

Monitor 6 – Ministerial correspondence

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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 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



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



18 September 2019

Senator the Hon Jonathon Duniham
Assistant Minister for Forestry and Fisheries
Parliament House
Canberra ACT 2600
Via email: Senator.Duniham@aph.gov.au
CC: DLO-Duniham@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].



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



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

