query to the program owner, which will make a decision on the policy query. This decision would be communicated to the responsible entity. In instances where residents seek clarification or guidance around governance of the overall program, these can be addressed to DoEE as the program owner. In instances where residents seek clarification of matters relating to implementation of the program, these can be addressed to Defence as the implementing entity. Both DoEE and Defence will ensure this distinction is made clear on respective entity's websites.

The Hon Christian Porter MP
Attorney-General

MC18-015203

28 NOV 2018

Senator John Williams
Chair, Senate Standing Committee on Regulations and Ordinances
Senator for New South Wales
Senate Standing Committee on Regulations and Ordinances

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Dear ~~Senator Williams~~

I am writing in response to a letter from Ms Anita Coles, Committee Secretary of the Senate Standing Committee on Regulations and Ordinances, dated 15 November 2018.

The letter requested clarification on the retrospective operation of item 15 of the *Crimes Legislation (International Crime Cooperation and other Measures) Regulations 2018* and whether any persons were, or could be, disadvantaged.

Item 15 is intended to ensure a consistent Australia wide approach to adducing foreign evidence and that parties are not disadvantaged by virtue of their location in an external territory or the Jervis Bay territory. My Department is not aware of proceedings in the external territories or the Jervis Bay territory which may be impacted by this amendment. However, should a particular case be affected then any foreign material adduced in the proceedings would be subject to the safeguards under the *Foreign Evidence Act 1994*, which gives the court a discretion to refuse to adduce evidence if, having regard to the interests of the parties to the proceedings, justice would be better served if the foreign material was not adduced. Additionally, the evidentiary rules applicable in that jurisdiction would also apply to any foreign evidence adduced in proceedings.

Thank you for raising this matter with me,

Yours sincerely

The Hon Christian Porter MP
Attorney-General

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28 NOV 2018

The Hon Stuart Robert MP
Assistant Treasurer

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
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 *ASIC Corporations (Short Selling) Instrument 2018/745* (the instrument). The instrument contains legislative relief from certain prohibitions on short selling, and exemptions from certain reporting requirements.

I note the Committee's concern that while the instrument includes references to the Investment Company Act 1940 of the United States of America, a timetable published by ASX Limited, and the official list of ASX Limited, the Explanatory Statement (ES) to the instrument does not indicate the manner in which they are incorporated, where they may be accessed or the power in the *Corporations Act 2001* or other Commonwealth legislation that permits their incorporation.

I also note the concern regarding which legislative power permits the incorporation of S&P ASX 200 and S&P ASX 300 indexes.

I have raised the Committee's concerns with the Australian Securities Investments Commission, which is responsible for the instrument. ASIC has advised me that is does not consider the above documents and indexes to be incorporated into the instrument. This is because the status of each is dependent on a question of fact, being mere references, rather than affecting the operation of the instrument.

However, ASIC has agreed to update the ES to provide more information on the documents, including where they can be obtained, and the reason for their inclusion.

Yours sincerely

Stuart Robert

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The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-025349

29 NOV 2018

Senator John Williams
Chair
Standing Committee on Senate Regulations and Ordinances
PO Box 6100
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CANBERRA ACT 2600

Dear Senator

I refer to the Delegated Legislation Monitor of 14 November 2018, which requested information about certain provisions in the *Health Insurance Regulations 2018* (the Regulations). The Committee sought response to three areas of the Regulations:

- the basis on which the fees in sections 14, 15 and 65 were calculated;
- the manner in which 'registered sonographers' are incorporated under section 71; and
- how personal information is managed for pathology requests under section 34.

Basis for fees in sections 14, 15 and 65
As noted by the Committee, sections 3DB and 3E of the *Health Insurance Act 1973* (the Act) provide a process for medical practitioners to apply to the Minister for recognition as a specialist or consultant physician. The application must be accompanied by the prescribed fee, which is $30 per sections 14 and 15 of the Regulations.

Since 1986, there have been two pathways for medical practitioners to be recognised as specialists under Medicare. The Department of Human Services would automatically process the registration of medical practitioners under section 3D of the Act if they were domiciled in Australia, were a fellow of a relevant organisation, and held a relevant qualification.

Medical practitioners who did not meet these requirements, but may have held the appropriate training to practice privately as a specialist under Medicare, could apply for recognition as a specialist. This included domestic medical practitioners under section 3DB of the Act or medical practitioners who were not domiciled in Australia under section 3E. Medical practitioners who wished to be recognised as a consultant physician, a type of specialist with access to a unique set of Medicare attendance items, would also need to apply via these pathways.

The fee of $30 recognised the additional administration involved in processing these applications for the Department of Human Services and the additional regulatory burden of creating a ministerial determination. Prior to Assent of the *Health Insurance Amendment (Medical Specialists) Bill 2005*, it also included the cost of liaising with the relevant State or Territory Specialist Recognition Advisory Committee.

Section 20AB of the Act allows the Chief Executive Medicare to approve applications for billing agents made by a person or body. Subsection 20AB(2) provides a regulation making power to specify requirements for the application and to set a fee (if any) to accompany the application. The fees are prescribed in section 65 of the Regulations.

The fees for the billing agent application reflect the administrative cost for the Department of Human Services to administer the process. The fee covers the assessment of the application against the criteria in the *Health Insurance (Approved Billing Agents) Instrument 2017* and notification of the outcome of the application process.

Sections 14, 15 and 65 of the Regulations do not amount to taxation. I have instructed my Department to liaise with the Department of Human Service to determine if the fees continue to appropriately reflect the cost of administration.

Section 71 and incorporation

Subsection 23DS(1) of the Act provides that regulations may require medical practitioners to prepare and maintain records of diagnostic imaging services rendered by them, and, in particular, may impose requirements relating to:

(a) the form in which the records are to be prepared;
(b) the information that must be included in the records; and
(c) the manner in which the records must be kept.

Subsection 71(2) of the Regulations requires that a medical practitioner who renders a diagnostic imaging service must provide a record of the service. Subsection 71(3) requires that the record of that service must include a report of the service by the providing practitioner.

Subsection 71(4) requires that, where an ultrasound service is performed by a 'registered sonographer' under the supervision, or at the direction of, the providing practitioner, the medical practitioner's report must include the name of the registered sonographer who performed the service. Subsection 71(6) defines a registered sonographer as a person whose name is entered on the register of sonographers maintained by the Chief Executive Medicare.

The Committee has requested information about the apparent incorporation by reference of the register of sonographers into the Regulations. I would like to address the Committee's concern by providing further information about the register of sonographers, which is, in practice, primarily an administrative function by the Chief Executive Medicare.

Under section 32 of the *Human Services (Medicare) Regulations 2017*, a prescribed function of the Chief Executive Medicare is to establish and maintain a register of sonographers. It is open to the Chief Executive Medicare to put in place the required administrative arrangements to perform this function; and the register is a record of the decision made by the Chief Executive Medicare to register a sonographer.

In practice, the register is an internal departmental database used as part of auditing and compliance action in relation to Medicare benefits. This is to ensure that the providing practitioner has provided an accurate report of the service as part of a claim for the payment of Medicare benefits in circumstances where an ultrasound is performed by a sonographer under the direction or supervision of the providing practitioner.

The requirement to provide a report, which includes, if applicable, the name of the registered sonographer, is only one of many requirements that must be met for a Medicare benefit to be payable for a diagnostic imaging service. As the providing practitioner is in direct contact with the sonographer, access to the register by the providing practitioner, who is required to provide the information as part of the required records of services, is not necessary. The sonographer would know whether he or she is registered. Accordingly, the purpose of mentioning the register in subsection 71(6) of the Regulations is to define 'registered sonographer' on the basis of the provisions in the *Human Services (Medicare) Regulations 2017* relating to the exercise of this statutory function of the Chief Executive Medicare.

Pathology request forms and personal information

Subsection 16A(4)(b) of the Act provides a regulation making power to specify the requirements of pathology requests. Section 34 of the Regulations specifies the information which must be included in a request for a pathology service about the patient (subject to the requirements applying to certain 'further requests' under section 37). The request must include:

- the name of the patient;
- the address of the patient; and
- if the person is a patient in relation to a hospital, particulars about the hospital.

These provisions recognise the unique arrangement for the billing of pathology services. Like diagnostic imaging services, most pathology services are rendered pursuant to a request from a medical practitioner.

Unlike diagnostic imaging, where a patient will attend a diagnostic imaging practice to access the diagnostic imaging equipment, there is often no interaction between the pathologist and the patient. This is because the service is undertaken on a specimen of the patient, which is usually taken by the requesting medical practitioner or an approved collection centre.

This is recognised in the Act. Subsection 20A(2) of the Act allows a patient to prospectively make an offer to assign their benefit for a pathology service. The pathologist can choose to accept the patient's benefit or to set their own fees for the service.

The personal information in section 34 of the Regulations is required for pathologists to bill the service under Medicare. It would be impractical for pathologists to collect this information from patients, as a large volume of pathology services are rendered each year. In 2017-18, Medicare benefits were paid for almost 145 million pathology services.

The personal information in the pathology request is protected by the *Privacy Act 1988*. The rendering pathologist, or any practice administrative staff who have access to the information, can use that information for the purpose of Medicare billing.

The Chief Executive of Medicare can require that a person produce documentation, including a pathology request form, to substantiate a service under section 129AAD of the *Health Insurance Act 1973*. The use of documents provided under 129AAD is subject to the secrecy requirements in section 130 of the Act.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

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

Dear Senator

Thank you for your Committee's correspondence of 15 November 2018 to my office in relation to the *Foreign Acquisitions and Takeovers Amendment (Peru-Australia Free Trade Agreement Implementation) Regulations 2018*. The Committee seeks further advice as to why no consultation was undertaken on the text of the Regulations.

The Regulations are technical in nature and only implement Australia's obligations with respect to the regulation of foreign investment under the *Free Trade Agreement between Australia and the Republic of Peru* (PAFTA). The Government undertook extensive consultation during the negotiations of the PAFTA. The Explantory Statement to the Regulations outlines this consultation process in detail as follows:

> The public consultation and stakeholder engagement process on the PAFTA negotiations commenced with the Government's announcement on 24 May 2017 that Australia and Peru would be launching PAFTA negotiations. Australia's negotiating positions were informed by the views and information provided by stakeholders through both formal and informal mechanisms. Stakeholders in the public consultation process broadly appreciated the benefits of the PAFTA.
>
> The Government tabled the text of the PAFTA and accompanying National Interest Analysis in the Parliament on 26 March 2018. The Joint Standing Committee on Treaties (JSCOT) undertook an inquiry into the Agreement, which included a public hearing on 7 May 2018. JSCOT received nine public submissions into its inquiry. On 15 August 2018, JSCOT recommended that the Government take binding treaty action to implement the PAFTA.

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Because of the extensive consultation that took place in relation to the PAFTA, and in light of the fact the Regulations implement the PAFTA, I consider the consultation was undertaken in relation to the Regulations and was appropriate in accordance with paragraph 17(1)(a) of the *Legislation Act 2003*. Further consultation on the text of the Regulations would have duplicated consultation already undertaken, and would not have been useful or reasonably practicable to undertake.

I appreciate the Committee's consideration of these Regulations.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

29 / 11 /2018

THE HON CHRISTOPHER PYNE MP
MINISTER FOR DEFENCE
LEADER OF THE HOUSE
MEMBER FOR STURT

29 NOV 2018

RECEIVED

MS18-003844

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

29 NOV 2018

Dear Senator Williams

Thank you for the correspondence of 15 November 2018 from Ms Anita Coles, Committee Secretary, Senate Standing Committee on Regulations and Ordinances, requesting advice about scrutiny issues identified in relation to the Inspector-General of the Australian Defence Force Amendment Regulations 2018 (the Amending Regulations).

Constitutional validity

I understand the Committee is concerned about the constitutional validity of the Amending Regulations and, in particular, whether they intend to confer powers and functions on judicial officers acting in their personal capacity. In relation to this issue, when a judicial officer is appointed as an Assistant IGADF, they are appointed in a personal capacity. All functions and powers conferred on a judicial officer appointed as an Assistant IGADF are conferred on them in their personal capacity. Appointment as an Assistant IGADF in their personal capacity, and conferral of the relevant functions and powers on them, is not incompatible with a judicial officer's performance of their judicial functions.

The explanatory statement will be updated to reflect this, by including the following words: *When a judicial officer is appointed as an Assistant IGADF, they are appointed in a personal capacity, and all functions and powers that are conferred on a judicial officer appointed as an Assistant IGADF are conferred on them in their personal capacity.*

It should also be noted that there are judicial officers presently appointed to the office of Assistant IGADF, and that the amendments to the Inspector-General of the Australian Defence Force Regulation 2016 are intended to clarify the powers and functions that may be exercised by an Assistant IGADF who is also a judicial officer, as well as the procedures to be followed in such a case.

Privacy

I understand the Committee is concerned about the privacy implications of new section 28G, which provides for an Assistant IGADF who is a judicial officer to disclose inquiry reports and evidence, and new section 28H, which provides for an Assistant IGADF who is a judicial officer to publicly disclose all or part of a report. The Committee is seeking advice as to the justification for empowering the Assistant IGADF to disclose information to 'any other person' or any person affected by a submission or the inquiry, and the legislative safeguards in place to protect the privacy of individuals in relation to personal information disclosed under new sections 28G and 28H.

The powers of the Assistant IGADF under new sub-paragraphs 28G(2)(a)(vi) and (vii) reflect the amended powers of the IGADF: see IGADF Regulation, sub-paragraph 27(5)(a)(vii). Equally, the Assistant IGADF's power to publicly release all or part of a report reflects the powers of the Minister, the Chief of the Defence Force and the IGADF: see IGADF Regulation, section 28. Extending these powers to the Assistant IGADF promotes transparency and enables swift implementation of inquiry findings and recommendations.

It removes the delays that would be associated with the Assistant IGADF needing to request IGADF, the Minister or the Chief of the Defence Force to disclose in these circumstances on his or her behalf. Importantly, the power to disclose is balanced with appropriate privacy safeguards, noting that IGADF inquiries are normally undertaken in private and so there is no expectation of publicity on the part of those involved. For example, as is the case under subsection 27(7), the report given to a person by the Assistant IGADF under new subsection 28G(4) need not include information that the Assistant IGADF considers would be inappropriate to include, including for reasons of privacy. In such circumstances, the Assistant IGADF would consider whether any personal information should be redacted prior to disclosure in accordance with existing privacy policies.

Finally, the Committee should also note the IGADF's power under existing section 21 to give a direction restricting the disclosure of information in certain circumstances, including where the IGADF is satisfied that it is necessary to do so in the interests of fairness to a person who the IGADF considers may be affected by an inquiry.

Retrospective effect

I understand the Committee is concerned with the application of the amendments to inquiries that were commenced before the Amending Regulations were made, but not yet finished. Of particular concern is the application of the new provisions that provide for disclosure of inquiry records. The Committee has sought advice as to whether any persons were, or could be, disadvantaged by the operation of section 37 of the Amending Regulations and, if so, what steps have been taken, or will be taken, to avoid such disadvantage.

I am advised that at the time the Amending Regulations came into operation, there were four proceedings on foot being conducted by an Assistant IGADF who was a judicial officer. Having assessed these four matters, Defence is not aware of circumstances suggesting that any person would or could be disadvantaged by the operation of section 37.

In relation to the operation of new sections 28G and 28H, the powers of the Assistant IGADF reflect existing powers currently reposed in the IGADF, the Minister and the CDF. The new provisions merely clarify the existing practice where an inquiry is being run by an Assistant IGADF who is also a judicial officer. In such a context, there is unlikely to be any disadvantage suffered by any person by reason of the application of the instrument to the four proceedings.

Conclusion

I trust this response addresses the Committee's concerns about the Amending Regulations. The explanatory statement will be amended as outlined above to include the information regarding the capacity in which a judicial officer is appointed as an Assistant IGADF.

Yours sincerely

Christopher Pyne MP

29 NOV 2018

The Hon Sussan Ley MP

Assistant Minister for Regional Development and Territories
Federal Member for Farrer

RECEIVED

Ref: MC18-002027

28 NOV 2018

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

Dear Chair

Thank you for your email of 15 November 2018 regarding the *Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018* [F2018L01377] (Ordinance).

The Ordinance makes important justice reforms for vulnerable people on Norfolk Island, first by introducing a modern apprehended violence regime for Norfolk Island that provides better protections for people who have reasonable grounds to fear domestic or personal violence, and second by facilitating greater access to justice by improving court processes for vulnerable witnesses.

The Committee has sought my advice about two aspects of the Ordinance, being the justification for imposing significant penalties in delegated legislation and the imposition of a legal burden of proof on the defendant for a statutory defence to an offence of publishing prescribed information relating to a sexual offence proceeding. I am pleased to provide further advice on those matters.

Significant Penalties

The Ordinance inserts new offence provisions (sections 167F, 168M and 174J) into the *Criminal Procedure Act 2007* (NI) (Criminal Procedure Act) in relation to the publication of certain sensitive material relating to sexual offence proceedings. The offences are designed both to protect witnesses' and complainants' privacy, given the nature of evidence that is heard in sexual, violent and domestic violence offence proceedings, and also further an accused person's right to a fair trial by preventing the publication of potentially prejudicial material.

The maximum penalty for each offence is imprisonment for 12 months or 60 penalty units, or both, and the Committee has expressed concern about the imposition of a custodial penalty in delegated legislation.

As the Committee has noted previously, ordinances made for Norfolk Island, like the other external territories, are quite different from other types of Commonwealth delegated legislation. The Ordinance was made under Section 19A of the *Norfolk Island Act 1979* (the Act) which provides that the Governor-General may, subject to the Act, make ordinances 'for the peace, order and good government of the Territory.' This legislative power is expressed in the broadest possible terms and reflects the wording used in State constitutions to confer plenary legislative power on State parliaments. Accordingly, unlike a general regulation-making power commonly found in Commonwealth legislation, Section 19A of the Act authorises the broadest range of ordinances as necessary for the good government of Norfolk Island, including to prescribe offences that are punishable by imprisonment.

The Criminal Procedure Act was made by the former Norfolk Island Legislative Assembly and has been continued in force by Section 16A of the Act. The Criminal Procedure Act covers matters that would normally be dealt with under state or territory legislation. Subsection 17(3) of the Act expressly provides that laws continued in force by Section 16A of the Act may be amended or repealed by a Section 19A Ordinance. Accordingly, the amendment of this continued law by a Section 19A Ordinance is expressly authorised by the Act.

I should also point out that in the making of legislation for the external territories, the guiding objective is always to align, as far as possible, the rights and responsibilities of people in external territories with the rights and responsibilities of people in other Australian jurisdictions. Similar offences to the ones identified above and comparable penalties, including imprisonment, exist in other Australian jurisdictions.

Legal Burden of Proof

The Ordinance inserts new Section 167F (Sexual offence proceeding – prohibition of publication of complainant's identity) and includes new Subsection 167F(2) which provides that it is a defence to a prosecution for an offence against the section if the person proves that the complainant consented to the publication before the publication happened. A note follows that advises that a defendant bears a legal burden in relation to the matter in the subsection (the defence), and refers to Section 59 of the *Criminal Code 2007* (NI) (Criminal Code).

Section 59 of the Criminal Code anticipates the imposition of a legal burden on the defendant in some circumstances, providing that a burden of proof imposed on the defendant is a legal burden where, relevantly, the law expressly requires the defendant to prove the matter. In such cases, the defendant must prove the matter on the balance of probabilities, as per Section 60 of the Criminal Code.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide to Framing Offences) outlines circumstances in which it will be appropriate for legislation to provide an offence-specific defence, being where:

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

In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent ought to be in the knowledge of the person committing the act, in this case the defendant.

If that consent was received it will be significantly less difficult and less costly for the defendant to prove the existence of the consent than for the complainant or the prosecution to prove that consent does not exist. In addition, given there is a presumption against the publication of sensitive information, the defendant would be or should be aware of the need for consent and should be able to produce proof of such consent.

In any case, I note the Guide to Framing Offences goes on to provide further guidance which is relevant in this case. It indicates that creating an offence-specific defence in legislation is also more readily justified where the matter in question is not central to the question of culpability. In relation to an offence referred to in Subsection 167(1), lack of consent is not something that is needed to establish the offence. This provides further justification for placing a legal burden, rather than an evidentiary burden, on the defendant in relation to the statutory defence set out in Subsection 167(2).

I would note also that relevant commentary from the Australian Law Reform Commission (ALRC), which looked at the issue of placing legal burdens on a defendant in its 2016 report titled *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, supports this position. In that report, the ALRC acknowledged the appropriateness of placing a legal burden, as opposed to an evidentiary burden, on the defendant where the matter is not an essential element of the offence, or is not central to culpability.

Subsection 167F(2) must also be seen as potentially beneficial for the defendant in placing a limit on the criminal liability associated with the offence, noting that the offence itself is made out only by proving that a person published relevant material. In this way, the statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material.

The Department of Infrastructure, Regional Development and Cities consulted broadly during the preparation of the Ordinance, including consulting specifically with the Attorney-General's Department on the provisions the subject of this letter.

I appreciate the point the Committee has made about these matters being inadequately addressed in the Explanatory Statement for the Ordinance. As such, I have instructed the Department of Infrastructure, Regional Development and Cities to update the Explanatory Statement to include further explanation on these matters in line with the reasoning outlined above. I have enclosed for the Committee an advance copy of the updated Statement with this letter.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Hon Sussan Ley MP

Enc

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

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

Dear Chair

Thank you for your correspondence on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee). I refer to the Committee's request for further advice in relation to paragraphs 31 and 36 of APRA's Prudential Standard APS 221 Large Exposures (APS 221), as made by *Australian Prudential Regulation Authority Banking (prudential standard) determination No. 4 of 2018* (the Determination).

Specifically, the Committee has requested further advice with reference to the application of the Administrative Review Council guidance document "What decisions should be subject to merit review?" (the Guidelines), as well as the appropriateness of amending APS 221 so the above referenced decisions would be subject to merits review except where excluded on a case-by-case basis.

I have raised with APRA the Committee's concerns and further request for comment. Based on advice from APRA, I set out below some further background on APRA's large exposure rules, followed by specific responses to the Committee's two requests.

The role of APRA's "large exposure" rules in insulating Australian banks from financial crises

APRA's Prudential Standard APS 221 applies only banks and banking groups. Importantly, APS 221 does not apply to natural persons, or regular companies.

Banks are subject to bespoke and intensive prudential regulation by APRA. The rationale for intensive prudential regulation of banks is firstly to provide an added level of safety that bank deposits will be repaid, and secondly to foster financial sector stability.

For example, APS 221 sets out "large exposure" rules for banks. At a high-level, one of the key purposes of APS 221 is to insulate banks in the event of financial crises. In APRA's prudential framework, where a bank lends very large amounts to another company or sovereign entity, this is referred to as a "large exposure". The risk with large exposures is that they can make banks vulnerable to a single failure by another company or sovereign entity, and so bank's large exposures are restricted by APRA.

The importance of "large exposure" rules for banks is highlighted by prior financial crises. For example, during the Global Financial Crisis, one factor contributing to the resilience of the Australian banking system was that Australian banks did not have any "large exposures" to any

offshore, international banks that failed, or any material large exposure to subprime mortgage securitisation issuers. Similarly, during the European Sovereign Debt Crisis, Australian banks did not have any material "large exposures" to sovereigns of concern.

Compared to some other types of regulation, prudential regulation is intensely focussed on a small set of entities (relevantly in this case, banks), but also highly tailored to the circumstances. A "one size fits all" approach to prudential regulation would be materially less effective. Prudential standards are comparatively "principles based" but tailored in application to complexity, scale, business model and risk profile of individual banks, against the backdrop of external circumstances.

The Banking Act explicitly envisages prudential standards being tailored to the circumstances. For example, s 11AF(1A) confirms that prudential standards may impose different requirements being complied with in different circumstances or with respect to different activities, and s 11AF(2) confirms that prudential standards may provide for exercise of discretions under the standards, including not limited to approve, impose, adjust or exclude specific prudential requirements.

Consistent with this, APS 221 confers discrete and appropriate discretions upon APRA to tailor the application of the "large exposure" regime to banks. For instance, if APRA identified an "emerging risk", paragraph 31 provides APRA may set additional limits on large exposures to particular types of companies, industries, countries or assets types. Further, paragraph 36 provides APRA may permit exposures on an exceptions basis where it is satisfied it would not involve excessive risk. As previously noted, APRA advised that if decisions taken under these powers were subject to merits review, this may result in delays and uncertainty that could jeopardise APRA's ability to effectively deal with an emerging problem before it becomes a pressing crisis.

Finally, Part VI Banking Act carefully sets out a carefully considered and comprehensive set of APRA decisions which are merits reviewable. Many key decisions of APRA are subject to merits review, including revoking a bank licence, imposing conditions on a bank, issuing certain types of directions to banks, and making select types (but not all types) of prudential standards, among other things. On the other hand, the legislature has seen fit to not make many decisions of APRA not subject to merits review. See further the discussion below.

The Administrative Review Council Guidelines

In terms of the Guidelines, some analogy can be made with two general factors that may justify excluding merits review.

First, a parallel can be drawn between APRA's decisions relating to banks' large exposures and 'financial decisions with a significant public interest element'. Decisions of APRA under paragraph 31 in particular could involve significant evaluation of complex market settings, and a failure to act rapidly could have a significant impact on Australian financial markets. On the other hand, it is acknowledged that certain of the sub-criteria specified in the Guidelines (e.g. Minister level decision) are not present.

Second, a parallel can also be drawn between APRA's decisions relating to banks' large exposures and 'preliminary or procedural decisions'. This is because the direct legislative consequences of a bank breaching a prudential standard – leaving aside where the entity also fails to notify APRA as required by s 62A(1B) – would be to make available to APRA two key powers under the Banking Act. These are the power to give a bank a direction to comply with the prudential standard (s 11CA(1)(b),(5A)) and the power to revoke a bank's authorisation to do banking business or impose a condition on that authorisation (s 11AAA(1),(5)). These most serious Banking Act powers of APRA are subject to merits review in accordance with Part VI of the Banking Act.

Summary

To summarise the above:

- APS 221 does not apply to natural persons but only banks;
- APS 221 is directed towards insulating the Australian banking system from financial crises, the value of which is highlighted by prior financial crises such as the GFC and the European Sovereign Debt Crisis;
- banks are subject to bespoke and intensive prudential regulation by APRA, which is different in nature to some other modes of regulation;
- the Banking Act expressly contemplates APRA making prudential standards, including with discretions allowing further APRA decisions to tailor prudential requirements to the complexity, scale, business model and risk profile of individual banks, as well as external circumstances;
- the Banking Act contains a carefully considered and comprehensive regime specifying which specific decisions of APRA should be subject to merits review; and
- in terms of the Guidelines, some analogy can be drawn with the categories of 'financial decisions with a significant public interest element' and 'preliminary or procedural decisions'.

Alternative Approach

The Committee observed that it may be appropriate for the instrument to be amended to require APRA to exclude merits review in relation to decisions made under sections 31 and 36 on a case-by-case basis (rather than globally).

Following engagement with APRA, it is suggested that exclusion of merits review on a case-by-case basis would not be preferable, for the same reasons outlined above. Having said that, in the alternative consideration could be given by APRA to amending APS 221 to provide for merits review in general, with a power exercisable by APRA to exclude merits review on a case-by-case basis.

*****

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 11 /2018

Parliament House Canberra ACT 2600 Australia
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THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

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 Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 2 of 2018* (the instrument). The instrument sets out minimum requirements for APRA-regulated institutions in determining the fitness and propriety of individuals to hold positions of responsibility. Its objective is to ensure that an institution prudently manages the risks that persons acting in responsible person positions who are not fit and proper pose to the institution's business and financial standing.

I note the Committee's has requested advice on two matters, firstly whether decision made by APRA under sections 22 and 23 of the instrument to determine that a person is, or is not, a responsible person, are subject to independent merits review; and if not, the characteristics of the decision that would justify excluding independent merits review.

Merits review

I have raised the Committee's concerns with APRA, they have advised me that paragraphs 22 and 23 of CPS 520 are not subject to independent merits review. APRA does not consider that paragraphs 22 and 23 of CPS 520 "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" (scrutiny principle 23(3)(c)).

CPS 520 is generally concerned with ensuring that an entity subject to CPS 520 (entity) has an appropriate fit and proper policy to guide it in determining the fitness and propriety of its responsible persons. CPS 520 makes it clear that the ultimate responsibility for ensuring the fitness and propriety of the responsible persons of an entity rests with its Board of directors.

The purpose of paragraphs 22 and 23 of CPS 520 is to provide APRA with a mechanism for determining persons to be, or not be (as the case may be), responsible persons where, on fact, they would appropriately be considered responsible persons (or not) regardless of how the definition of responsible person in paragraph 20 applies to them. The effect of such decision is that the individual would become subject to, or no longer be subject to, the entity's fit and proper policy.

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APRA advises that any potential impact on a person's rights and liberties under a fit and proper policy is subject to a further decision making process either in the control of the entity or, in APRA's case, as set out in the relevant Industry Acts (i.e. Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995, Private Health Insurance (Prudential Supervision) Act 2015). As such, paragraphs 22 and 23 of CPS 520 merely facilitate any subsequent decision(s) regarding the fitness and propriety of responsible persons and are therefore unsuitable for merits review.

Privacy

In relation to the Committee's second question, regarding the nature of the information that would be collected for a fit and proper assessment and how personal information collected during this process will be used, managed and protected, APRA have advised me that the information that may be collected is ultimately a matter for the entity conducting the assessment. Importantly, however, the entity would need to comply with applicable privacy laws.

Under CPS 520, APRA mandates that an entity must have a fit and proper policy, and at paragraph 38(b) of CPS 520, APRA requires that a fit and proper policy specify the information to be obtained in assessing the fitness and propriety of a responsible person and how it will be obtained. Notably, APRA does not mandate the type of information to be collected – that is a matter for the entity. Nonetheless, the criteria set out in paragraphs 30, 32 and 35 of CPS 520 for determining the fitness and propriety of a responsible person may provide some guidance as to the type of information an entity may collect.

Any personal information collected by an entity during a fit and proper assessment will be used and managed in accordance with an entity's relevant policies. To the extent any personal information is provided to APRA by the entity, this would occur under paragraphs 55 to 60 of CPS 520. APRA would use that information for the purposes of assessing the fitness and propriety of an individual. Any such information provided to APRA will be subject to the secrecy provisions in section 56 of the Australian Prudential Regulation Authority Act 1998 and cannot be further disclosed by APRA unless in accordance with the specific exceptions in section 56.

All officers of APRA are subject to section 56 and any breach of section 56 is an offence. Further, APRA has various internal policies and guidelines which stipulate how information collected is to be securely managed and stored, as well as protections in place to ensure that sensitive information such as personal information collected by APRA is secured.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 11 /2018

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-025352

26 NOV 2018

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

Dear Chair

I refer to your letter of 15 November 2018 on behalf of the Standing Committee on Regulations and Ordinances (the Committee) requesting information on the following declarations of corresponding state law, made under the *Research Involving Human Embryos Act 2002*: F2018L01402, F2018L01403, F2018L01404, F2018L01405, F2018L01406 (the Instruments).

The Committee has requested advice on whether a notice was published in the *Gazette* in relation to each of the Instruments.

Subsection 56(1) of the *Legislation Act 2003* provides as follows:

> "If a primary law requires a legislative instrument made under that law or other enabling legislation, or particulars of the making of the instrument, to be published or notified in the Gazette, the requirement is taken to be satisfied if the instrument is registered as a legislative instrument".

In accordance with subsection 56(1) of the *Legislation Act 2003*, each of the Instruments was registered as a legislative instrument on 5 October 2018, which satisfied the requirement to be published in the *Gazette*.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Karen Andrews MP

Minister for Industry, Science and Technology

Min ID: MC18-003753

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.11
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Williams~~ John

I refer to the Committee Secretary's correspondence of 15 November 2018 concerning the *Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018* and the *Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018*.

***Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018* (AI Instrument)**

The Senate Standing Committee on Regulations and Ordinances (the Committee) has requested more detailed advice as to the constitutional authority for the Artificial Intelligence Capability Program (the AIC Program) prescribed in s 5 of the AI Instrument.

Implied nationhood power

Section 6 of the AI Instrument specifies the Parliament's power to make laws with respect to measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

In particular, the Committee is concerned that it is not clear that the development of Artificial Intelligence (AI) Standards 'could *only* be carried out by the Commonwealth for the benefit of the nation, such as would engage the implied nationhood power' (emphasis in original). The Committee has noted that 'it is not apparent that Standards Australia could not develop AI standards on its initiative (with funding supported by another head of legislative power, if appropriate), or that the States could not develop such standards'.

The Commonwealth executive power (s 61 of the Constitution) and the express incidental power (s 51(xxxix) of the Constitution) support activities that the Commonwealth can carry out for the benefit of the nation. Justice Mason in *Victoria v Commonwealth* [1975] HCA 52; 134 CLR 338 at 397 stated that 'there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.

There is a need for national coordination and national leadership in relation to the development of standards on AI. The financial assistance under the AIC Program will be directed towards meeting this need for national coordination and national leadership. The strategic framework will have a national application and requires a high degree of national coordination and integration. Standards Australia has extensively contributed to standards development and adoption both nationally and internationally.

The strategic framework that will be developed by Standards Australia will identify Australian strategic priorities and current domestic and international standardisation activities. The strategic framework will also identify opportunities for Australian stakeholders to engage with the broader global digital economy and standards fora.

The financial assistance under the AIC Program will specifically be directed at meeting a need for national coordination and national leadership in AI, accordingly I am satisfied that the implied nationhood power will support the AIC Program.

***Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018* (Automotive Instrument)**

The Committee has also requested more detailed advice as to the constitutional authority for the Automotive Engineering Graduate Program (the AEG Program) prescribed in s 5 of the Automotive Instrument.

The corporations power

Section 6 of the Automotive Instrument specifies the Parliament's power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (see s 51(xx) of the Constitution). The Committee has commented that it is not clear to the Committee that funding under the AEG Program would only be provided to corporations.

There are a number of restrictions on the entities to which funding will be provided under the AEG Program. Funding will not be provided in the form of direct grants to students. The description of the AEG Program in s 5 of the Automotive Instrument states that the funding will be provided to higher education providers. Section 7 of the Automotive Instrument sets out a further limitation. Section 7 provides that applicants for funding under the AEG Program must be Table A or Table B providers within the meaning of the *Higher Education Support Act 2003*. As noted in the Explanatory Statement, the funding under the AEG Program will only be provided to trading or financial corporations to assist those corporations to increase the pipeline of post graduate students into Australia's automotive engineering sector. Applications for funding under the AEG Program will be assessed against the eligibility criteria. Applications must include supporting information to demonstrate that the application meets the eligibility criteria.

Section 34 of the *Industry Research and Development Act 1986* provides that the Commonwealth may make, vary or administer an arrangement in relation to activities carried out by persons under a program prescribed by legislative instrument under s 33(1). Section 35(2) limits the arrangements made under s 34 so that, where a party to those arrangements is a corporation to which s 51(xx) of the Constitution applies, the arrangement must be subject to a written agreement containing terms and conditions under which money is payable by the Commonwealth and that the corporation must comply with the terms and conditions. The *Industry Research and Development Act 1986* therefore may be distinguished from the

legislative provisions considered by the High Court in *Williams v Commonwealth (Williams (No. 2))* [2014] HCA 23; 252 CLR 416 to which the Committee refers.

Commonwealth executive power and the express incidental power and the territories power

Section 6 of the Automotive Instrument also specifies the express incidental power (s 51(xxxix) of the Constitution) and the executive power (s 61 of the Constitution) and the territories power (s 122 of the Constitution). These heads of power are specified because they also support the AEG Program. Funding under the AEG Program may be provided to providers that are established under a law of the Commonwealth or to Territory higher education providers. It is a well-accepted principle that a law can be with respect to more than one head of constitutional power.

Social welfare power

The Committee's comments have also queried whether further constitutional support for the expenditure proposed in the Automotive Instrument might be obtained from reliance on the student benefits aspect of the social welfare power in s 51(xxiiiA) of the Constitution. As noted above, a law can be with respect to more than one head of constitutional power.

I am satisfied that the heads of constitutional power specified in s 6 of the Automotive Instrument are sufficient to establish constitutional authority for expenditure on the AEG Program.

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

Yours sincerely

Karen Andrews

3 /12 /2018

THE HON CHRISTIAN PORTER MP
ATTORNEY-GENERAL
ACTING MINISTER FOR HOME AFFAIRS

Ref No: MS18-009733

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

Dear ~~Senator~~ Sen

I refer to the Senate Standing Committee on Regulations and Ordinances Committee's (the Committee) correspondence of 15 November 2018 in relation to the *Aviation Transport Security (Incident Reporting) Instrument 2018* (the Aviation Instrument) and the *Maritime Transport and Offshore Facilities Security (Incident Reporting) Instrument 2018* (the Maritime Instrument).

Please find my detailed response to the questions posed by the Committee at Attachment A. I also intend to update the explanatory statements for these instruments. For your information, please see copies of the updated explanatory statements at Attachment B and Attachment C.

Thank you for bringing these matters to my attention.

Yours sincerely

CHRISTIAN PORTER

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Attachment A

The committee requests the minister's advice as to:

- **whether any consultation was undertaken in relation to the instruments and if so, the nature of that consultation; or**
- **if no consultation was undertaken, why not.**

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

Thank you for the opportunity to outline what consultation was undertaken in relation to the Aviation and Maritime Instruments.

My Department engages in regular dialogue with industry in order to ensure that our national interests are secure. A focus of my Department is to ensure that aviation and maritime security laws are effective and enable the facilitation of trade and travel activities. My Department has a relationship with industry such that it regularly receives feedback on proposed legislation change and my Department takes that into account before legislation is changed.

In this case, both instruments were made in substantially the same form as the previous instruments. The only notable changes in the new instruments were to address administrative issues such as out-of-date contact information following machinery of government changes and advising when an incident concluded. I am satisfied that the nature of the consultation undertaken in regards to these instruments was appropriate and reasonably practicable in the circumstances. The explanatory statements have been updated to reflect this consultation. I am confident that industry had adequate mechanisms to comment on the proposed content of the instruments before the instruments were made.

The committee requests the minister's advice as to:

- **how personal information reported in accordance with the instruments will be used and managed – including whether onward disclosure is permitted:**

Thank you for the opportunity to outline how personal information reported in accordance with the Aviation and Maritime Instruments will be used and managed.

Security incidents can be reported to my Department via an online reporting form. The Department's privacy and security statements are accessible from each form, and the reporter is required to read and understand each statement before submitting an incident report. Security incident reporting includes the provision of limited personal information pertaining to the reporter. This is necessary information to allow the Department to contact the reporter to clarify and/or obtain further information if necessary. I also note that a security incident report may also include third-party personal information. Typically, this information will either relate to other persons involved in responding to the incident, or the person alleged to have been involved in the incident.

My Department utilises security incident reporting to help capture and efficiently monitor aviation security incidents. Security incident reporting is assessed for a regulatory response. This helps to ensure the Department meets its legislated requirements to prevent unlawful interference with aviation, maritime transport or

offshore facilities. The reports also provide information to enable the Australian Government to comply with its international obligations to report aviation security incidents to the International Civil Aviation Organization.

My Department periodically transmits de-identified summary-level security incident information to Departmental portfolio government agencies (e.g. Australian Border Force and Australian Federal Police) to inform their operational work. De-identified security incident information may also be provided to regulated industry participants to strengthen their regulatory compliance. Information is classified at the requisite level, and does not include personal information.

Should a circumstance arise where a request for personal information is requested, my Department would assess the request on its merits and in accordance with legal and policy obligations. The Department may disclose information where legally required to do so by law.

- **what safeguards are in place to protect individuals' privacy with respect to that information.**

The Department stores all security incident reports in a secure database. The database is housed on a PROTECTED security-rated network. Access to the database and its data is restricted to staff that hold the necessary security clearance and have a demonstrable operational need to access the data.

Access control is achieved through a username and password that is issued to each individual. This control framework ensures that the information provided to the Department is only accessible to those who hold a genuine need to know and therefore an individual's privacy information is inherently protected.

More broadly, the Department operates under the Protective Security Framework which provides direction on our information security management policies. Guidance on this framework is provided alongside each incident report form and is publicly available on the Department's website.

Attachment B

EXPLANATORY STATEMENT

Issued by Authority of the Delegate of the Secretary of the Department of Home Affairs

Subject - *Aviation Transport Security (Incident Reporting) Instrument 2018*

Aviation Transport Security Act 2004

The *Aviation Transport Security Act 2004* (the Act) establishes a regulatory framework to safeguard against unlawful interference with aviation. A part of that regulatory framework is the requirement (set out in Part 6 of the Act) to report aviation security incidents. Section 99 of the Act defines each of the following as an aviation security incident:

(a) a threat of unlawful interference with aviation;

(b) an unlawful interference with aviation.

Subsection 104(1) of the Act provides that airport operators must report aviation security incidents in accordance with section 104. In particular, paragraph 104(4)(a) provides that an aviation security incident that relates to the airport of the airport operator must be reported to the Secretary of the Department of Home Affairs (the Secretary).

Subsection 105(1) provides that aircraft operators must report aviation security incidents in accordance with section 105. In particular, paragraph 105(4)(a) provides that an aviation security incident that relates to an aircraft of the aircraft operator must be reported to the Secretary.

Subsection 106(2) provides that other persons with incident reporting responsibilities (identified in subsection 102(4)) must also report aviation security incidents to the Secretary.

Section 107 of the Act sets out how reports are to be made. Subsection 107(1) of the Act provides that the Secretary may, by legislative instrument, specify either or both of the following:

(a) information that must be included in a report required by Part 6 of the Act;

(b) the way in which the report must be made.

Subsection 107(3) of the Act provides that if a report is made under Part 6 of the Act and the report does not comply with the requirements of the legislative instrument made under subsection 107(1), then that report is taken not to have been made.

Subsection 127(1) of the Act enables the Secretary to delegate all or any of the Secretary's powers and functions under the Act to, among others, a Senior Executive Service (SES) employee in the Department of Home Affairs (the Department). On 9 April 2018, the Secretary delegated the power under subsection 107(1) of the Act to, among others, the SES Band 2 of the Aviation and Maritime Security Division of the Department.

The Aviation Transport Security (Incident Reporting) Instrument 2018 (the Instrument) repeals and replaces the *Aviation Transport Security (Incident Reporting) Instrument 2015* (the Principal Instrument). The Instrument sets out the information that must be included in a report to the Secretary under Part 6 of the Act. The information includes, for example, the date, time and location of the aviation security incident; the name of the person reporting the incident; the aviation industry participant to which the incident directly relates; and a description of the incident, including an indication of whether the incident was a threat of unlawful interference with aviation or an unlawful interference with aviation.

The Instrument also states that a report is to be made to the Department in writing, or orally and followed up in writing, within 24 hours.

Information contained in such reports allows the Department to capture and efficiently monitor aviation security incidents. The reports also provide information to enable the Australian Government to comply with its international obligations to report aviation security incidents to the International Civil Aviation Organization.

The Department of Home Affairs engages in regular dialogue with industry in order to ensure that our national interests are secure. A focus of the Department is to ensure that industry is regulated by aviation security laws that support industry and the community as they carry out trade and travel activities. Through this ongoing dialogue the Department regularly receives feedback on proposed legislation change and it takes into account that feedback into account before legislation is changed.

In this case, the Department consulted with aviation industry participants at industry forums such as the Aviation Security Advisory Forum (ASAF) and Regional Industry Consultative Forum (RICM). The Department advised that this instrument would be made in substantially the same form as the previous instrument and that the only notable changes were to address administrative issues such as out-of-date contact information following machinery of government changes. When the nature of the instrument and the close relationship the Department has with industry is considered, the consultation undertaken for this instrument is appropriate and reasonably practicable.

The Department will be issuing industry participants with updated guidance in October 2018 and will be presenting on incident reporting at the combined ASAF and RICM forum in November 2018.

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the making of the Instrument. OBPR has advised that a Regulation Impact Statement is not required to remake the instrument (OBPR ID: 23791).

A Statement of Compatibility with Human Rights is set out in the Attachment.

The Act does not specify any conditions that need to be satisfied before the power to make the Instrument may be exercised.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

Authority: Subsection 107(1) and section 127 of the *Aviation Transport Security Act 2004*

Attachment

Statement of Compatibility with Human Rights

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

Aviation Transport Security (Incident Reporting) Instrument 2018

This Legislative Instrument is 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 Legislative Instrument is a new Instrument setting out what is to be included in aviation security incident reports made under the *Aviation Transport Security Act 2004* and how those reports are to be made. The Legislative Instrument substantially replicates the *Aviation Transport Security (Incident Reporting) Instrument 2015*.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

ANGUS KIRKWOOD

Acting First Assistant Secretary, Aviation and Maritime Security Division

Department of Home Affairs

Attachment C

EXPLANATORY STATEMENT

Issued by Authority of the Delegate of the Secretary of the Department of Home Affairs

Subject - *Maritime Transport and Offshore Facilities Security (Incident Reporting) Instrument 2018*

Maritime Transport and Offshore Facilities Security Act 2003

The *Maritime Transport and Offshore Facilities Security Act 2003* (the Act) establishes a regulatory framework to safeguard against unlawful interference with maritime transport and offshore facilities. A part of that regulatory framework is the requirement (set out in Part 9 of the Act) to report maritime transport or offshore facility security incidents. Section 170 of the Act provides that:

(1) If a threat of unlawful interference with maritime transport or offshore facilities is made and the threat is, or is likely to be, a terrorist act, the threat is a *maritime transport or offshore facility security incident*.

(2) If an unlawful interference with maritime transport or offshore facilities is, or is likely to be, a terrorist act, the unlawful interference is a *maritime transport or offshore facility security incident*.

Subsection 177(1) of the Act provides that port operators must report maritime transport or offshore facility security incidents in accordance with section 177. In particular, paragraph 177(2)(a) provides that a maritime transport or offshore facility security incident that relates to the port of the port operator must be reported to the Secretary of the Department of Home Affairs (the Secretary).

Subsection 178(1) provides that the master of a security regulated ship or a ship regulated as an offshore facility must report maritime transport or offshore facility security incidents in accordance with section 178. In particular, paragraph 178(2)(a) provides that a maritime transport or offshore facility security incident that relates to the master's ship must be reported to the Secretary.

Subsection 179(1) provides that the ship operator for a security regulated ship must report maritime transport or offshore facility security incidents in accordance with section 179. In particular, paragraph 179(2)(a) provides that a maritime transport or offshore facility security incident that relates to a security regulated ship of the ship operator must be reported to the Secretary.

Subsection 179A(1) provides that the offshore facility operator for a security regulated offshore facility must report maritime transport or offshore facility security incidents in accordance with section 179A. In particular, paragraph 179A(2)(a) provides that a maritime transport or offshore facility security incident that relates to a security regulated offshore facility of the offshore facility operator must be reported to the Secretary.

Subsection 180(1) provides that a port facility operator for a port facility within a security regulated port must report maritime transport or offshore facility security incidents in accordance with section 180. In particular, paragraph 180(2)(a) provides that a maritime transport or offshore facility security incident that relates to the port facility operator's port facility must be reported to the Secretary.

Subsection 181(1) provides that other persons with incident reporting responsibilities (identified in subsection 175(4)) must also report maritime transport or offshore facility security incidents to the Secretary.

Section 182 of the Act sets out how reports are to be made. In particular, subsection 182(1) of the Act provides that the Secretary may, by legislative instrument, specify either or both of the following:

(a) information that must be included in a report required by Part 9 of the Act;

(b) the way in which the report must be made.

Subsection 182(3) of the Act provides, in effect, that if a report is made under Part 9 of the Act and the report does not comply with the requirements of the legislative instrument made under subsection 182(1), then that report is taken not to have been made.

Subsection 202(1) of the Act enables the Secretary to delegate all or any of the Secretary's powers and functions under the Act to, among others, a Senior Executive Service (SES) employee of the Department of Home Affairs (the Department). On 9 April 2018, the Secretary delegated the power under subsection 182(1) of the Act to, among others, the SES Band 2 of the Aviation and Maritime Security Division of the Department.

In accordance with the *Legislation Act 2003*, the *Maritime Transport and Offshore Facilities Security Act 2003 Notice About How Incident Reports Are to be Made (No. 3)* (the Principal Notice) will automatically repeal on 1 October 2018. The Principle Notice will be replaced by the *Maritime Transport and Offshore Facilities Security (Incident Reporting) Instrument 2018* (the Instrument).

The Instrument sets out the information that must be included in a report to the Secretary under Part 9 of the Act. The information includes, for example, the date, time and location of the maritime transport or offshore facility security incident; the name of the person reporting the incident; the maritime industry participant to which the incident directly relates; and a description of the incident, including an indication of whether the incident was a threat of unlawful interference with maritime transport or offshore facilities or an unlawful interference with maritime transport or offshore facilities.

The Instrument also states that a report is to be made to the Department in writing, or orally and followed up in writing, within 24 hours. Information contained in such reports allows the Department to capture and efficiently monitor maritime transport or offshore facility security incidents.

The Department of Home Affairs engages in regular dialogue with industry in order to ensure that our national interests are secure. A focus of the Department is to ensure that industry is regulated by aviation security laws that support industry and the community as they carry out trade and travel activities. Through this ongoing dialogue the Department regularly receives feedback on proposed legislation change and it takes into account that feedback into account before legislation is changed.

In this case, the Department consulted with maritime industry participants through the Maritime Industry Security Consultative Forum. The Department advised that this instrument would be made in substantially the same form as the previous instrument and that any changes were only administrative in nature. When the nature of the instrument and the close relationship the Department has with industry is considered, the consultation undertaken for this instrument is appropriate and reasonably practicable.

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the making of the Instrument. OBPR has advised that a Regulation Impact Statement is not required to remake the sunsetting notice as it is machinery in nature and does not substantially alter existing arrangements (OBPR ID: 23791).

A Statement of Compatibility with Human Rights is set out in the Attachment.

The Act does not specify any conditions that need to be satisfied before the power to make the Instrument may be exercised.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

Authority: Subsection 182(1) and section 202 of the *Maritime Transport and Offshore Facilities Security Act 2003*

Attachment

Statement of Compatibility with Human Rights

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

Maritime Transport and Offshore Facilities Security (Incident Reporting) Instrument 2018

This Legislative Instrument is 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 Legislative Instrument is a new Instrument setting out what is to be included in maritime transport or offshore facility security incident reports made under the *Maritime Transport and Offshore Facilities Security Act 2003* and how those reports are to be made. The Legislative Instrument substantially replicates the *Maritime Transport and Offshore Facilities Security Act 2003 Notice About How Incident Reports Are to Be Made (No. 3)*.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

ANGUS KIRKWOOD

Acting First Assistant Secretary, Aviation and Maritime Security Division

Department of Home Affairs