The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC19-001875

13 JUN 2019

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

Dear Chair

Thank you for the Committee's letter of 4 April 2019 regarding a request for additional advice in the Standing Committee on Regulations and Ordinances' *Delegated Legislation Monitor 2 of 2019*, in relation to AD/DHC – 2/26 Amdt 1 Passenger Seats and Passenger Seat Attachment Fittings [F2019L0001].

The Committee requested further clarification as to whether the instrument incorporates any documents already in existence, such as drawings approved by De Havilland Aircraft of Canada Ltd.

The Civil Aviation Safety Authority (CASA) has advised that whilst the instrument refers to approvals by the manufacturer or made under aviation legislation, no specific approval is being incorporated by reference as the instrument is expressing an applicability requirement, so that the absence of an approval will require compliance with the instrument.

The instrument otherwise does not require a person to comply with or do something expressed in an approval and CASA holds no such approvals.

This advice was incorporated into a replacement Explanatory Statement lodged with the Federal Register of Legislation on 30 April 2019.

Thank you again for your correspondence and I trust this is of assistance.

Yours sincerely

Michael McCormack

The Hon Michael McCormack MP
Parliament House Canberra | (02) 6277 7520 | minister.mccormack@infrastructure.gov.au
Suite 2, 11-15 Fitzmaurice Street, Wagga Wagga NSW 2650 | michael.mccormack.mp@aph.gov.au

SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MS19-900167

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells Connie,

I refer to correspondence of 15 February 2019 from the Secretariat of the Senate Standing Committee on Regulations and Ordinances, requesting advice in relation to the Aged Care Quality and Safety Commission Rules 2018 (Rules).

The Rules make provision for the performance of functions conferred under the *Aged Care Quality and Safety Commission Act 2018* (Act). Under that Act, the Australian Government established the Aged Care Quality and Safety Commission (Commission) as a single point of contact for aged care consumers and their families, and for aged care providers, in relation to aged care quality concerns.

The Rules support the operations of the Commission and, together with the Act, have implemented the first stage of legislative reform to strengthen the regulatory framework that safeguards the health, safety and wellbeing of aged care consumers. As you are aware, the Act brings together the functions previously performed by the Australian Aged Care Quality Agency and Aged Care Complaints Commissioner into a single agency. The object of the Act expresses Parliament's intention to confer additional functions on the Commissioner relating to matters such as the approval of providers of aged care and compliance, through future legislative change.

I have responded to the issues raised by the Committee below. While I have sought to address the Committee's concerns in full, where these matters may be further detailed in the explanatory statement, and or more appropriately considered in the context of the future legislative reforms, this will also be undertaken.

1. **Consultation**

The Committee requests further information regarding the consultation undertaken in relation to the Rules, including the nature of these consultations and, if no consultations were undertaken, the reasons for this.

As mentioned in the explanatory statement, as part of the Review of National Aged Care Quality Regulatory Processes (Carnell-Paterson Review), extensive public consultation took place with a range of stakeholders including aged care regulators, consumers, carers and approved providers to inform the recommendations of the Carnell–Paterson Review.

Further, as part of consultations on the establishment of the Commission, the Department of Health met with members of the Aged Care Quality Advisory Council (established under section 29 of the *Australian Aged Care Quality Agency Act 2013*) and members of the Aged Care Sector Committee Quality Subgroup. A targeted sector meeting was also held in early August 2018 to discuss the establishment of the Commission.

These consultations broadly informed the structure and scope of the legislative framework within which the Rules are made.

In relation to the instrument itself, the Department developed the Rules in close consultation with the former Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner. These consultations were undertaken to ensure the workability of the Rules and identified opportunities to refine and clarify processes, where appropriate.

Given the Rules largely consolidated and reproduced the effect of the former Principles (particularly the Quality Agency Principles 2013, the Complaints Principles 2015, and the Quality Agency Reporting Principles 2013) no further consultation was undertaken.

2. Retrospective effect - transitional provisions under Part 9

Part 9 of the Rules provide transitional provisions for activities which commenced under the former Quality Agency Principles 2013 and Complaints Principles 2015, but remain undetermined or incomplete before 1 January 2019 (i.e. the transition time). The transitional provisions treat these regulatory activities as if they were made, or commenced, under the Rules.

These transitional provisions operate in relation to the following regulatory activities:

- pending complaints (Division 1);
- pending applications for accreditation or re-accreditation (Division 2);
- incomplete quality reviews (Division 4) and monitoring processes (Division 5); and
- pending requests and applications for reconsideration (Division 7).

The Committee has raised concerns about the retrospective effect of the transitional provisions under Part 9, given the Rules do not appear to merely reproduce the former Principles but also introduce some changes. The Committee has requested advice in relation to whether these transitional provisions disadvantage any person, and if so what steps have been taken to mitigate such impacts.

While the Rules differ from the former Principles, this is due to the streamlining and refining of provisions. It was not the policy intent to alter the rights, responsibilities, powers or interests of providers or complainants under the new Rules. Accordingly there would be no difference for those with unresolved matters at the transition time. Further, some provisions which were previously made under the former Principles have been removed and enacted under primary legislation, due to a restructure to the legislative framework established by the Act (e.g. provisions concerning entry to premises).

For example, in relation to the complaints functions, the new concept of 'provider responsibility information' was introduced to more clearly distinguish how this information may be dealt with, from information that is provided as part of a complaint. However, the grounds and processes for making a complaint remain effectively the same, with the Commissioner able to deal with the complaint in largely the same manner and exercising the same powers as under the former Principles. The process for dealing with 'provider responsibility information' remains consistent with the ability of the former Aged Care Complaints Commissioner to conduct a resolution process on their 'own motion' under the Complaints Principles 2015.

Where substantive changes have been made to the operation of the complaints or regulatory functions, the operation of Part 9 would not disadvantage persons since these changes do not impose any new requirements or burdens, or alter processes, that are inconsistent with the rights or obligations they would have held under the former Principles.

In addition, sufficient scope has been left in the Rules to allow arrangements to be made to minimise any impact. For example, subsections 114(2) and (3) of the Rules allows things done under the former Principles to be treated as if it had been done under the Rules, and allow the Commissioner to 'make arrangements' to continue to deal with these matters, to avoid any unintended consequences.

As an example of this, one of the most significant changes is the removal of the requirement to produce a report on major findings from a review audit (sections 91 and 92 of the Rules). While the Rules streamline the former requirements and process for reporting, to make it consistent with the process for re-accreditation audits, the Rules preserve the opportunity for providers to respond in writing to the findings of the review audit under the new Rules. Under the Rules, the Commissioner would also have the ability to ensure providers are informed of these changes in advance, given the Commissioner would control the timing of the reporting process. Such changes have already been reflected in the Commission's communication products for providers, which are available from its website.

I will also incorporate this additional information on the impact of the transitional provisions into the explanatory statement for the Rules.

3. Privacy matters enacted in delegated legislation

The Committee has expressed concerns about the appropriateness of enacting delegated legislation dealing with disclosures of protected information, in the circumstances contemplated under section 111 of the Rules.

The Committee has requested advice in relation to:

- the necessity for permitting the kinds of disclosures of protected information set out under section 111;
- the safeguards for protecting the privacy of individuals, whose personal information is disclosed under section 111; and
- the appropriateness of enacting the circumstances in which protected information may be disclosed via delegated legislation, rather than primary legislation.

Rationale for permitted disclosure

Consistent with the objects of the Act, the intention of section 111 of the Rules is to allow disclosures of protected information, in circumstances where this would protect the health, safety and wellbeing of aged care consumers. The current provisions for disclosing protected information under Part 7 of the Act may not be sufficiently broad to ensure this objective is always achieved.

Limitations of existing permitted disclosure provisions
Part 7 of the Act allows protected information to be disclosed as either a defence (subsections 60(3) to (5) of the Act) to the offence of unauthorised use or disclosure (subsection 60(1)) for disclosures made in the course of performing regulatory or complaints functions, or as a permitted disclosure authorised for other specific purposes under subsection 61(1) of the Act.

However, paragraph 60(3)(a) of the Act may not allow disclosures to be made where information is acquired in the course of performing functions, but may not be disclosed in the course of performing these functions. For example, information could be received during a re-accreditation site audit which raises potential concerns regarding the health, safety and wellbeing of consumers, and if the information does not relate to a function, such as the assessment of a particular standard, the defence would not apply. An additional example is provided in the explanatory statement for the Rules.

Further, while paragraph 61(1)(e) permits disclosures for other specific purposes relating to the protection of the health, safety or wellbeing of an aged care consumer, there must be a serious risk to the health, safety and wellbeing of a consumer, and the disclosure must be necessary to, and have the effect of lessening and preventing that risk. The requirement for a risk to be serious does not allow disclosure in cases where matters raised about an aged care consumer has the potential to cause serious harm but do not amount to a serious risk given the nature and likelihood of the consequences. This can also cast doubt on whether a disclosure would actually be 'necessary to prevent or lessen a serious risk' as required under paragraph 61(1)(e).

Proposed provision for permitted disclosure
Section 111 overcomes these limitations by allowing disclosures to be made in circumstances where the Commissioner reasonably believes that not disclosing the information would place the health, safety and wellbeing of a consumer at risk. This provision is designed to allow disclosures where:

- the Commission receives information, or is made aware of matters that are not covered under paragraph 60(3)(a); and
- the information raises matters with the potential to affect a consumer's health, safety or wellbeing, whether or not that risk is serious.

The Commission may routinely receive, or be made aware of information which raises issues with the potential for serious consequences, but may not be able to be assessed as being a serious risk in the absence of further inquiry. Broadening the permitted disclosure provisions ensures this information is not withheld from a provider who could otherwise address the risk.

Safeguards for personal information privacy

Section 111 incorporates safeguards which operate to protect the personal information privacy of individuals, where this is relevant. Disclosures under section 111 can only be made when they have been authorised by the Commissioner. This helps to ensure that disclosures are considered on a case by case basis and only permitted where they achieve the intended policy objectives.

In exercising this discretion, no express requirements are imposed on the Commissioner to consider an individual's privacy to help ensure consistency with the existing grounds for permitted disclosure under the Part 7 of the Act. Despite this, it is likely that any decision to disclose on the grounds it protects the safety, health and well-being of consumers, will take into account the privacy of a consumer (among other factors).

Decisions under section 111 of the Rules would be made in the broader context of the Commission's legislative scheme. Relevantly, subsection 60(1) makes it a criminal offence to disclose protected information which is intended to (among other matters) give a level of confidence to persons providing information to the Commissioner that information which identifies a particular individual (or provider) will generally not be disclosed for an unrelated purpose. Complainants and providers are more likely to participate in the complaint resolution and regulatory processes under the Rules, and be candid in their dealings with the Commission, if they have a sufficient level of assurance regarding the confidentiality of information that identifies them.

Given the importance of upholding the protections afforded by subsection 60(1) of the Act to the fundamental operation of the Act, a decision to limit these protections by authorising disclosures of protected information containing personal information would need to balance the impact on an individual's privacy in terms of the objectives of subsection 60(1) of the Act, in determining whether to disclose under section 111 of the Rules.

To ensure disclosures under section 111 of the Rules are also limited to the kinds of disclosures envisaged (as described above), section 111 only permits disclosures which are made to approved providers or service providers as they are best placed to respond to addressing risks to consumers in the first instance.

Section 111 of the Rules does not contain any provisions requiring the Commissioner to notify and or provide affected individuals the opportunity to make written submissions in relation the disclosures which may be proposed under this provision. Incorporating these procedural requirements would not be warranted in many cases for which section 111 is intended to be used, since it is likely to be impractical or unreasonable to contact or seek consent from the person to whom the information relates as the disclosure relates to a present risk to an aged care consumer.

However, given the Committee's concerns my Department will review the operation of this rule as part of future legislative change, to ensure a consistent policy approach is taken under the Rules and Act.

Appropriateness of delegated legislation

Section 111 is made pursuant paragraph 61(1)(j) of the Act which allow rules to be made to provide supplementary grounds for disclosing protected information, to those permitted under Part 7 of the Act. In accordance with paragraph 61(1)(j), section 111 expands the existing purposes for which disclosures may be authorised, most relevantly under paragraph 61(1)(e), to ensure further disclosures under section 111 remain consistent with the policy objectives of Part 7, and more generally support the objects and spirit of the Act – which includes protecting the health, safety and wellbeing of aged care consumers.

4. Merits review

Part 7 of the Rules provide a scheme for the review and reconsideration of a range of decisions which may be made in the performance of the Commission's regulatory or complaints functions. These provisions afford persons whose interests are affected by an administrative decision the opportunity to seek a review of its merits, and ensure broader accountability, quality and fairness in government decision making.

Section 98 sets out the administrative decisions which are subject to merits review.

I understand the Committee is interested in why certain decisions made in the performance of the Commissioner's functions, particularly as they relate to the regulatory and complaints functions, have been excluded from internal merits review, and external merits review. I have sought to provide further explanation below of how these decisions warrant exclusion from internal or external review.

Internal review

The Committee has requested a list of all decisions not reviewable under section 98, and the rationale for their exclusion by reference to the Administrative Review Council's (Council's) principles for *'What decisions should be subject to merit review'*. This list is enclosed at Attachment A to this letter, which deals with all the administrative decisions which are likely to affect the interests of an individual or person but are not subject to merits review under section 98.

In general, decisions relating to the conduct of site audits under Part 3 or review audits under Division 6 of Part 5, and decisions which make findings about the non-compliance of providers with the law under Division 4 of Part 2 and Subdivision A, Division 7 of Part 5, are generally considered administrative decisions which fall into this category. These decisions are likely to bear on or affect an approved provider's accreditation status and or potential sanctions which may be imposed for non-compliance.

While these decisions have the potential to benefit from a merits review process, they have been excluded largely due to factors identified by the Administrative Review Council which primarily include the procedural and or preliminary nature of these decisions. In these cases, the intended benefits of a merits review process is likely to be limited due to the nature of these decisions, and or are outweighed by the costs it would impose to warrant a merits review process. Further details are at Attachment A.

In relation to decisions to register an applicant as a quality assessor under section 90(1) and

to register an applicant for a further period under section 92(1), these decisions are not made subject to review under Part 7. The reviewability of these decisions will be given further consideration in the context of future legislative reforms.

It should be noted that decisions which are unlikely to affect the interests of any particular person are not dealt with at Attachment A since these decisions are inherently unsuitable for merits review, and so require no further justification for their exclusion.

These decisions relate to the reports which are prepared as an outcome of the quality reviews conducted under Part 4 or the assessment contacts conducted under Division 5 of Part 5. Unlike the conduct of site audits under Part 3 and review audits under Division 6 of Part 5 which culminate into decisions regarding whether to re-accredit under section 41 or revoke the accreditation of a service under section 77, quality reviews and assessment contacts culminate in the preparation of a report under section 57 or 68 as a part of compliance monitoring and continuous improvement.

This means that decisions which facilitate the conduct of quality reviews or assessment contacts will also generally not be considered administrative decisions since they also could not have any direct impacts on the interests of any person. For example, a decision made under subsection 52(2) regarding the conduct of quality reviews of multiple services at the same time, when a body provides two or more of the specified kinds of services, would not be considered an administrative decision.

However, it should be noted that some decisions which facilitate the conduct of quality reviews or assessment contacts may also be considered unsuitable for merits review because these decisions do not themselves affect the interests of any person. For example, a decision made under subsection 53(5) regarding when the Commissioner may waive a requirement to provide an occupier of a home service notice of a site visit at their premises, is not considered a decision likely to affect the interests of an occupier, since the Commission must comply with the search and entry powers in the Commission Act, including obtaining the consent of the occupier for entry.

External review

While decisions relating to the administration of the complaints functions (i.e. complaints reviewable decisions) are reviewable under Part 7 of the Rules, reconsidered, complaints reviewable decisions are not subject to external review by the Administrative Appeals Tribunal under section 103. No further rights to seek an external review are afforded to affected persons given the procedural nature of these decisions, which afford little to none of the intended benefits of external merits review.

The Council identifies the procedural or preliminary nature of a decision as a factor which may justify its exclusion from merits review, where the beneficial effect of merits review is limited by the fact that such decisions do not generally have substantive consequences. In relation to complaints reviewable decisions, justification for exclusion from merits review, this is a question of degree.

While complaints raise issues about responsibilities of providers (and the rights of complainants) under the Aged Care Act or relevant funding agreement, complaints reviewable decisions only concern the process for resolving these issues, rather than the resolution or determination of the issues. A complaints reviewable decision will either include a decision to take no further action under section 14, or a decision to end a complaints resolution process under section 17. Any reconsidered, complaints reviewable decision would either affirm the decision or set it aside to start a new resolution process.

The Commissioner does not have any powers to determine, give effect to or enforce the rights and responsibilities of complainants and providers which may be raised in a complaint to the Commissioner. This is largely the role of the Secretary who may impose sanctions in accordance with Chapter 4.4 of the Aged Care Act, among other actions, to enforce and ultimately resolve any issues with a provider's responsibilities. In this context, the nature of complaints reviewable decisions are largely procedural in nature.

Complaints reviewable decisions are therefore excluded from external merits review due to the procedural nature of these decisions. It is unlikely that a complaints reviewable decision which has not been able to be resolved following an internal review process, will benefit from a further review by an external decision maker.

I trust that the advice provided in my letter will assist the Committee in its scrutiny of the Rules.

Yours sincerely

Richard Colbeck

Encl (1)

Attachment A

Function	'Merits reviewable decisions'	Affected person	Factors excluding decision from section 98
Withdrawn complaints	A decision under section 14 to take no further action, in relation to an issue raised in a complaint that has been withdrawn under section 12	The complainant	<u>Decision has such limited impact that the costs of review cannot be justified</u> A decision to take no further action under subsection 14(f) is not subject to merits review since it is unlikely a person would be directly affected by such a decision, particularly that would warrant the costs of merits review. In relation to a complainant that withdraws their complaint, the complainant relinquishes their personal interests in, and therefore rights to apply for reconsideration of a decision in relation to the complaint. In addition, it would be open to a complainant to submit a new complaint and, if the Commissioner decided to take no further action under section 14(1)(c) of the Rules, to then seek a review of that decision. In relation to the provider, a decision to take no further action under section 14(f) would not affect the relevant provider given no further action has been taken to resolve the issues raised in a complaint, who at that stage may not have received notification of the complaint by the Commissioner.
	A decision under section 17 to end a resolution process, in relation to an issue raised in a complaint that has been withdrawn under section 12	The complainant The relevant provider, i.e. the approved provider or service provider of the service	<u>Decision has such limited impact that the costs of review cannot be justified</u> A decision to end the resolution process under subsection 17(f) is not subject to merits review since it is unlikely a person would be

			directly affected by such a decision, particularly one that would warrant the costs of merits review. In relation to a complainant that withdraws their complaint, the complainant relinquishes their personal interests in, and therefore rights to apply for reconsideration of a decision in relation to the complaint. In addition, it would be open to a complainant to submit a new complaint and, if the Commissioner decided to take no further action under section 14(1)(c) of the Rules, to then seek a review of that decision.
Site audit	A decision under section 32 to appoint an assessment team which must not include an assessor who was employed by the provider in the previous 3 years, or who has a pecuniary or other conflicting interest	The approved provider	<u>Decision is preliminary or procedural</u> While it is mandatory for the Commissioner to appoint an assessment team, there remains some scope for merits review to operate in relation to whether any member of the team has a pecuniary or other conflicting interest of a type described. However, this aspect of the decision has not been made subject to merits review given the appointment of an assessment team only facilitates the making of the substantive decision regarding whether or not to re-accredit under section 41 – this decision is reviewable including on grounds where conflicting interests may affect the substantive decision. Further, allowing a decision to appoint an assessment team under section 32 to be reviewed would also undermine the Commissioner's ability to effectively assess compliance with the applicable standards through an unannounced site audit. In the case of section 32, this notice would be of the actual day of the

			site audit.
	The decisions regarding the conduct of a site audit under subsection 36(2) in assessing the performance of the service and determining relevant information to consider	The approved provider	<u>Decision is preliminary or procedural</u> These decisions facilitate the making of the substantive decision regarding whether to re-accredit the service under section 41, and so have no substantive effect, meaning there would be no benefit to merits review. It should be noted that a decision not to re-accredit the provider is reviewable under section 98. Further, the provider is also afforded the opportunity to respond to the site audit report under section 40 of the Rules prior to a decision being taken.
	A decision about the matters the assessment teams includes in the site audit report under subsection 40(2)	The approved provider	
Review audit	A decision under section 71 to appoint an assessment team which must not include an assessor who was employed by the provider in the previous 3 years, or who has a pecuniary or other conflicting interest	The approved provider	<u>Decision is preliminary or procedural</u> While it is mandatory for the Commissioner to appoint an assessment team, there remains some scope for merits review to operate in relation to whether any member of the team has a pecuniary or other conflicting interest of a type described. However, this aspect of the decision has not been made subject to merits review given the appointment of an assessment team only facilitates the making of the substantive decision regarding whether or not to revoke under section 77 – this decision is reviewable including on grounds where conflicting interests may affect the substantive decision. Further, allowing a decision to appoint an assessment team under section 71 to be reviewed would also undermine the

			Commissioner's ability to effectively assess compliance with the applicable standards, with or without notice. In the case of section 71, this notice would be of the timing of an audit.
	The decisions regarding the conduct of a review audit under subsection 73(2) in assessing the performance of the service and determining relevant information to consider	The approved provider	<u>Decision is preliminary or procedural</u> These decisions facilitate the making of the substantive decision regarding whether to revoke the accreditation of the service under section 77, and so have no substantive effect, meaning there would be no benefit to merits review. It should be noted that a decision to revoke the accreditation of a service is reviewable under section 98. Further, the provider is also afforded the opportunity to respond to the review audit report under section 76 of the Rules prior to a decision being taken.
	A decision about the matters the assessment teams includes in the site audit report under subsection 76(2)	The approved provider	
Dealing with non-compliance	A decision under paragraph 81(1)(b) to give the provider and the Secretary written notice that the Commissioner is not satisfied that the accredited service complies with the applicable standards	The approved provider	<u>Decision is preliminary, to a decision to enforce the law</u> A decision under paragraph 81(1)(b) is not a reviewable decision under section 98 since it is preliminary to making a substantive decision, to impose sanctions for non-compliance. That is a decision under paragraph 81(1)(b) requires the Commissioner to be satisfied that the service does not comply with the applicable standards, at the end of the improvement period notified under section 30, 42, 68 or 79, before giving the Secretary notice of such a failure to comply. The Secretary may decide to impose sanctions in accordance with the Chapter 4.4 of the Aged Care Act, which is reviewable.

			Allowing this decision to be reviewed could also reduce the Commission's ability to effectively monitor, and the Department's ability to effectively enforce non-compliance.
	A decision under paragraph 82(1)(b) to give the provider and the Secretary written notice that the Commissioner is not satisfied that the home service does not comply with the applicable standards	The home service provider	<u>Decision is preliminary, to a decision to enforce the law</u> A decision under paragraph 82(1)(b) is not a reviewable decision under section 98 since it is preliminary to making a substantive decision, to impose sanctions for non-compliance. That is a decision under paragraph 82(1)(b), requires the Commissioner to be satisfied that the service does not comply with the applicable standards, at the end of the improvement period notified under section 68 or by way of a final report under section 57, before giving the Secretary notice of such a failure to comply. The Secretary may decide to impose sanctions in accordance with the Chapter 4.4 of the Aged Care Act, which is reviewable, or take action under the relevant agreement. Allowing this decision to be reviewed could also reduce the Commission's ability to effectively monitor, and the Department's ability to effectively enforce non-compliance.
Issuing directions	A decision under section 19 to direct the provider to take specified actions to meet a provider's responsibilities	The complainant The relevant provider	<u>Decision is preliminary, to a decision to enforce the law</u> A decision under section 19 is not a reviewable decision since it is preliminary to making a substantive decision, to impose sanctions for non-compliance. The Commissioner may issue a direction under section 19, provided that the Commissioner is satisfied that a provider is not

			meeting its responsibilities under Chapter 4.1 to 4.3 of the Aged Care Act or the relevant funding agreement. Subject to notice given in accordance with section 20, the Secretary is notified of the non-compliance under section 21. The Secretary may initiate action either under Part 4.4 of the Aged Care Act or the relevant funding agreement, if the relevant provider fails to comply with the direction. However, it should be noted that a decision to end a resolution process on the ground that a direction is issued under section 19, remains a reviewable decision. If the Commissioner decides under paragraph 17(1)(c) of the Rule, (or any other ground listed under subsection 17(1)), to end a complaints resolutions process because directions have been issued under section 19, reconsideration of this decision may be sought to either affirm, or set aside the original decision and undertake a new resolution process.
	A decision under section 84 to direct the provider to revise a plan for continuous improvement showing how the applicable standards will be complied with	The relevant provider	<u>Decision is preliminary or procedural</u> A decision under section 84 to direct the provider to revise a plan for continuous improvement is not a reviewable decision since it is procedural in nature. Unlike a direction issued under section 19, a decision to issue a direction under section 84 is only directed at the process for ensuring actions are taken to make improvements rather than whether a service complies with the applicable standards, or what actions should be taken to enforce or address any failure to comply. While the Commissioner may only issue a direction under section

			84, if the Commissioner finds that a provider has failed to comply with the applicable standards, this direction does not specify actions to comply with the applicable standards, rather it requires the provider to demonstrate (by revising its plan for continuous improvement) how improvements will be made to ensure compliance with the applicable standards.
Serious risk	A decision under subsection 85(2) regarding whether a failure to comply with the applicable standards has placed the safety, health or wellbeing of an aged consumer at serious risk	The relevant provider	<u>Decision is preliminary or procedural</u> A decision under subsection 85(2) is not a reviewable decision where the decision relates to an accredited service or a home service that is provided by an approved provider. Reporting to the Secretary of a finding that a failure to comply with the applicable standards has placed a consumer of such services at serious risk is not a decision which affects any individual or provider. This decision is procedural in nature in that it is made preliminary to any substantive decision which may be made by the Secretary, if the Secretary considers it appropriate to impose sanctions in accordance with section 65-1 of the Aged Care Act. If the Secretary is satisfied that because of the provider's non-compliance there is an immediate and severe risk to the safety, health or wellbeing of a care recipient under section 67-2 of the Aged Care Act, the Secretary may avoid certain procedural steps in the process of imposing sanctions. Where a decision is made under subsection 85(2) in relation to a home service provided by a service provider, this decision is not reviewable decision. This is because a finding of serious risk under subsection 85(2) does not have any specific implications for how the Secretary responds to or takes action against a service

			provider under the relevant funding agreement.
Registration	A decision under section 90(3) to refuse to register an applicant as a quality assessor	The applicant	<u>To review</u> While there is generally no scope for a merits review process to operate in relation to a decision to refuse to register an applicant, there may be potential for a merits review process to operate when this decision is made on the grounds of the applicant's performance of its functions under section 90(1)(e). Making this decision subject to merits review will be given further consideration future reforms.
	A decision under section 92(3) to refuse to further register an applicant as a quality assessor	The applicant	<u>To review</u> While there is limited scope for a merits review process to operate in relation to a decision to refuse to register an applicant, there may be potential for a merits review process to operate when this decision is made on the grounds of the applicant's compliance with his or her obligations as specified under paragraph 92(1)(a), or the applicant's performance of its functions under section 92(1)(c). Making this decision subject to merits review will be given further consideration in future reforms.

Protected information	A decision under section 111 to disclose protected information, containing personal information, to an approved provider or service provider	The person to whom the personal information relates	<u>Decision requires immediate action</u> Given the purpose of disclosing protected information under section 111 is to ensure the safety, health or wellbeing of an aged consumer is not put at risk, these policy objectives could be frustrated by a merits review process, which could delay potential action in circumstances where an immediate response is warranted.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC19-003977

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

regords.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your correspondence to the former Minister for the Environment, the Hon Melissa Price MP, concerning the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* [F2018L01730] and the *Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018* [F2019L00015]. Your letter has been referred to me as it falls under my responsibilities as the Minister for the Environment.

The responses with respect of the two instruments are enclosed at Attachment A for the Committee's consideration.

Thank you for raising this matter with me.

Yours sincerely

SUSSAN LEY

Enc

Ozone Protection and Synthetic Greenhouse Gas Management (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018 [F2018L01730]

The Committee requested further advice on the appropriateness of including the matters in the offence-specific defence at subsection 304A(2) of the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* rather than being specified as an element of the offence in subsection 304A(1).

An offence-specific defence is appropriate for the offence provided in subsection 304A(1) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations as it is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The following scenario provides a practical example of a situation which would give rise to both.

A small business owner (the defendant) advertises it can provide a service relevant to section 304A. The business previously employed one technician who held a fire protection industry permit, which enabled that technician to provide the relevant service. The technician ceases employment, so the business owner enters into an agreement with a third party to temporarily perform the services while a new employee is found. The agreement contains a provision to the effect that this third party must be a holder of a relevant permit or special circumstances exemption, thereby entitling them to provide the relevant service. The agreement is not in the form of a formal employment or sub-contracting arrangement between the defendant and the third party.

The prosecution's difficulty in proving the matter

The existence of such an agreement (which could be verbal), its content, and the identity of the third party are all details which would not be available to the prosecution. There is no implied or express obligation on the part of the business owner to inform the Department of the existence of any such agreement under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* or the Ozone Protection and Synthetic Greenhouse Gas Management Regulations.

As such, it would be inherently difficult for the prosecution to prove that such an agreement does not exist. However, the business owner would be able to readily and cheaply provide evidence of the existence and content of the agreement.

Peculiarly within the defendant's knowledge

The Guide to Framing Commonwealth Offences (the **Guide**) states that "... where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence" (page 50).

The Department notes the Committee's comment in paragraph 1.208 of the Monitor that the existence, or content of an agreement between the defendant and a third party are matters which would also be within the knowledge of that third party, and therefore not peculiarly within the knowledge of the defendant.

Nonetheless, the Department considers that existence of the agreement is peculiarly within the defendant's knowledge for the purpose of the offence in subsection 304A(2) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations. This is because the

identity of the third party would not be known to the Department unless provided by the defendant themselves. As noted above, there is no requirement under the Ozone Protection and Synthetic Greenhouse Gas Management legislation to inform the Department of the existence of such agreements or of the parties with whom the agreements were made.

Other considerations

The Guide also specifies that creation of an offence-specific defence is more readily justified if, relevantly:

- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety (page 50).

The Department notes the offence in 304A(1) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations carries a relatively low penalty of 10 penalty units. Further, the conduct in section 304A of making a false representation in the fire protection industry poses a grave danger to public safety, arising from the risk that a fire suppression system malfunctions when its use is required, because it has not been serviced in the appropriate manner by a qualified person.

The Department is preparing a replacement explanatory statement to better describe the reasons for placing the evidential burden of proof on the defendant.

Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018 [F2019L00015]

The Committee has requested further specific advice in relation to whether the former Minister 'relied primarily' on the outcomes of a strategic assessment carried out for the purposes of Division 1 and Division 2 of Part 10 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in making the instrument *Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018*.

I am advised by the Department of the Environment and Energy (the Department) that the decision, made by the delegate of the former Minister for the Environment, to amend the list of exempt native specimens relied primarily on the outcomes of an assessment for the Northern Prawn Fishery (the Fishery) as required by subsection 303DC(1A) of the EPBC Act.

The Fishery was assessed for the purposes of Division 1 and Division 2 of Part 10 of the EPBC Act in December 2003. The Australian Fisheries Management Authority continue to manage the Fishery in accordance with the *Northern Prawn Fishery Management Plan 1995* made under the *Fisheries Management Act 1991* (Cth).

Further assessment under Part 10 of the EPBC Act is only required if the impacts of fishing are greater than previously assessed. The Department has advised that, as the impacts of fishing have not increased since the previous assessment, the Ministers administering the Fisheries Management Act and the EPBC Act have not made an agreement under section 146 of the EPBC Act for further assessment, as is required by subsection 152(2) of the EPBC Act.

The Department is preparing a replacement explanatory statement which will clarify that the decision to amend the List of Exempt Native Specimens relied primarily on the outcomes of an assessment in relation to the Fishery, as required by subsection 303DC(1A) of the EPBC Act.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC19-003717

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

regords.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your correspondence to the former Minister for the Environment, the Hon Melissa Price MP, concerning the *Amendment to the List of Exempt Native Specimens* [F2019L00151], the *Great Barrier Reef Marine Park Regulations 2019* [F2019L00166], and the *Underwater Cultural Heritage Rules 2018* [F2019L00096]. Your correspondence has been referred to me as it falls under my responsibilities as the Minister for the Environment.

The responses with respect of the Amendment to the List of Exempt Native Specimens and the Underwater Cultural Heritage Rules are enclosed at Attachment A for the Committee's consideration.

I refer to my correspondence of 26 June 2019 (MS19-000351) in regard to the response for the Great Barrier Reef Marine Park Regulations.

Thank you for raising this matter with me.

Yours sincerely

SUSSAN LEY

Enc

ATTACHMENT A

Amendment of List of Exempt Native Specimens – Commonwealth Southern and Eastern Scalefish and Shark Fishery, February 2019 [F2019L00151]

The Committee has requested specific advice as to whether, in making the instrument, the Minister 'relied primarily' on the outcomes of an assessment in relation to the Commonwealth Southern and Eastern Scalefish and Shark Fishery (the Fishery), such as would satisfy subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

I am advised by the Department of the Environment and Energy (the Department) that the decision, made by the delegate of the former Minister for the Environment, to amend the list of exempt native specimens relied primarily on the outcomes of an assessment for the Fishery as required by subsection 303DC(1A) of the EPBC Act.

The Fishery was assessed for the purposes of Division 1 and Division 2 of Part 10 of the EPBC Act in May 2007. The Australian Fisheries Management Authority continue to manage the Fishery in accordance with the *Southern and Eastern Scalefish and Shark Fishery Management Plan 2003*, as amended by the *Southern and Eastern Scalefish and Shark Fishery Management Plan Amendment 2016* made under the *Fisheries Management Act 1991* (Cth), in accordance with the outcome of the 2007 assessment.

Further assessment under Part 10 of the EPBC Act is only required if the impacts of fishing are greater than previously assessed. The Department has advised that, as the impacts of fishing have not increased since the previous assessment, the Ministers administering the Fisheries Management Act and the EPBC Act have not made an agreement under section 146 of the EPBC Act for further assessment, as is required by subsection 152(2) of the EPBC Act.

The Department is preparing a replacement explanatory statement, which will clarify that the decision to amend the List of Exempt Native Specimens relied primarily on the outcomes of an assessment in relation to the Fishery, as required by subsection 303DC(1A) of the EPBC Act.

Underwater Cultural Heritage Rules 2018 [F2019L00096]

The Committee requested information regarding:

(1) why it is considered necessary and appropriate for the instrument to incorporate 'relevant government guidelines' and 'relevant international conventions, agreements or treaties', noting that these documents may not yet exist; and

(2) whether this approach complies with paragraph 15J(2)(c) of the *Legislation Act 2003*, which requires the explanatory statement to an instrument to contain a description of each incorporated document and to indicate how it may be obtained.

Addressing question (1), the evolution of best practice standards and guidelines is a real time activity. Equally dynamic is the development of relevant international agreements between Australia and countries with shared underwater cultural heritage (both for other countries' heritage in Australian waters and for Australian underwater heritage in other countries' waters). By referring to 'relevant international conventions, agreements or treaties' generally rather than specifying particular international instruments, the *Underwater Cultural Heritage Rules 2018* (Rules) have been written to enable administrative flexibility. This is considered necessary and appropriate because it ensures that Australia is able to meet best practice in the management and protection of underwater cultural heritage, in line with the objects of the *Underwater Cultural Heritage Act 2018* (the Act) in s.3 (a) and (b), and can immediately comply with any new international shared heritage agreements entered into by the Australian Government.

Further, with the commencement of the Act on 1 July 2019, all existing domestic guidelines for the management of underwater cultural heritage are required to be replaced because of changes to the scope of protected underwater heritage, objects of the Act and statutory processes under the Act. Working within existing resources, the drafting of these new guidelines will occur as soon as possible following commencement of the Act and consultation with the Minister's Underwater Cultural Heritage Delegates who collaboratively administer the Act. It is therefore considered necessary and appropriate for the instrument to incorporate 'relevant government guidelines' rather than identify specific guidelines because no specific guidelines currently exist.

In regards to question 2, the Explanatory Statement (ES) specifically references the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage* (Convention) with its associated Annex Rules and the Australia ICOMOS Charter for Places of Cultural Significance (The Burra Charter 2013). The ES includes a note on where to locate the Convention on the UNESCO website as well as a note on where to locate the Burra Charter 2013 on the ICOMOS website. Reference to a Departmental webpage in the ES would be inappropriate as these change often because of Departmental name changes and regular modifications to Departmental URLs. However, the Department does host a link to the Convention and its associated Annex Rules with a short explanatory statement at https://www.environment.gov.au/heritage/historic-shipwrecks/international-agreements.

Currently, there are no other relevant international conventions, agreements or treaties in existence that are incorporated by the Rules nor are there any relevant government guidelines in existence that are incorporated by the Rules. Since there are no documents other than the Convention and the Burra Charter 2013 currently being incorporated, there are no other documents that require description in the ES for the purposes of paragraph 15J(2)(c). In the circumstances, the approach is therefore considered compliant at this point in time.

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MS19-001163

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

03 JUL 2019

Dear Chair

Further consideration of ACT National Land Amendment (Lakes) Ordinance 2018

I refer to the email of 4 April 2019 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) in relation to the Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018 (Ordinance).

In that correspondence, the Committee sought advice from Hon Sussan Ley MP, the then Assistant Minister for Regional Development and Territories, as to why a failure to provide notice to an applicant of the availability of review of certain decisions should not affect the validity of those decisions (the effect of a 'no-invalidity' clause in the Ordinance). I understand that Assistant Minister Ley wrote to the then Chair of the Committee on 4 March 2019, but that the Committee has raised a further request (in the Delegated Legislation Monitor 2 of 2019), for further justification of the no-invalidity clause.

As the new Assistant Minister for Regional Development and Territories, I am pleased to provide the following additional justification.

Lake Burley Griffin and its Foreshores are a designated area of national significance, under the National Capital Plan administered by the National Capital Authority. Decisions made under this Ordinance directly relate to the use and character of this area, such as approvals, authorities, or permits for use, and the imposition of conditions on use.

A no-invalidity clause is appropriate for this Ordinance as the character of these decisions reflect the national significance of the area, and also involve essential safety, environmental and heritage considerations for the area and users of the area. In addition, many of these decisions feed into the decision-making and determinations of other legislative frameworks, such as the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the natural and heritage management obligations for Commonwealth agencies that own or manage Commonwealth Heritage Listed places. The no-invalidity clause provides a general regulatory benefit in respect of decisions under the Ordinance by giving certainty about their legal effect.

The Hon Nola Marino MP
Parliament House Canberra | (02) 6277 4293 | minister.marino@infrastructure.gov.au
PO Box 2028 BUNBURY WA 6231

This certainty is also essential as these decisions regulate the conduct of persons in order to achieve the important public purpose of ensuring the proper management and conservation of Lake Burley Griffin. The no-invalidity clause ensures that persons, whose conduct is regulated, have certainty about the conduct they are legally allowed or forbidden to engage in. There would be considerable public inconvenience and regulatory uncertainty if such decisions could be rendered invalid simply due to a failure to specify that an application for review could be made.

The clause is also intended to ensure that certain administrative decisions that have a beneficial operation for members of the community are not unfairly or unjustly rendered invalid. For example, the Ordinance provides that I may award compensation to an owner of land injuriously affected by the doing of an act authorised by myself under the Ordinance. The no-invalidity clause prevents the unjust and unfair outcome, and substantial administrative burden, of such a determination or similar, being rendered invalid due to an administrative error or oversight.

I also note that a person who did not apply to the Administrative Appeals tribunal for review of a decision within 28 days would remain able to seek an extension of time in which to make an application for review under section 29 of the *Administrative Appeals Tribunal Act 1975*. The availability of such recourse in these circumstances largely mitigates the possibility that a person might lose the opportunity to have an adverse decision considered by an independent tribunal.

Finally, I reiterate the initial advice provided, that the provision in question continues the effect of, and maintains consistency with, pre-existing law. It reproduces and continues the effect of the pre-existing section 51(4) of the *Lakes Ordinance 1976* (the Ordinance modified by the Ordinance). In addition, it replicates the effect of section 27A (3) of the *Administrative Appeals Tribunal Act 1975*, which provides that the validity of a reviewable decision is not affected where the decision maker fails to provide the person whose interests are affected with a notice of decision and the right of that person to have the decision reviewed. It is, therefore a provision of a kind commonly used in the context of merits review, provides clarity to users of the Ordinance, and is included in other Commonwealth laws for the same reason, for example, the *Child Support (Registration and Collection) Act 1988*.

I have requested the Department of Infrastructure, Transport, Cities and Regional Development update the Explanatory Statement to include further explanation in line with the reasoning outlined above. I have enclosed for the Committee an advance copy of the updated Explanatory Statement.

If you require further information on this matter, the contact officer within the Department is Catharina van Moort, Director ACT/NT Section, on 02 6274 8175.

Thank you for bringing the Committee's concerns to the Australian Government's attention and I trust this is of assistance.

Yours sincerely

Nola Marino

Enc

EXPLANATORY STATEMENT

Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018

Issued by the authority of the Assistant Minister for Regional Development and Territories

Seat of Government (Administration) Act 1910

Authority

The *Seat of Government (Administration) Act 1910* (the Act) provides for the Provisional Government of the Territory for the Seat of Government of the Commonwealth.

Section 12(1) of the Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory with respect to National Land as defined by the *Australian Capital Territory (Planning and Land Management) Act 1988.*

Purpose and Operation

The *Lakes Ordinance 1976*, as modified by the *National Land Ordinance 1989* and the *Lakes (Amendment) Ordinance 1992* (the Old Ordinance) applies to activity in relation to National Land that may be conducted on Lake Burley Griffin, Lake Ginninderra or any other body of water declared to be a lake under the Lakes Ordinance 1976 as so modified.

The *Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018* (the Ordinance) repeals and replaces the Old Ordinance which is due to sunset on 1 April 2019. The *Legislation Act 2003* provides for an instrument to sunset 10 years after its registration with special rules applying to older instruments (such as the Old Ordinance) registered in bulk on 1 January 2015. Sunsetting is the automatic repeal of legislative instruments, with the objective to reduce red tape, deliver clearer laws and align existing legislation with current government policy and ensure legislative instruments remain relevant and fit for purpose.

The Ordinance repeals the Old Ordinance and transfers the modifications of the *Lakes Ordinance 1976* made by the Old Ordinance to the *National Land Ordinance 1989.*

Amongst these modifications, the Old Ordinance modified the *Lakes Ordinance 1976* to include a replacement section 51, which provides applicants with the ability to have certain decisions of the Minister reviewed by the Administrative Appeals Tribunal. Section 51(4) also includes the previous Ordinance's non-invalidity clause which ensures that validity of decisions are not affected by a failure to comply with the notification requirements of section 51.

This reflects the status of Lake Burley Griffin and its foreshores as a designated area of national significance, the character of these decisions as relating to essential safety, environmental and heritage considerations, and provide surety as these decisions affect other legislative frameworks.

Section 51(4) is consistent with section 27A (3) of the *Administration Appeals Tribunal Act 1975* (the AAT Act). Section 27A (3) of the AAT Act provides that the validity of a reviewable decision is not affected where the decision maker fails to provide the person

whose interests are affected with a notice of decision and the right of that person to have the decision reviewed. Such provisions are included in other Commonwealth laws for the same reason: for example, see *Child Support (Registration and Collection) Act 1988*.

The Ordinance also implements minor changes for greater clarity and consistency with current drafting standards. None of these changes affect the substance of the *Lakes Ordinance 1976* as currently in force and modified in its application to National Land.

Consultation

The Australian Capital Territory Government, National Capital Authority, and Australian Federal Police were consulted and agree that the Ordinance should be made.

Details of the Ordinance are set out in the Attachment.

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

The Ordinance commences the day after it is registered.

Statement of Compatibility with Human Rights

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

Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018

This Disallowable 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

This Disallowable Legislative Instrument replaces the *Lakes (Amendment) Ordinance 1992* which is due to sunset on 1 April 2019. It provides amendments from the *Lakes (Amendment) Ordinance 1992* to be substituted into the *Lakes Ordinance 1976* as it applies to the *National Land Ordinance 1989*. The amendments largely relate to activity that may be conducted on Lake Burley Griffin, Lake Ginninderra or any other body of water declared to be a lake under the *Lakes Ordinance 1976*.

Human rights implications

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

Conclusion

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

ATTACHMENT

Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018

Section 1 – Name

This section provides that the title of the Ordinance is the *Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018*.

Section 2 – Commencement

This section provides for the Ordinance to commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Ordinance is made under the *Seat of Government (Administration) Act 1910*.

Section 4 – Schedules

This section activates Schedule 1 to the Ordinance.

Schedule 1 – Amendments

Item 1 – Modifications of the *Lakes Ordinance 1976*

This item repeals the modifications of the *Lakes Ordinance 1976* currently provided for by Schedule 1 to the *National Land Ordinance 1989*, and substitutes the following modifications, based on the modifications in the Old Ordinance (which is to be repealed by Schedule 2 to the proposed Ordinance) and the current modifications in the *National Land Ordinance 1989*.

Paragraph 21(8)(b)

This paragraph provides that certain prohibitions in the *Lakes Ordinance 1976* relating to the use of a lake area or parts of a lake would not apply to: an Australian public servant or a Territory public servant; or a member of the staff of an authority established for a public purpose by or under a Territory Act or a law of the Commonwealth. This retains a modification currently provided for by Schedule 1 to the *National Land Ordinance 1989*.

At the end of section 22

The section provides that the Minister may specify conditions in an authority relating to the conducting of a function in a closed area of a lake; and that this authority would apply to the members of the association to whom it is given and to all other persons whom it is expressed to apply. This modification is transferred from the Old Ordinance.

Paragraph 23(1)(a), (b) and (c)

These paragraphs provide that where an association of persons is authorised to conduct a function in a closed area, a person other than: a member of the association; or a person to whom the authority to conduct the function is expressed to apply, shall not enter or be in the closed area. This modification is transferred from the Old Ordinance.

Paragraph 23(2)(b)

This paragraph provides that restrictions relating to entering a closed area authorised to conduct a function do not apply to: an Australian public servant or a Territory public servant; or a member of the staff of an authority established for a public purpose by or under a Territory Act or a law of the Commonwealth. This retains a modification currently provided for by the *Lakes Ordinance 1976*.

Paragraph 27(3)(b)

This paragraph provides that restrictions on the use of power boats do not apply to: an Australian public servant of a Territory public servant; or a member of the staff of an authority established for a public purpose by or under a Territory Act or a law of the Commonwealth. This retains a modification currently provided for by the *Lakes Ordinance 1976*.

The modification of section 34 of the *Lakes Ordinance 1976* currently provided for by Schedule 1 to the *National Land Ordinance 1989* relates to agreements currently in force on 11 May 1989 (Self Government day). This omitted this modification because it is now redundant.

Section 36

This modification is made for consistency with current drafting standards.

At the end of section 36

This section provides that restrictions related to using the part of Lake Burley Griffin between Commonwealth Avenue Bridge and King's Avenue Bridge do not apply to a person who has authority from the Minister to conduct a function within that area. This modification is transferred from the Old Ordinance.

Subsection 38(5)

This subsection contained a drafting error and is now modified to correct the error. This modification is transferred from the Old Ordinance and is changed for consistency with current drafting standards.

Subsection 38(6)

This subsection contained a drafting error and is now modified to correct the error. This modification is transferred from the Old Ordinance and is changed for consistency with current drafting standards.

Section 39

This modification replaces section 39 with new sections 39 and 39A to correct an error in the way the *Lakes Ordinance 1976* (in its application to National Land) previously provided for lights to be carried by small power boats and sailing vessels. This modification is transferred from the Old Ordinance and is changed for consistency with current drafting standards.

Section 51

This modification replaces section 51 with a new section 51 to provide for the review by the Administrative Appeals Tribunal of a range of additional decisions. This modification is consolidated and transferred from the Old Ordinance. The modification is changed for consistency with current drafting standards.

In particular, the Old Ordinance modified the *Lakes Ordinance 1976* to include a new section 51(4). That new section 51(4) is retained by the Ordinance in its pre-existing form for consistency with section 27(A) (3) of the *Administration Appeals Tribunal Act 1975* (the AAT Act) and to provide clarity to users of the Ordinance. Section 27A (3) of the AAT Act provides the validity of a reviewable decision is not affected where the decision maker fails to provide the person whose interests are affected with a notice of decision and the right of that person to have the decision reviewed.

Section 51(4) also reflects the status of Lake Burley Griffin and its Foreshores as a designated area of national significance, under the National Capital Plan administered by the National Capital Authority. Decisions made under this Ordinance directly relate to the use and character of this area, such as approvals, authorities, or permits for use, and the imposition of conditions on use.

In addition, a no-invalidity clause is appropriate as the character of these decisions also reflect essential safety, environmental and heritage considerations, and feed into other legislative frameworks, such as the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the natural and heritage management obligations for Commonwealth agencies that own or manage Commonwealth Heritage Listed places.

Section 51(4) also provides a general regulatory benefit in respect of decisions under the Ordinance by giving certainty about their legal effect.

These decisions regulate the conduct of persons in order to achieve the important public purpose of ensuring the proper management and conservation of Lake Burley Griffin. Section 51(4) ensures that persons, whose conduct is regulated, have certainty about the conduct they are legally allowed or forbidden to engage in. There would be considerable public inconvenience and regulatory uncertainty if such decisions could be rendered invalid only because, for instance, an administrative oversight resulted in a notice of decision not specifying that an application for review could be made to the Administrative Appeals Tribunal.

Were such an oversight to occur, a person who as a result did not apply to the Administrative Appeals tribunal for review of a decision within 28 days would remain able

to seek an extension of time in which to make an application for review under section 29 of the *Administrative Appeals Tribunal Act 1975*.

Schedule 2 – Repeals

Item 1 – The whole of the instrument

This item repeals the Old Ordinance.

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

PDR MS19-000729

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

Thank you for your correspondence of 4 April 2019 to the former Minister for Defence, the Hon Christopher Pyne MP, requesting advice in relation to the *Defence (Payments to ADF Cadets) Determination 2019* and the *Defence (State of Emergency – Townsville Floods) Determination 2019 (No. 1)*.

Defence (Payments to ADF Cadets) Determination 2019

I understand you are seeking advice as to whether discretionary decisions made under this instrument are subject to independent merits review and, if not, the characteristics of those decisions that would justify excluding independent merits review.

The Australian Defence Force Cadets is a community-based youth development organisation primarily staffed by volunteers drawn from the community. Defence provides some compensation to Officers and Instructors of Cadets for their attendance at approved cadet activities through the payment of a taxable allowance. Based on there being a maximum level of funding available for a set number of individuals, Officers and Instructors of Cadets are entitled to apply for a maximum of 48 days of allowance per financial year, although they may make an application to the relevant delegate to receive additional days.

Against this background and noting that payment decisions relate to allocating a finite resource between applicants, it is the view of Defence that decisions relating to payments to Officers and Instructors of Cadets should not be subject to independent merits review. Notwithstanding this, while Officers and Instructors of Cadets are not members of the Australian Defence Force and, therefore, cannot submit a Redress of Grievance application, such members remain able to submit a complaint through the Cadet organisation management should they disagree with any decision made about a payment claim. Such complaints will be considered by an appropriate delegate.

I understand the Committee has also sought advice about the retrospective application of the instrument. As the substance of the determination is identical to the previous determination, no Officer or Instructor of Cadets has been, or will be, disadvantaged by the transitional provision that may have a retrospective operation.

Defence (State of Emergency – Townsville Floods) Determination 2019 (No. 1)

I understand the Committee is seeking advice about whether decisions made under this instrument are subject to independent merits review, including whether the ADF redress of grievance process applies to those decisions.

This instrument provides benefits for members of the Australian Defence Force and their families who were affected by recent floods in Townsville. The Determination made available to these members and their families a number of benefits to assist them recover from the flood, including providing temporary accommodation and transport. In limited circumstances a decision maker could extend certain benefits.

Section 40 of the *Defence Regulation 2016* permits a member of the Defence Force to submit a complaint through the ADF Redress of Grievance system. A complaint must be about a decision, act or omission that is a decision, act or omission in relation to the member's service, is adverse or detrimental to him or her and capable of being redressed. Decisions made under the Determination fall within the scope of the Redress of Grievance process and are therefore subject to an independent review under the Defence Regulation.

Thank you for bringing these matters to my attention.

Yours sincerely

Linda Reynolds

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-001425

16 JUL 2019

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

Kim,

Dear Chair

A representative of the Senate Regulations and Ordinances Committee wrote to the office of the former Assistant Treasurer, The Hon Stuart Robert MP, on 4 April 2019 requesting a response in relation to issues raised in *Delegated Legislation Monitor 2 of 2019* regarding the *Financial Sector (Collection of Data) Determinations of 2019 No. 2 - 9* (the reporting standards).

The Committee sought advice as to whether decisions to determine thresholds, change reporting periods and grant extensions under the reporting standards are subject to merits review, and if not, why such decisions should not be subject to merits review.

Broadly, decisions to determine thresholds, change reporting periods and grant extensions under the reporting standards are reviewable decisions under the *Financial Sector (Collection of Data) Act 2001* (the Act) and subject to merits review by the Administrative Appeals Tribunal.

APRA's power to determine thresholds, change reporting standards and grant extensions is located in paragraphs 5, 11 and 12 of each reporting standard. Paragraph 5 of each reporting standard allows APRA to determine that a threshold, or a higher threshold than that specified in paragraph 4 of the reporting standards will apply to a particular authorised deposit-taking institution (ADI) or Registerable Financial Corporation (RFC). The threshold determines which reporting form (standard or reduced) is required to be completed by the ADI or RFC. Paragraphs 11 and 12 allow APRA respectively to change the reporting periods and to grant an extension of a due date for a particular ADI or RFC.

The reporting standards are made by APRA under subsection 13(1) of the Act. Paragraph 13(2)(f) provides that APRA may include in reporting standards matters relating to the discretion of APRA, and in particular cases, vary reporting standards. The definition of "reviewable decision" in section 31 of the Act includes a decision to vary a reporting standard determined under section 13 for a particular financial sector entity. Each of the decisions in paragraphs 5, 11 and 12 would be properly characterised as a decision to vary a reporting standard and be reviewable decisions.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 3123 | Facsimile: 61 2 6277 5782

Part 3A of the Act provides for merits review of reviewable decisions. A person in relation to whom a reviewable decision is made may request APRA to reconsider the decision under section 25B of the Act. If APRA confirms or varies the original decision, a person dissatisfied with the subsequent decision may then make an application to the Administrative Appeals Tribunal for review provided for in section 25D of the Act.

I trust this information will be of assistance to you.

Yours sincerely,

Senator the Hon Jane Hume

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT

MS19-000351

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

Dear Chair ~~Dear Chair~~

I refer to the letter dated 4 April 2019 from the Committee Secretary to the former Minister requesting advice on scrutiny issues identified in relation to the *Great Barrier Reef Marine Park Regulations 2019* [F2019L00166] (the Regulations). I have addressed each of the concerns raised in turn below.

Reversal of evidential burden of proof

Applications for exemptions

I advise that there is no intention to reverse the burden of proof in relation to whether a particular permission is held, for the purposes of applying for an exemption under section 188 of the Regulations. The requirements set out in section 189 of the Regulations for an application for an exemption include a requirement that the application must be made either by a person who holds a permission referred to in section 188, or by a person who has applied for such a permission if the Authority has not made a decision on the application. There is no requirement in that section or in section 188 that the applicant must prove they hold the necessary permission.

Offences

I confirm that the intention is to reverse the evidential burden of proof in relation to whether a person holds an exemption for the purposes of making out a defence to the offences in Part 9 of the Regulations.

This reversal of the evidential burden of proof occurred in the predecessor to section 188, which was regulation 117K of the *Great Barrier Reef Marine Park Regulations 1983* (the 1983 Regulations). The Regulations are intended to remake the 1983 Regulations in substantially the same form. Section 188 of the Regulations was drafted to produce substantially the same effect as regulation 117K of the 1983 Regulations.

Since 2008 there have been no prosecutions by the Authority for the offences relating to interacting with cetaceans. The Authority has focused more effort on educating the public about the rules for interacting with cetaceans rather than pursuing prosecutions. Notwithstanding this, it is important that the rules remain in place under the Regulations.

The reversal of the burden of proof is consistent with guidance provided in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers – September 2011*. In cases where the Authority has granted an exemption to a permission holder, subsection 188(9) provides that the exemption automatically applies to a person who holds a written authority for a person to carry out an activity under the permission pursuant to section 118. There is no requirement under section 118 of the Regulations (or anywhere else in the Regulations) for the holder of a permission to advise the Authority when they have given a person written authority to carry out an activity under the permission. For example, the holder of a permission to conduct a tourist program that involves swimming-with-whales may hold an exemption to the prohibitions in Part 9 relating to interacting with cetaceans. Section 118 of the Regulations allows for the holder of the permission to give a written authorisation to another operator to carry out the swimming-with-whales activities under the permission (without the Authority's knowledge), and the exemption that applies to the permission will automatically apply to the authorised operator because of subsection 188(9). Accordingly, it is possible for a person who has a written authority under section 118 to automatically have an exemption because of subsection 188(9) which would be peculiar to the knowledge of that person and the relevant permittee, and would not be within the Authority's knowledge.

Exemptions granted by the Authority are required to be granted in writing; therefore it would not be difficult for a defendant who holds an exemption, or who holds a written authority under a permit to which an exemption is attached, to produce evidence of this. In contrast, it will be impossible for the prosecution to prove that a defendant does not hold an exemption, because the Authority has no way of establishing that a defendant does not hold a written authority from the holder of a permission which has an exemption attached.

Explanatory Statement

I acknowledge that page 135 of the Explanatory Statement to the Regulations contains errors in that it refers to the need to prove that a defendant held a permission. I confirm that I have approved a replacement Explanatory Statement which will correct this error and will clarify the justification for reversing the burden of proof for the offence provisions in Part 9. An extract of the relevant paragraphs of the replacement Explanatory Statement is at **Attachment A**.

Significant matters in delegated legislation

Justification for delegation of offence content

I believe it is both necessary and appropriate to leave the content of the offence in section 38DC of the *Great Barrier Reef Marine Park Act 1975* (the Act) to delegated legislation because of the changing nature of the requirements for the Authority to effectively manage the Great Barrier Reef Marine Park (the Marine Park). At present, section 167 of the Regulations provides for orders for the removal of property and orders to take action to remedy, mitigate or prevent damage to the Marine Park caused by the removal of abandoned, sunk or wrecked property. The Marine Park is currently undergoing unprecedented levels of change due to changing trends for the use of the Marine Park, and threats to the environment in the Marine Park. This could necessitate changes to the types of orders that need to be prescribed by the Regulations. For example:

- The Authority is currently considering whether changes should be made to the definition of 'responsible person' in section 167 in light of recent changes to the position adopted by insurers for property which has sunk in the Marine Park.

- Changes to technology could lead to new types of property being used in the Marine Park which could necessitate the need for changes to the orders which can be made regarding the use of, removal, etc. of such new types of property.

- The outbreak of a pest species (such as the current outbreak of Crown of Thorns Starfish), or a disease in the Marine Park, may necessitate changes to the types of orders which can be made in order to ensure that orders can be made to reduce the spread of the pest or disease.

The delegation of legislative power to the Regulations, rather than to another kind of subordinate instrument, means that any changes would be considered by the Federal Executive Council and remain subject to disallowance by Parliament. This ensures an appropriate level of Parliamentary review is afforded to the types of orders prescribed while still allowing for the flexibility to respond to the changing nature of the types of orders needed. This may not be achieved if the offence content is included in the Act.

The orders currently prescribed in section 167 of the Regulations contain appropriate safeguards so that the types of orders that can be made by the Authority fall within clear parameters, necessary to protect the Marine Park and achieve the objects of the Act. Thus, it is the view of the Authority that the prescription of the orders in the Regulations in this instance is not an excessive application of the delegation of legislative power from the Act.

Explanatory Statement

I acknowledge that the Explanatory Statement does not contain a justification for the approach taken in section 167 of the Regulations. I confirm that the replacement Explanatory Statement that I have approved includes the appropriate justification. An extract of the relevant paragraph of the replacement Explanatory Statement is at **Attachment B**.

I trust that the above addresses the concerns raised by the Committee.

Yours sincerely

SUSSAN LEY

Attachment A

Extract from replacement Explanatory Statement – Section 188

"Section 188 Exemption from this Part

...

A note at the end of subsection 188(1) alerts the reader to the fact that a defendant bears an evidential burden in relation to the matters mentioned in subsection 188(1) and refers the reader to section 13.3 of the Criminal Code. The effect of this is that the evidential burden of proof is reversed in relation to whether a person holds an exemption, for the purposes of making out a defence to the offences in Part 9. As offence-specific defences the burden is appropriately reversed because the existence of an exemption may be peculiarly within the knowledge of the defendant and it would be impossible for the prosecution to prove that no exemption exists. This is because in cases where the Authority has granted an exemption to a permission holder, the exemption automatically applies to any person who holds a written authority given under section 118 (see discussion of subsection 188(9) below). There is no requirement for the holder of a permission to advise the Authority in cases where they give a person a written authority under section 118 therefore it is almost impossible for the prosecution to establish whether this has occurred. Thus, the presence of a written authority under section 118 and any exemption attached because of section 188(9) would be peculiar to the knowledge of the defendant (and the relevant permit holder) in cases where the defendant holds such an authority. Exemptions granted by the Authority are required to be granted in writing therefore it would not be difficult for a defendant who holds an exemption, or who holds a written authority under a permit to which an exemption is attached, to produce evidence of this.

...

Subsections 188(8) and (9) provide for the effect of an exemption. Subsection 188(8) provides that an exemption has effect according to its terms. This means that the terms set out in an exemption are to dictate how it applies. Subsection 188(9) provides for circumstances where the holder of a permission has granted a written authority to a person to carry out an activity under the permission pursuant to section 118. In such circumstances, subsection 188(9) clarifies that any exemption granted to the permission holder applies to the holder of the written authority in the same way that it applies to the holder of the permission."

Attachment B

Extract from replacement Explanatory Statement – Section 167

*"**Section 167 Removal of property***

...

It is necessary and appropriate to leave the content of the offence in section 38DC of the Act to delegated legislation because of the changing nature of the requirements for the Authority to effectively manage the Marine Park. The Marine Park is currently undergoing unprecedented levels of change to things such as trends for the use of the Marine Park, and threats to the environment in the Marine Park. This could necessitate changes to the types of orders that need to be prescribed."

Australian Government
Attorney-General's Department

MC19-002538

23 April 2019

Ms Anita Coles
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear Ms Coles

Thank you for your letter to the Attorney-General's Office dated 4 April 2019. I am replying on behalf of the Attorney-General as the government is now in a caretaker role pending the outcome of the election on 18 May 2019.

Your letter refers to the Senate Standing Committee on Regulations and Ordinances (the Committee) *Delegated Legislation Monitor 2 of 2019* which seeks further information on the *Marriage (Celebrant Professional Development) Statement 2019* (the Statement) – specifically with regard to consultation on the making of the Statement. The Committee has also requested that the explanatory statement to the Statement be amended to include further information about the consultation process.

The Statement is made by the Registrar of Marriage Celebrants (Registrar) under subsection 53(3) of the Marriage Regulations 2017. Subsection 53(3) provides the Registrar must publish a written statement which sets out a list of professional development activities available for celebrants to complete in order to meet their ongoing professional development (OPD) obligations in each calendar year.

In order to develop the list of activities, the Registrar consults with an established panel of OPD providers, celebrant associations, and Registered Training Organisations (RTOs) who deliver the Certificate IV in Celebrancy, seeking nominations for activities in the coming year. The Registrar then assesses the appropriateness of proposed activities and advises providers whether their activity will be included on the published list of activities for the OPD year. Individual celebrants are not routinely consulted on the list of activities each year, as they have the ability to choose from a large range of approved activities, as published in the Statement (in this case, more than 200 activities have been prescribed for celebrants to choose from in 2019).

This consultation process was followed in making the Statement. Specifically, the Registrar consulted with the OPD panel members and celebrant associations between 2 November 2018 and 4 January 2019. On 18 January 2019, the Registrar consulted with RTOs that had already confirmed their intention to deliver Certificate IV units by completing a new Declaration for 2019. These RTOs have been included in the Statement as delivering Certificate IV units to count towards OPD.

While individual celebrants were not consulted on the Statement, I note, however, that celebrants were consulted in detail in 2016 as part of a broader review of the professional development framework. Following this review, the Registrar expanded the number and variety of activities available to celebrants to undertake to meet their annual professional development obligations. These changes took effect from 2018.

As requested, the Attorney-General's Department has prepared a Revised Explanatory Statement which includes this additional information about the consultation process (**Attachment A**). The Revised Explanatory Statement will be published on the Federal Register of Legislation and tabled in Parliament as soon as practicable.

I note that prior to the Statement being tabled in the Senate, an amending legislative instrument was registered on the Federal Register of Legislation on 29 March 2019. This amending instrument, the *Marriage (Celebrant Professional Development) Amendment Statement* 2019 (Amendment Statement) was tabled in the Senate on 3 April 2019. The Amendment Statement adds an additional two activities to the list of OPD activities for 2019.

I trust this information addresses the Committee's concerns.

The action officer for this matter is Bridget Quayle who can be contacted on (02) 6141 2825.

Yours sincerely

Cameron Gifford
First Assistant Secretary
Families and Legal System Division

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC19-005871

Chair
Senate Regulations and Ordinances Committee
regords.sen@aph.gov.au

19 JUN 2019

Dear Chair

I refer to correspondence of 4 April 2019 from the Standing Committee on Regulations and Ordinances (the Committee) requesting additional information as referred to in the Committee's Delegated Legislation Monitor 2 of 2019 about *the National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (PB 3 of 2019)* (the Instrument).

I note that the Committee has previously requested advice about the availability of the Asthma Control Questionnaire (ACQ) and the Psoriasis Area Severity Index (PASI). As advised in my response of 26 March 2019 and 10 April 2019, the ACQ is available at no cost through the suppliers of the asthma medicines. I acknowledge the Committee's concern with free access for key users of the ACQ (for example, prescribers), but also free access to persons who may be affected by, or otherwise interested in, the law. The ACQ is also publicly available from a number of sources including the National Asthma Council of Australia at www.asthmahandbook.org.au/resources/tools/control-questionnaires and Asthma Australia at www.asthmaaustralia.org.au/national/about-asthma/resources/asthma-control-test/asthma-score.

As also advised in my response of 10 April 2019, the PASI calculation form is publicly available for download for free from the Department of Human Services at www.humanservices.gov.au.

The Committee has also requested advice on the manner in which the ACQ and the PASI have been incorporated by the Instrument. Both the ACQ and the PASI (as set out in the PASI calculation form) are in force from the day the Instrument commenced, in this case 1 February 2019. A replacement Explanatory Statement to the Instrument incorporating this information will be included on the Federal Register of Legislation.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7220

The Hon Greg Hunt MP
Minister for Health

Ref No: MC19-005470

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

10 APR 2019

Dear Chair

I refer to correspondence of 4 April 2019 from the Standing Committee on Regulations and Ordinances (the Committee) requesting additional information as referred to in the Committee's Delegated Legislation Monitor 2 of 2019 about the *National Health (Highly specialised drugs program) Special Arrangement 2010 (PB 116 of 2010)* (the Instrument).

I note that the Committee has previously requested advice about whether the Asthma Control Questionnaire (ACQ), which is currently included as part of the Pharmaceutical Benefit Scheme (PBS) restriction criteria for the drugs Benralizumab (Fasenra®), Mepolizumab (Nucala®) and Omalizumab (Xolair®), can be accessed free-of-charge.

As advised in my response of 26 March 2019, the ACQ is available at no cost through the suppliers of the medicines in question. The Explanatory Statement for the *National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 3) (PB 20 of 2019)* has been amended to refer to the ACQ and where the document can be accessed.

The Committee has also requested advice specifically about the availability of the Psoriasis Area Severity Index (PASI), which is included as part of the PBS restriction criteria for Infliximab (Inflectra®, Renflexis®, Remicade®). The PASI calculation form is available for download for free from the Department of Human Services at www.humanservices.gov.au. The Explanatory Statement for the Instrument will be revised to include this information on 1 May 2019.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC19-003977

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

regords.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your correspondence to the former Minister for the Environment, the Hon Melissa Price MP, concerning the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* [F2018L01730] and the *Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018* [F2019L00015]. Your letter has been referred to me as it falls under my responsibilities as the Minister for the Environment.

The responses with respect of the two instruments are enclosed at Attachment A for the Committee's consideration.

Thank you for raising this matter with me.

Yours sincerely

SUSSAN LEY

Enc

Ozone Protection and Synthetic Greenhouse Gas Management (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018 [F2018L01730]

The Committee requested further advice on the appropriateness of including the matters in the offence-specific defence at subsection 304A(2) of the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* rather than being specified as an element of the offence in subsection 304A(1).

An offence-specific defence is appropriate for the offence provided in subsection 304A(1) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations as it is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The following scenario provides a practical example of a situation which would give rise to both.

A small business owner (the defendant) advertises it can provide a service relevant to section 304A. The business previously employed one technician who held a fire protection industry permit, which enabled that technician to provide the relevant service. The technician ceases employment, so the business owner enters into an agreement with a third party to temporarily perform the services while a new employee is found. The agreement contains a provision to the effect that this third party must be a holder of a relevant permit or special circumstances exemption, thereby entitling them to provide the relevant service. The agreement is not in the form of a formal employment or sub-contracting arrangement between the defendant and the third party.

The prosecution's difficulty in proving the matter

The existence of such an agreement (which could be verbal), its content, and the identity of the third party are all details which would not be available to the prosecution. There is no implied or express obligation on the part of the business owner to inform the Department of the existence of any such agreement under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* or the Ozone Protection and Synthetic Greenhouse Gas Management Regulations.

As such, it would be inherently difficult for the prosecution to prove that such an agreement does not exist. However, the business owner would be able to readily and cheaply provide evidence of the existence and content of the agreement.

Peculiarly within the defendant's knowledge

The Guide to Framing Commonwealth Offences (the **Guide**) states that "... where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence" (page 50).

The Department notes the Committee's comment in paragraph 1.208 of the Monitor that the existence, or content of an agreement between the defendant and a third party are matters which would also be within the knowledge of that third party, and therefore not peculiarly within the knowledge of the defendant.

Nonetheless, the Department considers that existence of the agreement is peculiarly within the defendant's knowledge for the purpose of the offence in subsection 304A(2) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations. This is because the

identity of the third party would not be known to the Department unless provided by the defendant themselves. As noted above, there is no requirement under the Ozone Protection and Synthetic Greenhouse Gas Management legislation to inform the Department of the existence of such agreements or of the parties with whom the agreements were made.

Other considerations

The Guide also specifies that creation of an offence-specific defence is more readily justified if, relevantly:

- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety (page 50).

The Department notes the offence in 304A(1) of the Ozone Protection and Synthetic Greenhouse Gas Management Regulations carries a relatively low penalty of 10 penalty units. Further, the conduct in section 304A of making a false representation in the fire protection industry poses a grave danger to public safety, arising from the risk that a fire suppression system malfunctions when its use is required, because it has not been serviced in the appropriate manner by a qualified person.

The Department is preparing a replacement explanatory statement to better describe the reasons for placing the evidential burden of proof on the defendant.

Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018 [F2019L00015]

The Committee has requested further specific advice in relation to whether the former Minister 'relied primarily' on the outcomes of a strategic assessment carried out for the purposes of Division 1 and Division 2 of Part 10 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in making the instrument *Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018*.

I am advised by the Department of the Environment and Energy (the Department) that the decision, made by the delegate of the former Minister for the Environment, to amend the list of exempt native specimens relied primarily on the outcomes of an assessment for the Northern Prawn Fishery (the Fishery) as required by subsection 303DC(1A) of the EPBC Act.

The Fishery was assessed for the purposes of Division 1 and Division 2 of Part 10 of the EPBC Act in December 2003. The Australian Fisheries Management Authority continue to manage the Fishery in accordance with the *Northern Prawn Fishery Management Plan 1995* made under the *Fisheries Management Act 1991* (Cth).

Further assessment under Part 10 of the EPBC Act is only required if the impacts of fishing are greater than previously assessed. The Department has advised that, as the impacts of fishing have not increased since the previous assessment, the Ministers administering the Fisheries Management Act and the EPBC Act have not made an agreement under section 146 of the EPBC Act for further assessment, as is required by subsection 152(2) of the EPBC Act.

The Department is preparing a replacement explanatory statement which will clarify that the decision to amend the List of Exempt Native Specimens relied primarily on the outcomes of an assessment in relation to the Fishery, as required by subsection 303DC(1A) of the EPBC Act.

THE HON ANGUS TAYLOR MP
MINISTER FOR ENERGY AND EMISSIONS REDUCTION

MC19-003718
04 JUL 2019

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

regords.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 4 April 2019 requesting additional information about the *Renewable Energy (Electricity) Amendment (Small-scale Solar Eligibility and Other Measures) Regulations 2019* [F2019L00197]. Please find below responses to the issues raised in the committee's Delegated Legislation Monitor 2 of 2019.

Merits Review

Under subsection 22UG(8) the applicant for exemption certificates for an emissions-intensive trade-exposed (EITE) activity may apply to the Regulator for a determination that an audit report is not required with their application. This determination has been exempt from merit review on the basis that it is a preliminary or procedural decision. The decision to require an audit report has no substantive effect on the number of exemption certificates the applicant would be issued, however, the audit assists the Regulator in assessing whether the activities set out in application comply with the EITE activity requirements set out in Schedule 6 and whether the electricity use method is reasonable. The benefits of the merit review were considered to be outweighed by the cost of potentially frustrating the making of the substantive decision on the issuance of exemption certificates.

The Administrative Review Council's 'What decisions should be subject to merit review?' guidance document includes a similar situation where the Council recommended that a decision by the Australian Securities and Investments Commission (ASIC) to require a liquidator's accounts to be audited under section 539(2) of the *Corporations Act 2001* not be subject to review. Although that decision had no substantive effect, it could assist ASIC in taking further action in relation to the accounts.

Retrospective effect

No persons were disadvantaged by the operation of the new section 52 inserted into the principal regulations. At the time that the instrument commenced there were no applications to amend 2019 exemption certificates for EITE activities pending. The closing date for new

applications for 2019 exemption certificates was 1 April 2019. The new information and audit requirements will only apply in 2019 if a prescribed person makes a subsequent request to amend the issued certificates.

Thank you for bringing your concerns to my attention.

Yours sincerely

ANGUS TAYLOR

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC19-001874

17 JUN 2019

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances (the committee) for its email of 4 April 2019 regarding the committee's report, *Delegated Legislation Monitor 2 of 2019*. The report includes a request for information about scrutiny issues identified in relation to delegated legislation for which I have portfolio responsibility. I have provided responses to each of the matters raised below.

Section 11 exemption for voyages between the Cocos (Keeling) Islands and Australian states and territories (F2019L00142)

The committee requested a justification for why it is considered necessary and appropriate to rely on exemptions to the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (the Coastal Trading Act) to allow the Cocos (Keeling) Islands to access shipping services at competitive freight rates, instead of amending the primary legislation, and whether amendments to the primary legislation are being considered to address this issue.

The use of temporary exemptions from the Coastal Trading Act is necessary so that in the event an Australian ship becomes available to service the Cocos (Keeling) Islands, the Ministerial exemption can be repealed promptly. The continuation of an exemption from the Coastal Trading Act for the Cocos (Keeling) Islands in such circumstances would be at odds with the objects of the Coastal Trading Act, particularly maximising the use of vessels registered in the Australian General Shipping Register in coastal trading. If the primary legislation were amended to exclude the Cocos (Keeling) Islands, it may discourage the use of Australian vessels on this route as they would not be able to contest voyages under the coastal trading regime. As such, there are no amendments to the primary legislation currently being considered.

The Hon Michael McCormack MP
Parliament House Canberra | (02) 6277 7520 | minister.mccormack@infrastructure.gov.au
Suite 2, 11-15 Fitzmaurice Street, Wagga Wagga NSW 2650 | michael.mccormack.mp@aph.gov.au

Road Vehicle Standards Rules 2018 **(F2019L00198)**

The committee sought advice as to whether the intergovernmental agreements to which sections 50 and 171 of the *Road Vehicle Standards Rules 2018* (the Rules) refer are incorporated by the instrument.

Intergovernmental agreements referred to in these sections of the Rules are not incorporated by the instrument; they do not determine the content of the law but rather provide a circumstance in which offence and civil penalty provisions do not apply.

The Rules define 'intergovernmental agreement' to mean 'an agreement between Australia and another country or countries that provides for road vehicles specified in the agreement to be imported into Australia on a temporary basis without payment of duties of customs. This definition is consistent with that in the *Customs (International Obligations) Regulation 2015*. Sections 50 and 171 of the Rules ensure that, for vehicles that can be temporarily imported into Australia under such agreements, the importer does not contravene the *Road Vehicle Standards Act 2018*.

Such intergovernmental agreements include, but are not limited to, the United Nations Customs Convention on the Temporary Importation of Private Road Vehicles (the Customs Convention) and bilateral Status of Forces Agreements (SOFAs). The Customs Convention allows the temporary importation of vehicles for up to 12 months by visitors to Australia under a 'carnet' document which is issued in the visitor's country of residence. SOFAs are an internationally-recognised means of handling issues arising out of the presence of one country's visiting military forces in the territory of another country. Australia currently has SOFAs with Malaysia, New Zealand, Papua New Guinea, Singapore and the United States of America which permit the temporary importation of both official vehicles and vehicles privately owned by military personnel and dependants.

Notwithstanding the fact that intergovernmental agreements are not incorporated by the Rules, the explanatory statement nonetheless provides information to interested people by referencing the Customs Convention and SOFAs. Detailed information on the temporary importation of vehicles, including carnets, is available from the Department of Infrastructure, Transport, Cities and Regional Development and Australian Border Force websites which are typical information sources for those interested in the temporary importation of road vehicles into Australia.

Shipping Registration Regulations **2019 (F2019L00206)**

The committee requested a justification for the imposition of strict liability to the offences at subsections 19(3), 19(4), 20(5), 22(1), 25(1) and 38(6) of the *Shipping Registration Regulations 2019* (the Regulations). The imposition of these strict liability offences assists in enhancing the effectiveness of the overall regulatory regime in relation to Shipping Registration. These offences relate to behaviour by some industry players who could view compliance with regulatory requirements as an avoidable imposition. The imposition of strict liability is therefore important for the integrity of the shipping registration regulatory regime.

The committee also requested the justification for reversing the evidential burden for subsections 19(5), 20(6), 22(2), 25(3) and 38(7) of the Regulations. The burden of proof is placed on the defendant in all of the above provisions because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This would appear to be a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. In these circumstances, the Senate Standing Committee for the Scrutiny of Bills has indicated that the burden of proof may be imposed on a defendant.

The committee also requested the advice of the Minister for Infrastructure, Transport and Regional Development's (the Minister) as to whether decisions to exempt persons from requirements relating to the inscription on ships of names and home ports are subject to independent merits review and if not, the characteristics of those decisions that would justify excluding independent merits review.

I can advise that the decision as to whether or not to grant approval for a vessel not to comply with the marking requirements, under regulations 23(4) or (5), is a procedural decision made in the lead up to the approval of a registration application. Prior to the Regulations coming into effect, a determination relating to the inscription on ships of names and home ports could only be made at the discretion of the Minister. The recent change to the regulations was only to remove this burden from the Minister, so that the decision could made by the Authority (the Australian Maritime Safety Authority) which was seen to be a more appropriate level for the decision to be made. This decision is now consistent with provisions for decisions by the Authority for other exemptions in the Regulation. Historically, the only time these powers have been used was to exempt historical or government ships from the requirement to apply external markings.

I trust this information supports the committee in finalising its consideration of these instruments. I have also emailed a copy of this letter to the Regulations and Ordinances Committee Secretariat.

Yours sincerely

Michael McCormack

The Hon Andrew Gee MP

Assistant Minister to the Deputy Prime Minister
Federal Member for Calare

Ref: MC19-001494

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

Via email: regords.sen@aph.gov.au

Dear Senator Williams

I refer to your email of 15 February 2019 regarding Vehicle Standard (Australian Design Rule 4/06 – Seatbelts) 2018 [F2019L00026].

I can confirm that some of the referenced standards listed in the explanatory statement for ADR 4/06 are not yet available free of charge, but that the Department of Infrastructure, Regional Development and Cities is currently considering options to make them available free of charge as was set out in the response provided by the Hon Andrew Broad MP, the then Assistant Minister to the Deputy Prime Minister, to the Senate Committee on similar matters in 2018.

I respectfully request that the Senate Committee accepts the Explanatory Statement for ADR 4/06 – Seatbelts, without change, which explains how documents incorporated by reference can be accessed, including that for some documents there may be a cost to the user.

Thank you again for writing and I trust this is of assistance.

Yours sincerely

Andrew Gee

The Hon Andrew Gee MP
Parliament House CANBERRA ACT 2600 | 02 6277 2150 | minister.gee@infrastructure.gov.au
PO Box 673 ORANGE NSW 2800 | PO Box 54 BATHURST NSW 2795