PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

# PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Urban Infrastructure

*PDR ID: MS17-001995*

Chair
Senate Regulations and Ordinances Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

**Airports (Protection of Airspace) Amendment Regulations 2017**

I refer to the letter dated 7 September 2017 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding the Airports (Protection of Airspace) Amendment Regulations 2017 (the Amending Regulations).

The Committee raised two scrutiny issues in the Amending Regulations concerning the incorporation of the airport plan for Sydney West Airport (SWA). I would like to provide the following advice to the Committee in response to these matters as they appear in the Delegated Legislation Monitor No. 11 of 2017.

**1. Manner of incorporation**

The airport plan is a non-legislative instrument that authorises the initial airport development for SWA. As the airport plan for SWA is not a legislative instrument, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Amending Regulations can only operate in relation to the airport plan for SWA as in force at the time the Amending Regulations commenced (27 July 2017), and not by incorporating the airport plan 'as in force or existing from time to time'.

I note the Committee's comments on facilitating the public's ability to understand the operation of the Amending Regulations. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that the exemption provided for under 16A(4) relates to a controlled activity that is, or comprises part of, a development covered by Part 3 of the airport plan for SWA as in force at the date of commencement of the Amending Regulations.

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## 2. Access to incorporated document

I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents. As the Committee has noted, the airport plan for SWA is readily available for free online. In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the Department to amend the ES to include the website where the airport plan for SWA can be accessed.

A marked up copy of the revised ES, as amended by the Department, to address the issues raised by the Committee is enclosed for your information.
I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

I trust this information supports the Committee in finalising its consideration of the Amending Regulations.

Yours sincerely

Paul Fletcher

22 / 9 /2017

Enc

**EXPLANATORY STATEMENT**

**Select Legislative Instrument No. 11, 2017**

**Issued by the authority of the Minister for Infrastructure and Regional Development**

***Airports Act 1996***

***Airports (Protection of Airspace) Amendment Regulations 2017***

The *Airports Act 1996* (the Act) establishes a system for the regulation of airports, including a regime for the protection of airspace surround airports.

Section 252 of the Act provides that the Governor-General may make regulations prescribing matters that are required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part 12 of the Act provides for the Commonwealth to regulate certain incursions into airspace around airports. Specifically, section 181 of the Act provides for a 'prescribed airspace' to be specified in, or ascertained in accordance with, the regulations, where it is in the interests of safety, efficiency or regularity of existing or future air transport operations into or out of an airport. Section 182 of the Act defines what 'controlled activities' are in relation to prescribed airspace. Section 183 prohibits the carrying out of controlled activities in relation to prescribed airspace, unless the activity is approved under the regulations or exempted by the regulations from Division 4 of Part 12 of the Act. Section 184 provides for the regulations to set out a regime for the approval of controlled activities. The *Airports (Protection of Airspace) Regulations 1996* (the Principal Regulations) provide such an approval regime but do not currently exempt any controlled activities from Division 4 of Part 12 of the Act.

The declaration of prescribed airspace for Sydney West Airport (SWA) will be an important element in ensuring the safety, efficiency and regularity of future air transport operations to and from SWA, by helping protect airspace at and around the airport from incompatible developments. It will also increase certainty for relevant land planning authorities who will be able to incorporate the Obstacle Limitation Surface (OLS) heights into their planning and development approval mechanisms.

The declaration of prescribed airspace for SWA – a regulatory action already permitted by the Principal Regulations and separate from the focus of these amendments – is an important step in helping protect the airspace from incompatible developments, once airspace is declared as 'prescribed'. However, a range of activities on and around the airport site during airport construction and prior to air transport operations commencing to and from SWA may be 'controlled activities' and will require approval or exemption to be lawfully carried out. Some activities in that range would, by nature, have no impact on future air transport operations to and from SWA and therefore their regulation under Part 12 of the Act prior to operations commencing could impose unnecessary administrative and regulatory obligations on affected stakeholders. Furthermore, activities relating to the initial construction of the airport would not need to be regulated under Part 12 because they will be sufficiently regulated by the airport plan for SWA.

The *Airports (Protection of Airspace) Amendment Regulations 2017* (the Amending Regulations) amends the Principal Regulations to exempt certain controlled activities in

relation to the prescribed airspace for SWA from Division 4 of Part 12 of the Act. The Amending Regulations amend the Principal Regulations to do this.

Specifically, the Amending Regulations establishes exemptions covering three classes of controlled activities that may be carried out on and around the airport site prior to SWA being operational:

- the first exemption relates to activities involving buildings, structures or things no more than 10 metres high;
- the second exemption relates to activities that do not continue for more than 12 months and do not involve buildings, structures or things that intrude or will intrude into the prescribed airspace and that will not remain in place for longer than 12 months; and
- the third exemption relates to activities covered by the airport plan for SWA.

**Consultation**

The Amending Regulations were finalised after consultation with the Civil Aviation Safety Authority (CASA) and Airservices Australia as relevant regulatory bodies. CASA were consulted in recognition of their role as the regulatory authority responsible for defining the criteria by which the OLS is established, and for aviation safety generally. Airservices Australia were consulted in recognition of their future role in establishing air navigation procedures for SWA.

**Regulation Impact Statement**

The amendments are minor and machinery in nature. The Office of Best Practice Regulation advised that no analysis in the form of a Regulatory Impact Statement was not required for the Amending Regulations (OBPR ID: 22413).

**Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights is at Attachment A.

The Amending Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Details of the Amending Regulations are set out in Attachment B.

The Amending Regulations commence the day after they are registered on the Federal Register of Legislation.

**Authority**

The Amending Regulations amend existing regulations under section 252 of the *Airports Act 1996*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument

**ATTACHMENT A**

**Statement of Compatibility with Human Rights**

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

**Airports (Protection of Airspace) Amendment Regulations 2017**

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 Disallowable Legislative Instrument**

The Airports (Protection of Airspace) Amendment Regulations 2017 amends the Airports (Protection of Airspace) Regulations 1996 to exempt certain activities related to prescribed airspace for Sydney West Airport from the need for approval once airspace is declared at SWA but prior to operations commencing. during construction of the airport.

**Human rights implications**

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

The amendments are intended to exempt certain activities, relevant to an operating airport, from the need for approval, during the airport's construction period prior to operations commencing.

**Conclusion**

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

**Paul Fletcher**

**Minister for Urban Infrastructure**

**ATTACHMENT B**

**Details of Airports (Protection of Airspace) Amendment Regulations 2017**

Section 1 - Name of Regulations

Section 1 provides that the title of the Amending Regulations is the Airports (Protection of Airspace) Amendment Regulations 2017.

Section 2 - Commencement

Section 2 provides for the Amending Regulations to commence on the day after it is registered.

Subsection 2(2) confirms that column 3 in the commencement table under subsection 2(1) does not form part of the Amended Regulations. This allows the commencement date to be published in column 3.

Section 3 - Authority

Section 3 provides that the Amending Regulations are made under the Airports Act 1996.

Section 4 - Schedule(s)

Section 4 provides that the instruments specified in a Schedule to the Amending Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amending Regulations has effect according to its terms.

**Schedule 1 - Amendments**

**Item 1 – Before regulation 1**
This item inserts a new heading, "Part 1 – Preliminary", before regulation 1 in the Principal Regulations.

**Item 2 –Subregulation 3(1)**
This item inserts two new definitions in subregulation 3(1) of the Principal Regulations.

**Item 3 – Before regulation 5**
This item inserts a new heading, "Part 2 – Prescribed airspace", before regulation 5 in the Principal Regulations.

**Item 4 – Before regulation 6A**
This item inserts a new heading, "Part 3 – Matters affecting whether activities are controlled activities", before regulation 6A in the Principal Regulations.

**Item 5 – Before regulation 7**
This item inserts a new heading, "Part 4 – Notification and approval of controlled activities", before regulation 7 in the Principal Regulations.

**Item 6 – Subregulation 7(1) note**
This item repeals the note to subregulation 7(1) and substitutes it with two new notes. New note 1 states that a person may commit an offence against section 183 of the Act, and remedial orders may be made under section 187 of the Act, if a controlled activity is carried out other than in accordance with an approval. The purpose of this amendment is to consolidate in a single note the two existing notes to subregulations 7(1) and (2).

New note 2 clarifies that approval is not required for controlled activities that are covered by any of the exemptions provided by new Part 5 of the Principal Regulations (inserted by item 11 of the Amending Regulations).

**Item 7 – Subregulation 7(2) (note)**
This item is consequential to item 6.

**Item 8 – Regulation 8**
This item is consequential to item 9.

**Item 9 – At the end of regulation 8 (after the note)**
This item adds new subregulation 8(2) at the end of regulation 8, after the note. Regulation 8 currently requires a building authority that receives a proposal for a building activity that, if undertaken, would constitute a controlled activity to give notice of the proposal to the airport-operator company for the relevant airport or, if there is no airport-operator company, to the Secretary of the Department. Subregulation 8(2) disapplies this requirement if the proposed building activity would be a controlled activity that is exempted from Division 4 of Part 12 of the Act by new regulation 16A (inserted by item 11 of the Amending Regulations).

**Item 10 – Subregulations 9(1) and (1A)**
This item inserts the words "an application for approval of" after "applies to" in subregulations 9(1) and 9(1A). The purpose of this amendment is to clarify that regulation 9 of the Principal Regulations only applies where an application for approval is received for a proposed controlled activity that, if undertaken, would involve an intrusion into Procedures for Aviation Navigation Services - Aircraft Operations (PANS-OPS) airspace.

**Item 11 – After regulation 16**
This item inserts a new heading "Part 5 – Exemptions for controlled activities", after regulation 16 in the Principle Regulations, and insert new regulation 16A.
New regulation 16A declares controlled activities in three classes to be exempt from Division 4 of Part 12 of the Act.
The first exemption appears in new subregulation 16(A)(2). It covers controlled activities that:

- are referred to in paragraph 182(1)(a), (b) or (c) of the Act;
- involve buildings, structures or things that intrude into the prescribed airspace for SWA but do not extend above ground level by more than 10 metres; and
- are not carried out after 31 December 2025.

The purpose of limiting this exemption to relevant controlled activities carried out before 1 January 2026 is to provide an appropriate period of time between the end date of the exemption and the anticipated commencement of air transport operations to and from SWA to enable affected stakeholders to develop sufficient awareness of, and familiarity with, the regulatory regime and approval requirements before SWA operations commence.

Illustrative Example

Tina is a resident of Silverdale Road, Silverdale and would like to build an extension to her house in 2019. While Tina's planned extension will not exceed the average height of a two storey house, which is less than 10 metres, it will intrude into the prescribed airspace for SWA (once declared) and will therefore involve a 'controlled activity' under the Act.

Under subregulation 16(A)(2), Tina's planned extension is exempt from Division 4 of Part 12 of the Act, as the proposed activity would not involve buildings etc that extend above ground level by more than 10 metres, and the extension would be completed before 1 January 2026. Therefore Tina does not need to seek an approval under the Principal Regulations for this work to proceed.

The second exemption appears in new subregulation 16(A)(3). It covers controlled activities that:

- relate to the prescribed airspace for SWA;
- are referred to in paragraph 182(1)(a), (b) or (c) of the Act;
- do not continue for more than 12 months;
- do not involve buildings, structures or things that intrude into the prescribed airspace for SWA and are intended to remain in place for longer than 12 months; and
- are not carried out after 31 December 2025.

The purpose of limiting this exemption to relevant controlled activities carried out before 1 January 2026 is to provide an appropriate period of time between the end date of the exemption and the anticipated commencement of air transport operations to and from SWA to enable affected stakeholders to develop sufficient awareness of, and familiarity with, the regulatory regime and approval requirements before SWA operations commence.

Illustrative Example

Richard is overseeing the construction of an office complex in St Marys. A crane will be required during the substantive construction phase of the office complex which is expected to take approximately nine months between February 2020 and October 2020. The crane will intrude into the prescribed airspace for SWA (once declared) and its use will therefore be a 'controlled activity' under the Act. However, the completed office complex will not penetrate the prescribed airspace.

Under subregulation 16(A)(3), the proposed use of the crane is exempt from Division 4 of Part 12 of the Act, as it would not continue for longer than 12 months, would end before 1 January 2026, and would not involve buildings etc that intrude into the prescribed airspace for SWA. Therefore Richard does not need to seek an approval under the Principal Regulations for this work to proceed.

The third exemption appears in new subregulation 16(A)(4). It covers controlled activities that:

- are, or comprise part of, developments covered by Part 3 of the airport plan for SWA; and
- are not carried out after 30 June 2026.

The Minister for Urban Infrastructure determined an airport plan for SWA under section 96B(1) of the Act on 5 December 2016. The airport plan for SWA is a transitional planning instrument that authorises the intial airport development for SWA and specifies the Australian Government's requirements for the airport. This exemption relates to a controlled activity that is, or comprises part of, a development covered by Part 3 of the airport plan for SWA as in force at the date of commencement of the Amending Regulations. This exemption recognises the detailed assessment of the interaction between activities covered by Part 3 of the airport plan and airspace restrictions that was completed as part of the airport plan development process. The purpose of limiting this exemption to relevant controlled activities carried out before 1 July 2026 is to provide an appropriate period of time between the end date of the exemption and the anticipated commencement of air transport operations to and from SWA to enable affected stakeholders to develop sufficient awareness of, and familiarity with, the regulatory regime and approval requirements before SWA operations commence.

The airport plan for SWA is available to download free of charge at http://westernsydneyairport.gov.au/.

The end date for this exemption is six months later than the end dates for the exemptions in subregulations 16(A)(2) and (3), as it is expected that the predefined nature of activities covered by Part 3 of the airport plan enables a shorter transition time.

Item 11 also inserts a new heading, "Part 6 – Miscellaneous", after new Part 5 in the Principal Regulations.

# Office of the Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

20 SEP 2017

Dear Sir/Madam

Thank you for your correspondence dated 7 September 2017 concerning two Treasury portfolio legislative instruments, originally addressed to the Treasurer's Office. Your correspondence has been referred to me as I am responsible for these matters.

**ASIC Corporations (Amendment) Instrument 2017/642 [F2017L00905]**

**ASIC Credit (Amendment) Instrument 2017/641 [F2017l00904]**

The two instruments raised in your letter concern relief provided by the Australian Securities and Investments Commission (ASIC) to a number of litigation funding schemes and proof of debt funding arrangements.

Specifically, these instruments provide relief to these entities from the requirements to hold an Australian Financial Services Licence (AFSL) or Australian Credit Licence (ACL) as required under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2010*. They were originally created in response to a number of High Court decisions which declared certain litigation funding arrangements to be credit facilities and others a financial product. Both these instruments were set to expire in July 2017 and have been extended for a further two years.

As you are aware, the conduct and regulation of the financial services industry has attracted substantial attention. The Government has sought to address these concerns by implementing an extensive legislative agenda, including reforms to the life insurance industry, increasing professional standards for advisers and making significant changes to the financial system's external dispute resolution (EDR) framework.

The Government is committed to progressing all of its legislative and regulatory reform agenda where possible, however, the existing volume of work currently being undertaken has resulted in matters of urgency taking priority over others due to the limited resources that are available to implement those changes.

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In light of this, ASIC class orders are an effective interim mechanism to resolve some of the matters of concern and to provide certainty to industry.

I can confirm that the Government does intend to progress both of these legislative instruments into primary regulation when additional resources become available.

I hope this information will be of assistance to you.

Yours sincerely

**Kelly O'Dwyer**

**THE HON JOSH FRYDENBERG MP**
**MINISTER FOR THE ENVIRONMENT AND ENERGY**

MC17-018098

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

Dear Senator Williams

Thank you for the Senate Regulations and Ordinances Committee's request in the Delegated Legislation Monitor 12 of 2017 for advice in relation to merits review of decisions under the *Carbon Credits (Carbon Farming Initiative) Amendment Rule (No. 2) 2017* (the Rule).

The Rule restricts eligibility of new plantation forestry projects under the Emissions Reduction Fund if the minister responsible for agriculture (referred to as the Agriculture Minister in the instrument) finds they would have an undesirable impact on agricultural production. It includes an extensive consultative framework for the Agriculture Minister (the Minister) when considering whether to make an adverse impact finding. If the Minister intends to make an adverse impact finding, the project proponent must be advised in writing and given an opportunity to provide further written information for the Minister to consider before making a final decision. This framework ensures proponents are afforded natural justice before any adverse decision is taken. Proponents can also elect to submit a new or modified proposal at any point in time at no cost.

If the Minister does make an adverse impact finding about a proposed project after carrying out all required consultation steps, it will be an excluded offsets project. The Clean Energy Regulator cannot approve an excluded offsets project. An appeal of the Regulator's decision in the Administrative Appeals Tribunal does not reopen the merits of whether the Minister should have made an adverse impact finding. However, the legality of an adverse impact finding by the Minister remains subject to judicial review. Subsection 20B(4) of the Rule also gives the Minister the ability to remove an adverse impact finding if appropriate.

The Australian Government's view is that additional merits review processes are unnecessary and could delay decision-making. In particular, the Rule allows project proponents to submit a project notification to the Minister at the same time as they submit a project application to the Regulator. This ensures timely decisions on whether projects can proceed. The Australian Government received advice from forestry industry representatives during consultation that plantation forestry projects need certainty on a number of issues to secure financial close on their investments. Additional merits review steps would not allow the Regulator to meet its 90 day deadline for processing applications in subsection 27(14) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* and could delay investment certainty.

Parliament House Canberra ACT 2600 Telephone (02) 6277 7920

Further, the nature of the Minister's role is such that a decision under the legislative rules may be unsuitable to be subject to merits review. The decision may involve weighing up a number of important but competing considerations of an environmental and economic nature, and potentially competing government policies. The Minister is in a unique position to form a view as to the importance of the particular agricultural production in the region to the Australian economy and export markets.

Thank you for raising this matter with me.

Yours sincerely

JOSH FRYDENBERG

**The Hon Darren Chester MP**
Minister for Infrastructure and Transport
*Deputy Leader of the House*
*Member for Gippsland*


*PDR ID: MC17 004351* 19 SEP 2017

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

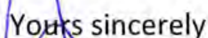
Dear Senator John

Thank you for your letter of 7 September 2017 regarding the Standing Committee on Regulation and Ordinances (the Committee) seeking advice in relation to instrument *CASA EX106/17 - Exemptions and directions - use of portable electronic devices when loading fuel [F2017L00975].*

The Committee requested advice on the manner of incorporation, and access to incorporated documents in relation to the instrument. The instrument provides alternative regulatory arrangements for the use of electronic devices around aircraft that are being refuelled. The instrument refers to devices that transmit on a frequency specified in an Institute of Electrical and Electronics Engineers (IEEE) 802.11 wireless standard. The wireless standards are freely available from the IEEE website at www.ieee.org.

I am advised that the Civil Aviation Safety Authority will lodge a replacement explanatory statement to clarify the operation of the instrument, and this will be available by 15 September 2017.

Thank you again for taking the time to write and inform me of the Committee's concerns on this matter.



Yours sincerely

**DARREN CHESTER**


Parliament House Canberra ACT 2600 Telephone: (02) 6277 7680

**THE HON JULIE BISHOP MP**

Minister for Foreign Affairs

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

Dear Senator John

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) of 7 September 2017 seeking my advice in relation to matters arising from the *Charter of the United Nations (UN Sanctions Enforcement Law) Declaration 2017* (No.2 ) (the Sanctions Law Declaration).

The Committee has requested my advice on the inclusion in the Sanctions Law Declaration of Regulations 8, 10, 12 and 13 of the *Charter of the United Nations (Sanctions — Liberia) Regulations 2008* (the Liberia Regulations).

The Committee is correct that following the adoption of UN Security Council (UNSC) Resolution 2288 (2016), the Liberia Regulations ceased to have effect.

I will amend the Sanctions Law Declaration to remove the reference to these Regulations.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

02 OCT 2017

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ATTORNEY-GENERAL

CANBERRA

MC17-009026

13 SEP 2017

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

Thank you for the Committee's correspondence of 17 August 2017 concerning the nature of any consultation carried out in relation to the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017* (the Regulations).

Regulations to facilitate the appointment of legal representatives for young persons who are the subject of control order proceedings were drafted in consultation with the Australian Federal Police and state and territory Legal Aid Commissions.

Further, the *Intergovernmental Agreement on Counter-Terrorism Laws* (June 2004) (the IGA) requires that the Commonwealth Government consult the governments of the states and territories prior to the making of legislation that would amend or alter Chapter 2 or Part 5.3 of the *Criminal Code*. In the spirit of the IGA, my department wrote to the states and territories through the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee on the proposed Regulations.

Consistent with your request, my department has amended the Explanatory Statement supporting the Regulations to include information about the consultation which was carried out in accordance with the requirements of the *Legislation Act 2003*. A copy of the amended Explanatory Statement is enclosed and has been uploaded to the Federal Register of Legislative Instruments.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Amended Explanatory Statement

## EXPLANATORY STATEMENT

**Select Legislative Instrument 2017 No.**

Issued by the authority of the Attorney-General

*Criminal Code Act 1995*

*Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*

### Background

Section 5 of the *Criminal Code Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Schedule to the Act sets out the Criminal Code (the Code).

Division 104 of the Code allows obligations, prohibitions and restrictions to be imposed by a control order on a person from 14 years of age for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act, and/or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Subsections 104.28(4) to (5) of the Code require an issuing court to appoint a lawyer to act for a person aged at least 14 but under 18 (the young person) in relation to control order proceedings, other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed, where the young person does not have legal representation in those proceedings. Subsection 104.28(6) of the Code provides for the making of regulations to support the requirement to appoint a lawyer under subsection 104.28(4).

### Purpose

The purpose of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017* (the Instrument) is to amend the *Criminal Code Regulations 2002* (the Regulations) to insert an administrative framework to support the appointment of lawyers for young persons the subject of control order proceedings.

### Explanation and effect of provisions

Details of the Instrument are set out in Attachment A.

**Consultation**

Regulations to facilitate the appointment of legal representatives for young persons who are the subject of control order proceedings were drafted in consultation with the Australian Federal Police and state and territory Legal Aid Commissions.

The Attorney-General's Department wrote to the states and territories through the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee on the proposed Regulations.

**Statement of Compatibility with Human Rights**

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

## Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017

The Instrument, a 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 Instrument**

Division 104 of the Code authorises an issuing court to impose a control order on persons 14 years and older for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act, and/or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. Safeguards provided by Division 104 of the Code include subsection 104.28, which requires an issuing court to appoint a lawyer for a young person (that is, a person aged at least 14 but under 18) for the purposes of certain proceedings in relation to the control order if the young person does not have legal representation.

The object of the Instrument is to provide an administrative framework to support the appointment of lawyers for young persons the subject of control order proceedings. Specifically, the Instrument provides that an issuing court may request that representation be provided by a legal aid body, with the Australian Federal Police (AFP) to facilitate contact between that legal aid body and the young person.

**Human rights implications**

The Instrument engages the following rights:

- Article 14, *International Covenant on Civil and Political Rights* (ICCPR)
- Article 12, *Convention on the Rights of the Child* (CROC), and
- Article 40, CROC.

*Article 14, ICCPR*

The Instrument engages and promotes the right to a fair trial, the right to minimum guarantees in criminal proceedings and in a suit at law and the presumption of innocence in Article 14 of the ICCPR.

Control orders under Division 104 of Part 5.3 of the Code have been a tool available to law enforcement since 2005.

Control orders are a protective mechanism and constitute an important element of Australia's counter-terrorism strategy. They provide the AFP with a means to request that a court impose obligations, prohibitions and restrictions (controls) on a person for the purpose of protecting

the public from a terrorist act. Law enforcement may have sufficient credible information or intelligence that an individual poses a threat to security to take action in relation to the person before they have gathered sufficient admissible evidence to support a criminal prosecution for terrorism or terrorism-related conduct. In these circumstances, control orders provide a mechanism to manage the threat. Use of a control order is therefore considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

The Instrument engages and promotes this human right by ensuring an issuing court actively considers whether a young person is legally represented, and ensuring the AFP is required to take certain action to ensure the young person has the opportunity to obtain legal representation, including in circumstances where the young person does not have the resources to pay for those services.

The Instrument strengthens the existing safeguards in the Act and supports the implementation of recommendation 2 of the February 2016 advisory report of the Parliamentary Joint Committee on Intelligence and Security (the Committee) on the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*.

*Article 12, CROC*

The Instrument engages and promotes Article 12 of the CROC, which states that a child shall be provided the opportunity to be heard in any judicial proceedings affecting the child, either directly, or through a representative, in a manner consistent with the procedural rules of national law.

The administrative framework introduced by the Instrument promotes Article 12 of the CROC by ensuring that a lawyer is made available to represent a young person in control order proceedings, other than proceedings the issuing court has determined should be held *ex parte*, where the young person does not have legal representation. The young person will therefore be provided with the opportunity to be heard through a legal representative in any control order proceedings (other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed). It should be noted that the Instrument does not require the young person to accept the legal representation offered under the Instrument. The young person retains the right to select – and meet the costs associated with – a different source of legal representation.

*Article 40, CROC*

The Instrument also engages a child's right to a fair trial and minimum guarantees in criminal proceedings, as well as a child's right to be presumed innocent until proven guilty in Article 40 of the CROC.

The Instrument promotes Article 40 of the CROC and the young person's right to a fair trial by providing the administrative framework to facilitate the appointment of lawyers for young

persons subject to control order proceedings (other than proceedings the issuing court has determined should be held *ex parte*).

**Conclusion**

The Instrument is compatible with human rights and promotes the right to a fair trial, the right to minimum guarantees in criminal proceedings and in a suit at law, as well as the presumption of innocence. In addition, the Instrument promotes the young person's opportunity to be heard in judicial proceedings affecting the young person.

**ATTACHMENT A**

**Details of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017***

**Clause 1 – Name**

Clause 1 provides for the short title of the Instrument to be the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017.*

**Clause 2 – Commencement**

Subclause 2(1) provides for the commencement of each provision in the Instrument the day after the Instrument is registered.

Subclause 2(2) provides that information in Column 3 of the table included in subclause 2(1) may be edited and does not form part of the Instrument.

**Clause 3 – Authority**

This clause states that the Instrument is made under the *Criminal Code Act 1995.*

**Clause 4 – Schedules**

Each instrument specified in a Schedule to the Instrument is amended as set out in the applicable items in the Schedule. Any other item in a Schedule to this Instrument has effect according to its terms.

**Schedule 1 – Amendments**

Schedule 1 makes the following amendments to the *Criminal Code Regulations 2002.*

**Item 1 – Regulation 3**

Item 1 amends the definitions in Part 1 of the *Criminal Code Regulations 2002* by inserting the following definitions into regulation 3:

> ***AFP member*** has the same meaning as in Part 5.3 of the Code.
>
> ***chief executive officer*** has a different meaning for each jurisdiction as set out in regulation 3 and in accordance with the relevant structure and legislation in the particular state or territory.
>
> ***control order*** has the same meaning as in Part 5.3 of the Code.
>
> ***issuing court*** has the same meaning as in Part 5.3 of the Code.
>
> ***lawyer*** has the same meaning as in Part 5.3 of the Code.
>
> ***legal aid commission*** means an authority established by or under a law of a State or Territory for the purpose of providing legal assistance.
>
> ***parent*** has a meaning affected by the Dictionary at the end of the Code.

**Item 2 – Before regulation 4**

Item 2 inserts a new Division into Part 2 of the *Criminal Code Regulations 2002.*

Division 1—Control orders

This item inserts a new heading 'Division 1—Control orders' before section 4. Division 1 has been inserted before the existing regulation in relation to preventative detention orders to ensure consistency with the order in which the provisions regarding 'control orders' and 'preventative detention orders' appear in the Code.

This item also inserts new sections 3A, 3B and 3C after the new heading.

New regulation 3A Legal representation for young people

New section 3A informs the reader that Division 1 of this Instrument provides for a lawyer to be appointed to act for a person who is at least 14 but under 18 (the young person). The appointment is for the purposes of acting for the young person in relation to certain control order proceedings as set out in subsection 104.28(6) of the Code.

New regulation 3B Court may request legal aid commission to arrange representative

New section 3B authorises an issuing court to request a legal aid commission to arrange the legal representation of the young person (the relevant legal aid commission).

This regulation is designed to ensure any young person the subject of control order proceedings, other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed, who does not already have legal representation has a reasonable opportunity to access a lawyer for the purposes of proceedings.

New regulation 3C AFP to inform relevant persons of request and contact details

New section 3C imposes certain obligations on the AFP. New subsections 3C(2), 3C(3) and 3C(5) are designed to ensure that, to the extent possible, the relevant legal aid commission, the young person, and the young person's parent or guardian are made aware of the issuing court's request for legal representation to be provided to the young person. This process is intended to ensure, so far as is reasonably practicable, that contact is made by one or both parties to discuss the particulars of the legal representation, thereby facilitating the young person's access to that representation.

New subsection 3C(1) provides that the regulation only applies where the issuing court requests that a legal aid commission arrange legal representation of a young person for certain proceedings in relation to a control order.

New subsection 3C(2) imposes certain obligations on the AFP with respect to the relevant legal aid commission. New paragraph 3C(2)(a) requires either a member of the AFP or a legal representative of the AFP to inform the chief executive officer of the relevant legal aid commission in writing of the issuing court's request. In addition, new paragraph 3C(2)(b) requires either an AFP member or a legal representative of the AFP to provide the relevant legal aid commission with the following information (if any) that the AFP member or a legal representative of the AFP has:

(i) the young person's name

(ii) the young person's residential address

(iii) the young person's contact details, including a telephone number and an email address

(iv) the young person's date of birth

(v) the name, residential address and contact details of at least one parent or guardian of the young person, and

(vi) if the young person requires assistance with communication—information about the assistance required.

A note to paragraph 3C(2)(b) provides that, for the purposes of subparagraph (b)(vi), a person may need assistance with communication because, for example, the young person is deaf or hearing impaired, is unable to read, has a mental impairment, or requires an interpreter.

Paragraph 3C(2)(b) only requires the AFP member or legal representative to provide the information to the extent that that member or legal representative already holds or has access to that information. It does not impose an obligation on the AFP member or legal representative to obtain and furnish the relevant legal aid commission with information not already held by the AFP.

As the AFP is an enforcement body and the disclosure of the young person's contact details to the relevant legal aid commission is a disclosure of personal information reasonably necessary for an enforcement related activity (in this case, the conduct of control order proceedings), the AFP member or legal representative will be required to make a written note of the disclosure, in accordance with Australian Privacy Principle 6.5.

New subsection 3C(3) imposes certain obligations on the AFP with respect to the young person.

New paragraph 3C(3)(a) requires an AFP member to inform the young person of the request made by the issuing court. New paragraph 3C(3)(b) requires an AFP member to give the young person sufficient information about the relevant legal aid commission to enable the young person to contact and, if necessary, attend the relevant legal aid commission. In addition, new paragraph 3C(3)(b) requires the AFP member to provide the young person with the following information (if any) that the AFP member has:

(i) the name of the legal aid commission

(ii) the legal aid commission's business address (not being a post box)

(iii) the legal aid commission's contact details, including a telephone number and an email address, and

(iv) any other information about the legal aid commission provided by the issuing court.

The overall effect of new paragraph 3C(3)(b) is that, provided the AFP member gives the young person sufficient information to contact and attend the legal aid commission, consistent with new paragraph 3C(2)(b), there is no obligation on the AFP member to obtain relevant information in addition to what the AFP already holds. Neither new paragraph 3C(3)(a) nor 3C(3)(b) requires the AFP member to provide the information in writing. However, the AFP member would make a written record of the conversation and the information provided.

New paragraph 3C(3)(c) imposes an obligation on the AFP, consistent with that in subsection 104.12(1)(c) of the Code, to ensure the young person understands the information provided to him or her.

New subsection 3C(4) notes that new subsection 3C(3) does not apply if the actions of the young person make it impracticable for the AFP member to comply with that subsection. For example, such actions could include the young person behaving violently towards the AFP member or otherwise acting to prevent the AFP member from conveying the information required to be conveyed under new subsection 3C(3).

In addition, new subsection 3C(5) imposes certain obligations on the AFP with respect to taking reasonable steps to inform at least one parent or guardian of the young person of the issuing court's request and give the parent or guardian the relevant legal aid commission's contact details.

This new subsection is designed to ensure that at least one parent or guardian of a young person subject to a control order is made aware that the issuing court has requested legal aid to provide a lawyer for the young person.

The term 'reasonable' is to be given its ordinary meaning and will be determined at the time of informing or attempting to inform. There may be instances where the AFP is unable to identify and/or locate a parent or guardian. For example, the young person could be estranged from his or her parents or guardians, or those individuals are unable to be contacted. The drafting of the provision acknowledges that the young person may not cooperate with authorities in seeking to identify his or her parents or guardians.

It is important that an inability to inform one of the young person's parents or guardians of the request and the relevant legal aid commission's contact details does not frustrate the provision of the legal representation. If an AFP member has taken reasonable steps to inform at least one parent or guardian of the young person of the relevant details, but was unsuccessful, an AFP member is not required to attempt to inform another parent or guardian. However, these amendments do not prevent an AFP member from doing so.

New subsection 3C(6) imposes a timeframe in which the AFP is required to comply with the requirements to inform the relevant legal aid commission, the young person and a parent or guardian of the young person imposed by new subsections 3C(2), (3) and (5). In particular, the AFP member or legal representative, as the case may be, must provide the information and comply with any other requirements in those subsections as soon as practicable after the issuing court decides to make the request and at least 48 hours before the next day when the court will conduct proceedings relating to the control order. This is designed to ensure the legal aid commission, the young person and the parent or guardian have sufficient time to make the necessary preparations for the next court date.

Division 2—Preventative detention orders

This item also inserts a new heading 'Division 2—Preventative detention orders' after new section 3C. As noted above, inserting the regulations in relation to control orders before the existing regulation relating to preventative detention orders ensures consistency with the order of the provisions relating to control orders and preventative detention orders in the Code.

**Items 3, 4 and 5 – Division 3.1 (heading), Division 3.2 (heading) and Division 3.3 (heading)**

These items amend Part 2 of the *Criminal Code Regulations 2002* by renumbering the Divisions within that Part so they commence with Division 1 of Part 2, consistent with standard numbering practice.

Item 3 repeals the current heading for 'Division 3.1—Cross-border firearms trafficking' and replaces it with the new heading 'Division 1—Cross-border firearms trafficking'.

Item 4 repeals the heading 'Division 3.2—Serious drugs and precursors' and replaces it with the new heading 'Division 2—Serious drugs and precursors'.

Item 5 repeals the heading 'Division 3.3—Psychoactive substances' and replaces it with the new heading 'Division 3—Psychoactive substances'.

**Item 6 – After Part 4**

Part 5—Application and transitional provisions

Item 6 inserts a new heading 'Part 5—Application and transitional provisions' after Part 4 of the *Criminal Code Regulations 2002*.

7 Application of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*

This item also inserts new section 7, 'Application of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*', into new Part 5 of the *Criminal Code Regulations 2002*.

New section 7(1) provides guidance on the proceedings to which the amendments apply.

New section 7 is designed to ensure that the control order provisions in this instrument apply to any part of a proceeding relating to a control order made or requested on or after 30 November 2016 (the date on which the amendments to the Code commenced operation), regardless of when the proceedings commenced.

New subsection 7(1) provides that the amendments made by items 1 and 2 of Schedule 1 to the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017* – which relate to making a lawyer available to a young person for certain control order proceedings – apply in relation to the parts of a proceeding that occur after the commencement of that instrument if:

(a) the proceeding commenced before or after the commencement of that instrument; and

(b) the proceeding relates to a control order made on or after 30 November 2016; and

(c) the control order was, or is, requested (however described) on or after 30 November 2016.

Accordingly, the effect of new subsection 7(1) is that the amendments made by items 1 and 2 will apply to any control order proceedings that occur after the commencement of that instrument.

New subsection 7(2) is an avoidance of doubt provision. It provides that the amendments made by items 1 and 2 apply regardless of when the conduct to which the request made by the issuing court relates occurred or occurs.

The note following subsection 7(2) acknowledges that the conduct of the young person that has led to the control order proceedings may have occurred before or after 30 November 2016.

**Senator the Hon. Anne Ruston**

**Assistant Minister for Agriculture and Water Resources**
**Senator for South Australia**

Ref: MC17-006611

25 SEP 2017

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

Dear Chair

I refer to the Committee's letter of 7 September 2017 and associated *Delegated legislation monitor* 11 of 2017, in which the Committee has sought advice on the *Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulations 2017* (the Instrument). I apologise that this advice has been slightly delayed.

The Committee has requested advice on the manner in which documents have been incorporated by the Instrument and how those documents can be accessed.

The Instrument amended the *Fisheries Management (International Agreements) Regulations 2009* (the Principal Regulations). The broad purpose of the Principal Regulations is to give effect, through the legislative framework for Commonwealth fisheries management, to international fisheries management measures (IFMMs) agreed by international fisheries management organisations (IFMOs) to which Australia is a party.

Specifically, the Principal Regulations enable the Australian Fisheries Management Authority, the agency responsible for the management of Commonwealth fisheries, to:

- require persons who use a foreign boat to fish beyond the Australian Fishing Zone to comply with IFMMs adopted by IFMOs to which Australia is a party;
- authorise officials of a foreign country that participates in a prescribed IFMO to board and inspect an Australian-flagged boat on the high seas if there are reasonable grounds to believe that the boat has been fishing in the waters of a foreign country without authorisation; and
- authorise an authority of a foreign country that participates in a prescribed IFMO to investigate an alleged contravention of a prescribed IFMM involving an Australian-flagged boat.

Parliament House, Canberra ACT 2600 Tel: 02 6277 3753 Fax: 02 6277 5825 Email: assistant.minister@maff.gov.au

The Instrument prescribes in the Principal Regulations both new IFMMs, and amendments to existing IFMMs, that have come into force as a result of decisions made at meetings of five IFMOs held between 1 July 2015 and 30 June 2016. These IFMOs are the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the South Pacific Regional Fisheries Management Organisation (SPRFMO). The IFMMs that were prescribed by way of incorporation were incorporated as in force at the commencement of the Instrument. They relate to matters such as vessel monitoring systems, seabird bycatch mitigation and the management of exploratory fisheries.

Copies of all IFMMs prescribed in the Instrument and the Principal Regulations can be accessed at no charge from the websites of the respective IFMOs, as follows:

- CCAMLR: www.ccamlr.org
- IOTC: www.iotc.org
- WCPFC: www.wcpfc.int
- CCSBT: www.ccsbt.org
- SPRFMO: www.sprfmo.int

The Explanatory Statement for the Instrument has been updated to clarify these matters and is enclosed. My department will arrange for the updated Explanatory Statement to be re-registered on the Federal Register of Legislation.

I thank the Committee for its consideration of the Instrument and its constructive suggestions. I trust that the explanations I have provided clarify the points raised.

I have also reminded my department and the Australian Fisheries Management Authority of the importance of reflecting on the committee's feedback when preparing future instruments.

Yours sincerely

Anne Ruston
Enc.

# EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister for Agriculture and Water Resources

*Fisheries Management Act 1991*

*Fisheries Management (International Agreements) Amendment (2015 and 2016 measures) Regulations 2017*

The *Fisheries Management Act 1991* (the Act) provides the legislative framework governing the management of Commonwealth fisheries.

Section 168 of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters required or permitted by the Act or necessary or convenient to be prescribed giving effect to the Act.

The *Fisheries Management (International Agreements) Regulations 2009* (the Principal Regulations) enable the Australian Fisheries Management Authority (AFMA), the agency responsible for the management of Commonwealth fisheries, to require persons who use a foreign boat to fish beyond the Australian Fishing Zone to comply with international fisheries management measures (IFMMs) adopted by international fisheries management organisations (IFMOs) to which Australia is a party.

The Principal Regulations also enable AFMA to authorise officials of a foreign country that participates in a prescribed IFMO to board and inspect an Australian-flagged boat on the high seas if there are reasonable grounds to believe that the boat has been fishing in the waters of a foreign country without authorisation; and to authorise an authority of a foreign country that participates in a prescribed IFMO to investigate an alleged contravention of a prescribed IFMM involving an Australian-flagged boat.

Subject to Part 6, Division 5A of the Act, contravention of an IFMM as prescribed by the Principal Regulations, is an offence.

The purpose of the *Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulations 2017* (the Regulations) was to prescribe in the Principal Regulations both new IFMMs, and amendments to existing IFMMs, that have come into force as a result of decisions made at meetings of five IFMOs held between 1 July 2015 and 30 June 2016. These IFMOs are the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the South Pacific Regional Fisheries Management Organisation (SPRFMO). Those IFMMs that are incorporated in the Regulations are incorporated as in force at commencement of the Regulations.

The Regulations prescribe amended and new IFMMs that are broadly focused on ensuring that fish stocks, or an IFMO's conservation area, are exploited sustainably. The Regulations take account of new IFMMs to strengthen current fisheries management arrangements and ensure that Australia has the ability to comply with its obligations under international law.

Copies of all IFMMs prescribed in the Regulations and Principal Regulations can be accessed at no charge from the websites of the respective IFMOs, as follows:

- CCAMLR: www.ccamlr.org
- IOTC: www.iotc.org
- WCPFC: www.wcpfc.int
- CCSBT: www.ccsbt.org
- SPRFMO: www.sprfmo.int

AFMA consulted with the following stakeholders during the development of the Regulations:

- the Department of Agriculture and Water Resources, which has portfolio responsibility and is the lead agency for Australian delegations to the WCPFC, IOTC, CCSBT and SPRFMO;
- the Department of the Environment and Energy's Australian Antarctic Division which is the lead agency for the Australian delegation to CCAMLR;
- the Department of Foreign Affairs and Trade;
- the Attorney General's Department;
- the Commonwealth Fisheries Association.

In 2014 the Office of Best Practice Regulation (OBPR) advised that the preliminary proposal to amend the Principal Regulations fell outside the regulation impact analysis framework as the proposal was to regulate fishing activity operating outside Australian waters. OBPR further advised that no Regulation Impact Statement was required as this type of decision is machinery of government in nature.

The details of the Regulations are set out in Attachment A.

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

The Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

**Attachment A**

**Details of the *Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulation 2017***

Section 1 – Name of Regulation

This section provides for the Regulations to be cited as the *Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulations 2017.*

Section 2 – Commencement

This section provides that the Regulations commence on the day after its registration.

Section 3 – Authority

This section provides that the Regulations are made under the *Fisheries Management Act 1991*.

Section 4 – Schedules

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

Schedule 1 – Amendments

Schedule 1 amends the *Fisheries Management (International Agreements) Regulations 2009* (the Principal Regulations), to incorporate amendments to international fisheries management measures (IFMMs) that are currently prescribed and prescribe new IFMMs.

Part 1 – CCAMLR conservation measures

**Items 1 to 9** amend the table in item 2.2 of the Principal Regulations that identifies the clause in Schedule 1 that gives effect to each CCAMLR measure listed in the table.

**Item 10** updates the requirements for automatic location communicators, including in relation to the frequency of data reporting, to reflect amendments in CCAMLR conservation measure (CM) 10-04 (2015) as in force at the commencement of the Regulations.

**Item 11** inserts definitions of relevant vessel monitoring system terms used in the Principal Regulations, consistent with those used in CCAMLR CM 10-04 (2015).

**Item 12** removes the prescriptive list of what information a *Dissostichus* Catch Document (DCD) must include as this is already captured in clause 5.1A of Schedule 1 that states that DCD must be completed as described in Annex 10-05/A of CM 10-05.

**Item 13** inserts the requirement for a boat's streamer-line to be in accordance with Annex 25-02/A of CCAMLR CM 41-01 as in force at the commencement of the Regulations.

**Item 14** requires a person to ensure that toothfish are tagged and released at the rate specified in Annex 41-01/C for each fishery as in force at the commencement of the Regulations.

**Item 15** updates the fishing season dates for Statistical Subarea 48.3 consistent with those in CCAMLR CM 41-02 (2015).

**Item 16** inserts the bycatch limits that have been agreed in CCAMLR CM 41-02 (2015) that apply to boats fishing for Patagonian toothfish in CCAMLR Statistical Subarea 48.3

**Item 17** updates the note at the end of clause 48.2 to indicate that relevant documents could be viewed on the CCAMLR website in 2017.

Part 2 – Indian Ocean Tuna Commission

**Items 18 to 21** amends the table in item 2.3 of the Principal Regulations that identifies the clause in Schedule 2 that gives effect to each IOTC measure listed in the table.

**Item 22** inserts the requirement for boats in the IOTC area to provide observers on boats with appropriate gear and equipment necessary to carry out their duties as per IOTC Resolution 11/04.

**Item 23** reduces the number of instrumented buoys that are permitted to be used in the IOTC area by a person using a purse seine boat, giving effect to new requirements in IOTC Resolution 16/01.

**Item 24** adds a subclause reflecting the ban on fishing around or near artificial lights that are designed to attract tuna and tuna-like species, as required by IOTC Resolution 16/07.

**Items 25 to 27** clarify the wording in the Principal Regulations that ban the use of artificial lights to attract fish to drifting fish aggregating devices, as required by IOTC Resolution 16/07.

**Item 28** inserts a prohibition on the use of aircraft or unmanned aerial vehicles by fishing or support vessels as a fishing aid, giving effect to the new requirements in IOTC Resolution 16/08.

Part 3 – Western and Central Pacific Fisheries Commission

**Items 29 to 31** amend the table in item 2.4 of the Principal Regulations that identifies the clauses in Schedule 3 that give effect to each WCPFC measure listed in the table.

**Item 32** clarifies the different mitigation measure requirements that apply, whether a boat is greater than, or less than 24 metres in length and is fishing in an area north of 23°N as required by WCPFC conservation and management measure (CMM) 2015-03.

**Item 33** clarifies that if the boat is side setting with a bird curtain and using weighted branch lines, the boat is considered to be using two separate mitigation measures.

**Item 34** inserts an additional clause that gives effect to WCPFC CMM 2011-03 and CMM 2011-04 for the protection of cetaceans from purse seine fishing operations and the conservation of oceanic whitetip sharks.

Part 4 – Commission for the Conservation of Southern Bluefin Tuna

**Items 35 and 38** removes the definition of 'IMO' (i.e. International Maritime Organization) from Schedule 4 and inserts the definition in the 'Interpretation' section of the body of the Principal Regulations.

**Items 36 and 37** amend the table at clause 2.5 that refer to the CCSBT measures.

**Item 39** amends the title of the schedule to remove the reference to the 'Extended' Commission.

**Items 40 and 41** amend clause 2 to more closely reflect the wording used in the *CCSBT Record of Vessels authorised to fish for Southern Bluefin Tuna*.

**Item 42** requires boats that are not wooden or made of fibreglass and that have a gross tonnage or gross registered tonnage of 100 or more to have an IMO number.

**Item 43** amends the date reference to state that in 2017 the CCSBT Record of vessels could be accessed on CCSBT's website.

**Item 44** adds a new clause to implement the requirements of the *Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port*, which requires a person to provide a minimum set of information to the port State before the boat arrives in port.

Part 5 – South Pacific Regional Fisheries Management Organisation

**Item 45** amends the table in item 2.6 of the Principal Regulations that identifies the clause in Schedule 3B that gives effect to each SPRFMO measure listed in the table.

**Item 46** inserts a definition for 'exploratory fishing'.

**Items 47 and 48** reflect an exemption for a person to apply the mitigation measures outlined in sub-clause 8.2 if the boat has not had any bird mortalities in the past year and has maintained 100% observer coverage for the last five years with less than one recorded bird mortality per year.

**Item 49** corrects a numbering error by re-numbering the second clause 8 in Schedule 3B to clause 9.

**Item 50** incorporates the requirement to conduct exploratory fishing in line with a Fishery Operations Plan approved by the SPRFMO Commission as in force from time to time as per SPRFMO CMM 13-2016, or in accordance with CMM 14-2016 in the case of exploratory fishing for toothfish.

Part 6 – Transitional provisions

**Item 51** provides that:

(1) the by-catch limits specified in subclause 37B.6A of Schedule 1 include by-catch caught in the 2016/2017 season before the commencement of the Regulations; with the exception that if any one of those by-catch limits has been exceeded before the commencement of the Regulations a person contravenes subclause 37B.6A only if the person uses a boat to fish for *Dissostichus species* on or after that commencement;

(2) if the limit in paragraph 18.4(b) of Schedule 2 on the number of instrumental buoys that may be acquired in relation to a boat in relation to 2017 is exceeded before the commencement of the Regulations, a person contravenes subclause 18.4 only if at least one more instrumental buoy is acquired for the boat in 2017.

**Attachment B**

# Statement of Compatibility with Human Rights

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

## *Fisheries Management (International Agreements) Amendment (2015 and 2016 Measures) Regulations 2017*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

### Overview of the Legislative Instrument

The Legislative Instrument amends the *Fisheries Management (International Agreements) Regulations 2009* to update the international fisheries management organisations (IFMOs) to which Australia is a party and amend or prescribe new international fisheries management measures that have come into force as a result of a number of annual IFMO meetings held between 1 July 2015 and 30 June 2016.

### Human rights implications

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

### Conclusion

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

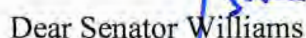
**Senator the Hon. Anne Ruston**
**Assistant Minister for Agriculture and Water Resources**

**THE HON JOSH FRYDENBERG MP**
**MINISTER FOR THE ENVIRONMENT AND ENERGY**

MC17-017635

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

4 OCT 2017

Dear Senator Williams


I refer to your letter requesting my advice on scrutiny issues identified in relation to the *Great Barrier Reef Marine Park Amendment (Whitsundays Plan of Management) Instrument 2017* [F2017L00932] (the Instrument).

**References to 'Regulations made under the Act'**

I advise that the Instrument has been drafted in a way that refers to regulations made under the *Great Barrier Reef Marine Park Act 1975* (the Act) rather than to the *Great Barrier Reef Marine Park Regulations 1983* (the 1983 Regulations) because the 1983 Regulations will be repealed and remade prior to their sunset date of 1 April 2017, and will no longer be called the *Great Barrier Reef Marine Park Regulations 1983*.

If the *Whitsundays Plan of Management 1998* (the Plan) was to instead, refer to the 1983 Regulations, it would almost certainly become outdated in less than seven months, which would be likely to cause confusion among affected or interested persons.

It would be inappropriate for the Great Barrier Reef Marine Park Authority (the Authority) to delay updates to the Plan in order to align with the repeal and remaking of the 1983 Regulations. The Plan has been under review for approximately two years and the amendments were made to address stakeholder concerns in the area covered by the Plan. The amendments need to commence as soon as possible to respond to those concerns.

To assist affected and interested persons to identify the relevant regulations, the Authority as the rule maker will prepare a supplementary Explanatory Statement which explicitly identifies the 1983 Regulations as containing the relevant definitions. The supplementary Explanatory Statement will explain that the 1983 Regulations are likely to be repealed and replaced in 2018 with new regulations that are in substantially the same form, and which will contain the relevant definitions.

The supplementary Explanatory Statement for the Instrument will also make it clear, that if in future, separate regulations are made under the Act, the relevant definitions are likely in future, to be located in the regulations that replace the 1983 Regulations, and not in separate regulations. Additionally, the intention of the Authority is to work with the Office of Parliamentary Counsel toward consistent use of terminology and definitions across Great Barrier Reef Marine Park legislation, so the making of regulations with terminology or definitions that are inconsistent with the main Regulations, is unlikely to occur.

**Incorporation of Disallowable Legislative Instruments**
In response to the Committee's comments about the incorporation of disallowable instruments, I advise that the supplementary Explanatory Statement, prepared by the Authority, will clarify that the Regulations are incorporated in the Instrument 'as in force from time to time', and that this accords with section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*).

Thank you for raising these matters with me.

Yours sincerely

JOSH FRYDENBERG

**The Hon Darren Chester MP**
Minister for Infrastructure and Transport
*Deputy Leader of the House*
*Member for Gippsland*

*PDR ID: MC17-004350*

27 SEP 2017

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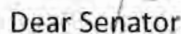

Dear Senator

Thank you for your letter of 7 September 2017 regarding Inspector of Transport Security Regulations 2017 [F2017L00510].

I have sought advice from the Department of Infrastructure and Regional Development in relation to the Senate Regulations and Ordinances Committee's concerns regarding information on whether, and if so where, Annex 13 of *The Convention of International Civil Aviation (Chicago Convention)* may be accessed for free.

The Department has raised this matter with the entity responsible for the Chicago Convention, the International Civil Aviation Organisation (ICAO). ICAO has advised that in accordance with the ICAO Publication Regulations (Doc 7231, Thirteenth edition, 2017), annexes are distributed free of charge to Member States. Member States are permitted to reproduce and distribute annexes internally for their own purposes. However, they may not resell or distribute them beyond the government, as doing so would violate the terms and conditions under which a Member State has access to the annexes. This is in part because annexes impose legal obligations on the states that are party to the Chicago Convention, not on members of the public directly.

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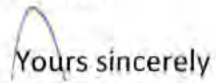
I would also note that the Inspector of Transport Security Regulations 2017 only have an impact on the Inspector of Transport Security and access to Annex 13 is available to the Inspector of Transport Security via the Department.

Thank you again for taking the time to write and inform me of your concerns on this matter.



Yours sincerely

**DARREN CHESTER**

ATTORNEY-GENERAL

CANBERRA

11 OCT 2017

MS17-008594

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

Dear ~~Senator Williams~~ Wacka

I refer to your letter of 10 August regarding the *Legal Services Directions 2017* (2017 Directions). I note the Committee's concern that the limits on the imposition of sanctions for non-compliance with the 2017 Directions do not appear to be contained in legislation.

To the extent that the Attorney-General has a sanction power in respect of the 2017 Directions that goes beyond what is available at general law (for example the right to terminate a contract with a legal services provider for a breach of a condition of the deed of agreement executed with the Commonwealth), it is contained in sections 55ZF and 55ZG of the *Judiciary Act 1903*. The limitations on the grant of power are contained in the legislative provisions that grant the power, that is, the Attorney-General is granted the right to issue Legal Services Directions under section 55ZF, but those directions may only apply to the performance of Commonwealth legal work.

The 2017 Directions and the *Compliance Framework* (enclosed) do not grant sanction powers further or in addition to those described under section 55ZF of the *Judiciary Act 1903*.

The note to paragraph 14.1 of the 2017 Directions provides that examples of the range of sanctions are set out in the *Compliance Framework*. Paragraph 20 of the *Compliance Framework* restates that the power to sanction by way of issuing Legal Services Directions is contained in section 55ZF of the *Judiciary Act 1903*. That paragraph also makes clear that such a sanction may take the form of a further Legal Services Direction to direct compliance in a particular matter.

I note that paragraph 21 of the *Compliance Framework* goes on to say that a "direction [in a particular matter to enforce and/or direct compliance] would only be made where there is no other more effective means of addressing the identified risk to the Commonwealth." It is rare that such a sanction is contemplated under the Directions. The most recent exercise of this power occurred in April 2010 when the then Attorney-General's delegate issued an instruction that copies of certain material be provided to the Australian Government Solicitor.

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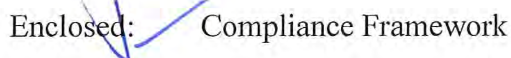
Further, and by way of background, it may be useful to explain the purpose of reissuing the 2017 Directions in substantively the same form as the *Legal Services Directions 2005* (2005 Directions). The objective was to remake the 2005 Directions, which were due to sunset on 1 April 2017. The original sunsetting date had already been deferred in 2016. The certificate I issued under section 51 of the *Legislation Act 2003* to defer the sunsetting explained that the Secretary of my department was undertaking a review of how legal work could be delivered most effectively and efficiently to the Commonwealth. Potential changes to the 2005 Directions formed part of this review, the release of which has been delayed. The *Legislation Act 2003* does not allow for the making of a second certificate of deferral. Therefore, the 2017 Directions preserved all existing arrangements for the management of Commonwealth legal services while the review conducted by my Secretary was undertaken.

The Committee's feedback regarding this temporary re-making of the existing terms of the Directions will be very useful for my department and office when they are engaged in re-drafting the Directions following the review. Further, the engagement of the Committee secretariat with my office has been exemplary, and I thank the Committee for their very helpful comments on the 2017 Directions.

I have also instructed my department to draft a supplementary Explanatory Memorandum for the 2017 Directions to clarify the limits of the sanctions power. Given the very useful and informative scrutiny provided by the Committee on this matter to date, I would welcome the views of the Committee as to appropriate wording for the supplementary Explanatory Memorandum.



ATTORNEY-GENERAL

CANBERRA

MS17-002082

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

Dear ~~Chair~~ Wacka

I thank the Senate Standing Committee on Regulations and Ordinances (the Committee) for its letter of 15 August 2017, in which the Committee requested further information in relation to its concerns about the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* (the Sunsetting Exemption Regulation).

The Committee has requested further advice in relation to its concerns as detailed in the Committee's *Delegated legislation monitor 9 of 2017*, noting that the Committee's stated focus where a sunsetting exemption is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated. In particular, the Committee has expressed concerns about:

- the effect of sunsetting exemptions on parliamentary oversight of delegated legislative power for significant legislative instruments,
- the appropriateness of exempting the *Migrations Regulation 1994* from the sunsetting requirements of the *Legislation Act 2003* (the Legislation Act) in a regulation rather than in primary legislation, and
- the absence of a tabling requirement in the Migration Regulations requiring that the review of the Migration Regulations be tabled.

Policy oversight of significant instruments

As advised in my previous letter of 11 August 2017, the Migration Regulations were exempted from sunsetting on the basis that the review process contained in those Regulations met the objectives of the sunsetting regime as set out in section 49 of the Legislation Act. These objectives are *'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed'* (see section 49 of the Legislation Act).

I acknowledge the Committee's position that careful consideration should be applied to granting exemptions from sunsetting where the instrument may be regarded as 'significant'.

In deciding whether to grant an exemption from the sunsetting regime, I give careful consideration to the longstanding policy criteria described in the Explanatory Statement to the Sunsetting Exemption Regulation.

I note that the Legislation Act does not distinguish between significant and non-significant instruments, and it is not clear that applying different considerations based on such a distinction would necessarily advance the objectives of the sunsetting regime.

Further, as the Committee is aware, parliamentary oversight of delegated legislation can occur in a variety of ways. This includes through the Committee's consideration of instruments at the time they are created, cooperation between the government and scrutiny bodies in relation to the implementation of instruments, and scrutiny of the application of instruments through Senate Estimates, Question Time, and other parliamentary processes.

Including exemptions in delegated legislation

I acknowledge that the Committee is concerned that it would be preferable to provide a sunsetting exemption for the Migration Regulations in the primary legislation. This concern arises in the context of scrutiny principle 23(3)(d) of the Committee's terms of reference, which includes consideration of whether an instrument contains matter more appropriate for parliamentary enactment.

It is critical that the sunsetting regime remain flexible, in order to ensure that it does not undermine the proper functioning of government. For this reason, the Legislation Act enables exemptions by legislative instrument, and the *Legislation (Exemptions and Other Matters) Regulation 2015* (Exemptions Regulation) provides a list of all exemptions from sunsetting. This reflects the longstanding policy preference for maintaining a clear list of exemptions in a single piece of legislation.

This flexibility ensures that all requests for exemptions from sunsetting are assessed within the framework of the Legislation Act. In particular, it ensures that all new exemptions are considered in light of the express purpose of Part 4 Chapter 3 of the Legislation Act and are granted on consistent grounds.

Tabling requirement for the report following the review of the Migration Regulations

The Committee has suggested that the Migration Regulations be amended to require that reports prepared for the purposes of regulation 5.44A of the Migration Regulations be tabled in the Parliament. I am supportive of measures that ensure that legislative instruments remain up to date and fit for purpose. However, as the Migration Regulations are administered by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, I am unable to respond to the Committee in relation to this matter.

The responsible adviser for this matter in my Office is Mr Jules Moxon who can be contacted on 6277 7300.

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

Cc: The Hon Peter Dutton MP, Minister for Immigration and Border Protection

**Senator the Hon Fiona Nash**
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

*PDR ID: MC17-004349*

2 9 SEP 2017

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

Dear Senator Williams

I refer to the letter of 7 September 2017 from the Senate Standing Committee on Regulations and Ordinances regarding the *Norfolk Island Continued Laws Amendment (Director of Public Prosecutions) Ordinance 2017* [F2017L00986] (the Ordinance).

The Ordinance was made by the Federal Executive Council on 27 July 2017 under Section 19A of the *Norfolk Island Act 1979* (the Act). The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Principal Ordinance) to amend a number of Norfolk Island enactments. The enactments, made by the former Legislative Assembly, have been continued in force under Section 16A of the Act and, under Section 17, may be amended or repealed by a Section 19A ordinance. The purpose of these amendments is to allow the Commonwealth Director of Public Prosecutions (CDPP) to perform certain functions in relation to particular Norfolk Island enactments.

The Department of Infrastructure and Regional Development has principal responsibility for administering Australian territories on behalf of the Commonwealth. The Australian Government has committed to providing to Norfolk Island a level of services comparable to those enjoyed by Australians in other similar-sized communities. The Ordinance contributes to delivering this commitment by allowing prosecutions against particular Norfolk Island laws, and related functions, to be dealt with by the CDPP, consistent with normal prosecution practices on mainland Australia and the other external Territories. The Ordinance complements the Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017.

I note the Senate Standing Committee on Regulations and Ordinances' expectations in relation to the power of the CDPP to delegate all or any of his or her functions and powers under the Norfolk Island enactments to a member of the staff of the Office of the CDPP other than the Associate Director.

In response to the matters raised by the Committee, the CDPP has advised through the Department that the approach to delegations in the Ordinance mirrors the approach taken to delegations in the *Director of Public Prosecutions Act 1983* (Cth) (the DPP Act). The large number and variety of powers and functions which must be exercised by the CDPP both under the DPP Act and other Commonwealth laws means their delegation to only nominated officers or members of the senior executive service (in accordance with the Committee's expectations) would not be practical from an operational perspective.

These operational considerations include the small population and remote location of Norfolk Island. It is expected that the prosecutorial and related functions of the CDPP with respect to Norfolk Island will not ordinarily be undertaken by senior executive staff and/or holders of nominated offices, but by appropriately qualified officers within the Office of the CDPP. This practical constraint on the operational environment requires a power of sub-delegation to a broad category of officers within the Office of the CDPP.

Thank you for taking the time to write to me on this matter.

Yours sincerely

FIONA NASH