Monitor 3 of 2019 – Committee correspondence

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AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Minister for Agriculture
Department of Agriculture
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Item 41 of the instrument inserts a new section 42A into the Agricultural and Veterinary Chemicals Code Regulations 1995 (AgVet Code Regulations).[1] The new section provides that certain substances and chemical products that meet prescribed criteria are exempted from section 88 of the Agriculture and Veterinary Chemicals Code (the Code),[2] which prohibits the publication of notices relating to the sale of certain substances and chemical products.

The explanatory statement provides that the exemptions in new section 42A are intended to address an anomaly in the Code. It explains that this anomaly was impeding persons' ability to publish notices offering to buy or sell chemical products, despite the Australian Pesticides and Veterinary Medicines Authority having authorised the products for sale.[3]

The committee notes that the amendments to the AgVet Code Regulations are authorised by the *Agriculture and Veterinary Chemicals Code Act 1994*. However, the committee generally considers that issues with the operation of primary legislation (in this case, the Code) are more appropriately resolved by amending the relevant Act. In this respect, the

1 [F2019C00270].

2 Set out in the Schedule to the *Agriculture and Veterinary Chemicals Code Act 1994*.

3 Explanatory statement, p. 13.

committee notes that the explanatory statement does not appear to indicate whether amendments to primary legislation are being considered to resolve the anomaly.

In light of the matters above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation to resolve the identified anomaly in the operation of the Agriculture and Veterinary Chemicals Code; and**
- **whether amendments to primary legislation (for example, the *Agriculture and Veterinary Chemicals Code Act 1994*) are being considered to resolve the issue.**

Unclear basis for determining fees

Item 17 of the instrument repeals and replaces section 69AA of the AgVet Code Regulations. New subsection 69AA(1) prescribes a fee of $50 for lodging certain notices under the Code.

Item 49 of the instrument repeals and replaces Part 2, Schedule 6 of the AgVet Code Regulations. The new Part prescribes a number of fees in relation to applications made under the Code. The prescribed fee amounts range from $350[4] to $96,135.[5]

Item 50 of the instrument repeals and replaces section 6A of the Agricultural and Veterinary Chemical Products (Collection of Levy) Regulations 1995.[6] The new provisions prescribe rates of levy for chemical products. The rates of levy are prescribed in relation to parts of the total leviable value of a product, and range from 0.63% to 0.25%.

The committee's expectation in cases where an instrument carries financial implications via the imposition of, or a change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement will make clear the specific basis on which such an imposition or change has been calculated; for example, on the basis of cost recovery, or other factors. This is to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

In this instance, the explanatory statement does not appear to explain the basis on which the fees noted above have been calculated. It merely outlines the operation and effect of the relevant provisions.

The committee requests your advice as to the basis on which the fees identified above have been calculated.

The committee would also expect such information to be included in the explanatory statement to the instrument, and would appreciate your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

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4 For example, item 21, in relation to an application for a permit, or extension of a permit, where the proposed use is a minor use.

5 For example, item 1, in relation to applications for approval of an active constituent contained in a chemical product, registration of the associated chemical product and approval of the product label requiring a full assessment of the active constituent and chemical product.

6 [F2019L00264].

Incorporation

Section 14 of the *Legislation Act 2003* allows a legislative instrument to incorporate Commonwealth Acts and legislative instruments, either as in force at a particular time or as in force from time to time. However, subsection 14(2) provides that a legislative instrument may only incorporate other documents as in force at a particular time (before or at the same time as the instrument commences), if the instrument's enabling Act or another Act expressly allows the incorporation of documents as in force from time to time.

In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to indicate where each incorporated document may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[7]

With regard to these matters, the committee notes that the instrument incorporates the following documents:

- British Pharmacopoeia, British Pharmacopoeia (Veterinary), European Pharmacopoeia and United States Pharmacopeia (the pharmacopoeias);
- *Handbook of First Aid Instructions, Safety Directions, Warning Statements and General Safety Precautions for Agricultural and Veterinary Chemicals* (Handbook); and
- Food Standards Code.

The instrument and the explanatory statement indicate that the Handbook is incorporated as in force from time to time, and that it is available online. However, neither the instrument nor the explanatory statement appears to indicate the manner in which the Food Standards Code is incorporated. Moreover, while the explanatory statement indicates that the Food Standards Code is freely available, it does not appear to indicate where the Code may be accessed.

Additionally, the explanatory statement provides that the pharmacopoeias are only available for a fee, and does not appear to indicate the manner in which those documents are incorporated.

In light of the matters above, the committee requests your advice as to:

- **the manner in which the Food Standards Code, the British Pharmacopoeia, the British Pharmacopoeia (Veterinary), the European Pharmacopoeia and the United States**

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7 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

Pharmacopoeia are incorporated by the instrument (that is, as in force from time to time or as in force at a particular time); and

- **where those documents are, or may be made, accessible free of charge.**

The committee would also expect such information to be included in the explanatory statement to the instrument, and would appreciate your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Minister for Infrastructure, Transport and Regional Development
Department of Infrastructure, Transport, Cities and Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Air Navigation (International Airline Licence Exemption) Determination 2019 [F2019L00375]

Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 [F2019L00378]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with primary or enabling legislation.

The Air Navigation (International Airline Licence Exemption) Determination 2019[1] (first determination) provides that air services which fly across Australia without landing, or which land in Australia without taking or discharging passengers or cargo, are exempt from the requirement to have an international licence.

The Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019[2] (second determination) exempts certain charter flights from requirement to seek the permission of the Secretary of the Department of Infrastructure, Regional Development and Cities before undertaking a non-scheduled flight to or from Australia.

1 [F2019L00375].

2 [F2019L00378].

The explanatory statement to the first determination indicates that the instrument has been in force since at least December 2008,[3] while the explanatory statement to the second determination indicates that the instrument has been in force since 1997.[4]

The committee generally prefers that exemptions in delegated legislation do not operate as de facto amendments to primary legislation. Where it is proposed to include such exemptions in delegated legislation, the committee would expect a sound explanation to be included in the explanatory materials.

In this instance, the explanatory statements provide reasons for the exemptions, and indicate that they are supported by relevant stakeholders. However, the explanatory statements do not appear to explain why it is considered necessary and appropriate to enact the exemptions in delegated legislation, rather than in primary legislation.

In light of the matters above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation to enact the identified exemptions to the *Air Navigation Act 1920* (Air Navigation Act); and**
- **whether amendments to the Air Navigation Act (or other primary legislation) are being considered to remove the need for the exemptions in the instruments.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

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3 Explanatory statement, Air Navigation (International Airline Licence Exemption) Determination 2019, p. 1.

4 Explanatory statement, Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 [F2019L00378], p. 3.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

Minister for Infrastructure, Transport and Regional Development
Department of Infrastructure, Transport, Cities and Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Air Services Regulations 2019 [F2019L00371]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters that are more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Division 2, Part 2 of the instrument sets out powers and functions of Airservices Australia in relation to air traffic services. These include powers to requisition an aircraft to perform air traffic services and to engage persons to operate it,[1] and powers to deal with claims for compensation associated with such requisitions.[2]

The committee's longstanding view is that significant matters, such as powers to requisition property (in this case, aircraft) and to determine claims for compensation, should be set out in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory statement provides no such justification. It merely restates the operation and effect of the relevant provisions.[3]

The committee acknowledges that the *Air Services Act 1995* (Air Services Act) expressly provides that regulations may make provision for requisitioning aircraft, and for

1 Section 9.

2 Sections 10, 11 and 12 of the instrument. Claims for compensation may relate to injury, loss or damage sustained by the owner of the relevant aircraft or a person engaged to operate it, including costs, expenses and loss of income.

3 Explanatory statement, pp. 2-3.

compensating persons for losses sustained in respect of any requisition.[4] Nevertheless, given the significance of these matters, the committee considers it may be more appropriate that they be enacted via primary legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to set out Air Services Australia's powers and functions relating to the requisitioning of aircraft and determination of claims for compensation in delegated legislation, rather than primary legislation.

Privacy

Senate standing order 23(3)(b) requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties, including the right to privacy.

Division 4, Part 5 of the Air Services Act deals with statutory liens for unpaid services charges.[5] Section 64 of the Act provides for the establishment of a register of liens, while sections 59 and 62 provide for the making of entries in the register where a lien is created or ceases. Subsections 59(1) and 62(2) provide that entries in the register must be made in the manner prescribed by regulations.

Section 63 of the Air Services Act further provides that, as soon as possible after an entry is made in the register, the Registrar must publish in the *Gazette* a notice of that fact, containing such particulars as are prescribed by regulations.

Sections 30 and 32 of the instrument provide for the information that must be included, respectively, in an entry in the register of liens and in a notice relating to an entry. Relevantly, paragraphs 30(1)(c) and 32(1)(d) provide that this information includes the name and address of the person by whom the relevant service charge is payable. Under subsection 30(2), the register must be maintained by electronic means and must be made available for inspection on Airservices Australia's website.

The committee is concerned that the publication of a person's name and address (either in the *Gazette* or in a public register) may trespass unduly on that person's right to privacy. In particular, publication of that information may identify a person who has failed to pay a charge, thereby revealing that person's financial affairs.

The committee notes that liens are routinely part of the public record, and are used to inform potential creditors and buyers about existing debts. In this regard, the committee acknowledges that it may be necessary to publish information about a lien that applies to an aircraft, for example, to inform a prospective buyer of Airservices Australia's interests or to

4 Sub-paragraph 77(2)(b)(iii) and paragraph 77(2)(c) of the Air Services Act.

5 Under the Air Services Act, a lien may be created where a service charge in respect of an aircraft is not paid in full by the due date, and where any part of the charge, or any part of a late payment penalty on the charge, remains unpaid. The lien covers the charge or penalty, any penalty that becomes payable in respect of a service charge after an entry in the Register is made, and any further outstanding amounts in respect of the relevant aircraft.

draw attention to restrictions on the use of aircraft subject to a lien (set out in the Air Services Act).[6]

However, it appears that these objectives may be achieved by merely publishing information about the relevant *aircraft* (for example, a registration number and a description, as contemplated by paragraphs 30(1)(a) and (b) of the instrument). It is not clear why it is necessary to publish the name and address of the debtor for the service charge. Neither the explanatory statement nor the statement of compatibility explains why it is considered necessary to publish this personal information.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to include personal information (that is, a person's name and address) in:

- **the register of statutory liens established under section 64 of the *Air Services Act 1995*; and**
- **a notice of an entry in the register, published in the *Gazette*.**

Reversal of evidential burden of proof (certificate constitutes* prima facie *evidence)

Senate standing order 23(3)(b) requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where an instrument reverses the burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

Section 41 of the instrument provides that Airservices Australia may certify any of the following matters in writing:

- that a document attached to the certificate is a true copy;
- that a particular document was posted, on a specified date or between specified dates, to a particular person in connection with proceedings;
- that an airspace was, or was not, a designated air route or airway within the meaning of the Airspace Regulations 2007;
- that a facility was, or was not, established in relation to an air route or airway; and
- that an aerodrome was, or was not, a controlled aerodrome.

Subsection 41(3) provides that, in proceedings covered by subsection 41(4), a certificate given under section 41 is taken to be *prima facie* evidence of the matters to which it relates. Subsection 41(4) covers proceedings in a court or tribunal (including civil, administrative, criminal, disciplinary or other proceedings), and any other proceedings under the Air Services Act or the present instrument.

The committee notes that, where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the

6 For example, sections 65 to 67 of the Air Services Act permit Airservices Australia to seize an aircraft subject to a lien and to sell the aircraft to recover outstanding service charges (that is, charges relating to the provision of facilities and services). Sections 70 and 71 prohibit a person from removing an aircraft to which a lien applies from Australia, and from detaching any part of such an aircraft.

proceedings. While a person retains a right to rebut or dispute the matters in the certificate, they bear the burden of adducing evidence to do so. The issue of an evidentiary certificate therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common law right to be presumed innocent until proven guilty.

The committee also notes that the *Guide to Framing Commonwealth Offences* states that:

> Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters not likely to be in dispute but that would be difficult to prove under normal evidential rules, and should be subject to safeguards.[7]

In this instance, while the matters to which an evidentiary certificate issued under section 41 of the instrument relate appear to be largely factual, it is not clear that all such matters would be difficult to prove under normal evidential rules. In any case, given the implications for a person's common law rights, the committee would expect the explanatory materials to contain a sound justification for permitting the issue of evidentiary certificates. It appears that no such justification has been included in this instance.

In light of the matters above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to permit Airservices Australia to issue evidentiary certificates under section 41 of the instrument; and**
- **the circumstances in which it is intended that evidentiary certificates would be issued, including the nature of any relevant proceedings.**

Immunity from civil liability

Section 41 of the instrument confers immunity from civil liability on a range of persons and entities. The immunity applies to acts done or omitted to be done in good faith, in the exercise or purported exercise of powers and functions conferred by the Air Services Act or the present instrument. The persons and entities to which the immunity applies are listed in subsection 42(2), and include:

- the Commonwealth;
- Airservices Australia, or an employee or agent of Airservices Australia acting in the course of their employment or agency;
- a person assisting Airservices Australia under subsection 8(3) of the instrument (relating to the removal of safety hazards);
- a fire fighter, volunteer or other person assisting Airservices Australia in an operation mentioned in section 16 or 20 of the instrument (which relate, respectively, to firefighting and rescue services and to emergencies); and
- a person acting in accordance with section 18 or 22 of the instrument (which relate, respectively, to the use or rescue and firefighting resources and to using resources in emergencies).

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7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 54.

This conferral of immunity from liability on the persons and entities listed in subsection 42(2) removes any common law right to bring an action to enforce legal rights (for example, a personal injury claim), unless it can be demonstrated that the person or entity was not acting in good faith. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake a task (that is, to perform a function or exercise a power), and calls into question the integrity of the relevant person or entity. Consequently, the courts have taken the position that bad faith can only be demonstrated in very limited circumstances.

Additionally, while it is relatively clear from the terms of the instrument why it may be necessary to confer immunity from civil liability on certain persons and entities (in particular, persons performing fire and rescue operations), it is not clear why it is also necessary to extend this immunity to Airservices Australia, its employees and agents, and the Commonwealth.

The committee expects that, if an instrument confers immunity from civil liability (particularly where this could affect individual rights), the immunity should be soundly justified. This is particularly important where an instrument confers such immunity from liability on a broad range of persons and entities. In this instance, the explanatory statement provides no such justification, merely noting that the provisions 'replace multiple references in the 1995 Regulations to the protections certain persons are afforded'.[8]

In light of the matters above, the committee requests your advice as to why it considered necessary and appropriate to:

- **confer immunity from civil liability on the persons and entities listed in subsection 42(2) of the instrument; and**
- **extend this immunity to the Commonwealth, and to Airservices Australia and its employees and agents.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

8 Explanatory statement, p. 9.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
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Attorney-General
Attorney-General's Department
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Attorney-General,

Archives (Records of the Parliament) Regulations 2019 [F2019L00282]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Section 7 of the instrument provides that Divisions 2 and 3 of Part V of the *Archives Act 1983* (Archives Act) apply to records in the possession of the House of Representatives, the Senate or a Parliamentary Department, subject to modifications set out in Schedule 1 to the instrument. The modifications set out in that Schedule designate records of the Parliament as Class A, B or C records, and provide for how different classes of records are to be managed.

The instrument was made for the purposes of subsection 20(1) of the Archives Act. The provision states that, subject to certain conditions, regulations may provide for the application of Divisions 2 and 3 of Part V of the Archives Act to court records and records of the Parliament, and may provide that the relevant provisions apply subject to prescribed modifications.

A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. Subsection 20(1) of the Archives Act is akin to a Henry VIII clause, as it enables regulations to modify the operation of primary legislation. The committee has significant scrutiny concerns with provisions of delegated legislation enabled by Henry VIII-type clauses, as such clauses limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive.

The explanatory statement explains that the modifications in the present instrument intend to 'provide a basis for the sound and professional management of the records of the Parliament' and 'endeavour to ensure that any activities related to the management of [these] records…will be undertaken in a manner which reflects the position of the Parliament within the Commonwealth and the different powers and functions of the Parliament and the [executive]'.[1] However, it does not explain why it is considered necessary and appropriate to make these modifications by delegated legislation (rather than, for example, by amending the Archives Act).

In light of the matters above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to modify the operation of the *Archives Act 1985* (Archives Act) by delegated legislation; and**
- **whether the matters in the present instrument could instead be enacted via primary legislation (for example, by amending the Archives Act).**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

1 Explanatory statement, p. 1.

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
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Assistant Treasurer
The Treasury
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Treasurer,

ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148 [F2019L00290]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with primary legislation.

The instrument appears to exempt persons responsible for preparing Product Disclosure Statements (PDS) and supplementary PDS from certain notification requirements under the *Corporations Act 2001* (Corporations Act).[1] In doing so, the instrument remakes ASIC Class Order CO [08/781][2] (which was in force since 2008), and extends exemptions provided by that class order. The committee notes that the relevant exemptions will be extended for a further 10 years (that is, until they are repealed by the sunsetting provisions in the *Legislation Act 2003*).

The committee generally prefers that exemptions in delegated legislation do not continue in force for such time as to operate as de facto amendments to primary legislation. Where it is proposed to include such exemptions in delegated legislation, the committee would expect a sound explanation to be included in the explanatory materials. In this instance, while the

1 In effect, the instrument rather delays requirements for notification until all warrant products under a PDS or supplementary PDS cease to be available to new clients. However, the committee notes that the relevant provisions are included under 'Part 2—Exemption'.

2 [F2008L04270].

explanatory statement explains the purpose of the exemptions, it does not appear to explain why it is considered necessary to enact them via delegated legislation.

In light of these matters, the committee requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation to extend the exemptions in the instrument for a further 10 years; and**
- **the appropriateness of enacting the exemptions in primary legislation (for example, by amending the *Corporations Act 2001*).**

The committee's expectation is to receive your response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, I would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Assistant Treasurer
The Treasury
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Treasurer,

Corporations Amendment (Name Exemption) Regulations 2019 [F2019L00271]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

The instrument was made for the purposes of subsections 5H(5) and 5I(I) of the *Corporations Act 2001* (Corporations Act). It inserts a new section 2B.6.02A into the Corporations Regulations 2001 (Corporations Regulations), to:

- exempt the Westpac Banking Corporation (Westpac) from the requirement in subsection 148(2) of the Corporations Act for a public company to include the word 'Limited' at the end of its name; and
- specify the *Westpac Banking Corporation (Transfer of Incorporation) Act 2000* (NSW) (NSW Act). This has the effect that the provisions of the Corporations Act and associated instruments do not apply to matters dealt with by the NSW Act.

Subsections 5H(5) and 5I(1) of the Corporations Act allow regulations to modify the operation of that Act to, respectively, facilitate the registration of companies and deal with interactions between the corporations legislation and state and territory laws. Those provisions may be regarded as akin to Henry VIII clauses, which permit delegated legislation to modify or override the operation of primary legislation. The committee has significant scrutiny concerns with provisions in delegated legislation enabled by Henry VIII-type clauses, as such clauses limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive.

In this instance, the explanatory statement does not explain why it is considered necessary and appropriate to allow delegated legislation to modify or overridde the operation of primary legislation.

Further, the explanatory statement indicates that the modifications made by the present instrument have been in force since at least 2002. It also indicates that these modifications will be ongoing, as they will be set out in an instrument (the Corporations Regulations) that is not subject to sunsetting.[1] In light of these matters, it is unclear why the modifications made by the present instrument have been included in delegated legislation, rather than primary legislation.

In light of the matters outlined above, the committee requests your advice as to:

- **why it is considered necessary and appropriate for the present instrument—and other instruments made under subsections 5H(5) and 5I(1) of the *Corporations Act 2001* (Corporations Act)—to modify the operation of primary legislation; and**
- **whether the matters in the present instrument could instead be enacted via primary legislation (for example, by amending the Corporations Act).**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance in this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

1 Explanatory statement, p. 1. The exemption from sunsetting is set out in item 18(d), section 12 of the Legislation (Exemptions and Other Matters) Regulation 2015.

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Treasurer
The Treasury
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Treasurer,

Corporations Amendment (Proprietary Company Thresholds) Regulations 2019 [F2019L00538]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Section 45A of the *Corporations Act 2001* (Corporations Act) sets the thresholds at which a proprietary company will be a 'small proprietary company' or a 'large proprietary company'. Whether a proprietary company is small or large will affect the operation of a number of reporting requirements under the Corporations Act.[1] The instrument is made for the purpose of subsections 45A(2) and (3). It has the effect of doubling the threshold amounts (which relate to both revenue and to number of employees) set out in those provisions.

The committee's consistent view is that significant matters, such as the thresholds for determining 'large' proprietary companies, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory statement provides some explanation as to why the relevant thresholds have been doubled. However, it does not appear to explain why it is considered necessary and

1 The explanatory statement (p. 1) notes that large proprietary companies are required to lodge an annual financial report, a director's report and an auditor's report with the Australian Securities and Investments Commission (ASIC), and must have a whistle-blower policy in place. Small proprietary companies are required to keep sufficient financial records, and are only required to lodge or audit financial reports if directed by ASIC.

appropriate to enact the substantial increase to the thresholds by delegated legislation, rather than primary legislation.

Additionally, the explanatory statement notes that the Corporations Act permits regulations to prescribe revenue and other thresholds to allow these thresholds to be regularly reviewed and adjusted over time, and to ensure they accurately reflect 'genuine economic significance' during periods of long and sustained growth.[2] This suggests that the thresholds should be subject to routine adjustment, and should reflect actual growth in nominal GDP.

However, the explanatory statement provides that the thresholds have not been adjusted since 2007, and are doubled to account for growth in nominal GDP to 2017-18.[3] It further notes that growth in nominal GDP from 2006-07 to 2017-18 was 70 per cent, reflecting an increase of $17.5 million and $8.75 million to the revenue and asset thresholds respectively. To this, $7.5 million and $3.75 million have been added (thereby doubling the thresholds).[4]

It is unclear that this approach reflects the purpose for which the regulation-making power in the Corporations Act was intended, and suggests that the increases to the thresholds set out in the instrument should instead be enacted by Parliament.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation to double the thresholds in the *Corporations Act 2001* for 'large' proprietary companies, instead of amending primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

2 Explanatory statement, p. 1.

3 Explanatory statement, p. 2.

4 Explanatory statement, p. 2.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Minister for Agriculture
Department of Agriculture
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Farm Household Support (Forced Disposal of Livestock) Minister's Rules 2019 [F2019L00523]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation (Henry VIII clause)

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument amends section 8 of the *Social Security Act 1991* (Social Security Act), to exclude amounts derived from the forced disposal of livestock from the assessment of income for the purposes of the Farm Household Allowance (FHA). The statement of compatibility notes that this is to help ensure that a person does not exceed the income threshold for the FHA, where they are experiencing financial hardship.[1]

The instrument was made under subsection 106(1) of the *Farm Household Support Act 2014* (FHS Act). Section 92 of that Act provides that the minister's rules may provide that Part 5 of the FHS Act, the Social Security Act or the *Social Security (Administration) Act 1999* has effect for the purposes set out in section 91 of the FHS Act, with any modifications that are prescribed.[2]

A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. Section 92 of the FHS Act is akin to a Henry VIII clause, as it enables

1 Statement of compatibility, p. 7.

2 Specific modifications are set out in sections 93 to 99 of the FHS Act. Further modifications may be made by minister's rules.

regulations to modify the operation of primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive.

The explanatory statement explains the purpose of the instrument, and why it is considered necessary to exclude amounts derived from the forced sale of livestock from the calculation of a person's income for the purposes of the FHA.[3] However, it does not appear to explain why it is considered necessary and appropriate to enact this exclusion by delegated legislation, rather than primary legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to exclude amounts derived from the forced sale of livestock from the calculation of income for the purposes of the Farm Household Allowance.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

3 Explanatory statement, pp. 1-2.

Attorney-General
Attorney-General's Department
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Attorney-General,

Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019 [F2019L00615]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Section 30 of the *Foreign Influence Transparency Scheme Act 2018* (FITS Act) permits rules to prescribe the circumstances in which a person is exempt from registration requirements in that Act.

Item 2 of the instrument adds a new subsection 5(2) to the Foreign Influence Transparency Scheme Rules 2018. The new subsection establishes a relatively broad exemption to the registration requirements in the FITS Act. The exemption applies to an activity undertaken by a person ('first person') on behalf of a foreign principal in the following circumstances:

- the activity is covered by item 2 of the table in subsection 21(1) of the Act (relating to political lobbying in Australia); and
- the first person or the foreign principal is taking part in a process relating to a federal government decision (within the meaning of paragraph 12(1)(b) of the Act) in order to comply with a law of the Commonwealth; and
- the process involves the first person or the foreign principal providing information in accordance with that law, for the purposes of making the decision; and
- at the time the activity is undertaken, the identity of the foreign principal is apparent to or disclosed to all persons with whom the first person is dealing.

The committee acknowledges that the FITS Act expressly provides that the rules may prescribe circumstances in which a person is exempt from requirements in that Act in relation to an activity undertaken on behalf of a foreign principal.

Nevertheless, the registration requirements in the FITS Act are a key element of the foreign influence transparency scheme. Exemptions to the registration requirements, particularly if applied to a broad range of persons or activities, may alter the scheme's operation in a relatively significant way. The committee's general view is that such significant matters are more appropriately enacted via primary legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to prescribe circumstances in which a person is exempt from the registration requirements in the *Foreign Influence Transparency Scheme Act 2018* by delegated legislation, rather than primary legislation.

The committee's expectation is to receive a response in time for the committee to consider and report on it while an instrument is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give a notice of motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Department of Home Affairs
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Migration Amendment (New Skilled Regional Visas) Regulations 2019 [F2019L00578]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

Items 9, 30 and 76 of Schedule 2 to the instrument insert, respectively, subsections 2.12F(3B), 2.73C and 8101 into the Migration Regulations. Those sections provide that the minister may refund amounts of visa application charge, nomination fees and nomination training contribution charges in certain circumstances.

The decisions relating to the refund of fees and charges appear to involve at least an element of discretion, and may affect the rights and interests of individuals (for example, visa holders and sponsors). It therefore appears that the decisions are suitable for independent merits review. However, the explanatory statement provides that merits review is not available, and that this is:

> consistent with the current position in relation to refunds of fees and charges under the Migration Regulations, including nomination fees, the nomination training contribution charge and visa application charges.[1]

Where an instrument fails to provide for or excludes independent merits review, the committee expects the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance

1 Explanatory statement, pp. 34, 44 and 61.

document, *What decisions should be subject to merit review?*. The fact that the exclusion of merits review is the 'current position' in relation to the refund of fees and charges does not appear to reflect any such established grounds. The committee notes that no other grounds for excluding merits review have been identified.

In light of these matters, the committee requests your advice as to the characteristics of decisions made under new sections 2.12F, 2.73C and 8101 of the Migration Regulations, in relation to the refund of fees and charges, that would justify excluding independent merits review. It would assist if your response would expressly identify relevant grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

The committee would also expect such information to be included in the explanatory statement to the instrument. We would therefore appreciate your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

Imposition of fees (taxation)

Item 19, Schedule 1, item 61, Schedule 2 and item 4, Schedule 3 to the instrument insert, respectively, new sections 1241, 1242 and 1139 into the Migration Regulations. The new sections set out a number of requirements relating to visa applications, including the payment of visa application charges.

The explanatory statement explains that the visa application charge is a tax imposed on visa applications by the *Migration (Visa Application Charge) Act 1997* (VAC Act), with the amount payable on particular applications prescribed in the Migration Regulations.[2]

The committee is concerned that these measures may raise two, interrelated scrutiny concerns. First, the committee emphasises that the levying of taxation is one of the most fundamental functions of the Parliament, and consequently it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. In the committee's view, the visa application charges may be more appropriate for enactment in primary legislation.

Secondly, the committee notes that section 55 of the Constitution provides that laws which impose taxation 'shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect'. The committee acknowledges that the VAC Act may be considered to impose the visa application charge, with amounts in relation to specific applications being specified in the Migration Regulations. Nevertheless, the committee considers that constitutional best practice would be for the application charges to be set out in a separate law (preferably in primary legislation).

In light of these matters, the committee requests your advice as to:

- **why the visa application charges set out in the instrument are specified in the Migration Regulations 1994, rather than in a separate instrument dealing only with the imposition of charges; and**
- **why it is considered necessary and appropriate to impose visa application charges by delegated legislation, noting that these charges are imposed as taxes.**

2 Explanatory statement, pp. 23, 51 and 63.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation that fundamentally changes the law.

The committee considers that this instrument, made primarily under the general regulation-making power in subsection 504(1) of the *Migration Act 1958* (Migration Act), could be said to change Australia's migration law in a significant way. For example, it introduces three new visas,[3] closes two others,[4] and makes associated changes to Australia's visa regime.

The committee's longstanding view is that it is more appropriate to make significant changes to the law by primary legislation, rather than delegated legislation, as this approach ensures that significant changes are subject to the full legislative process and consideration by the Parliament before such changes commence. Where significant matters are included in delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this instance, no such justification appears in the explanatory statement.

The committee recognises that Australia's legal framework for migration, largely established under the Migration Act and the Migration Regulations 1994 (Migration Regulations),[5] provides for significant law-making via delegated legislation. However, the committee notes that it routinely expresses concern about ensuring appropriate parliamentary oversight of changes to the migration law. For example, it expressed particular concern regarding the exemption of the Migration Regulations from the sunsetting provisions of the *Legislation Act 2003*.[6] The committee notes that, as a result of this exemption, the new visa scheme being inserted into the Migration Regulations by the present instrument will not be subject to the review and parliamentary oversight requirements of the sunsetting regime.

The committee has also repeatedly expressed concern that a large number of legislative instruments made under the Migration Regulations have been exempted from disallowance—including some that cover more than merely administrative and technical matters.[7] The present instrument makes provision for specifying matters relevant to the regional visa regime that will be exempt from disallowance, including some matters of a

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3 Subclass 491 Skilled Work Regional (Provisional), Subclass 494 (Skilled – Regional (Provisional)) and Subclass 191 (Permanent Residence (Skilled Regional)) visas.

4 Subclass 489 (Skilled – Regional (Provisional)) and Subclass 187 (Regional Sponsored Migration Scheme) visas.

5 [F2019C00421].

6 See Senate Standing Committee on Regulations and Ordinances, *Delegation Legislation Monitors 1, 3, 5, 7, 9, 13 and 15 of 2017*, and associated ministerial correspondence, in relation to Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L001897] and Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809].

7 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2016*, pp. 18-20; *Monitor 8 of 2017*, pp. 100-103.

substantive nature.[8] A notable example is new section 1.15M (item 3, Schedule 1 to the instrument), which permits the minister to specify a part of Australia to be a 'designated regional area' for the purposes of the visa regime.

While recognising that the instrument is lawfully made, given the significance of the changes to the law it enacts and the committee's longstanding concerns in relation to appropriate parliamentary oversight of executive law-making in the migration area, the committee considers that it may have been more appropriate that these changes be effected via amendment to primary, rather than solely delegated, legislation.

The instrument appears to make a number of relatively significant changes to Australia's migration law. The committee remains concerned about the use of delegated legislation to make significant changes to the law, and the exemption of legislative instruments from parliamentary oversight mechanisms such as sunsetting and disallowance. The committee will continue to monitor these issues.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

8 Under table item 20(b) of the Legislation (Exemptions and Other Measures) Regulation 2015, legislative instruments made under Parts 1, 2 and 5 of, or Schedules 1, 2, 4, 5A or 8 to, the Migration Regulations are not subject to disallowance.

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
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Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Department of Home Affairs
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) 2019 [F2019L00551]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

Item 42 of the instrument inserts a new section 2.60U into the Migration Regulations. That section requires the minister to approve a person as a parent sponsor if satisfied in relation to prescribed matters. Item 56 of the instrument inserts a new section 2.68K into the Migration Regulations. That section requires the minister to vary the terms of a parent sponsor's approval if satisfied in relation to prescribed matters.

Decisions by the minister under new sections 2.60U and 2.68K of the Migration Regulations appear to involve at least an element of discretion, and may affect the rights and interests of individuals (for example, prospective parent sponsors and visa applicants). Consequently, the committee considers that the decisions may be suitable for independent merits review.

The statement of compatibility explains that 'sponsors who are refused approval will be afforded natural justice and will be able to seek merits review of the decision by the Administrative Appeals Tribunal'.[1] However, neither the statement of compatibility nor the explanatory statement appears to specify the provisions (for example, in the Migration Act or the Migration Regulations) that provide for independent merits review.

1 Statement of compatibility, p. 12.

Additionally, it appears that the explanation in the statement of compatibility regarding the availability of merits review may only apply to refusal decisions that are based on past criminal convictions of the applicant. It is unclear whether refusal decisions based on other matters would also be subject to independent merits review.

In light of these matters, the committee requests your advice as to:

- **whether decisions made under sections 2.60U and 2.68K, in relation to the approval of persons as a parent sponsor and the variation of such approvals, are subject to independent merits review;**
- **whether the instrument makes provision for any other discretionary decisions and, if so, whether these are subject to independent merits review; and**
- **in relation to any decision that is not subject to independent review, the characteristics of the decisions that would justify excluding independent merits review. It would assist if your response would expressly identify relevant grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

The committee would also expect such information to be included in the explanatory statement to the instrument. We would therefore appreciate your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

Unclear basis for determining fees

Item 8 of Schedule 2 to the instrument inserts a new item 1239 into Schedule 1 to the Migration Regulations. The item specifies the required form in relation to the Family (Temporary) (Class GH) visa, as well as application charges. The amount specified is $1,000 as a first instalment, followed by $4,000 or $9,000 (depending upon the length of time for which the visa is to be granted).

The committee's usual expectation in cases in which an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

In this instance, the explanatory statement does not appear to explain the basis on which the fees outlined above have been calculated.

In light of these matters, the committee requests your advice as to the basis on which the fees set out in item 8, Schedule 2 to the instrument have been calculated.

The committee would also expect such information to be included in the explanatory statement to the instrument. We would therefore appreciate your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

Privacy

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not trespass unduly on personal rights and liberties, including the right to privacy.

Section 140ZH of the Migration Act provides for the disclosure of personal information relating to visa holders and family sponsors to specified persons and agencies. The type of

information that may be disclosed, and the Commonwealth, State and Territory agencies to which disclosure is permitted, may be prescribed by regulations.

Item 127, Schedule 1 to the instrument inserts a new section 2.103A into the Migration Regulations, which prescribes personal information relating to visa holders and family sponsors that may be disclosed under section 140ZH of the Migration Act. The personal information may relate, for example, to the immigration status of a visa holder, to failures to satisfy visa conditions or sponsorship applications, and to actions taken in relation to breaches of the migration law. Section 2.103A also prescribes Commonwealth, State and Territory agencies with portfolio responsibility for health, law enforcement, public safety and taxation as agencies to which personal information may be disclosed.

The explanatory statement explains that the sharing of personal information will assist in protecting potentially vulnerable visa applicants from the risk of family violence and elder abuse.[2] The statement of compatibility further explains that:

> The sharing of information will also act to protect any children within a family unit in instances where there is previous criminal activity related to offences against children. If parties to an application receive information related to other parties' police checks, they are then able to make an informed decision on whether to proceed with the sponsorship or visa application if there are any concerns identified relating to a person's previous history.[3]

The committee acknowledges that the disclosure provisions in section 140ZH of the Migration Act and section 2.103A of the instrument are intended to guard against the risk of family violence and elder abuse, and to protect children from harm. However, it is unclear from the information in the explanatory materials why it is necessary to permit the disclosure of personal information to such a broad range of persons and agencies in order to achieve these objectives. In particular, it is unclear why it is necessary to permit the disclosure of personal information to *any* Commonwealth, State or Territory agency with portfolio responsibility for health, law enforcement, public safety or taxation.

Additionally, given the relatively significant amount of personal information that may be disclosed and the range of entities to which disclosure is permitted, the committee would expect the explanatory materials to identify relevant safeguards against undue interference with individuals' privacy. In this regard, the committee notes that the statement of compatibility explains that 'every authority entering into letters of exchange with the department will be responsible for…ensuring that they abide by relevant privacy laws'.[4] However, this appears to apply only to the disclosure of outstanding public health debts. In any case, the committee is concerned that this safeguard may not be sufficient, noting that states and territories often lack uniform privacy legislation and that authorities will be 'responsible for their own arrangements' in relation to privacy protection.

In light of these matters, the committee requests your detailed advice as to:

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2 Explanatory statement, p. 33.

3 Statement of compatibility, p. 8.

4 Statement of compatibility, p. 9.

- **why it is considered necessary and appropriate to permit the disclosure of personal information to the broad range of Commonwealth, state and territory agencies prescribed by section 2.103A of the instrument; and**
- **the existence of any relevant safeguards to protect individuals' privacy—in particular, any relevant statutory provisions.**

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation that fundamentally changes the law.

The committee considers that this instrument, made principally under the general regulation-making power in subsection 504(1) of the Migration Act 1958 (Migration Act), could be said to change Australia's migration law in a significant way. For example, it establishes a new family sponsorship framework, creates a new class of family sponsor (the 'parent sponsor'), and creates a new Subclass 870 (Sponsored Parent (Temporary)) visa.

The committee's longstanding view is that it is more appropriate to make significant changes to the law via primary legislation, rather than delegated legislation, as this approach ensures that significant changes are subject to the full legislative process and consideration by the Parliament before such changes commence. Where significant matters are included in delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this instance, no such justification appears in the explanatory statement.

The committee recognises that Australia's legal framework for migration, largely established under the Migration Act and the Migration Regulations 1994 (Migration Regulations),[5] provides for significant law-making via delegated legislation. However, the committee notes that it routinely expresses concern about ensuring appropriate parliamentary oversight of changes to the migration law. For example, it expressed particular concern regarding the exemption of the Migration Regulations from the sunsetting provisions of the *Legislation Act 2003*.[6] The committee notes that, as a result of this exemption, the new visa scheme being inserted into the Migration Regulations by the present instrument will not be subject to the review and parliamentary oversight requirements of the sunsetting regime.

The committee has also repeatedly expressed concern that a large number of legislative instruments made under the Migration Regulations have been exempted from disallowance—including some that cover more than merely administrative and technical matters.[7] The present instrument makes provision for specifying matters relevant to the

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5 [F2019C00421].

6 See Senate Standing Committee on Regulations and Ordinances, *Delegation Legislation Monitors 1, 3, 5, 7, 9, 13 and 15 of 2017*, and associated ministerial correspondence, in relation to Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L001897] and Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809].

7 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2016*, pp. 18-20; *Monitor 8 of 2017*, pp. 100-103.

temporary sponsored parent visa regime that will be exempt from disallowance, including some matters of a substantive nature.[8] A notable example is the power to determine matters relating to the definition of 'adequate arrangements for health insurance' for the purpose of the visa regime by legislative instrument made under section 1.15L of the Migration Regulations (inserted by item 2, Schedule 3 to the instrument).

While recognising that the instrument is lawfully made, given the significance of the changes to the law it enacts and the committee's longstanding concerns in relation to appropriate parliamentary oversight of executive law-making in the migration area, the committee considers that it may have been more appropriate that these changes be effected via amendment to primary, rather than solely delegated, legislation.

The instrument appears to make a number of relatively significant changes to Australia's migration law. The committee remains concerned about the use of delegated legislation to make significant changes to the law, and the exemption of legislative instruments from parliamentary oversight mechanisms such as sunsetting and disallowance. The committee will continue to monitor these issues.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

8 Under table item 20(b) of the Legislation (Exemptions and Other Measures) Regulation 2015, legislative instruments made under Parts 1, 2 and 5 of, or Schedules 1, 2, 4, 5A or 8 to, the Migration Regulations are not subject to disallowance.

AUSTRALIAN SENATE

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Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Department of Home Affairs
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters that are more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument was made under paragraph 5(1AA)(b) of *the Migration Act 1958* (Migration Act). It designates the following classes of persons for the definition of 'fast track applicant' in subsection 5(1) of the Act:

- a person who currently holds, or most recently held, a Subclass 785 (Temporary Protection) or Subclass 790 (Safe Haven Enterprise) visa, and made an application for a protection visa on or after 2 April 2019;[1]
- a person who makes, or is taken to have made, a valid application for a protection visa that is combined with the application for a protection visa noted above;[2] and
- the child of a person to whom subsection 6(1) applied, who is born after the application for a protection visa mentioned in subsection 6(1) has been finally determined, and who makes an application in Australia for a protection visa.[3]

1 Subsection 6(1).

2 Subsection 6(2).

The effect of these designations is that where a person in a class prescribed by the instrument applies for a protection visa,[4] their application will be processed under the 'fast track applicant' provisions in the Migration Act. In particular, a decision to refuse the visa will be subject to a more limited merits review process (set out in Part 7AA of the Act).

The explanatory statement explains that the instrument intends to ensure that all applications for Temporary Protection and Safe Haven Enterprise visas made after 2 April 2019 are processed under the fast track regime, to 'ensure consistency in…processes and outcomes'.[5] It further asserts that the fast track process is the most appropriate mechanism for assessing the protection claims of those to whom the instrument applies.[6]

The instrument would appear to have the effect of determining procedural and other rights of persons under Australian law, and could therefore be said to change the law in a significant way. The committee's longstanding view is that significant changes to the law are more appropriately enacted via primary legislation, as this ensures that any such changes are subject to appropriate levels of parliamentary oversight.

The committee recognises that Australia's legal framework for migration (largely set out in the Migration Act and the Migration Regulations 1994) permits significant matters to be left to delegated legislation. However, the committee has expressed concern on several occasions about ensuring appropriate parliamentary oversight of changes to migration law.[7]

The committee's views with regard to the making of significant policy changes in delegated legislation accord with those of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), which has consistently drawn attention to Acts that enable significant changes to the law to be made via delegated legislation. Relevantly, the Scrutiny of Bills committee expressed serious concerns about the proposal to expand the definition of 'fast track applicant' by legislative instrument when it considered the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.[8]

Specifically, the Scrutiny of Bills committee noted that most decisions to refuse a visa to fast track applicants would only be eligible for review by the (then) newly-created Immigration Assessment Authority (IAA), whose review powers were limited in two significant ways. First, by a lack of power to vary or set aside a refusal decision (unlike the Administrative Appeals Tribunal, or the former specialist migration tribunals) or to otherwise compel the minister to comply with any direction or recommendation made by the IAA. Second, by the

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3 Subsection 6(3).

4 'Protection visa' is defined in section 35A of the Migration Act to include Protection (Class XA) visas, Temporary Protection (Class XD) visas, safe haven enterprise visas, visas formerly provided for by section 36(1) of the Act (for example, the Protection (Class AZ) visa), and visas prescribed by the regulations.

5 Explanatory statement, p. 2.

6 Statement of compatibility, p. 6.

7 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2018,* June 2018, pp. 42-44.

8 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 14 of 2014*, October 2014, pp. 31-35. The bill proposed to insert the fast track process into the Migration Act.

exclusion of certain procedural fairness obligations, because the IAA is obligated (subject to limited exceptions) not to accept or request new information or to interview the applicant.[9]

The Scrutiny of Bills committee expressed further concern about the appropriateness of designating classes of applicants as 'fast track applicants' by delegated legislation:

> the operation of the fast track assessment process, and in particular the categories of person to whom it applies, appears to raise significant policy questions. This gives rise to a scrutiny concern relating to the use of delegated legislation, rather than primary legislation, for important matters such as the categories of persons to whom [key provisions of the migration law] may apply can be altered by legislative instrument.[10]

The Scrutiny of Bills committee drew this matter to the attention of the Senate, and left the question of its appropriateness to the Senate as a whole. It also drew its concerns to the attention of this committee.[11]

The committee recognises that the instrument is lawfully made. However, given the significance of the changes that it enacts (including the potentially significant restrictions on individuals' procedural and review rights), the committee considers that it would be more appropriate for these changes to be enacted via primary legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to enact changes to the definition of 'fast track applicant' in the *Migration Act 1958* (thereby altering affected persons' procedural and review rights) by delegated legislation, rather than primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

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9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 14 of 2014*, October 2014, pp. 31-35

10 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, November 2014, p. 945.

11 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, November 2014, pp. 945-946. It is noted that the Scrutiny of Bills committee's concerns included that legislative instruments would not be subject to disallowance. However, the bill was subsequently amended prior to its enactment to include subsection 5(1AD) in the Migration Act, which provides that instruments made under subsection 5(1AA) are subject to disallowance.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee on Regulations and Ordinances

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Minister for Families and Social Services
Services Australia
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019 [F2019L00273]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Privacy

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not trespass unduly on personal rights and liberties, including the right to privacy.

Item 33 of the instrument repeals and replaces section 32 of the National Rental Affordability Scheme Regulations 2008 (Principal Regulations). New section 32 of the Principal Regulations provides that information obtained by the secretary for the purposes of the National Rental Affordability Scheme (NRAS) may be used or disclosed for the purposes of the scheme, or for the purposes of certain programs relating to rental affordability. Subsection 32(2) provides examples of persons and entities to whom information might be disclosed, including Commonwealth, state and territory agencies, and approved NRAS participants and investors.

The explanatory statement indicates that the information obtained by the secretary, which may be used and disclosed under section 32, includes personal information.[1] However, it does not explain why the powers of use and disclosure are necessary, or identify relevant safeguards to protect individuals' privacy. The statement of compatibility similarly provides only limited information, stating that:

> The information sharing provisions do not adversely affect individuals' right to privacy and reputation as they are strictly to be used if the

1 Explanatory statement, p. 17.

information is relevant to a person's interest in a rental dwelling covered by an NRAS allocation, for programs which are related to the purposes of the scheme or for another Commonwealth or State or Territory agency for the purposes of the operation of the scheme.[2]

The committee is concerned that the explanatory materials do not appear to explain why it is considered necessary to allow the secretary to use or disclose information collected for the purposes of the NRAS. Moreover, they do not appear to provide examples of the type of information that might be used or disclosed, or set out any relevant safeguards (for example, against unauthorised use or disclosure).

In light of the matters outlined above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to allow the secretary, under section 32 of the instrument, to use and disclose information obtained for the purposes of the National Rental Affordability Scheme;**
- **the type of information that may be used and disclosed; and**
- **any relevant safeguards to protect individuals' privacy (noting the varying levels of privacy protection afforded by state and territory laws).**

Retrospective effect

Item 37 of the instrument inserts section 41 into the Principal Regulations. New subsection 41(1) provides that Subdivision C, Division 1A of Part 3 of the Principal Regulations, as inserted by item 20 of the present instrument, applies in relation to conduct engaged in before, on, or after the present instrument commences.

While the instrument commences prospectively, the committee is concerned that the operation of subsection 41(1) may result in the instrument having a retrospective effect, to the potential detriment of a person who has engaged in conduct prior to the commencement of the instrument, in circumstances in which the conduct enlivens the application of new Subdivision C, Division 1A.

In this regard, the committee notes that Subdivision C includes a new compliance framework, which deals with a number of significant matters. For example, it establishes circumstances in which an NRAS participant would commit certain regulatory breaches,[3] which may lead to the revocation or transfer of allocations by the secretary.[4] It also establishes a participant code of conduct.[5]

The explanatory statement merely restates the operation of new section 41. It does not indicate whether anyone may be disadvantaged by the operation of that provision. For example, it does not indicate how many persons may have engaged in conduct which would

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2 Statement of compatibility, pp. 21-22.

3 For example, section 22BA of the instrument provides that a participant will commit an 'individual breach' if they are subject to an insolvency event (for example, dying or ceasing to existing, becoming insolvent or winding up), breach the participants' code of conduct, or breach the Act or the regulations.

4 Under section 4 of the *National Rental Affordability Scheme Act 2008* , an 'allocation', in relation to an approved participant, means an allotment of an entitlement to receive an incentive for an approved rental dwelling.

5 Section 22BD of the instrument.

have been permissible under the old compliance framework, but which may now constitute a regulatory breach. Further, it does not explain whether, and if so, how, such persons would be given the opportunity to address any requirements under the new compliance framework that may be relevant to their circumstances.

In light of the matters outlined above, the committee requests your advice as to:

- **whether any person was, or could be, disadvantaged by the operation of the transitional provisions in section 41 of the instrument; and**
- **if so, what steps have been or will be taken to avoid such disadvantage, and to ensure procedural fairness for affected persons.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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Attorney-General
Attorney-General's Department
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Attorney-General,

Privacy (Disclosure of Homicide Data) Public Interest Determination 2019 [F2019L00322]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Privacy

Significant matters in delegated legislation

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not trespass unduly on personal rights and liberties, including the right to privacy.

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument permits the Australian Federal Police (AFP) to disclose personal information to the Australian Institute of Criminology (AIC), for the purposes of research under the National Homicide Monitoring Program (NHMP), without breaching the *Privacy Act 1988* (Privacy Act) or the Australian Privacy Principles (APPs). Subsection 7(2) of the instrument indicates that the information would include personal information including sensitive information,[1] requested by the AIC about offenders and suspects, in relation to homicides in the Australian Capital Territory (ACT).

The explanatory statement appears to recognise the significant privacy implications of the instrument, and explains that the disclosure of the personal information is necessary to ensure the effective operation of the NHMP. It also explains that the Australian Information

1 The explanatory statement (p. 2) indicates that the type of information previously requested by the AIC has included an offender or suspect's full name, gender, age, address, country of birth, indigenous status, prior criminal history, and relationship with the victim.

Commissioner (Commissioner) was satisfied that the public interest served by permitting the disclosure of the homicide data substantially outweighs the public interest associated with adherence to the Privacy Act and APPs.[2] The Commissioner was also satisfied that there are no applicable exemptions under the APPs or the Privacy Act that would permit disclosure of the homicide data, and that it is not appropriate or practicable to seek consent before disclosing the data or to de-identify the data prior to disclosure, as this would compromise the integrity of the AIC's research.[3]

The statement of compatibility further explains that there are a number of safeguards in place to 'mitigate and minimise' the privacy impacts on individuals, which will ensure that the potential for disclosure to adversely affect individuals is limited. The statement of compatibility indicates that these safeguards include:

- research guidelines and approvals that underpin work conducted by the AIC;
- independent review by the Human Research Ethics Committee of research proposed by the AIC, to assess whether such research is consistent with applicable ethics codes;
- restricting access to the homicide information to those who have substantial prior experience in criminology research involving sensitive data, and who have been personally authorised by the director of the AIC to undertake the research; and
- the results of the research being published in de-identified, aggregate form.[4]

However, it appears that the safeguards are largely matters of policy, or reflect agreements between the AFP and the AIC. In particular, it is noted that the restrictions on who may access the homicide data, and the proposal to publish research in a de-identified form, are safeguards that the AFP 'anticipates applying' by way of an agreement with the AIC.

These administrative and policy safeguards may, in practice, be sufficient to ensure that the disclosure of homicide data for the purposes of the NHMP does not trespass unduly on individuals' privacy. Nevertheless, such safeguards are less stringent than those established by legislation, particularly as they may be amended or removed at any time. Given the potentially very significant implications for personal privacy associated with the disclosure of homicide data, the committee would expect at least some safeguards to be set out in legislation. It is unclear from the explanatory materials whether any such safeguards exist.

Additionally, the committee's view is that significant matters, including those with a substantial impact on personal rights and liberties, are more appropriately enacted via primary rather than delegated legislation. Where significant matters are left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this case, while the explanatory statement and statement of compatibility provide a comprehensive account of why the

2 Explanatory statement, p. 7.

3 The explanatory statement explains that relying on consent may lead to incomplete data sets (that is, where some people to not consent to the disclosure), while de-identifying the data prior to disclosure may limit the AIC's ability to cross-check the data against other sources.
See explanatory statement, p. 5.

4 Statement of compatibility, p. 12.

relevant exemptions are necessary, they do not explain why it is necessary that they be enacted via delegated legislation.

The explanatory statement also indicates that the AFP has been permitted to disclose personal information to the AIC for the purposes of the NHMP since 1991 (under the terms of former Public Interest Determination No. 5, which expired 1 October 2018).[5] Noting the importance of the exemptions to the ongoing effectiveness of the NHMP, it is unclear to the committee why the exemptions could not be enacted via primary legislation (for example, by amending the Privacy Act). No information is provided as to whether amendments to the Privacy Act are being considered to allow the disclosure of homicide data to the AIC (rather than relying on delegated legislation).

In light of the matters above, the committee requests your advice as to the existence of any statutory safeguards to protect the privacy of individuals in relation to the use and disclosure of homicide data for the purposes of the National Homicide Monitoring Program.

The committee also requests your advice as to:

- **whether amendments to the *Privacy Act 1988* (or other primary legislation) are being considered to permit the Australian Federal Police to disclose homicide data to the Australian Institute of Criminology; and**
- **If not, the justification for continuing the exemptions to the *Privacy Act 1988* and the Australian Privacy Principles, including why it is considered necessary and appropriate to enact these exemptions in delegated legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

5 Explanatory statement, p. 2.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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Minister for Home Affairs
Department of Home Affairs
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Public Order (Protection of Persons and Property) Regulations 2019 [F2019L00272]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Section 6 of the instrument prescribes the Australian Criminal Intelligence Commission and the Integrity Commissioner for the purposes of Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* (enabling Act). The effect of this is to enliven a number of coercive powers under Part IIA of the enabling Act, which may be exercised by 'authorised officers' of those two agencies. The relevant powers include powers to require information, to search a person or require a person to deposit personal effects, and to direct a person to leave premises.[1]

The committee's longstanding view is that significant matters, such as prescribing the entities whose officers may exercise coercive powers, are more appropriately enacted via primary rather than delegated legislation. Where significant matters are left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this case, it appears that no such justification is included in the explanatory materials.

In light of the matters above, the committee requests your advice as to why it is considered appropriate to specify investigatory authorities whose officers may exercise

1 Sections 13C, 13D and 13E of the enabling Act.

coercive powers under Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* by delegated legislation, rather than primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Minister for Finance
Department of Finance
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00340]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Under the *Public Works Committee Act 1969* (PWC Act), public works[1] with an estimated cost exceeding the 'threshold amount' may not commence unless:

- the work has been referred to the Parliamentary Standing Committee on Public Works (Public Works Committee);
- the House of Representatives has resolved that it is expedient for the work to be carried out without having been referred to the committee;
- the Governor-General has, by order, declared that the work is for defence purposes and that reference of the work to the Public Works Committee would be contrary to the public interest; or

1 Under section 5AA of the PWC Act, a 'public work' is a work carried out by or for the Commonwealth or an authority of the Commonwealth, or of which the Commonwealth or an authority of the Commonwealth is to become the owner, and in relation to which money appropriated by the Parliament is proposed to be expended.

- the work has been declared by the minister to be a 'repetitive work' (that is, a work that is substantially similar to other works to which the PWC Act applies).[2]

Subsection 18(9) of the PWC Act provides that 'threshold amount' means $15 million, or such other amount as is specified in the regulations. Item 5 of the present instrument amends the Public Works Committee Regulations 2016 (principal regulations)[3] to provide that the threshold amount for a public work for defence purposes is $75 million.

The committee's consistent view is that significant matters, particularly those which are central to a regulatory scheme, are more appropriately enacted via primary legislation. While recognising that the present instrument is lawfully made, the committee considers that the significant increase to the threshold amount would be more appropriately enacted via primary legislation. This would appear to accord with the *First Principles Review of Defence* (to which the explanatory statement refers), which recommended that:

> the Government amend the *Public Works Committee Act 1969* to set a $75 million threshold for referring proposed works to the Public Works Committee…These are further constraints that should be removed as their removal would reduce overhead, cost and delays to infrastructure projects.[4]

The committee is also concerned that increasing the threshold amount for referral to the Public Works Committee may reduce parliamentary oversight of individual items of expenditure. While acknowledging that increasing the referral threshold may reduce delays and costs associated with infrastructure projects, the committee considers that the decision to increase the threshold amount should more appropriately be made by Parliament, given the implications for the overarching scheme in the PWC Act.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to significantly increase the 'threshold amount' in section 18(9) of the *Public Works Committee Act 1969* by delegated legislation, rather than by primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

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2 Section 18 of the PWC Act.

3 [F2019C00261].

4 David Peever (Chair), *First Principles Review: Creating One Defence* (2015), p. 47, http://www.defence.gov.au/publications/reviews/firstprinciples/Docs/FirstPrinciplesReviewB.pdf.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Minister for Aged Care and Senior Australians
Department of Health
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Personal rights and liberties
Significant matters in delegated legislation

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not trespass unduly on personal rights and liberties. In addition, Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

The instrument amends the Quality of Care Principles 2014[1] to limit the use of chemical and physical restraints by approved providers of residential aged care services.[2] The instrument thereby appears to permit the use of chemical and physical restraints on aged care consumers in prescribed circumstances. In this regard, the committee notes that the use of physical and chemical restraints may have a substantial impact on personal rights and liberties. For example, the use of restraints will necessarily deprive a person of their liberty.

The committee acknowledges that the instrument permits the use of chemical and physical restraints only in limited circumstances. Nevertheless, the committee considers that significant matters, including those with a potentially substantial impact on personal rights and liberties, are more appropriately enacted via primary legislation. In this respect, the

1 [F2019LC00205].

2 Subsections 15F(1) and 15G(1). Subsections 15F(2) and 15G(2) sets out procedures that must be followed by an approved provider where a chemical or physical restraint is used.

committee notes that in some other jurisdictions, the circumstances in which chemical and physical restraints may be used are set out in primary legislation.[3]

Where significant matters are left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be provided. In this instance, the explanatory statement does not explain why it is considered necessary and appropriate to prescribe the circumstances in which restraints may be used by delegated legislation, rather than primary legislation.

Noting the potentially significant impact of the use of physical and chemical restraints on personal rights and liberties, the committee requests your detailed advice as to why it is considered necessary and appropriate to prescribe the circumstances in which restraints may be used by delegated legislation, rather than primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, I would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

3 See, for example, section 140 of the Victorian *Disability Act 2006.*

AUSTRALIAN SENATE

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Minister for Agriculture
Department of Agriculture
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532]

Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters that are more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instruments enable the Regional Investment Corporation (the Corporation) to grant loans in relation to farm businesses.[1] Section 12 of each instrument provides for the matters that the Corporation must observe in managing loans, and for actions that the Corporation may take in relation to loan recovery. These include taking foreclosure action and waiving unpaid debts. Section 18 of each instrument provides for how the Corporation may acquire and use funds for the purpose of the loan program.

The committee's consistent view is that significant matters, such as broad principles for loan management, the circumstances in which foreclosure action may be taken, and the process by which Commonwealth funds may be acquired and used, should be set out in primary

1 The Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532] allows the Corporation to provide loans to farm businesses that have suffered direct damage as a result of the North Queensland floods of January and February 2019. The Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604] allows the Corporation to grant loans to encourage and assist purchasers to acquire a farm business or a controlling stake in a farm business.

legislation, unless a sound justification for the use of delegated legislation is provided. In this instance, no such justification is provided in the explanatory materials.

The committee also notes that the broad provisions in each instrument relating to administrative and financial matters concerning loan management are almost identical, and are similar to those set out in other instruments relating to the Corporation.[2] Accordingly, it is unclear why such matters could not be set out in primary legislation, with more minor or technical matters specific to individual loan programs set out in delegated legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to set out broad administrative and financial matters relating to loan management in delegated legislation, rather than primary legislation.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

As noted above, the instruments enable the Corporation to grant loans in relation to farm businesses. Section 13 of each instrument provides that the Board of the Corporation must ensure that an internal review process for decisions to grant or refuse loans is developed and applied by the Corporation. The internal review would be carried out by an officer within the Corporation who did not make the original decision. Subsection 13(2) provides that the review procedure must be 'transparent, robust and fair', and sets out specific requirements that must be observed. The explanatory statement to each instrument provides these requirements:

> include giving a fair hearing appropriate to the circumstances, lack of bias, providing evidence and reasoning to support a decision, and making proper inquiry into matters in dispute.[3]

The committee appreciates that loan decisions would be subject to some form of review, and that the instruments require that procedural fairness be afforded to applicants. However, the committee does not generally consider internal review by an officer within the Corporation, on its own, to constitute sufficiently independent merits review. The committee also notes that neither the instrument nor the explanatory statement indicates whether loan decisions would be subject to any other form of independent merits review (for example, by the Administrative Appeals Tribunal).

The committee notes that it considered a similar issue in relation to the Regional Investment Corporation Operating Mandate Direction 2018.[4] The (then) Minister for Agriculture and Water Resources advised that external merits review might jeopardise the capacity of the

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2 For example, the Regional Investment Corporation Operating Mandate Direction 2018 [F2019C00323].

3 Explanatory statement, p. 6.

4 [F2018L00778]. See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018* (15 August 2018), pp. 32-34; *Delegated Legislation Monitor 10 of 2018* (12 September 2018), pp. 70-72.

Board to ensure that the Corporation is adequately managing financial risk to the Commonwealth. The minister also advised that the Corporation is in a 'unique position' to determine if a grant accords with the Corporation's operating mandate.

While noting this advice, the committee reiterated that it does not generally consider internal review, on its own, to constitute sufficiently independent merits review. The committee further noted that the minister's response did not identify established grounds for excluding merits review. Finally, the committee noted that the Corporation's specialist expertise (which may place the Corporation in a 'unique position' to determine eligibility for loans) is not, on its own, considered to be sufficient justification for excluding independent (that is, external) merits review.

In light of the matters above, the committee requests your advice as to:

- **whether decisions made by the Regional Investment Corporation, in relation to the grant of loans under the instruments, are subject to merits review by an independent tribunal (for example, the Administrative Appeals Tribunal); and**
- **if not, the characteristics of those decisions that would justify excluding independent merits review. It would assist if your response would expressly identify relevant grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

The committee's expectation is to receive a response in time for it to consider and report on these instrument while they are still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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Minister for Agriculture
Department of Agriculture
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Regional Investment Corporation Operating Mandate (Amendment) Direction 2019 [F2019L00434]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters that are more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument is a direction given under section 11 of the *Regional Investment Corporation Act 2018* (RIC Act). It amends the Regional Investment Corporation Operating Mandate Direction 2018 to decrease the minimum loan amount under the National Water Infrastructure Loans Fund (NWIFL) from $50 million to $10 million, and to make changes to eligibility requirements and assessment criteria related to water infrastructure loans.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 11 of the RIC Act when the Regional Investment Corporation Bill 2017 (RIC Bill) was before the Parliament. The Scrutiny of Bills committee noted that the provision would enable the minister to direct the Regional Investment Corporation (RIC) in relation to significant matters (including eligibility criteria for loans or financial assistance), and expressed concern that relevant instruments would not be subject to disallowance or sunsetting.

The Scrutiny of Bills committee noted its longstanding scrutiny position that significant concepts relating to a legislative scheme should be defined in primary legislation, or at least

in instruments subject to disallowance and sunsetting.[1] Ultimately, the Scrutiny of Bills committee drew its concerns to the attention of senators, and left to the Senate as a whole the appropriateness of the approach taken in the RIC Bill.[2]

The RIC Bill was later amended (before passage), to specify that directions under section 11 of the RIC Act would be subject to disallowance.[3] However, while acknowledging that the present instrument is subject to disallowance, the committee is concerned that the instrument deals with significant matters relating to the operation of the RIC, which may be more appropriate for enactment via primary legislation. The explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to leave significant matters relating to the operation of the Regional Investment Corporation to delegated legislation, rather than primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee on Regulations and Ordinances

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, June 2017, pp. 37-38.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, August 2017, pp. 146-147.

3 The Scrutiny of Bills committee welcomed the amendments in *Scrutiny Digest 2 of 2018,* February 2018, pp. 64-66.

AUSTRALIAN SENATE

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Minister for Infrastructure, Transport and Regional Development
Department of Infrastructure, Transport, Cities and Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Road Vehicle Standards Rules 2019 [F2019L00198]

Thank you for your response of 19 June 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 24 July 2019.

The committee remains concerned about the scrutiny issues outlined below, and has therefore resolved to seek further information in relation to this matter.

Incorporation

In its *Monitor 2 of 2018*, the committee requested:

- your advice as to whether the 'intergovernmental agreements' to which sections 50 and 171 of the instrument refer are incorporated by the instrument; and
- if so, a description of the agreements, the manner in which they are incorporated, and where they may be accessed free of charge.

Your response states that that the intergovernmental agreements to which sections 50 and 171 of the instrument refer are not incorporated, as 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 response also provides examples of intergovernmental agreements between Australia and other countries, and notes where some of these may be accessed.

While the relevant intergovernmental agreements may not determine the content of the law, the committee considers that they appear to determine the application of the law (that is, they appear to determine when a person may import a road vehicle, and the circumstances in which offence and civil penalty provisions will apply). In this regard, the agreements appear to be incorporated.

The committee therefore remains concerned that neither the instrument nor its explanatory statement appears to identify and describe the specific intergovernmental agreements to

which sections 50 and 171 refer,[1] the manner of their incorporation, or where the agreements may be accessed free of charge.

The committee therefore requests your further advice as to why it is considered that the 'intergovernmental agreements' to which sections 50 and 171 of the instrument refer, are not incorporated by the instrument, noting the committee's concerns that the instrument appears to determine the application of the law.

If the advice is that the instruments are incorporated, the committee also requests a description of the specific agreements that are incorporated, and your advice as to:

- **the manner in which the agreements are incorporated (that is, as in force at a particular time or as in force from time to time); and**
- **where the agreements may be accessed free of charge.**

The committee's expectation is to receive your further response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

1 The committee notes that the explanatory statement provides examples of relevant intergovernmental agreements. For example, it refers (p. 150) to the Customs Convention on the Temporary Importation of Private Road Vehicles [1967]. However, it does not specify each intergovernmental agreement to which sections 50 and 171 may refer.

AUSTRALIAN SENATE

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Minister for the Environment
Department of Environment and Energy
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Underwater Cultural Heritage Rules 2018 [F2018L00096]

Thank you for your response of 15 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 24 July 2019.

The committee remains concerned about the scrutiny issues outlined below, and has therefore resolved to seek further information in relation to this matter.

Incorporation

In its *Monitor 2 of 2018*, the committee requested your more detailed advice as to:

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

Your response notes that incorporating 'relevant international conventions, agreements and treaties' is appropriate given the need for administrative flexibility, and that this approach ensures Australia can immediately comply with any new international shared heritage agreements entered into by the government. It further notes that it is appropriate to incorporate 'relevant government guidelines', rather than specific guidelines, as no specific guidelines currently exist.

Your response also notes that as there are currently no relevant international agreements or government guidelines in existence, there are no documents that require description in the explanatory statement. The response notes that the instrument is therefore considered compliant with paragraph 15J(2)(c) of the Legislation Act.

While noting your advice, the committee remains concerned that the incorporation of documents (that is, guidelines and international agreements) that do not yet exist may

reduce the clarity and intelligibility of the instrument for persons interested in or affected by the law. This approach may also limit a person's ability to apply for a permit under the *Underwater Cultural Heritage Act 2018* (as the matters the minister may consider may be unclear), and an applicant's ability to challenge a decision to refuse a permit.

The committee therefore reiterates its view that, where there is an identified need to incorporate documents that do not yet exist, consideration should be given to amending the instrument to specify each incorporated document as the relevant document is made.

In light of these matters, the committee requests further advice as to the appropriateness of amending the instrument to remove references to 'relevant government guidelines' and 'relevant international conventions, agreements and treaties' and making future amendments to add the specific guidelines and international agreements to the instrument as they are made.

The committee's expectation is to receive your further response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, I would appreciate your response by **8 August 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

Concluded Ministerial Correspondence

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

AD/DHC-2/26 Amdt 1 Passenger Seats and Passenger Seat Attachment Fittings [F2019L00019]

Thank you for your response of 13 June 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

While the committee makes no further comment in relation to this particular instrument this instance, it remains concerned about the incorporation of external material into instruments of delegated legislation, and will continue to monitor the issue.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Aged Care Quality and Safety Commission Rules 2018 [F2018L01837]

Thank you for your comprehensive response of 17 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee considers that it would be appropriate to include key information about each of the matters covered by your response in the explanatory statement, and welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

Finally, in the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be recorded in the *Delegated Legislation Monitor* and published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Sussan Ley MP
Minister for the Environment
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

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

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

Thank you for your responses of 15 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

The committee also requests that future explanatory statements to similar instruments specify whether the rule-maker 'relied primarily' on the outcomes of strategic assessment, in accordance with section 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*.

Finally, in the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be recorded in the *Delegated Legislation Monitor* and published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
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www.aph.gov.au/senate_regord_ctte

Assistant Treasurer
The Treasury
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Treasurer,

ASIC Corporations (Amendment) Instrument 2019/216 [F2019L00325]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation (continuing exemption)

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with principal or enabling legislation.

ASIC Class Order [CO 02/0273][1] provides an exemption from certain fundraising and debenture provisions in the *Corporations Act 2001*, for persons involved in a business introduction service. Class Order [CO 02/0273] commenced in 2002.

The ASIC Corporations (Repeal and Transitional) Instrument 2017/186 (principal instrument)[2] repealed Class Order [CO 02/0273]. However, it also continued in force the exemptions in that Class Order for a period of two years (to 23 March 2019). The present instrument extends the operation of the principal instrument for a further three years (to 1 April 2022). The explanatory statement explains that the purpose of this extension is to allow further time for ASIC to:

- evaluate how and to what extent the crowd-sourced funding (CSF) regime interacts with the relief in Class Oder [CO 02/0273]; and

1 [F2007B00368].

2 [F2019C00217].

- undertake a full review of that Class Order to determine whether it remains appropriate in light of the CSF regime—including public consultation.[3]

The committee acknowledges that it may be necessary to preserve the exemptions granted by Class Order [CO 02/0273] while interactions between that Class Order and the nascent CSF regime are evaluated. The committee also notes that the relevant exemptions are extended by a specified period of three years (rather than, for example, being extended indefinitely).

However, the committee will generally have concerns where an instrument grants or extends exemptions from primary legislation, particularly where such exemptions apply for a significant period of time. In this regard, the committee notes that the exemptions extended by the present instrument have operated since at least 2002.[4]

In this instance, the committee is not seeking specific advice about the present instrument. However, the committee emphasises that, in general, delegated legislation should not grant or extend exemptions to primary legislation unless a sound justification is provided. Further, where it is considered necessary to exempt persons or entities from primary legislation, consideration should be given to enacting these exemptions in primary legislation. This is to ensure appropriate levels of parliamentary oversight.

In light of the matters above, the committee draws your attention to the use of delegated legislation to exempt persons and entities from the operation of primary legislation for a significant period of time.

The committee emphasises that, in general, delegated legislation should not grant or extend exemptions to primary legislation unless there is a sound justification for doing so. The committee will continue to monitor this issue.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee on Regulations and Ordinances

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3 Explanatory statement, p. 2. The CSF regime came into force in September 2017 for public companies and in October 2018 for eligible private companies.

4 Class Order [CO 02/0273] also revokes ASIC Class Order [CO 00/192]. However, it is unclear whether Class Order [CO 00/192] granted or extended exemptions from primary legislation, or whether Class Order [CO 02/0273] continued any such exemptions in force.

AUSTRALIAN SENATE

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The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Minister,

Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018 [F2018L01611]

Thank you for your response of 3 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at a private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee welcomes the comprehensive justification for the inclusion of the 'no-invalidity' clause in the instrument, and the information regarding the mechanisms in place to ensure procedural fairness for persons affected by adverse decisions. The committee also welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

In the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
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The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

CASA EX41/19 — Flight Training and Test (Low-Fidelity Simulators) Exemption 2019 [F2019L00687]

At the committee's private meeting on 24 July 2019, the committee concluded its consideration of the above instrument.

In the interests of promoting future compliance with the committee's scrutiny principles, the committee has resolved to draw your attention to the following scrutiny concerns.

Incorporation

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained. In the interest of ensuring that persons interested in or affected by the law should be able to readily access its terms, without cost, the committee would expect the explanatory statement to indicate where any incorporated documents may be accessed free of charge.

With reference to these matters, the committee notes that the instrument appears to incorporate syllabuses of training, set out in operations manuals and expositions of Part 141 and Part 142 operators. The explanatory statement indicates that operations manuals and expositions are not publicly or freely available, as they are 'proprietary to the operator and will generally include commercial in confidence information'.[1] It also explains that:

> The incorporated requirements of an exposition or operations manual are at the operator-specific level and apply only to the operator and its personnel. Further, the operator is under obligations to make the exposition or operations manual available to its personnel who have obligations under the document. Therefore, the syllabus of training is freely available to all persons who are affected by the requirements of the syllabus imposed by this instrument.[2]

1 Explanatory statement, p. 5.

2 Explanatory statement, p. 5.

The committee acknowledges that there may be difficulties associated with providing free, public access to expositions and operations manuals, and notes that persons affected by the instrument would likely have access to those documents.

Nevertheless, the committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. In this regard, the committee does not generally consider the fact that incorporated documents may contain commercial in confidence information, or the fact that documents would be available to persons most *affected* by the instrument, to be sufficient justification for not providing full access to the law for all persons who may be affected by, or are otherwise interested in, its terms.

The committee requests that, in the future, additional consideration be given to how incorporated documents might be made freely available to all persons who may be interested in the law. This may be, for example, by noting availability through specific public libraries, or by making the document available on request (for viewing only) at specified offices. Details of any means of access identified or established should be reflected in the explanatory statement to any instrument that incorporates documents by reference.

I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Defence (Payments to ADF Cadets) Determination 2019 [F2019L00059]

Defence (State of Emergency – Townsville floods) Determination 2019 (No. 1) [F2019L00108]

Thank you for your responses of 8 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at a private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instruments.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statements to the instruments. The committee also considers that it would be appropriate to amend the explanatory statement to the Defence (State of Emergency – Townsville floods) Amendment Determination 2019 (No. 3) [F2019L00263] to specify that discretionary decisions under the instrument are subject to the Redress of Grievance process.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Sussan Ley MP
Minister for the Environment
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Great Barrier Reef Marine Park Regulations 2019 [F2019L00166]

Thank you for your response of 10 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Parliament House, Canberra ACT 2600
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The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Attorney-General,

Marriage (Celebrant Professional Development) Statement 2019 [F2019L00138]

Thank you for your response of 23 April 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Greg Hunt MP
Minister for Health
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019) [F2019L00081]

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10) [F2018L01646]

Thank you for your response of 10 April 2019 and 19 June 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

Finally, in the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be recorded in the *Delegated Legislation Monitor* and published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Sussan Ley MP
Minister for the Environment
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

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

Thank you for your response of 15 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

Finally, in the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be recorded in the *Delegated Legislation Monitor* and published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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The Hon Angus Taylor MP
Minister for Energy and Emissions Reduction
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Renewable Energy (Electricity) Amendment (Small-scale Solar Eligibility and Other Measures) Regulations 2019 [F2019L00197]

Thank you for your response of 4 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at a private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement to the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

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

Thank you for your response of 17 June 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee reiterates its view that, in general, exemptions should not be used as de fact amendments to primary legislation. Where exemptions to primary legislation are necessary, consideration should be given to enacting the exemptions by amending the relevant Act. The committee will continue to monitor this issue.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Minister,

Shipping Registration Regulations 2019 [F2019L00206]

Thank you for your response of 17 June 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

While the committee makes no further comment in relation to this particular instrument, it reiterates its view that a defence of 'reasonable excuse' should not be applied to an offence unless it is not possible to rely on the general defences in the Criminal Code, or design more specific defences. This view accords with the guidance in the Attorney-General's Department's Guide to Framing Commonwealth Offences. The committee will continue to monitor this issue.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Minister,

Various Collection of Data Reporting Standard Determinations [F2019L00086], [F2019L00088], [F2019L00089], [F2019L00090], [F2019L00091], [F2019L00092], [F2019L00093], [F2019L00094]

Thank you for your responses of 16 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at a private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its consideration of the instruments.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statements to the instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Andrew Gee MP
Assistant Minister to the Deputy Prime Minister
Parliament House
Canberra ACT 2600
Via email:
CC:

25 July 2019

Dear Assistant Minister,

Vehicles Standard (Australian Design Rule 4/06 – Seatbelts) 2018 [F2019L00026]

Thank you for your response of 9 April 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 24 July 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

The committee welcomes your advice that the department is considering options to make the incorporated standards available free of charge, as was set out in the response provided by the Hon Andrew Broad MP, (then) Assistant Minister to the Deputy Prime Minister.1

The committee considers that it would be appropriate for this information to be included in the explanatory statement to the present instrument.

1 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 128-130.

Finally, in the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be recorded in the *Delegated Legislation Monitor* and published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

Monitor 4– Ministerial correspondence

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AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
02 6277 3066 | regords.sen@aph.gov.au
www.aph.gov.au/senate_regord_ctte

The Hon David Coleman
Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

1 August 2019

Dear Minister,

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

Thank you for your response of 23 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above legislative instrument.

The committee considered your response at its private meeting on 31 July 2019. Whilst noting your advice, the committee retains strong concerns that the above instrument raises significant scrutiny issues that should be brought to the attention of the Senate. The committee's views are supported by independent, expert legal advice.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2019*, available on the committee's website at www.aph.gov.au/regords_monitor.

The committee has also resolved to place a notice of motion to disallow the instrument, to emphasise the committee's scrutiny concerns and to give the Senate additional time to consider these matters.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

1 August 2019

Dear Minister,

Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]

The committee refers to the response of the Assistant Secretary, Murray-Darling Policy Branch, dated 18 April 2019, in relation to the above legislative instrument. The Assistant Secretary responded to the committee on the minister's behalf because, at the time of the response, the Parliament was prorogued for the 2019 Federal election.

The committee considered the Assistant Secretary's response at its private meeting on 31 July 2019. Whilst noting the Assistant Secretary's advice, the committee retains strong concerns that the instrument raises significant scrutiny issues that should be brought to the attention of the Senate. The committee's views are supported by independent, expert legal advice.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2019*, available on the committee's website at www.aph.gov.au/regords_monitor.

The committee has also resolved to place a notice of motion to disallow the instrument, to emphasise the committee's scrutiny concerns and to give the Senate additional time to consider these matters.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
Canberra 2600 ACT
Via email: peter.dutton.mp@aph.gov.au
CC: dlo@homeaffairs.gov.au

1 August 2019

Dear Minister,

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 [F2019L00352]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Broad delegation of power

The instrument inserts new section 4DA into the Customs (Prohibited Imports) Regulations 1956 (primary regulations),[1] to prohibit the import of tobacco products into Australia without specified approvals.[2] Among other matters, the new section allows the minister or an 'authorised person' to grant permission to import tobacco products. New subsection 4DA(10) provides that an 'authorised person' means an APS employee of the Department of Home Affairs who is authorised in writing by the minister.

The committee generally considers that delegations of powers in instruments should be restricted to members of the Senior Executive Service (SES) or, at a minimum, that delegates be required to possess expertise appropriate to the delegated powers. The committee does not expect that particular details of delegate's qualifications, attributes or expertise be specified in the instrument. Rather, the committee considers that the relevant instrument should include some requirement that the person delegating powers and functions be satisfied that delegates possess expertise appropriate to the relevant delegation.

The explanatory statement indicates that delegation to an APS level employee is necessary to ensure that the high volume of applications for permission can be processed in a timely manner.[3] The committee also understands that, in practice, the lowest level of authorised officers that the minister has approved is Executive Level 2, and that the position-holders

1 [F2019C00596].

2 These include where the minister or an authorised person has granted permission to import the tobacco product, or where the minister has approved the import of the tobacco product by legislative instrument.

3 Explanatory statement, p. 7.

responsible for issuing prohibited imports permits are experienced officers who are aware of, and diligently apply, administrative law principles.

The committee acknowledges that, owing to the high volume of applications and the need to avoid delays, it may not be possible to restrict delegations to members of the SES, even if APS level staff performed the relevant work and the SES only provided final authorisation. The committee also appreciates that, in practice, powers may be delegated only to appropriate persons.

Nevertheless, the committee is concerned that there is no legislative requirement that persons to whom powers are delegated possess qualifications, attributes and expertise appropriate to the delegated powers. The committee considers that, to ensure that the relevant powers are properly exercised, a requirement of this kind should be included in the instrument or in the enabling Act.

In light of these matters, the committee requests your advice as to the appropriateness of amending the instrument to require that the minister be satisfied that persons to whom powers are delegated possess the qualifications, attributes and expertise appropriate to the delegated powers.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments of delegated legislation do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

As noted above, new section 4DA of the primary regulations allows the minister or an authorised person to grant permissions to import tobacco products, and to revoke such permissions if satisfied in relation to certain specified matters.

Decisions relating to the grant or revocation of permits appear to involve a significant element of discretion. In particular, the committee notes that, in determining whether to grant permission to import tobacco products, the minister or authorised person may consider 'any relevant matter'.[4] Additionally, decisions relating to the grant or revocation of the relevant permission may affect the rights and interests of individuals. The decisions may therefore be suitable for independent merits review. However, the committee understands that the decisions are not reviewable, on the basis of their significance for the Australian economy.[5]

In this respect, the committee notes that the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*, notes that it may be appropriate to exclude policy decisions of a high political content (including decisions

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4 Subsection 4DA(4). The committee understands that relevant matters include the applicant's history of paying required duties and taxes, and their record of compliance with Australian customs requirements.

5 In this respect, the committee acknowledges the significant cost of revenue evasion associated with the trade in illicit tobacco, as well as the economic and social costs of black economy activities associated with tobacco sales.

affecting the Australian economy), and financial decisions with a significant public interest element, from independent merits review.[6]

However, the guidance document also notes that it is rare for decisions to fall within these grounds. Additionally, it suggests that the grounds intend to apply to decisions which are of individual significance to the Australian economy. Examples provided include floating the dollar and setting foreign exchange rates.[7] While the committee appreciates that decisions relating to the grant or revocation of permissions to import tobacco products are made in an economically significant context, it is not clear that *each* decision would be of such political or financial significance as to justify excluding merits review.

The committee also acknowledges that the decisions would be subject to judicial review. However, the committee does not generally consider the availability of judicial review to be sufficient justification for excluding independent merits review.

In light of these matters, the committee requests your detailed advice as to the characteristics of decisions relating to the grant or revocation of a permission to import tobacco products that would justify excluding independent merits review. The committee's consideration of this matter would be assisted if your response could identify established grounds for excluding merits review, as out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

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6 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?,* 1999, [4.23], [4.34]-[4.38].

7 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?,* 1999, [4.24].

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Senator the Hon Jonathon Duniam
Assistant Minister for Regional Tourism, Forestry and Fisheries
Parliament House
Canberra 2600 ACT
Via email: Senator.Duniam@aph.gov.au
CC: DLO-Duniam@agriculture.gov.au

1 August 2019

Dear Assistant Minister,

Fisheries Management Regulations 2019 [F2019L00383]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Reversal of evidential burden of proof

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not unduly trespass on personal rights and liberties. This requires the committee to ensure that where offence provisions in instruments reverse the burden of proof for persons in their individual capacities, this infringement on the right to the presumption of innocence is soundly justified.

Subsections 80(4) and (6) of the instrument create two offences relating to identification codes for boats. Subsection 80(8) creates an offence-specific defence, which provides that subsections 80(4) and (6) do not apply in relation to a boat that is licenced to be used to take fish under a law of a state or territory, and which displays an identifying marking in accordance with that law. In relation to this defence, the defendant bears the evidential burden of proof.

The explanatory statement explains that the *Guide to Framing Commonwealth Offences* (*Guide*) has been consulted in framing the defence in subsection 80(7). It also states that it is appropriate to include such a defence as the question of whether or not a boat is authorised under state or territory law is information that would be readily available to the defendant, and would be significantly more difficult and costly for the prosecution to disprove. In this regard, the explanatory statement notes that a defendant would be readily aware of their state or territory fishing authority and could produce a relevant fishing licence or permit.[1]

However, the committee notes that the *Guide* states that a matter should only be included in an offence-specific defence where it is peculiarly within the defendant's knowledge, and

1 Explanatory statement, p. 58.

where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[2] In this instance, while the committee appreciates that the matters in subsection 80(7) of the instrument may be readily available to the defendant, and that it may be challenging for the prosecution (as well as for officers of the Australian Fisheries Management Authority) to identify relevant evidence, this does not mean that the matters would be *peculiarly* within the defendant's knowledge. Other entities (for example, state and territory licencing bodies) may also be apprised of the matters in subsection 80(7).

In light of these matters, the committee requests your detailed advice as to the justification for reversing the evidential burden of proof in subsection 80(7) of the instrument. The committee's assessment would be assisted if your response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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2 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 50.

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The Hon Greg Hunt MP
Minister for Health
Parliament House
Canberra 2600 ACT
Via email: Greg.Hunt.MP@aph.gov.au
CC: Minister.Hunt.DLO@health.gov.au

1 August 2019

Dear Minister,

Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments of delegated legislation do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument prescribes diagnostic imaging services for which Medicare benefits are payable, and the relevant Medicare amount payable to providers for each service. Subdivision A, Division 1.2 of Schedule 1 to the instrument applies 'capital sensitivity' to the services provided under the instrument, which has the effect that higher rates of Medicare reimbursement are provided for services performed on newer or upgraded equipment.

Clause 1.2.3 of Schedule 1 provides for exemptions from capital sensitivity in relation to certain equipment used in regional and remote areas. While some exemptions are automatically applied, subclause 1.2.3(4) provides that the secretary may grant exemptions in respect of diagnostic imaging equipment in inner regional areas.

Clause 1.2.4 provides that if the secretary refuses to grant an exemption under subclause 1.2.3(4), the applicant may seek reconsideration of the decision by the secretary. However, the committee understands that independent merits review is not available in relation to refusal decisions, and notes the explanatory statement does not identify any established grounds for excluding merits review.

The committee has considered this issue in relation to a previous version of the instrument. In doing so, the committee emphasised that it does not consider internal review by department officials to constitute sufficiently independent merits review, irrespective of the seniority of the officer conducting the review or whether the review process applies administrative law

principles.[1] Where an instrument provides for the making of discretionary decisions that may affect rights and interests, the committee generally considers that independent merits review should be available.

The committee also understands that there are no plans to introduce a merits review process in relation to capital sensitivity decisions, as the government plans to repeal these decisions by 1 May 2021. The committee appreciates that merits review will no longer be necessary once the relevant provisions are repealed. However, the committee considers that it would be appropriate to provide for independent merits review while the provisions remain in force.

In light of these matters, the committee requests your advice as to the appropriateness of amending the instrument to provide for independent merits review in relation to decisions to grant exemptions from capital sensitivity.

If the advice is that amending the instrument is not appropriate, the committee requests your advice as to the characteristics of the relevant decisions that would justify excluding independent merits review. The committee's consideration of this matter would be assisted if your response could identify established grounds for excluding independent merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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1 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018,* pp. 17-18, and *Delegated Legislation Monitor 10 of 2018*, pp. 55-58, in relation to Health Insurance (Diagnostic Imaging Services Table) Regulations 2018 [F2018L00858].

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
Canberra 2600 ACT
Via email: Nola.Marino.MP@aph.gov.au
CC: Minister.marino@infrastructure.gov.au

1 August 2019

Dear Assistant Minister,

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Reversal of legal burden of proof

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not unduly trespass on personal rights and liberties. This requires the committee to ensure that where offence provisions in instruments reverse the burden of proof for persons in their individual capacities (including requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is soundly justified.

The instrument effectively amends the Norfolk Island *Criminal Code 2007* (Criminal Code (NI)), by amending relevant provisions of the Norfolk Island Continued Laws Ordinance 2015.[1] The amendments to the Criminal Code (NI) include the creation of two offences relating to sexual intercourse and acts of indecency with a person between 16 and 18 years of age (a 'relevant young person'), in circumstances where the defendant is in a position of trust or authority.[2] Each offence is punishable by 10 years' imprisonment.

In relation to each of these offences, the instrument also effectively creates two offence-specific defences. These apply where the defendant proves that:

- a valid, genuine marriage existed between the defendant and the relevant young person (marriage defence);[3] or

1 [F2019C00320].

2 Sections 113A and 119A of the Criminal Code (NI).

3 Subsections 113A(3) and 119A(3) of the Criminal Code (NI).

- the defendant believed on reasonable grounds that the relevant young person was of or above the age of 18 years (belief of age defence).[4]

Each of these defences reverses the legal burden of proof, as they require the defendant to *prove* particular matters.

The committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence where it is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for prosecution to disprove than for the defendant to establish the matter. It also states that creating a defence is more readily justified if relevant matters are not central to the question of culpability, the penalty for the offence is low, and the conduct proscribed by the offence poses a grave danger to public health or safety.[5]

Additionally, the *Guide* states that placing a legal burden of proof on the defendant should be kept to a minimum, and that the explanatory materials should justify why any legal burden of proof has been imposed instead of an evidential burden.[6]

In relation to the marriage defence, the explanatory statement notes that the existence of a marriage between the defendant and the relevant young person is not needed to establish the offence, and asserts that this provides justification for revising the legal burden of proof. In relation to the belief of age defence, the explanatory statement only notes that the defendant's reasonable belief as to a person's age would be peculiarly within their knowledge.[7]

While noting these matters, the committee does not consider that the explanatory materials provide an adequate justification for reversing the legal burden of proof. In relation to the marriage defence, while evidence of a valid marriage may be more readily available to the defendant and more difficult for the prosecution to establish, this does not mean that the matter is *peculiarly* within the defendant's knowledge. The existence of a valid marriage might be established, for example, by searches of relevant registries. Additionally, while there may be some justification for creating offence-specific defences in circumstances where a relevant matter is not central to culpability, the committee does not consider that this, of itself, is a sufficient justification for reversing the legal burden of proof.

As to the belief of age defence, the committee appreciates that the defendant's reasonable belief as to a person's age would be peculiarly within that person's knowledge, and that this reasonable belief is not central to questions of culpability. However, while these matters may justify creating an offence-specific defence, the committee does not consider that they justify reversing the legal, rather than the evidential, burden of proof.

Finally, and as noted above, the *Guide* states that an offence-specific defence is more readily justified if the relevant offence carries a low penalty. In this case, the offences carry

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4 Subsections 113A(4) and 119A(4) of the Criminal Code (NI).

5 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 51-52.

7 Explanatory statement, pp. 10-11.

a very significant penalty of 10 years' imprisonment. The committee would therefore expect a more comprehensive justification for creating an offence-specific defence, particularly if the defence reverses the legal burden of proof.

In light of these matters, the committee requests your detailed advice as to:

- **why it is considered necessary and appropriate to reverse the burden of proof in relation to the offence-specific defences in sections 113A and 119A of the *Criminal Code 2007*; in particular, why it is considered appropriate to reverse the legal rather than the evidential burden; and**
- **the appropriateness of amending the instrument to include the offence-specific defences as elements of the offences to which they relate.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Senator the Hon Marise Payne
Minister for Foreign Affairs
Parliament House
Canberra ACT 2600
Via email: Senator.Payne@aph.gov.au
CC: foreign.minister@dfat.gov.au, legislation@dfat.gov.au

1 August 2019

Dear Minister,

Charter of the United Nations (Sanctions—South Sudan) Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00112]

Thank you for your response of 22 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee acknowledges the dynamic nature of the UN sanctions environment, and notes that the use of delegated legislation in this context is intended to ensure that Australia is able to meet its international law obligations in a timely and effective manner. However, the committee remains concerned about the use of delegated legislation, rather than primary legislation, to prescribe conduct that may be punishable by 10 years' imprisonment. The committee also considers it inappropriate to apply strict liability in circumstances where such significant penalties may be imposed. The committee will continue to monitor these issues.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement to the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon Dan Tehan MP
Minister for Education
Parliament House
Canberra ACT 2600
Via email: Dan.Tehan.MP@aph.gov.au
CC: Minister@education.gov.au

1 August 2019

Dear Minister,

Child Care Subsidy Minister's Amendment Rules (No. 1) 2019 [F2019L00107]

Thank you for your response of 25 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

In the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
Canberra ACT 2600
Via email: Senator.Cormann@aph.gov.au
CC: DLO-Finance@finance.gov.au

1 August 2019

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018 [F2018L01723]

Thank you for your response of 25 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee considers that excluding decisions from independent merits review should be justified by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?* (ARC guide), rather than by reference to the Australian Administrative Law Policy Guide.

The committee also emphasises that decisions made under programs on which spending is authorised by the Financial Framework (Supplementary Powers) Regulations 1997 should generally be subject to independent merits review, unless an established ground for excluding merits review is identified by reference to the ARC guide.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

Monitor 5 – Ministerial correspondence

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Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

12 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

The committee has resolved to place a protective notice of motion to disallow the instrument to provide the committee with additional time to consider the scrutiny issues raised by the instrument and the matters outlined your response.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Air Services Regulations 2019 [F2019L00371]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

The committee welcomes your undertaking to amend the instrument to limit immunity from civil liability to Airservices Australia and its employees.

While these amendments remain outstanding the committee has resolved to place a protective notice of motion to disallow the instrument to ensure that the undertaking is implemented. The committee will withdraw the notice once the instrument is amended in accordance with your undertaking.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon Jason Wood MP
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: Jason.Wood.MP@aph.gov.au
CC: amo.dlo@homeaffairs.gov.au

Dear Assistant Minister,

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 [F2019L00352]

Thank you for your response of 9 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019. The committee remains concerned about the scrutiny issues outlined below, and has therefore resolved to seek further information in relation to this matter.

Broad delegation of power

The committee notes your advice that delegating powers under the instrument to Executive Level 2 (EL2) officers within the department strikes an appropriate balance between the need to process a high volume of applications, facilitating legitimate trade, and ensuring sufficient oversight and judgment in the permit application process. The committee also notes that you are satisfied that the current delegates possess appropriate expertise.

Whilst acknowledging this advice it remains unclear to the committee that it is appropriate to delegate the relevant powers to officers at the EL2 level in this case. In this respect, the committee notes your advice that at least some of the relevant decisions are of such significance to the Australian economy as to justify excluding merits review. While this may reflect established grounds for excluding merits review,[1] it is unclear that such significant decisions should be made by officers at the EL2 level. Conversely, if the decisions are more routine, and are therefore appropriately made by EL2 officers, it is unclear why the decisions should not be reviewable.

1 In this respect, it is noted that it may be appropriate to exclude policy decisions of a high political content, and financial decisions with a significant public interest element, from merits review. See Attorney-General's Department, Administrative Review Council , *What decisions should be subject to merit review,* 1999, https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx#pol , [4.22]-[4.30]; [4.34]-[4.38].

It is also unclear whether the volume of applications makes it necessary, from a staff and resourcing perspective, to delegate the relevant powers to EL2 officers. The committee's consideration of this matter would be assisted by more detailed information about the number of applications that are processed within a particular period of time.

The committee therefore remains concerned that the instrument does not restrict the relevant delegations to members of the SES, or expressly require the minister to be satisfied that delegates possess appropriate experience, qualifications or expertise. In this respect, while current delegates may possess appropriate expertise, the committee considers that—in the absence of such a restriction—there is a risk of the powers being delegated in the future to persons who do not.

In light of the matters above, the committee requests your advice as to:

- **the average number of permit applications that are processed each month, and the nature of those applications; and**
- **why it is considered appropriate for officers occupying Executive Level 2 positions to decide any permit application, regardless of its economic significance.**

The committee also considers that it may be appropriate to amend the instrument to expressly require that the minister be satisfied, before delegating powers to approve permit applications, that the persons to whom powers are to be delegated possess appropriate qualifications, attributes and expertise. The committee requests your further advice in relation to this matter.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Consequently, the committee has resolved to place a 'protective' notice of motion to disallow the instrument, to provide it with additional time to consider your response.

To facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 September 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon Greg Hunt MP
Minister for Health
Parliament House
Canberra ACT 2600
Via email: Greg.Hunt.MP@aph.gov.au
CC: Minister.Hunt.DLO@health.gov.au

Dear Minister,

Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

The committee welcomes your undertaking to amend the instrument to provide for independent merits review in relation to decisions relating to capital sensitivity exemptions.

While these amendments remain outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee will withdraw the notice once the instrument is amended in accordance with your undertaking.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

The committee has resolved to place a protective notice of motion to disallow the instrument, to provide the committee with additional time to consider the scrutiny issues raised by the instrument and the matters outlined in your response.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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The Hon David Coleman MP
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Parliament House
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Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffirs.gov.au

12 September 2019

Dear Minister,

Migration Amendment (New Skilled Regional Visas) Regulations 2019 [F2019L00578]

Thank you for your response of 14 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

Imposition of fees (taxation)

On the basis of your advice, the committee has concluded its examination of this matter.

However, the committee considers that a best-practice approach would be for VACs to be set out in a separate instrument dealing only with the imposition of a tax. This would be consistent with requirements for the imposition of tax in primary legislation, as well as with the approach preferred by the Office of Parliamentary Council (as noted in your response).

The committee considers that it would be appropriate for the key information in relation to this issue set out in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

Significant matters in delegated legislation

On the basis of your advice, the committee has concluded its examination of this matter.

However, the committee reiterates that significant changes to the law (including significant changes to Australia's migration regime) should generally be enacted via primary rather than delegated legislation.

The committee considers that it would be appropriate for the key information in relation to this issue set out in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

Merits review

While noting your advice, the committee remains concerned in relation to this matter, and has resolved to seek further information.

The committee notes your advice that merits review is not available in relation to refund decisions under subsection 2.12F(3C), section 2.73C and item 8101 of Schedule 13, on the basis that to provide merits review could undermine the good administration of Australia's immigration program. The committee also notes your advice that none of the refund decisions under the Migration Regulations are subject to merits review, and that this has been the case since the refund provisions were inserted into the regulations in 1997.

The committee further notes your advice that the refund decisions are subject to judicial review, and that is open to applicants who consider that they have been lawfully refused a refund to apply to the courts.

However, the committee's general expectation is that any decision to exclude merits review be justified by reference to established grounds set out in the Administrative Review Council's (ARC) guidance document, *What decisions should be subject to merit review?* While the committee acknowledges the concern that providing independent merits review in relation to refund decisions may undermine the administration of Australia's immigration program, the committee also notes that this does not appear to reflect an established ground set out in the ARC's guidance material.

Additionally, the committee does not generally consider the availability of judicial review to be adequate justification for excluding independent merits review. In this respect, the committee notes that judicial review is complementary to, but distinct from, merits review. Judicial review involves the exercise of the Commonwealth's judicial power and results in findings in law. Merits review involves the exercise of administrative powers and results in a correct and preferable decision. The different forms of review can, and often do, co-exist.

In light of the matters above, the committee requests your more detailed advice as to the characteristics of decisions under subsection 2.12F(3C), section 2.73 and item 8101 of Schedule 1 to the instrument that would justify excluding independent merits review. The committee's consideration of this matter would be assisted if your response identified established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response (to the questions concerning merits review included above) by **26 September 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
Canberra ACT 2600
Via email: Senator.Colbeck@aph.gov.au
CC: Minister.Colbeck.DLO@health.gov.au

12 September 2019

Dear Minister,

Quality of Care Amendment (Minimising Use of Restraints) Principles 2019 [F2019L00511]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

The committee remains concerned about the scrutiny issues outlined below, and has resolved to seek further information in relation to this matter.

Personal rights and liberties

Significant matters in delegated legislation

The committee notes your advice that the instrument does not authorise the use of restraints where it is otherwise unlawful, but rather imposes restrictions, safeguards and conditions on the use of restraints by approved providers in the aged care setting, in addition to those imposed at common law. In this respect, the committee also notes your advice that the instrument does not have a significant, negative impact on the personal rights and liberties of an aged care consumer.

The committee further notes your advice that enacting the relevant limitations on the use of restraints by delegated legislation allows for detailed regulation of the use of restraints, and provides the flexibility necessary for the instrument to be refined to address emerging issues and reflect best practice.

The committee acknowledges your advice that the instrument may not have a significant *negative* impact on personal rights and liberties, insofar as it only imposes restrictions on the use of restraints. However, the committee will generally have concerns where matters with a significant impact on personal rights and liberties are enacted via delegated legislation— irrespective of whether the impact is positive or negative. In this respect, the committee notes that the instrument is the mechanism by which specific criteria must be satisfied before physical and chemical restraints may be used in the aged care setting, and including these criteria in delegated legislation means that in the future the criteria may be watered down or removed without full parliamentary oversight. The instrument could therefore be said to affect the rights and liberties of aged care consumers in a significant way.

The committee's longstanding view is that significant matters, including those with a substantial impact on personal rights and liberties, whether negative or positive, are more appropriately enacted via primary legislation. This is to ensure that such matters are subject to the full range of parliamentary scrutiny inherent in the passage of an Act of Parliament. Given the reduced parliamentary scrutiny of delegated legislation, the committee does not generally consider flexibility, on its own to be sufficient justification for including significant matters in delegated legislation.

In light of these matters, the committee considers that it may be appropriate for at least the core principles governing the use of restrictive practices to be set out in primary, rather than delegated, legislation. This is to ensure appropriate parliamentary oversight of matters that may have a substantial impact on personal rights and liberties. In this regard, the committee reiterates that other jurisdictions (for example, Victoria) appear to take this approach.[1]

In light of the matters outlined above, the committee requests your advice as to whether consideration has been given to setting out the core principles governing the use of restrictive practices in the aged care setting in primary legislation. The committee also requests your advice as to why this approach has not been taken, noting the additional parliamentary scrutiny that attaches to primary legislation.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. In this instance, the committee has resolved to give a notice of motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider the information received.

To facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 September 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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1 See, for example, section 140 of the *Disability Act 2006* (Vic). That section provides (among other matters) that restraint or seclusion can only be used if necessary to prevent a person from causing physical harm to themselves or others, including in circumstances involving the destruction of property. The section also provides that the use and form of restraint or seclusion must be the least restrictive option available in the circumstances, and must accord with the relevant person's behaviour management plan.

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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12 September 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Road Vehicle Standards Rules 2018 [F2019L00198]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 11 September 2019.

While noting your advice, the committee remains concerned that the instrument appears to incorporate the relevant intergovernmental agreements, and that neither the instrument nor its explanatory statement appears to describe the agreements, identify the manner in which they are incorporated, or indicate where they may be accessed free of charge.

The committee notes your undertaking to amend the instrument to clarify that the agreements are not incorporated. In light of this undertaking, and noting your advice that the explanatory statement to the amending instrument will specify where the agreements may be accessed, the committee makes no further comment on this matter.

However, while these amendments remain outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee may withdraw the notice once the instrument is amended in accordance with your undertaking, provided the amendment satisfies the committee's concerns.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650]

The Senate Standing Committee on Regulations and Ordinances' secretariat has been corresponding with your department and the Australian Fisheries Management Authority (AFMA) on the committee's behalf regarding the above legislative instrument.

On 3 September 2019, the secretariat received advice from your department that AFMA has undertaken to revoke the instrument in response to the committee's concerns.

The committee welcomes this undertaking, as well as the advice that AFMA will ensure that future instruments correctly address the committee's concerns.

While the revocation remains outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee will withdraw the notice once the instrument is revoked in accordance with AFMA's undertaking.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Air Navigation (International Airline Licence Exemption) Determination 2019 [F2019L00375]

Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 [F2019L00378]

Thank you for your response of 8 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee also welcomes your commitment to consider the committee's comments as part of a broader review of the *Air Navigation Act 1920*.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600
Via email: attorney@ag.gov.au
CC: DLO@ag.gov.au

Dear Attorney-General,

Archives (Records of the Parliament) Regulations 2019 [F2019L00282]

Thank you for your response of 7 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee also welcomes your proposal for the Functional and Efficiency Review of the National Archives to include further consideration of the committee's concern about the delegated legislation provision in subsection 20(1) of the *Archives Act 1983.*

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148 [F2019L00290]

Thank you for your response of 8 August 2019 on behalf of the Assistant Treasurer to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

Corporations Amendment (Name Exemption) Regulations 2019 [F2019L00271]

Thank you for your response of 8 August 2019 on behalf of the Assistant Treasurer to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

The Hon Josh Frydenberg MP
Treasurer
Parliament House
Canberra ACT 2600
Via email: Josh.Frydenberg.MP@aph.gov.au
CC: tsrdlos@treasury.gov.au, committeescrutiny@treasury.gov.au

Dear Treasurer,

Corporations Amendment (Proprietary Company Thresholds) Regulations 2019 [F2019L00538]

Thank you for your response of 5 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Farm Household Support (Forced Disposal of Livestock) Minister's Rules 2019 [F2019L00523]

Thank you for your response of 19 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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12 September 2019

Senator the Hon Jonathon Duniam
Assistant Minister for Forestry and Fisheries
Parliament House
Canberra ACT 2600
Via email: Senator.Duniam@aph.gov.au
CC: DLO-Duniam@agriculture.gov.au

Dear Assistant Minister,

Fisheries Management Regulations 2019 [F2019L00383]

Thank you for your response of 14 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600
Via email: attorney@ag.gov.au
CC: DLO@ag.gov.au

Dear Attorney-General,

Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019 [F2019L00615]

Thank you for your response of 19 August 2019 on behalf of the Assistant Treasurer to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon Angus Taylor MP
Minister for Energy and Emissions Reduction
Parliament House
Canberra ACT 2600
Via email: Angus.Taylor.MP@aph.gov.au
CC: DLOTaylor@environment.gov.au; legislation@environment.gov.au

Dear Minister,

Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2019 [F2019L00968]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument.

Access to justice

Senate standing order 23(3)(b) requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, which the committee considers to include the right of access to justice.

The instrument was made under the *Greenhouse and Energy Minimum Standards Act 2012* (GEMS Act). It revokes and remakes the Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018[1] (2018 Determination). Similarly to the 2018 Determination, the present instrument includes a copyright notice, which states that:

> This Determination includes material from International Electrical Commission (IEC) Standards, which are copyright IEC. Apart from reproduction for personal and non-commercial use, and uses permitted under the Copyright Act 1968, IEC material may not be reproduced without permission or licence.

The committee raised concerns about the inclusion of a copyright notice in the 2018 Determination, noting that the such a notice may limit the capacity of persons to access and

1 [F2018L01572].

use the law, and thereby restrict access to justice. The committee noted that this view is shared by Copyright Law Review Committee.[2]

In response, you advised that entities to which the 2018 Determination applied did not make any complaints about their ability to comply with that instrument.[3] You also advised that careful consideration is given to the material included in instruments made under the GEMS Act, and noted that your department was actively considering the issue of including copyrighted material in such instruments.[4] On the basis of your advice, the committee concluded its examination of the 2018 Determination. However, the committee remained concerned about the impact on access to justice associated with imposing copyright restrictions on instruments, and noted that it would continue to monitor the issue.[5]

In relation to the present instrument, the committee reiterates its concerns regarding the limits on access to justice associated with imposing copyright restrictions on the content of delegated legislation. In this regard, the committee notes that the explanatory statement does not explain why it is considered appropriate to include a copyright notice. It merely states that the notice acknowledges the inclusion of copyrighted material and clarifies the permitted use of the instrument by those seeking to comply with relevant obligations.[6]

In light of the matters above, the committee draws your attention to the inclusion of a copyright notice in the text of the present instrument.

The committee considers that including copyrighted material in delegated legislation may limit the capacity of persons to access and use the law, and thereby potentially restrict access to justice. The committee will continue to monitor this issue.

Incorporation

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, all or part of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of that Act requires the explanatory statement to an instrument that incorporates a document to contain a description of that document and to indicate how it may obtained.

The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to contain a description of each incorporated document and to indicate where it may be

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2 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, 5 December 2018, pp. 4-5. See also Copyright Law Review Council, *Crown Copyright*, 2005, 138, [9.38], http://www.austlii.edu.au/au/other/clrc/18.pdf.

3 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, 14 February 2019, pp. 71-73. You provided this advice in your capacity as Minister for Energy.

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 2 of 2019*, 3 April 2019, pp. 115-117.

5 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 2 of 2019,* 3 April 2019, p. 117.

6 Explanatory statement, p. 4.

accessed free of charge. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[7]

With reference to these matters, the committee notes that the instrument incorporates the following standards:

- *IEC 60034-1 Ed. 13.0 (Bilingual 2017) Rotating electrical machines – Part 1: Rating and Performance*;
- *International Standard IEC 60034-2-1 Ed. 2.0 (Bilingual 2014) Rotating electrical machines – Part 2-1: Standard methods for determining losses and efficiency from tests (excluding machines for traction vehicles)*;
- *IEC 60034-30-1 Ed. 1.0 (Bilingual 2014) Rotating electrical machines – Part 30-1: Efficiency classes of line operated AC motors (IE code)*;
- *IEC 60050-411 Ed. 2.0 (Bilingual 1996) International Electrotechnical Vocabulary – Chapter 411: Rotating machinery*;
- *IEEE 112:2004 Test Procedure for Polyphase Induction Motors and Generators*; and
- *IEEE Standard IEEE 112:2017 Test Procedure for Polyphase Induction Motors and Generators*.

Each standard is incorporated as in force at the time the instrument was made.[8] In relation to where the standards may be accessed, the explanatory statement states that:

> The Determination references IEC and IEEE standards. The use of these international standards is consistent with the Australian Government's policy of harmonisation with international standards where appropriate. The Determination includes definitions and text extracted from the relevant IEC standards. This makes it possible to determine if a product is covered by (or excluded from) the Determination and the minimum efficiency levels without having to refer to the standards. The IEEE test standards referenced in the Determination are identified as alternatives to reduce costs for members of the regulated community who already have access to these standards.
>
> Commercial users who have ascertained that they are likely to be covered by the Determination (which is possible from reading the Determination in isolation) would be expected to purchase the relevant referenced standards in order to comply with the Determination. The referenced standards can be purchased from Standards Australia through its current licensee, SAI Global.[9]

The explanatory statement also notes the ongoing work of the COAG Industry Skills Council Standards Accessibility Working Group (ISCSA Working Group) and Standards Australia to improve access to standards that are incorporated in delegated legislation, stating that:

> Options for accessing the referenced standards without purchasing them are limited, as the standards subscriptions of the National Library and other libraries

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7 Senate Standing Committee on Regulations and Ordinances, *Guideline on incorporation of documents*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents

8 Subsection 6(2) of the instrument.

9 Explanatory statement, p. 4.

> does not generally cover international standards. While this is currently the case, the COAG Industry Skills Council Standards Accessibility Working Group continues to work on solutions to ensure greater access to standards.
>
> Standards Australia is also working towards improving value and access to Australian Standards. SAI Global has had an exclusive distribution arrangement with Standards Australia since 2003. In February 2019, Standards Australia announced that it will look to improve access to standards and any future distribution agreement with SAI Global will be non-exclusive. Standards Australia intend to commence a consultation process with stakeholders to "understand how the current and future distribution models can deliver easier access for those who use Standards Australia's content".[10]

The committee notes that, in many cases, it will be possible to determine the content and application of the law without reference to the incorporated standards, and acknowledges the ongoing work of the ISCSA Working Group and Standards Australia to improve access to incorporated standards. Nevertheless, the committee remains concerned that every person interested in or affected by the law should be able to access its terms. In this regard, the committee would expect the full text of any document incorporated by reference—including Australian and international standards—to be available free of charge.

In light of the matters above, the committee draws your attention to the lack of free access to the standards incorporated by the instrument.

The committee emphasises that, in general, the full text of any document incorporated by reference should be available free of charge. This may include, for example, providing access through specified public libraries, or by making the relevant document available for viewing at departmental offices. The committee will continue to monitor this issue.

In the interests of transparency, this correspondence will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

10 Explanatory statement, p. 4.

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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12 September 2019

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
Canberra 2600 ACT
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffirs.gov.au

Dear Minister,

Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 [F2019L00551]

Thank you for your response of 14 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to include the key information set out in your response regarding the basis for determining visa application charges and the availability of merits review. The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

In the interests of promoting future compliance with the committee's scrutiny principles, the committee has resolved to draw your attention to the following matters.

Unclear basis for determining fees

The committee notes your advice that the visa application charges (VACs) set out in the instrument are imposed as taxes. The committee also notes the justification for imposing VACs on this basis, set out in the response to the committee's concerns in relation to Migration Amendment (New Skilled Regional Visas) Regulations 2019 [F2019L00578].

However, the committee considers that a best-practice approach would be for VACs to be set out in a separate instrument dealing only with the imposition of a tax. This would be consistent with requirements for the imposition of tax in primary legislation, as well as with the approach preferred by the Office of Parliamentary Counsel (as noted in your response).

Significant matters in delegated legislation

The committee notes your advice that the instrument is subject to a level of parliamentary oversight. The committee also notes your advice that, given the frequency and extent of the amendments needed to maintain a dynamic and responsible immigration system, it is considered appropriate to make such amendments by delegated legislation.

However, as set out in the committee's initial comments, the instrument appears to make a number of significant changes to Australia's migration law. While noting that the present instrument is lawfully made, and that it is subject to some level of parliamentary oversight, the committee's longstanding view is that such significant matters are more appropriately enacted via primary legislation. This ensures that the relevant matters are subject to the full range of parliamentary scrutiny inherent in passing an Act of Parliament.

In the interests of transparency, I note that this correspondence will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

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Parliament House, Canberra ACT 2600
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12 September 2019

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
Canberra ACT 2600
Via email: senator.ruston@aph.gov.au
CC: dlos@dss.gov.au

Dear Minister,

National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019 [F2019L00273]

Thank you for your response of 14 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

In relation to retrospectivity, the committee notes your advice that, as a matter of discretion, the department does not propose to rely upon any conduct of an approved participant that occurred before the commencement of the Regulations when assessing whether an approved participant has complied with regulation 22BD(2)(d) and regulation 22BD(2)(e).

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
02 6277 3066 | regords.sen@aph.gov.au
www.aph.gov.au/senate_regord_ctte

12 September 2019

The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
Canberra ACT 2600
Via email: Nola.Marino.MP@aph.gov.au
CC: Minister.marino@infrastructure.gov.au

Dear Assistant Minister,

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546]

Thank you for your comprehensive response of 20 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee welcomes your undertaking to register a replacement explanatory statement, including the key information set out in your response, on the Federal Register of Legislation. The committee will monitor the undertaking to ensure that it is implemented.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600
Via email: attorney@ag.gov.au
CC: DLO@ag.gov.au

Dear Attorney-General,

Privacy (Disclosure of Homicide Data) Public Interest Determination 2019 [F2019L00322]

Thank you for your response of 19 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. The committee also considers that it would be useful for the explanatory statement to outline how the non-statutory safeguards identified in your response will be effective to protect individuals' privacy (including, for example, the consequences of non-compliance with the relevant guidelines and approvals).

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
Canberra ACT 2600
Via email: peter.dutton.mp@aph.gov.au
CC: dlo@homeaffairs.gov.au

Dear Minister,

Public Order (Protection of Persons and Property) Regulations 2019 [F2019L00272]

Thank you for your response of 8 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
Canberra ACT 2600
Via email: Senator.Cormann@aph.gov.au
CC: DLO-Finance@finance.gov.au

Dear Minister,

Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00340]

Thank you for your response of 7 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019.

The committee notes your advice that the Public Works Committee (PWC) has updated its Procedure Manual to require that the PWC be notified of all public works for defence purposes between $2 million and $75 million. The committee notes that this new requirement is intended to ensure that parliamentary oversight of public works continues uninterrupted.[1]

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee also reiterates its longstanding view that significant matters are more appropriately enacted via primary rather than delegated legislation. The committee will have particular concerns where relevant matters are central to a regulatory scheme, or may have a substantial effect on levels of parliamentary oversight.

1 See Public Works Committee, *Procedure Manual,* April 2019, [1.87].

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

Dear Minister,

Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532]

Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604]

Thank you for your response of 20 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instruments.

However, the committee also reiterates that significant matters – particularly where these are central to a regulatory scheme – should generally be enacted via primary legislation. In the context of a loans scheme, these may include broad principles for loan management, the circumstances in which foreclosure action may be taken, and the processes by which Commonwealth funds may be acquired and used.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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12 September 2019

The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

Dear Minister,

Regional Investment Corporation Operating Mandate (Amendment) Direction 2019 [F2019L00434]

Thank you for your response of 20 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 11 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee reiterates that significant matters – particularly where these are central to a statutory scheme – should generally be enacted via primary legislation. In the context of a loans scheme, such significant matters may include minimum loan amounts and eligibility criteria for financial assistance. The committee also draws your attention to the comments of the Senate Standing Committee for the Scrutiny of Bills on this matter.[1]

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

1 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, June 2017, pp. 37-38; *Scrutiny Digest 8 of 2017*, August 2017, pp. 146-147, in relation to the Regional Investment Corporation Bill 2017.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

Monitor 6 – Ministerial correspondence

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AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

19 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]

Thank you for your response of 23 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 18 September 2019.

Significant matters in delegated legislation

The committee acknowledges that the instrument intends only to correct a policy anomaly associated with the operation of the Agriculture and Veterinary Chemicals Code (AgVet Code), and notes that the *Agricultural and Veterinary Chemicals Code Act 1994* expressly permits exemptions of the type set out in the present instrument. However, the committee emphasises that, in general, issues associated with the operation of primary legislation (in this case, the AgVet Code) are more appropriately resolved by amending the relevant Act, rather than relying on delegated legislation.

Unclear basis for determining fees

The committee notes your advice that the instrument does not impose or alter any charges, fees, levies, scales or rates of cost or payment, but only preserves existing charges and levy rates and scales. In this respect, the committee also notes your advice that the levels specified in the present instrument are identical to those already prescribed. However, the committee considers that by re-making provisions which set fees and charges, the instrument imposes those charges on the entities to which they apply. This is irrespective of whether new fees are imposed or existing amounts have been altered.

The committee therefore reiterates its view that where an instrument imposes or changes a fee, levy, charge, scale or rate of costs of payment, the explanatory statement should make clear the specific basis on which the relevant imposition or change has been calculated. The committee expects this information to be included even where the relevant provisions replicate those in a previous instrument, or preserve existing fees or charges.

The committee also notes your advice that:

> …as the Agvet Code is implemented as an applied law of the states and territories, section 55 of the Constitution, which requires separate taxation legislation, is not relevant. This is reflected in section 3 of the Agvet Code, which provides for a fee to include a fee that is a tax.

In light of this advice, the committee is particularly concerned to understand the basis on which each of the fees in the instrument has been calculated; that is, whether they have each been calculated on the basis of cost recovery, or imposed as a tax. This information will enable the committee to consider, in more detail, the constitutional matter you have raised.

The committee consequently requests your further advice as to the basis on which the fees and charges set out in the instrument have been calculated (that is, on the basis of cost recovery or on another basis).

The committee would also expect this information to be set out in the explanatory statement. The committee therefore requests your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

Incorporation

The committee notes your advice that each document incorporated by the instrument is incorporated as in force from time to time, and your advice that this is authorised by paragraphs 6(2)(c) and 6(3)(a) of the *Agricultural and Veterinary Chemicals Code Act 1994* (AgVet Code Act). The committee also notes your advice that the Food Standards Code is a legislative instrument, and freely accessible on the Federal Register of Legislation.

However, the committee remains concerned that the British, European and United States Pharmacopoeias are only available for a fee. In this respect, the committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to readily access its terms. The committee's expectation, at a minimum, is that consideration be given to any means by which an incorporated document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request (for example, at departmental offices). Consideration of this principle and details of any means of access should be reflected in the explanatory statement.

In light of the matters above, the committee requests your further advice as to where the British, European and United States Pharmacopoeias may be accessed free of charge. The committee also expects the explanatory statement to indicate, for each incorporated document:

- **where the document may be accessed free of charge;**
- **the manner in which the document is incorporated; and**
- **if the document is incorporated as in force from time to time, the power relied on to incorporate the document in this manner.**

The committee therefore requests your advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

The committee's expectation is to receive your further response in time for it to consider and report on the instrument while it is still subject to disallowance. Consequently, the committee placed a 'protective' notice of motion of motion to disallow the instrument on 11 September 2019, to provide it with additional time to consider the relevant scrutiny issues.

Noting this, and to facilitate the committee's consideration of the matters above, I would appreciate your response by **2 October 2019.**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Kim Carr
Acting Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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19 September 2019

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]

Thank you for your response of 14 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 18 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee takes this opportunity to reiterate that it remains of the view that the 'fast track' application process, and the categories of person to whom it applies, raises significant concerns relating to procedural fairness and review rights. In particular, the committee is concerned that decisions to refuse visas to fast track applicants are only reviewable by the Immigration Assessment Authority (IAA), and that the IAA provides a more limited form of merits review than other independent bodies (for example, the Administrative Appeals Tribunal).

In light of these matters, the committee considers that if it is necessary to designate classes of persons as 'fast track applicants', this should be done by primary, rather than delegated, legislation. This view is shared by the Senate Standing Committee for the Scrutiny of Bills. Accordingly, although the committee has concluded its examination of this particular instrument, it will continue to monitor this general issue into the future.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Kim Carr
Acting Chair
Senate Standing Committee on Regulations and Ordinances

AUSTRALIAN SENATE

Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra ACT 2600
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18 September 2019

Senator the Hon Jonathon Duniam
Assistant Minister for Forestry and Fisheries
Parliament House
Canberra ACT 2600
Via email: Senator.Duniam@aph.gov.au
CC: DLO-Duniam@agriculture.gov.au

Dear Assistant Minister,

Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650]

On 3 September 2019, the secretariat received advice from your department that the Australian Fisheries Management Authority (AFMA) had undertaken to revoke the above legislative instrument, in response to concerns raised by the committee secretariat.

The committee welcomed this undertaking, and resolved to place a notice of motion to disallow the instrument while the undertaking remained outstanding. The notice was placed on 16 September 2019. The committee notes that the instrument was revoked on 16 September 2019, in accordance with AFMA's undertaking.[1] The committee has therefore resolved to withdraw the notice of motion to disallow the instrument.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Kim Carr
Acting Chair
Senate Standing Committee on Regulations and Ordinances

1 The instrument was revoked by the Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019 [F2019L01200].

AUSTRALIAN SENATE

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19 September 2019

The Hon Sussan Ley MP
Minister for the Environment
Parliament House
Canberra ACT 2600
Via email: Sussan.Ley.MP@aph.gov.au
CC: DLOley@environment.gov.au

Dear Minister,

Underwater Cultural Heritage Rules 2018 [F2019L00096]

Thank you for your response of 15 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 11 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee takes this opportunity to reiterate that it considers that, as a matter of best practice, it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

In particular, the committee considers that the explanatory statement should outline the reasons provided in your response for incorporating 'relevant government guidelines' and 'relevant international conventions, agreements and treaties', and information regarding where the documents maybe accessed (that is, on the department's dedicated webpage).

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Kim Carr
Acting Chair
Senate Standing Committee on Regulations and Ordinances

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19 September 2019

The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

Dear Minister,

Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]

Thank you for your letter of 11 September 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your letter at its private meeting on 18 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument. Consequently, the committee has also resolved to withdraw the notice of motion to disallow the instrument, which was placed on 1 August 2019.

The committee welcomes your undertaking to progress amendments to the *Water Act 2007* to remove doubt as to whether the Basin Salinity Management Procedures may be incorporated as in force from time to time. The committee notes that any proposed amendments will require the agreement of the Murray-Darling Basin States. The committee will monitor this undertaking to ensure that it is implemented.

Consistent with your request, the committee has resolved to publish your advice in Chapter 1 of the committee's *Delegated Legislation Monitor 6 of 2019.*

I also note that your undertaking to progress amendments to the Water Act will be recorded in the Monitor, and all correspondence relating to this matter will be published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Kim Carr
Acting Chair
Senate Standing Committee on Regulations and Ordinances