The Senate

Standing Committee on Regulations and Ordinances

Delegated Legislation Monitor

Monitor 11 of 2018

19 September 2018

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Steve Martin	Tasmania, NAT
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Secretariat

Ms Anita Coles, Secretary
Ms Laura Sweeney, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Mr Andrew Piper, Legislative Research Officer

Committee legal adviser

Associate Professor Andrew Edgar

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

Contents

Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does 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; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed

1 For further information on the disallowance process and the work of the committee see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.[3]

Guidelines

Guidelines referred to by the committee are published on the committee's website.[4]

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.[5]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[6]

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[7]

---

2 Regulations and Ordinances Committee, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

3 See www.aph.gov.au/regords_monitor.

4 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

5 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

6 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

7 Regulations and Ordinances Committee, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 23 and 29 August 2018 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Guidelines referred to by the committee are published on the committee's website.[1]

Response required

The committee requests an explanation or information from relevant ministers with respect to the following concerns.

Instrument	**Banking (prudential standard) determination No. 4 of 2018 [F2018L01190]**
Purpose	Determines Prudential Standard APS 221 Large Exposures
Authorising legislation	*Banking Act 1959*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[2]

Merits review[3]

1.1 Scrutiny principle 23(3)(c) of the committee's terms of reference 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.

1 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(c).

1.2 The instrument is a prudential standard made under subsection 11AF(1) of the *Banking Act 1959*.[4] It requires authorised deposit-taking institutions (ADIs) to implement prudent measures and to set prudent limits to monitor and control their large exposures and risk concentrations.[5]

1.3 Section 30 of the instrument provides that the aggregate large exposures of an ADI to a counterparty (for example, the other party to a loan agreement) or a group of connected counterparties must not exceed 25 per cent of the ADI's Tier 1 Capital, except in certain prescribed circumstances. Section 31 provides that, notwithstanding section 30, the Australian Prudential Regulation Authority (APRA) may set specific limits on an ADI's exposures to particular counterparties, groups of connected counterparties, countries or asset classes, including property holdings and any other investments, having regard to the ADI's individual circumstances.

1.4 Section 36 of the instrument also provides that an ADI must obtain approval from the APRA prior to undertaking any proposed exposures which would exceed the large exposure limits set out in section 30, or any specific limits determined under section 31. Section 36 further provides that such approval will only be granted on an exceptions basis, taking into consideration a number of prescribed matters.[6]

1.5 It appears to the committee that decisions by APRA under sections 31 and 36 of the instrument involve at least an element of discretion. Moreover, it appears that these decisions have the potential to affect the financial interests (for example, the ability to make certain financial arrangements) of the ADIs to which they apply. Consequently, it appears that decisions by APRA under sections 31 and 36 of the instrument may be suitable for merits review. However, neither the instrument nor the explanatory statement (ES) indicates whether these decisions are reviewable.

---

4 The instrument specifies that it is made under subsection 11AF(1) of the *Banking Act 1959.* However, it does not specify the paragraph under which it is made. In this regard, the committee notes that subsection 11AF(7A) provides that standards referred to in paragraph 11AF(1)(d), and instruments varying or revoking standards made that paragraph, are not legislative instruments. Subsection 11AF(7B) provides that other instruments made under section 11AF are legislative instruments.

5 An exposure (e.g. a loan) is generally defined as a 'large exposure' where it is equal to or above 10 per cent of an ADI's eligible capital base. 'Risk concentrations' refers broadly to matters such as asset exposures; reliance on concentrated funding sources; etc. See Basel Commission on Banking Supervision, *Standards: Supervisory framework for measuring and controlling large exposures,* https://www.bis.org/publ/bcbs283.pdf.

6 The matters prescribed are: the individual circumstances of the ADI, the ADI's assessment of the concentration risks involved with exceeding the large exposure limits and why the proposed exposures will not unreasonably expose the ADI to excessive risk; and the ADI's assessment of how the proposed exposures are consistent with its large exposures and risk concentration policies.

1.6 The committee requests the minister's advice as to:

- **whether decisions by the Australian Prudential Regulation Authority to set limits on particular exposures (section 31), and to approve exposures that would exceed certain exposure limits (section 36), are subject to merits review; and**
- **if not, the characteristics of those decisions that would justify excluding merits review.**

Instrument	**Carbon Credits (Carbon Farming Initiative—Industrial Equipment Upgrades) Methodology Determination 2018 [F2018L01206]**
Purpose	Sets out rules for implementing and monitoring offsets projects that reduce emissions associated with the electricity and fuel consumption of industrial and similar equipment
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[7]

Incorporation of documents[8]

1.7 The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

1.8 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 ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate

7 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

8 Scrutiny principle: Senate Standing Order 23(3)(c).

where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[9]

1.9 With reference to these matters, the committee notes that the instrument incorporates the standard AS 4777, as in force from time to time. The ES provides a web reference for where this standard may be accessed.[10] However, the committee secretariat's research indicates that the standard may only be accessed on payment of a fee. Additionally, the committee notes that the web page provided lists a number of Australian standards commencing '4777'. It is therefore unclear to the committee whether 'AS 4777' is the full title of the incorporated standard.

1.10 The instrument also appears to incorporate the following standards, as in force in October 2014:

- AS/NZS 3598:2014.1 Energy Audits—Commercial Buildings; and
- AS/NZS 3598:2014.2 Energy Audits—Industrial and related activities.[11]

1.11 The ES provides a web reference where each of the standards may be accessed.[12] However, the committee secretariat's research indicates that the standards are only available for a fee. With respect to AS/NZS 3598:2014.1 and AS/NZS 3598:2014.2, the ES also states that '[e]nergy service providers who provide energy audits…would be expected to already have copies of these Australian Standards'.[13]

1.12 The committee acknowledges that anticipated users of the instrument (for example, certain energy service providers) are likely to be in possession of, or able to access, the incorporated standards. However, in addition to access for energy service providers, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

1.13 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. The issue of access to material incorporated into law by reference to external documents, such as

---

9 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.

10 The web reference provided for the standard is www.standards.org.au.

11 These two standards may also have been mistitled in the instrument. In this regard, it appears that AS/NZS 3598:2014.1 should be titled AS/NZS 3598:1.2014, and AS/NZS 3598:2014.2 should be titled AS/NZS 3598:2.2014.

12 The web reference provided for each of the standards is www.standards.org.au.

13 ES, p. 12.

Australian and international standards, has been one of ongoing concern to this committee and other Australian parliamentary scrutiny committees. In 2016, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.[14]

1.14 The committee's expectation, at a minimum, is that consideration be given to any means by which documents incorporated by reference into delegated legislation are or may be made freely available. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

1.15 The committee requests the minister's advice as to where the standards incorporated by the instrument may be accessed free of charge; and requests that the explanatory statement be updated to include this information.

Compliance with authorising legislation[15]

1.16 Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation, as well as any constitutional or other applicable legal requirements.

1.17 The instrument is a methodology determination made under subsection 106(1) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (authorising legislation). It sets out rules for implementing and monitoring offsets projects that reduce emissions associated with the electricity and fuel consumption of industrial and similar equipment.

1.18 Subsection 106(2) of the authorising legislation provides that, before making a methodology determination, the minister must request the Emissions Reduction Assurance Committee (ERAC) to advise whether the minister should make the determination. The minister must have regard to any advice provided by the ERAC,

---

14 Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Thirty-Ninth Parliament, Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3.

15 Scrutiny principle: Senate Standing Order 23(3)(c).

as well as a number of other prescribed matters,[16] when deciding whether to make the methodology determination. Additionally, subsection 106(11) provides that, if the minister decides to make a methodology determination, the minister must cause a copy of any advice given by the ERAC in relation to the determination to be published on the department's website. The minister must cause the advice to be published as soon as reasonably practicable after making the decision.

1.19 In relation to these requirements, the explanatory statement (ES) to the instrument states:

> Subsection 106(1) of the Act empowers the Minister to make, by legislative instrument, a methodology determination…
>
> In deciding to make a methodology determination the Minister must have regard to the advice of the Emissions Reduction Assurance Committee, an independent expert panel established to advise the Minister on proposals for methodology determinations. The Minister must not make or vary a methodology if the Emissions Reduction Assurance Committee advises the Minister it is inconsistent with the offsets integrity standard, set out in section 133 of the Act. The Minister will also consider any adverse environmental, economic or social impacts likely to arise as a result of project to which the determination applies.[17]

1.20 However, while the ES outlines the requirements that apply to the making of methodology determinations under section 106 of the authorising legislation, it does not explain whether these requirements were complied with in this instance. Further, although subsection 106(11) requires the advice given by ERAC be published as soon as reasonably practicable after the minister has made the decision, the advice does not appear to be readily accessible on the department's website. It is therefore unclear to the committee whether all of the requirements in section 106 of the authorising legislation have been satisfied.

1.21 The committee requests the minister's advice as to:

- **whether, prior to making the instrument, the minister complied with the conditions set out in section 106 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*; and**

16 Subsection 106(4) of the authorising legislation provides that, in deciding whether to make a methodology determination, the minister must have regard to: whether the determination complies with the offset integrity standards; any advice given to the minister by the ERAC; whether any adverse environmental, economic or social impacts are likely to arise from the carrying out of the kind of project to which the determination applies; and any other matters the minister considers relevant.

17 ES, p. 1.

- **if so, the web address where the advice sought and obtained from the Emissions Reduction Assurance Committee may be accessed.**

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2018 [F2018L01195]**
Purpose	Determines Reporting Standard ARS 221.0 Large Exposures
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[18]

Incorporation of documents[19]

1.22 The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

1.23 The manner in which the material is incorporated must be authorised by legislation.

1.24 Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act, a Commonwealth disallowable legislative instrument or rules of court, with or without modification, as in force at a particular time or as in force from time to time.

1.25 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative

18 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

19 Scrutiny principle: Senate Standing Order 23(3)(a).

instrument commences, or at a time before its commencement. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

1.26 The committee therefore expects instruments or their explanatory statements (ES) 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. This enables persons interested in or affected by an instrument to understand 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*.[20]

1.27 With reference to the above, the committee notes that the definitions of 'counterparty country' and 'legal entity identifier' appear to rely on codes defined under or issued in accordance with two international standards: ISO 3166 and ISO 17442.[21] The ES states that 'the ISO standards, LEI database, country names or LEI codes are not intended to be incorporated into ARS 221.0'.[22] However, given that entities to which the instrument applies must use the codes to comply with certain requirements, it is unclear to the committee that these standards are not incorporated.

1.28 The committee notes that web references are provided for browsing platforms and databases where the codes defined under or issued in accordance with the standards may be accessed.[23] However, neither the instrument nor its ES indicates the manner in which the standards are incorporated (that is, whether the standards are incorporated from time to time or as at a particular date).

1.29 The committee notes that the enabling legislation for the instrument allows for the incorporation of documents as in force from time to time. However, it appears that the exercise of that power is restricted to making provision for matters

---

20 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.

21 See Reporting Form ARF 221.0 Large Exposures, Instruction Guide, pp. 3-4; Reporting Form ARF 221.0 Large Exposures – Foreign ADI, Instruction Guide, p. 3.

22 ES, p. 2.

23 In relation to the country codes defined under ISO 3166, the web address provided is http://www.iso.org/iso/country_codes. In relation to the legal entity identifier codes issued in accordance with ISO 17442, the address provided is https://www.gleif.org/en/lei/search.

related to the reporting of amounts for the purposes of the *Major Bank Levy Act 2017*.[24] It is therefore unclear to the committee whether the power to incorporate documents as in force from time to time extends to the international standards that appear to be incorporated by the instrument.

1.30 The committee requests the minister's advice as to:

- **whether the standards identified above (ISO 3166 and ISO 17442) are incorporated in the instrument and if not, why not;**
- **if the standards are incorporated, the manner in which they are incorporated; and**
- **if it is intended to incorporate these standards as in force from time to time, the provision in the enabling legislation or other Commonwealth law relied on to incorporate the standards in this manner.**

Instrument	**Other Grants Guidelines (Education) Amendment (No. 1) 2018 [F2018L01172]**
Purpose	Specifies the Regional Study Hubs Program as a program under which grants are paid to support open access to higher education across Australia
Authorising legislation	*Higher Education Support Act 2003*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[25]

Merits review[26]

1.31 Scrutiny principle 23(3)(c) of the committee's terms of reference 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.

24 See subsections 13(2B) and (2C) of the *Financial Sector (Collection of Data) Act 2001.*

25 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

26 Scrutiny principle: Senate Standing Order 23(3)(c).

1.32 The instrument amends the Other Grants Guidelines (Education) 2012 (Principal Guidelines) to specify the Regional Study Hubs Program (RSHP) as a program under which grants are to be paid for the purpose of activities that support open access to higher education across Australia.

1.33 Section 7C.10 of the instrument sets out the eligibility criteria for grants under the RSHP. Subsection 7C.10.1 specifies certain entities that are eligible for a grant under the program.[27] Subsection 7C.10.1 provides that certain bodies corporate[28] are not eligible to receive a grant under the RSHP unless the minister is satisfied that:

- the body corporate, and each person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the body's affairs, is a fit and proper person within the meaning of the *Higher Education Support Act 2003* (HES Act); and
- the body corporate is financially viable.

1.34 It appears to the committee that decisions by the minister in relation to the provision of grants under the RSHP may involve at least an element of discretion. Moreover, a decision to refuse to provide a grant has the potential to affect the interests of grant applicants. It therefore appears that decisions by the minister in relation to the provision of grants under the RSHP may be suitable for merits review.

1.35 However, neither the instrument nor its explanatory statement (ES) indicates whether decisions regarding the provision of grants are subject to merits review. Moreover, it does not appear that either the HES Act or the Principal Guidelines provides for merits review of decisions made under the RSHP.

1.36 The committee requests the minister's advice as to:

- **whether decisions by the minister in relation to the provision of grants under the Regional Study Hubs Program are subject to merits review; and**
- **if not, the characteristics of those decisions that would justify excluding merits review.**

---

27 The entities specified under subsection 7C.10.1 include bodies corporate that the minister is satisfied has, or will have, a physical operational presence in regional or remote Australia; bodies corporate that are registered entities within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Charities Act); 'Table A providers' and 'Table B providers' within the meaning of the *Higher Education Support Act 2003*; and higher education providers to which the minister has allocated Commonwealth supported places.

28 That is, bodies corporate specified under paragraph 7C.10.1(a) and (b), which include bodies corporate with an operational presence in regional or remote Australia, and registered entities within the meaning of the Charities Act.

Instrument	**Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018 [F2018L01185]**
Purpose	Exempts Corrective Services NSW from certain requirements in the *Radiocommunications Act 1992* relating to mobile telecommunications service jamming devices
Authorising legislation	*Radiocommunications Act 1992*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[29]

Access to incorporated documents[30]

1.37 The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times. Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement (ES) to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

1.38 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 ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[31]

1.39 With regard to these matters, the committee notes that the instrument appears to incorporate the following documents, as in force from time to time:

- a map of the Lithgow Correctional Centre approved by the Australian Communications and Media Authority (ACMA) for the purpose of the definition of 'field zone' in section 4 of the instrument; and

29 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

30 Scrutiny principle: Senate Standing Order 23(3)(a).

31 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.

- the written agreement referred to in the definition of 'nominated PMTS jamming device' in section 4 of the instrument.

1.40 The ES to the instrument states that the map of the LCC is available on the ACMA website.[32] However, the ES does not provide a specific web address at which the map is located, and the committee's secretariat has not been able to locate the map at the address provided. Further, neither the ES nor the instrument indicates where the written agreement may be accessed.

1.41 The committee's expectation, at a minimum, is that consideration be given to any means by which documents incorporated by reference into delegated legislation are or may be made freely available. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Details of any means of accessing identified or established should be reflected in the ES to the instrument.

1.42 The committee requests the minister's advice as to how the documents incorporated by the instrument may be accessed free of charge; and requests that the explanatory statement be amended to include this information.

1.43 With regard to the map of the Lithgow Correctional Centre, it would assist the committee if the minister's response would provide a reference to the specific web address where the document may be accessed.

32 See www.acma.gov.au.

Instrument	**Safety, Rehabilitation and Compensation (Catastrophic Injury) Rules 2018 [F2018L01160]** **Seafarers Rehabilitation and Compensation (Catastrophic Injury) Rules 2018 [F2018L01161]**
Purpose	Sets the conditions for when an injury will be a 'catastrophic injury' for workers' compensation purposes
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988* *Seafarers Rehabilitation and Compensation Act 1992*
Portfolio	Jobs and Small Business
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[33]

Personal rights and liberties: privacy[34]

1.44 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

1.45 The instruments set out the conditions for when certain kinds of injury will be classified as 'catastrophic injuries' for the purposes of the *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation and Compensation Act 1992*.[35] Two of the classes of injury classified as 'catastrophic injuries'[36] under the instruments require that the impairment of the person who has sustained the injury

33 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

34 Scrutiny principle: Senate Standing Order 23(3)(b).

35 Compensation under the *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation Act 1992* in relation to injuries classified 'catastrophic' is not capped as it is for non-catastrophic injuries.

36 That is, 'catastrophic brain injury' (section 8) and 'catastrophic burn injury' (section 10).

be assessed at a score of five or less on the Functional Independence Measure (FIM).[37] A 'score sheet' for the FIM is included at Schedule 1 to the instrument.

1.46 The committee notes that the FIM assesses an injured person's ability to perform functions such as eating, grooming and dressing, their continence, and their ability to move independently. It therefore appears that the completion of the FIM may involve the collection of a substantial amount of highly personal information relating to injured persons.

1.47 The ES to the instrument explains that the FIM is widely used in Australia by medical and health professionals. The ES also states that the FIM assessment must be carried out by a person who has been trained in the use of the FIM, and is credentialed in the use of the FIM at the time of the relevant assessment.[38]

1.48 However, the ES does not provide any further information regarding how the FIM assessment is carried out and neither the ES nor the statement of compatibility discusses the privacy implications of the FIM assessment. In particular, neither the ES no the statement of compatibility addresses how personal information collected in the course of the assessment will be used and managed, where the disclosure of information to third parties is permitted, and whether there are any safeguards in place to protect the privacy of individuals to whom the information relates.

1.49 The committee requests the minister's advice as to:

- **how the Functional Independence Measure will be carried out for the purposes of the instrument;**
- **how personal information collected in the course of conducting the assessment will be used and managed; and**
- **what safeguards are in place to protect individuals' privacy in relation to that information.**

37 The explanatory statement (ES) to the instrument explains that the FIM is a basic indicator of severity of functional limitation that uses a seven-point scale for each of 18 activities of daily living. The scale provides for the classification of individuals by their ability to carry out an activity independently, compared with their need for assistance from another person or service. A score of five or less indicates that the person needs either supervision or assistance with the relevant activity.

38 ES, p. 2.

Further response required

The committee requests further explanation or information from relevant ministers with respect to the following concerns.

Correspondence relating to these matters is published on the committee's website.[39]

Instrument	**Australian Radiation Protection and Nuclear Safety Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00850]** **Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00851]**
Purpose	Amend the Australian Radiation Protection and Nuclear Safety Regulations 1999 to amend license conditions, increase licence application fees, update incorporated standards and codes, and address other minor issues
Authorising legislation	*Australian Radiation Protection and Nuclear Safety Act 1998* *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018). Notice of motion to disallow must be given by 17 September 2018[40]

Access to incorporated documents[41]

1.50 In *Delegated legislation monitor 8 of 2018*[42] the committee requested the minister's advice as to how the four Australian and New Zealand standards incorporated in the instruments are or may be made readily and freely available to persons interested in or affected by the instruments; and requested that the explanatory statements be amended to include this information.

---

39 See www.aph.gov.au/regords_monitor.

40 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

41 Scrutiny principle: Senate Standing Order 23(3)(a).

42 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 3-5.

Minister's response

1.51 The Minister for Regional Services advised:

> The Australian/New Zealand Standards that have been incorporated by reference into both Regulations are copyrighted to Standards Australia who have been designated by the Australian Government as the nation's peak non-government standards development organisation and who have exclusively licenced SAI Global to publish standards developed by it. Other than accessing a copy, where available, at a public library, there is no alternative method to legally obtain Australian Standards free-of-charge.
>
> Please note that both Regulations only apply to the Australian Radiation Protection and Nuclear Safety Agency's licence holders and potential licence holders, which are other Commonwealth departments or agencies. Therefore, in this context, these standards would only affect a small number of technical and scientific personnel from Commonwealth entities and not the general public.

Committee's response

1.52 The committee thanks the minister for her response, and notes the minister's advice that the incorporated standards are copyrighted to Standards Australia. In this regard, the committee notes the advice that there is no method to legally obtain the standards free of charge other than accessing a copy, where available, at a public library. The committee also notes the minister's advice that the standards would only affect a small number of technical and scientific personnel from Commonwealth entities, and not the general public.

1.53 The committee acknowledges that the standards incorporated by the instrument may affect only a small number of key users. However, in addition to access for these persons and entities, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

1.54 The committee reiterates 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. Where documents (including standards) are incorporated by reference into an instrument, the committee's expectation is that, at a minimum, consideration be given to any means by which those documents may be made available free of charge to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the documents available for viewing on request, for example, viewing at Australian Radiation Protection and Nuclear Safety Agency offices.

1.55 In this regard, the committee notes that while the minister's response indicates that some standards copyrighted by Standards Australia may be available

through public libraries, it does not indicate whether this means of access is available in relation to the standards incorporated by these instruments.

1.9 The committee requests the minister's further advice as to whether the standards incorporated by reference in these instruments:

- **can be made available for viewing without charge at the Australian Radiation Protection and Nuclear Safety Agency offices; and**
- **are, or can be made, available through public libraries (and if so, which public libraries).**

Advice only

The committee draws the following matters to the attention of relevant ministers and instrument-makers on an advice only basis.

Instrument	**Higher Education Support (Maximum Payments for Indigenous Student Assistance Grants) Determination 2016 [F2017C01128]** **Higher Education Support Amendment (Maximum Payments for Indigenous Student Assistance Grants) Determination 2017 [F2017L01564]**
Purpose	[F2017C01128]: Sets the total maximum payments made under Part 2-2A of the *Higher Education Support Act 2003* in respect of the years 2017 to 2021 [F2017L01564]: Increases the total maximum payments made under Part 2-2A of the *Higher Education Support Act 2003* in respect of the years 2018 to 2021
Authorising legislation	*Higher Education Support Act 2003*
Portfolio	Prime Minister and Cabinet
Disallowance	The disallowance period for both instruments has passed[43]

Parliamentary oversight: registration of incorrect version of instrument[44]

1.56 The Higher Education Support (Maximum Payments for Indigenous Student Assistance Grants) Determination 2016 (Principal Determination) sets the maximum amount of grant payments that may be made under Part 2-A of the *Higher Education Support Act 2003* (HES) Act for each of the years from 2017 to 2021. The Higher Education Support Amendment (Maximum Payments for Indigenous Student Assistance Grants) Determination 2017 (Amending Determination) amended the

43 [F2017L01564] was tabled in the Senate on 6 December 2017. The applicable disallowance period expired on 27 March 2018. [F2017C01128] is a compilation instrument. The principal instrument ([F2016L02000]) was tabled in the Senate on 7 February 2017. The applicable disallowance period expired on 9 May 2017.

44 Scrutiny principle: Senate Standing Order 23(3)(a).

Principal Determination to increase the maximum amount of grant payments for the years 2018-2021 from $67,472,900 to $68,484,000.

1.57 The Amending Determination was initially registered on 4 December 2017. It was tabled in the Senate on 6 December 2017 and in the House of Representatives on 5 December 2017. On 29 August 2018, the Amending Determination was corrected by the Office of Parliamentary Council (OPC), on the Federal Register of Legislation (FRL), to increase the maximum amount of grant payments set by the Principal Determination for each of the years 2018 to 2021 by $1000.[45] On the same date, the Principal Determination was similarly corrected on the FRL to reflect the changes made to the Amending Determination.

1.58 No replacement explanatory statement was registered for either the Amending Determination or the Principal Determination. The only information in regard to the correction of the instruments appears in a note by OPC in the FRL, which states that the corrections were to 'correct the dollar figures…to reflect the original…instrument as signed by the rule-maker'.[46]

1.59 It appears to the committee that the instruments were corrected using section 15D of the *Legislation Act 2003* (Legislation Act). Section 15D provides that if the First Parliamentary Counsel (FPC) is satisfied there is a mistake, omission or other error in the FRL consisting of an error in the text of an Act or legislative instrument, or of a compilation of an Act or such an instrument, the FPC must correct the error as soon as possible. The FPC must also include on the FRL a statement outlining the correction in general terms. There is currently no requirement in section 15D that the corrected version of an instrument be tabled in Parliament.[47]

1.60 The committee has previously commented on the operation of section 15D when it was used to make substantive corrections to other instruments after they were registered on the FRL and tabled in Parliament.[48] The committee expressed

---

45 That is, from $67,484,000 to $67,485,000.

46 https://www.legislation.gov.au/Details/F2017C01128/Download (Principal Determination); https://www.legislation.gov.au/Details/F2017L01564/Download (Amending Determination).

47 In this regard, the committee notes that the Legislation Act has been amended by the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* (Amendment Act) to provide that instruments 'rectified' under section 15D must be re-tabled in the Parliament. The amendments also provide that, where an instrument is re-tabled following rectification, it becomes subject to disallowance under the Legislation Act from the date of re-tabling. However, these amendments have not yet commenced (they are to commence at a date fixed by proclamation, or six months from the date the Amendment Act received Royal Assent; that is, six months from 24 August 2018).

48 See Joint Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 1 of 2018,* pp. 23-26; *Delegated legislation monitor 3 of 2018*, pp. 66-72; *Delegated legislation monitor 5 of 2018*, pp. 35-37; *Delegated legislation monitor 6 of 2018*, pp. 94-98.

concerns on those occasions that using section 15D to make substantive corrections does not appear to fit within the circumstances envisaged by that section. The committee was also concerned that using an administrative process to make substantive changes to an instrument after it has been tabled could have significant adverse impacts on parliamentary oversight. This is because, as there is currently no statutory requirement to table a corrected version of an instrument in Parliament, changes made under section 15D may not be brought to the attention of parliamentarians. Members and senators may therefore lose the opportunity to consider the correct version of the instrument during all or part of the applicable disallowance period.

1.61 In this instance, the correction to the Amending Determination and the Principal Determination occurred more than nine months after those instruments were tabled in Parliament. Consequently, it appears that members and senators lost the opportunity to consider the correct version of the instrument during the applicable disallowance period.

1.62 The committee therefore reiterates its concern that, in general, using an administrative process to correct an instrument on the FRL, particularly so long after the instrument has been tabled in Parliament, has the potential to seriously undermine parliamentary scrutiny. The committee also reiterates its view that any substantive changes to a legislative instrument should be brought about by amending or re-making the instrument. The committee further emphasises that making and registering legislative instruments should be undertaken with sufficient care to ensure that incorrect versions of instruments are not registered and tabled.

1.63 The committee draws the registration of incorrect versions of the instruments identified above, and the subsequent correction of those instruments on the Federal Register of Legislation, to the attention of the minister and the Senate.

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

Correspondence relating to these matters is available on the committee's website.[1]

Instrument	**Australian Prudential Regulation Authority (confidentiality) determination No. 1 of 2018 [F2018L00765]**
Purpose	Provides that certain information given to the Australian Prudential Regulation Authority is to be non-confidential
Authorising legislation	*Australian Prudential Regulation Authority Act 1998*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018). Notice of motion to disallow must be given by 23 August 2018.[2]

Consultation[3]

1.1 In *Delegated legislation monitor 8 of 2018*[4] the committee requested the Treasurer's advice as to whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or, if no consultation was undertaken, why not. The committee also requested that the explanatory statement (ES) to the instrument be updated to include this information.

Treasurer's response

1.2 The Treasurer advised that:

> The instrument determines certain data provided to the Australian Prudential Regulation Authority (APRA) by general insurers and Lloyds non-confidential for the purposes of an annual publication by APRA called

1 See www.aph.gov.au/regords_monitor.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(a).

4 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, pp. 1-3.

the National Claims and Policies Database (NCPD). The data is provided to APRA on a half-yearly basis under six reporting standards determined under the Financial Sector (Collection of Data) Act 2001.

I note the Committee's concerns that the Explanatory Statement to the instrument does not provide information on any consultations undertaken, as required under paragraphs 15J(2)(d) and (e) of the Legislation Act 2001.

I have raised the Committee's concerns with APRA. They have advised me that as set out in the Explanatory Statement of the 2018 Determination, APRA conducted extensive external consultations in 2008 and 2009 for the purpose of determining data provided by general insurers and Lloyd non-confidential for the NCPD. In 2010, APRA determined the data non-confidential for the NCPD after considering responses to the consultation and being satisfied the consultation was appropriate and reasonably practicable.

Since 2010, APRA has determined the same types of data, as submitted by general insurers and Lloyds every six months, non-confidential. The population of general insurers whose data is determined non-confidential has remained substantially the same since 2010. There are a small number of new entrants to the reporting population, all of whom were aware at the time of authorisation that certain data they report to APRA is made non-confidential for publication purposes. The new entrants had opportunity to raise concerns about non-confidentiality determinations during their authorisation process, and had access to all non-confidentiality determinations on the Federal Register of Legislation. On this basis, APRA has made similar legislative instruments determining certain data provided to APRA by general insurers and Lloyds non-confidential since 2010.

APRA did not consider that further consultation was necessary in relation to the 2018 Determination. APRA is satisfied that the extensive external consultations in 2008 and 2009 continue to be to be appropriate in relation to the 2018 Determination.

However, in response to the Committee's concerns, APRA has agreed to lodge a replacement Explanatory Statement for inclusion on the Register of Legislative Instruments, which outlines the reasons above.

Committee's response

1.3 The committee thanks the Treasurer for his response, and notes the Treasurer's advice that the Australian Prudential Regulation Authority (APRA) conducted extensive external consultation in 2008 and 2009 in relation to matters covered by the instrument. The committee also notes the advice that the population of general insurers whose data is determined to be non-confidential has remained substantially the same since 2010, and that the small number of new entrants to the reporting population have had the opportunity to raise concerns about non-confidentiality determinations during their authorisation process.

1.4 The committee further notes the Treasurer's advice that APRA did not consider that further consultation was necessary in relation to the present instrument, as APRA is satisfied that the consultation undertaken in 2008 and 2009 remains appropriate.

1.5 The committee notes the Treasurer's undertaking to lodge a replacement ES, including the information provided in the Treasurer's response, for registration on the Federal Register of Legislation.

1.6 The committee has concluded its examination of the instrument.

Instrument	**Competition and Consumer (Airservices Australia Prices Surveillance) Declaration 2018 [F2018L01013]**
Purpose	Requires Airservices Australia to notify the Australian Competition and Consumer Commission before increasing the price of certain services
Authorising legislation	*Competition and Consumer Act 2010*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow must be given by 20 September 2018[5]

No statement of compatibility[6]

1.7 In *Delegated legislation monitor 9 of 2018*[7] the committee requested the minister's advice as to why a statement of compatibility with human rights was not included in the explanatory statement (ES) to the instrument; and requested that the ES be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

Treasurer's response

1.8 The Treasurer advised:

> Unfortunately, due to an oversight in drafting the Explanatory Statement that accompanied the Declaration, a Statement of Compatibility with Human Rights was not included.

5 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

6 Scrutiny principle: Senate Standing Order 23(3)(a).

7 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at p. 6.

> I can advise the Committee that I have taken steps to amend the Explanatory Statement in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*. The revised Explanatory Statement will be lodged shortly on the Federal Register of Legislation.

Committee's response

1.9 The committee thanks the Treasurer for his response, and notes the Treasurer's advice that the omission of the statement of compatibility was due to an oversight in the process of drafting the ES.

1.10 The committee notes that a replacement ES, which includes a statement of compatibility with human rights, has been provided to the committee and registered on the Federal Register of Legislation.

1.11 The committee has concluded its examination of the instrument.

Instrument	**Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503]**
Purpose	Amends the Customs (Prohibited Exports) Regulations 1958 in relation to the export of goods on the Defence and Strategic Goods List, including adding new decision-making criteria for export permits, enhanced powers to revoke permits, and a process for review of decisions
Authorising legislation	*Customs Act 1901*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 8 May 2018). Notice of motion to disallow must be given by 20 August 2018[8]
Previously reported in	*Delegated legislation monitor 6 of 2018*

Merits review[9]

1.12 The committee initially scrutinised this instrument in *Delegated legislation monitor 6 of 2018*[10] and sought the minister's advice. The committee considered the

8 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

9 Scrutiny principle: Senate Standing Order 23(3)(c).

10 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 6 of 2018*, at pp. 12-17.

response provided by the Minister for Law Enforcement and Cyber Security in *Delegated legislation monitor 8 of 2018*[11] and requested further advice as to the need for the minister's power to withhold reasons from an applicant on the grounds of prejudice to the security, defence or international relations of Australia. The committee raised this question in light of the existing provisions in the *Administrative Appeals Tribunal Act 1975* for the Attorney-General to issue a public interest certificate to restrict disclosure of matters relating to a reviewable decision, where the disclosure would prejudice the security, defence or international relations of Australia.

Assistant Minister's response

1.13 The Assistant Minister for Home Affairs advised:

> The Amendment Regulations amend the Customs (Prohibited Exports) Regulations 1958 (Principal Regulations) to, among other modifications, introduce an ability for certain decisions to be reviewed by the Administrative Appeals Tribunal, and to impose a requirement for the decision-maker to provide reasons where they make an adverse decision - except to the extent that the disclosure of those reasons would prejudice the security, defence or international relations of Australia.
>
> The requirement in the Amendment Regulations for the Minister for Defence (the Minister) to withhold reasons is necessary to ensure consistency in the administration of Australia's defence export control framework. Specifically, it aligns the requirements on the Minister concerning the disclosure of certain information in the Principal Regulations with the position that exists in related export control legislation.
>
> Australia's defence export controls are underpinned by four key pieces of legislation, including the *Defence Trade Controls Act 2012* (DTC Act) and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (WMD Act). The DTC Act and the WMD Act require the Minister to provide reasons to an applicant when making certain adverse decisions. However, section 68 of the DTC Act and regulation 5 of the Weapons of Mass Destruction Regulations 1995 prohibit the Minister from including reasons where it would prejudice the security, defence or international relations of Australia, or where disclosure is not in the national interest.
>
> The powers in Australia's defence export control framework overlap in certain respects. In particular, the Minister regularly receives applications under both the Principal Regulations and the OTC Act for permission to export and supply the same controlled technology to the same destination and end user, with one application being for physical transfer and one for intangible transfer of the technology. In such situations, the risks and

11 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 51-55.

considerations relating to the export and supply are generally the same. Accordingly, the Minister's reasons for refusing permission are likely to be identical under both the Principal Regulations and DTC Act.

The inclusion of the requirement for the Minister to withhold reasons in the Amendment Regulations addresses the inconsistency that would arise if the Minister was required to withhold reasons under the OTC Act, but was required to disclose those same reasons under the Principal Regulations unless the Attorney-General had issued a public interest certificate under subsection 28(2) of the AAT Act.

Finally, the Department of Defence notes that the withholding of reasons does not preclude an applicant from seeking merits review of a Minister's decision by the Administrative Appeals Tribunal (the Tribunal). In this regard, if an applicant applied to the Tribunal for review of the Minister's decision, the Minister is required under section 37 of the AAT Act to lodge a statement with the Tribunal and the applicant that:

- sets out the findings on material questions of fact;
- refers to the evidence for the findings;
- gives reasons for the decision; and
- includes every document that is in the decision maker's possession or control that is relevant to the review.

At this point, the Minister would be required to include the reasons and documents which the Minister did not disclose to the applicant in the statement of reasons, due to concerns of prejudice to security, defence or international relations under regulation 13EH of the Defence Amendment Regulations unless:

- the AAT agrees that the information should be prohibited or restricted from disclosure (as per subsection 35(4) of the AAT Act); or
- the Attorney-General issues a public interest certificate requiring the Tribunal to not disclose the information (as per section 36 of the AAT Act).

The Minister is best placed to assess whether the disclosure of reasons for refusing an application to export defence and strategic goods would prejudice the security, defence or international relations of Australia.

The Amendment Regulations will align the Principal Regulations with the position in related legislation and ensure the requirements on the Minister concerning the release of information is consistent across Australia's defence export control framework.

Committee's response

1.14 The committee thanks the Assistant Minister for her response, and notes the Assistant Minister's advice that the power in section 13EH of the Customs (Prohibited Exports) Regulations 1958 (Principal Regulations) for the Minister for Defence to withold reasons for decisions, where disclosure of those reasons would prejudice the

security, defence or international relations of Australia, is necessary to ensure consistency in the administration of Australia's defence export control framework.

1.15 The committee also notes the Assistant Minister's advice that withholding reasons pursuant to section 13EH of the Principal Regulations does not preclude merits review by the Administrative Appeals Tribunal (AAT). In this regard, the committee notes the Assitant Minister's advice that, if an applicant applied to the AAT for review of a ministerial decision made under the Principal Regulations, the minister would be required to lodge a statement with the AAT and the applicant. The committee notes the advice that, in this statement, the minister would be required to include the reasons and documents that the minister did not include in the statement accompanying the original decision, due to concerns of prejudice to security, defence or international relations.

1.16 The committee further notes the advice that this requirement would apply unless the AAT agrees that the information should be prohibited or restricted from disclosure, or the Attorney-General issues a public interest certificate prohibiting the AAT from disclosing the information.

1.17 The committee considers that it would be appropriate for the information provided by the Assistant Minister 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.

1.18 The committee has concluded its examination of the instrument

Instrument	**Income Tax (Effective Life of Depreciating Assets) Amendment Determination 2018 (No 1) [F2018L00895]**
Purpose	Amends the Income Tax (Effective Life of Depreciating Assets) Determination 2015 to update prescriptions of 'effective lives' for specified assets as a basis to calculate their depreciation for income tax purposes
Authorising legislation	*Income Tax Assessment Act 1997*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[12]

Compliance with authorising legislation[13]

Retrospective effect[14]

1.19 In *Delegated legislation monitor 8 of 2018*[15] the committee requested the Treasurer's advice as to whether the retrospective operation of the provision complies with the conditions set out in subsection 40-100(3) of the *Income Tax Assessment Act 1997* (Income Tax Assessment Act); and whether the operation of the provision would have the effect of disadvantaging any person.

Assistant Treasurer's response

1.20 The Assistant Treasurer advised:

> The Determination does not operate retrospectively and does not disadvantage any person.
>
> Application dates prior to 1 July 2018 are in the amended Determination so these dates may appear to be retrospective. However, in every case the date has not changed from the original determination. There has only been an update to the asset or an extension to the industry listing, which requires the Commissioner to update the original list with new assets. The original application date remains unaltered.

12 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

13 Scrutiny principle: Senate Standing Order 23(3)(a).

14 Scrutiny principle: Senate Standing Order 23(3)(b).

15 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at p. 21-22.

> The details contained in the Determination are influenced by many factors. The Determination is reviewed continuously and updated annually to reflect the most recent changes. Appendix 1 to this letter has four examples of amendments to the Determination. These examples represent all of the changes to the determination.[16]
>
> **Example 1** adds information to the asset descriptor.
>
> **Example 2** updates the date when the effective life of a particular asset was reviewed.
>
> **Example 3** moves a class of assets to become a subclass of another asset type. This amendment was made because the Australian Bureau of Statistics made changes to the Australian and New Zealand Standard Industrial Classification (ANZSIC) Code.
>
> **Example 4** adds additional assets to a class of assets. The original assets in that class are unchanged.
>
> In every case or example both the effective life of the assets and the commencement date remain unchanged. No changes were retrospective and no persons are disadvantaged by the amendments.

Committee's response

1.21 The committee thanks the Assistant Treasurer for his response, and notes the Assistant Treasurer's advice that the instrument does not operate retrospectively and does not disadvantage any person. In this regard, the committee notes the Assistant Treasurer's advice that, while certain application dates may appear to be retrospective, in every case the application date has not changed from the original determination. The committee notes the examples provided by the Assistant Treasurer to support this explanation. The committee further notes that, in light of this information, it appears that subsection 40-100(3) of the Income Tax Assessment Act does not apply to the instruments, as that subsection is only enlivened where a determination operates retrospectively.

1.22 The committee considers that it would be appropriate for the information provided by the Assistant Treasurer 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.

1.23 The committee has concluded its examination of the instrument.

---

16 This is an extract of the minister's response which does not include Appendix 1 (examples of amendments to the determination). The full text of the minister's response is available on the committee's website: see correspondence relating to *Delegated legislation monitor 11 of 2018* available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

Instrument	**Industrial Chemicals (Notification and Assessment) Amendment (Miscellaneous Measures) Regulations 2018 [F2018L01046]**
Purpose	Sets out fees for the registration of industrial chemicals and for services performed under the National Industrial Chemicals Notification and Assessment Scheme, and updates controls on the import and export of certain industrial chemicals
Authorising legislation	*Industrial Chemicals (Notification and Assessment) Act 1989*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[17]

Unclear basis for determining fees[18]

1.24 In *Delegated legislation monitor 9 of 2018*[19] the committee requested the minister's advice as to the basis on which the fees set out in item 1 of Schedule 1 to the instrument have been calculated.

Minister's response

1.25 The Minister for Regional Services advised:

> The basis for calculating fees and charges is detailed in the National Industrial Chemicals Notification and Assessment Scheme Cost Recovery Implementation Statement 2018-19. The Cost Recovery Implementation Statement, prepared in accordance with the Australian Government Charging Framework, was reviewed by the Department of Finance and subject to public consultation, with stakeholder views taken into account in finalising the fees and charges. The certified Cost Recovery Implementation Statement is now available at www.nicnas.gov .au/about-us/how-we-work/cost-recovery-implementation-statement-201819.
>
> Under the *Industrial Chemicals (Notification and Assessment) Act 1989* all importers and manufacturers of industrial chemicals must be registered with National Industrial Chemicals Notification and Assessment Scheme.

17 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

18 Scrutiny principle: Senate Standing Order 23(3)(a).

19 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 10-12.

Registrants are grouped into four levels (A-D), according to the (increasing) value of relevant industrial chemicals introduced in a registration year.

Schedule 2 of the Industrial Chemicals (Notification and Assessment) Regulations 1990 (Principal Regulations amended by this instrument) prescribes, among other fees for services, the annual registration fee payable by all introducers (Levels A-D). In 2018-19, the registration fee is increased by $56 per introducer to match the actual costs of maintaining the Register of Industrial Chemical Introducers.

Regulation 11AB (as amended by item 1 of Schedule 1 of this instrument), sets out the registration charge imposed on introducers with an annual introduction value in excess of $100,000 (Levels B-D only). The total increase in registration charges for 2018-19 is due to two factors:

1. An increase of 5 per cent is applied to the charges (Levels B to D) to accommodate the additional effort required to deliver the regulatory service. This includes both increased costs for business as usual activities and limited expenditure of resources to complete work for reforms to the National Industrial Chemicals Notification and Assessment Scheme (in order to meet the announced commencement date of 1 July 2019).

2. An additional levy of $427,000 is apportioned to Levels B to D based on a sliding scale applied to introduction values. This additional levy was authorised by the 2015-16 Budget Measure (Reducing the Burden of the Industrial Chemicals Regulatory Framework to Industry www.budget.gov .au/2015-16/ content/bp2/html/bp2 expense-14.htm).

Committee's response

1.26 The committee thanks the minister for her response and notes the minister's advice that the increased fees set out in item 1 of Schedule 1 to the instrument have been calculated on a cost recovery basis, in accordance with the National Industrial Chemicals Notification and Assessment Scheme Cost Recovery Implementation Statement 2018-19. The committee notes the examples provided by the minister in this regard.

1.27 Additionally, the committee notes the advice that an additional levy of $427,000 has been apportioned to levels B to D introducers. The committee notes that while this levy has not been imposed on a cost recovery basis, it would appear to be authorised under primary legislation.[20] The committee notes that it would have been useful if the explanatory statement (ES) or minister's response referred expressly to the primary legislation authorising the imposition of the levy.

20 See section 80S of the *Industrial Chemicals (Notification and Assessment) Act 1989*; *Industrial Chemicals (Registration Charges – General) Act 1997*; *Industrial Chemicals (Registration Charges – Customs) Act 1997*; and *Industrial Chemicals (Registration Charges – Excise) Act 1997*

1.28 The committee considers that it would be appropriate for the information provided by the minister to be included in the ES, 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.

1.29 The committee has concluded its examination of the instrument.

Instrument	**Military Rehabilitation and Compensation (Family Support) Instrument (No.2) 2018 [F2018L01016]**
Purpose	Sets out family support benefits and assistance that may be available to members and former members of the Australian Defence Force, and to partners of deceased members, and prescribes associated eligibility criteria
Authorising legislation	*Military Rehabilitation and Compensation Act 2004*
Portfolio	Veterans' Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow must be given by 20 September 2018[21]

Merits review[22]

1.30 In *Delegated legislation monitor 9 of 2018*[23] the committee requested the minister's advice as to whether decisions made by the Military Rehabilitation and Compensation Commission under sections 8 and 14 of the instrument are subject to independent merits review; and, if not, the characteristics of those decisions that would justify their exclusion from merits review.

Minister's response

1.31 The Minister for Veteran's Affairs advised:

> I understand that the Committee has requested my advice as to whether decisions made under sections 8 and 14 of the Instrument are subject to independent merits review.

21 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

22 Scrutiny principle: Senate Standing Order 23(3)(c).

23 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 12-14.

> As you are aware the Instrument addressed recommendation 19 of the Senate Foreign Affairs, Defence and Trade Reference's committee report *The Constant Battle: Suicide by Veterans*.
>
> Recommendation 19, at 6.109, states: *the committee recommends that the Department of Veterans' Affairs review the support of partners of veterans to identify avenues for assistance. This review should include services such as information, advice, counselling, peer support and options for family respite care to support partners of veterans*.
>
> Chapter 8 of the *Military Rehabilitation Compensation Act 2004* (the Act) provides for the review of determinations ('original determinations') made under the Act by the Military Rehabilitation and Compensation Commission (Commission) and the Veterans' Review Board (VRB). Applications may be made to the Administrative Appeals Tribunal (AAT) for review of a determination revoking, varying or confirming an original determination. It follows that decisions of the Commission under section 8 (Part 2) and section 14 (Part 3) of the Instrument, being original determinations, would be subject to the full range of merits review by both the VRB and the AAT.
>
> I understand that it may not be clear that a determination made under an instrument is also a determination made under the Act for the purposes of the definition of '*original determination*' under paragraph 345(1)(a). It is intended that decisions of the Commission under section 8 (Part 2) and section 14 (Part 3) of the Instrument would be subject to independent merits review. An interpretation that excludes merits review of a beneficial scheme would be contrary to the policy objective of the measure.
>
> To facilitate finalisation of this matter, I undertake to ensure that a replacement Explanatory Statement is lodged on the Register of Legislative Instruments as soon as possible, clarifying that Commission determinations made under the Instrument are subject to independent merits review.

Committee's response

1.32 The committee thanks the minister for his response, and notes the minister's advice that it is intended that decisions of the Commission under sections 8 and 14 of the instrument would be subject to the full range of merits review by both the Veterans Review Board and the Administrative Appeals Tribunal.

1.33 The committee also notes the minister's undertaking to lodge for registration on the Federal Register of Legislation a replacement explanatory statement, clarifying that Commission determinations made under the instrument are subject to independent merits review.

1.27 The committee has concluded its examination of the instrument.

Instrument	**Remuneration Tribunal (Compensation for Loss of Office for Holders of Certain Public Offices) Determination 2018 [F2018L00899]** **Remuneration Tribunal (Recreation Leave for Holders of Relevant Offices) Determination 2018 [F2018L00898]**
Purpose	Replace the previous determinations establishing certain entitlements for relevant office holders, with minor amendments to improve clarity and drafting
Authorising legislation	*Remuneration Tribunal Act 1973*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[24]

Description of consultation[25]

1.34 In *Delegated legislation monitor 8 of 2018*[26] the committee requested the minister's advice as to what consultation was undertaken in relation to the instrument; and requested that the explanatory statement be amended to provide that information in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

1.35 The Minister for Finance and the Public Service advised:

> The Committee's Delegated legislation monitor 8 of 2018 requests my advice as to what consultation was undertaken in relation to these instruments. The attached amended explanatory statements advise that no consultation occurred on either instrument given they were redrafted to reflect standard Commonwealth drafting practice and to improve clarity and readability.
>
> Other than the inclusion of two new references in the Recreation Leave Determination, there were no changes to the terms and conditions contained in the previous instruments. The Tribunal's secretariat will arrange for the registration of the amended explanatory statements on the Federal Register of Legislation.

---

24 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

25 Scrutiny principle: Senate Standing Order 23(3)(a).

26 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 35-36.

Committee's response

1.36 The committee thanks the minister for his response, and notes the minister's advice that no consultation was undertaken for these instruments, because the instruments make very minor changes to certain terms and conditions, and otherwise only update references to reflect current drafting practice and to improve readability.

1.37 The committee notes the minister's undertaking to register replacement explanatory statements, which include information as to why no consultation was undertaken in relation to the instruments, on the Federal Register of Legislation.

1.38 The committee has concluded its examination of the instrument.

Senator John Williams (Chair)