

Monitor 5 – Committee correspondence

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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,

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



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



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.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



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



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



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

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



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

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.



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



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



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



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



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



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



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



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



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



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



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 2018¹ (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 be 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

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

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.



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@homeaffairs.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



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



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



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



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



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



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



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