The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 10 of 2018

12 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 Shennia Spillane, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Laura Sweeney, 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

Chapter 2 – Concluded matters

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

1.1 This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 3 and 22 August 2018 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

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

Response required

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

Instrument	**Adult Disability Assessment Determination 2018 [F2018L01106]**
Purpose	Sets out a method for assessing the care requirements for adult persons with disability
Authorising legislation	*Social Security Act 1991*
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[2]

Personal rights and liberties: privacy[3]

1.4 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 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)(b).

1.5 Schedule 1 to the instrument sets out two questionnaires about an adult's disability, emotional state, behaviour and special care needs. The questionnaires are one component of the Adult Disability Assessment Tool (ADAT). ADAT assessment is one of the qualification criteria for carer payments and carer allowances under the instrument's authorising legislation (the *Social Security Act 1991)*.

1.6 The first questionnaire may only be completed by a person wishing to claim, or continue to be qualified to receive, a carer allowance or carer payment, while the second questionnaire may only be completed by a 'treating health professional'.[4] Both questionnaires require the respondent to record a range of personal information about the person in care, and to provide this information to the secretary. This includes highly sensitive information about the capacity of the care receiver to care for themselves, their continence, and their cognitive function.

1.7 Neither the explanatory statement to the instrument nor the statement of compatibility addresses the implications of the ADAT assessments for the personal privacy of people with a disability. Specifically, they do not address how the personal information collected in the questionnaires will be managed, whether onward disclosure of the information is permitted, and what safeguards are in place to protect the privacy of care recipients.

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

- **how personal information collected in accordance with the instrument about people with disabilities will be used and managed; and**
- **what safeguards are in place to protect the personal privacy of people with disabilities in relation to that information.**

Merits review[5]

1.9 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.

1.10 The instrument was made under section 38C of the Social Security Act. Section 1.5 of the instrument provides that the secretary may approve a person as a

4 See subsections 2.1(2) and 2.1(4) of the instrument. Section 1.5 of the instrument allows the secretary to approve a person as a 'treating health professional', or a class of persons as 'treating health professionals'.

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

treating health professional, or a class of persons as treating health professionals, for the purposes of the instrument.[6] Neither the instrument nor the ES sets out any matters that the secretary must take into consideration when making this decision.

1.11 Additionally, subsection 2.2(3) of the instrument provides that, if the secretary is not satisfied that the professional questionnaire (as set out above at paragraph [1.6]) is an accurate reflection of an adult care recipient's disability, emotional state, behaviour and special care needs, the secretary must ask for a replacement professional questionnaire to be completed by another treating health professional.

1.12 It appears that decisions by the secretary in relation to the approval of persons as treating health professionals are largely discretionary, and that decisions by the secretary in relation to the completion of a replacement questionnaire may involve at least some discretionary elements. Moreover, both of these decisions have the potential to impact the interests of individuals—particularly the health professional in question and a person wishing to claim a carer allowance or carer payment, as the results of the test conducted by the treating health professional form part of the qualification criteria for carer payments and carer allowances. It therefore appears that decisions by the secretary under section 1.5 and subsection 2.2(3) of the instrument may be suitable for merits review.[7]

1.13 The committee notes that the instrument remakes the Adult Disability Assessment Determination 1999 [F2008COO672] (previous instrument) in largely the same terms. Section 3.1 of the previous instrument expressly provided for review of decisions by the secretary in relation to the approval of persons as treating health professionals and in relation to the completion of replacement questionnaires.[8] However, this provision has been removed in the present instrument. In relation to the removal of section 3.1, the ES states that:

---

6 As outlined above, the instrument sets out two questionnaires which are used to assess the care needs of adult care recipients. One of these questionnaires may only be completed by a treating health professional.

7 In this regard, the committee notes that both of these decisions were reviewable where they were made under the previous version of the instrument. See Administrative Appeals Tribunal, *Decisions Subject to Review* (as at 31 December 2016), http://www.aat.gov.au/AAT/media/AAT/Files/Lists/Reviewable-decisions-list-as-at-31-December-2016.pdf, p. 10.

8 In this regard, the committee also notes that the ES to the Adult Disability Assessment Amendment Determination 1999 (No. 1), which inserted section 3.1 into the previous instrument, expressly states that 'decisions of the Secretary under section 1.5 and subsection 2.2(3) of the Determination are subject to the review provisions of Chapter 6 of the *Social Security Act 1991*'.

> The…review sections were originally inserted into the 1999 Determination because it was drafted and registered prior to the commencement of the Administration Act.
>
> Prior to the commencement of the Administration Act, the [Social Security] Act provided powers of…review of decisions under [that]…Act, but did not clearly provide for…review of a decision made under the Act, to apply to the exercise of powers informed by an instrument.
>
> The 1999 Determination was made prior to the commencement of the Administration Act. Instruments made after the commencement of the Administration Act are made under the social security law and no longer routinely include specific…review powers.[9]

1.14 This suggests to the committee that, despite the removal of the provision in the previous instrument that expressly provided for review of decisions, decisions by the secretary in relation to the appointment of persons as treating health professionals and the completion of replacement questionnaires would remain subject to merits review under the *Social Security (Administration Act) 1991* (Administration Act). In this regard, the committee also notes that the ES states that the Administration Act 'now includes all review provisions'.[10]

1.15 Subsection 3(3) of the Administration Act provides that a reference to the 'social security law' in the Act is a reference to the Administration Act, the Social Security Act, 'or any other Act that is expressed to form part of the social security law'. Part 4A of the Administration Act provides for review of decisions made under the 'social security law' by the Administrative Appeals Tribunal (AAT). However, given the definition of 'social security law', it is unclear whether the social security law includes instruments, such that AAT review is also available for decisions by the secretary made under any and all instruments made under the Social Security Act. In this regard, the committee notes that the ES to the instrument does not expressly state that decisions by the secretary to approve persons as treating health professionals are subject to merits review.

1.16 **The committee requests the minister's advice as to whether decisions by the secretary in relation to the approval of persons as treating health professionals, and the completion of replacement questionnaires, are subject to merits review, and:**

- **if so, the specific provisions that would provide for merits review; or**
- **if not, the characteristics of those decisions that would justify their exclusion from merits review.**

---

9 ES, pp. 2-3.

10 ES, p. 2.

Instrument	**Australian Federal Police Regulations 2018 [F2018L01121]**
Purpose	Provide for matters related to the operation and administration of the Australian Federal Police
Authorising legislation	*Australian Federal Police Act 1979*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 20 August 2018) Notice of motion to disallow must be given by 18 October 2018[11]

Access to incorporated documents[12]

1.17 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.

1.18 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.

1.19 The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[13]

1.20 With reference to these matters, the committee notes that subsection 47(2) of the instrument incorporates the Australian and New Zealand Standard AS/NZS 4308:2008 *Procedures for specimen collection and the detection and quantification of drugs of abuse in urine*, as in force from time to time.

---

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

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

13 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.

1.21 The ES to the instrument states that the standard 'will be made available to all Australian Federal Police (AFP) appointees that are subject to the conduct of these tests'.[14] However, no information is provided as to how the standard may be accessed by persons other than AFP appointees. The committee's research also indicates that the standard may be accessed online, but only on payment of a fee.

1.22 The committee acknowledges that anticipated users of the instrument are likely to be in possession of, or able to access, the standard. However, in addition to access for anticipated users, the committee is interested in the issue of access for other parties who might be affected by, or are otherwise interested in, the law.

1.23 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 Australian and international standards, has been one of ongoing concern to this committee and to 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.[15]

1.24 The committee's expectation, at a minimum, is that consideration be given to any means by which incorporated documents may be made available to all interested persons. This might, for example, involve noting the availability of the documents through specific public libraries, or making the documents available for viewing on request (such as at the department's offices). Consideration of this principle and details of any means of access identified or established should be reflected in the ES to the instrument.

1.25 The committee requests the minister's advice as to where the AS/NZS 4308:2008 *Procedures for specimen collection and the detection and quantification of drugs of abuse in urine* can be accessed free of charge; and requests that the explanatory statement be updated to include this information.

---

14 Explanatory statement (ES), p. 32. The committee notes that 'these tests' refers to the drug and alcohol testing contemplated by Division 7 of the instrument.

15 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.

Review of employment decisions[16]

1.26 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.

1.27 Section 8 of the instrument provides that the AFP Commissioner (the Commissioner) may, in writing, suspend an AFP employee from duties if the Commissioner believes on reasonable grounds that the employee has, or may have, engaged in conduct that contravenes the AFP professional standards,[17] or has, or may have, engaged in corrupt conduct.[18] That section also allows the Commissioner to suspend an AFP employee if the employee is charged with an offence,[19] and the Commissioner believes on reasonable grounds that, because of the nature of the offence, the employee should not continue to perform their duties until the charge is resolved.

1.28 Section 61 of the instrument provides that the Commissioner must ensure that a process for reviewing AFP employment decisions exists at all times, and that this process must be at least as favourable to AFP employees and special members as the process set out in the *Australian Federal Police Certified Agreement 1999-2000*, as at 1 July 2000. It appears to the committee that decisions made under section 8 of the instrument would be 'employment decisions' within the meaning of section 61.

1.29 In relation to section 61, the ES to the instrument states that:

> Fair and equitable review is a critical part of maintaining regulatory accountability and is an important quality control mechanism for identifying and correcting possible errors within employment decisions.

---

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

17 The AFP website states that the AFP Professional Standards relate to the expectations the Commissioner has of all AFP appointees, and that the Professional Standards are underpinned by the AFP Code of conduct. The website also provides link at which the AFP Code of Conduct may be accessed. See https://www.afp.gov.au/about-us/our-organisation/professional-standards.

18 Section 4 of the *Australian Federal Police Act 1979* (AFP Act) provides that 'engages in corrupt conduct' has the meaning given by the *Law Enforcement Integrity Commissioner Act 2006*. Section 6 of that Act provides that a person 'engages in corrupt conduct' if they engage in conduct: for the purpose of abusing their office; that perverts or intends to pervert the course of justice; or that is engaged in for the purpose of corruption of any other kind.

19 The relevant offence may be a summary or indictable offence against a law of the Commonwealth, a State, a Territory, or another country.

> This section ensures that a process for review must continue to exist for all employment decisions.[20]

1.30 However, the ES does not specify the process that must exist for reviewing employment decisions, other than a requirement that the review process be at least as favourable as a process set out in an agreement in force in July 2000. Without further information, it is unclear to the committee whether the processes set out in that agreement would meet contemporary standards for independent review. The committee also notes that the ES to the instrument does not indicate where the agreement may be accessed.

1.31 Additionally, the committee notes that Division 2 of the instrument provides for review of decisions to retire AFP employees on the basis of physical or mental incapacity by the Merit Protection Commissioner. However, it is not clear whether review by the Merit Protection Commissioner would similarly be available in relation to other employment decisions.

1.32 The committee requests the minister's advice as to the processes in place for reviewing employment decisions made under the instrument.

Search and entry powers[21]

1.33 Part 4, Division 1 of the instrument provides for the return of 'returnable property'[22] to the Commissioner, as well as processes for recovering that property where it has not been returned. Section 63 provides that the Commissioner or an authorised member of the AFP may apply to a magistrate for a warrant authorising the officer to enter and search premises or a place for the purpose of ascertaining whether returnable property is to be found on those premises or at that place. The magistrate may grant the warrant if satisfied that there are reasonable grounds for believing that returnable property is to be found at the premises or place, and the warrant is reasonably required for its recovery.

---

20 ES, p. 38.

21 Scrutiny principle: Senate Standing Orders 23(3)(b) and (d).

22 Subsection 62(3) of the instrument defines 'returnable property' as property that was supplied to a person for the purpose of the person's service in the AFP, or was in the person's custody because of that service, and is not prescribed property. Subsection 62(4) provides that 'prescribed property' is property that the Commissioner has determined, in writing is not required to be returned to the Commissioner because its return is not necessary for the good governance of the AFP.

1.34 Section 63(3) sets out the measures that the authorised officer may take under a warrant granted under subsection 63(2). Under the warrant, the officer may:

- enter and search a premises or place during the hours of the day or night specified in the warrant or, if the warrant so specifies, at any time;
- use any assistance the officer thinks appropriate and, if necessary, use reasonable force against persons or things; and
- seize any returnable property the officer may find in the premises or place.

1.35 The committee considers that, as a warrant may authorise a person to enter residential premises to search for returnable property, this has the potential to trespass unduly on individuals' rights and liberties, in particular the right to privacy. The committee considers that powers to grant and to discharge warrants to enter into premises and places and to search for and seize property appear to be significant procedural matters which would be more appropriately included in primary rather than delegated legislation.

1.36 The committee also notes that, under a warrant, an authorised officer may use reasonable force against persons and things. With regard to this matter, the committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion of any use of force power for the execution of warrants should be accompanied by an explanation and justification in the explanatory materials, as well as a discussion of any accompanying safeguards that the agency has implemented or intends to implement.[23] In relation to the execution of warrants granted under section 63 of the instrument, the ES states that:

> The powers are narrowly confined to ensure that officers are only permitted to search for, identify and seize returnable property found in the premises or place. The section also introduces additional safeguards by clarifying that only 'reasonable' force can be used, not just 'force' as outlined in the AFP Regulations 1979'.[24]

1.37 However, the ES does not contain an explanation of the circumstances in which it is envisaged it may be necessary to use force against persons and things in order to identify and recover returnable property. Further, other than to note that the powers are 'narrowly defined', and that only 'reasonable force' may be used, the ES does not appear to discuss any safeguards that the AFP has implemented or intends to implement with respect to the use of force.

---

23 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 80.

24 ES, p. 39.

1.38 The committee further notes that the ES does not explain why it is necessary and appropriate for an officer to 'use any assistance the officer thinks appropriate' in the execution of a warrant, nor does it provide any examples of the circumstances in which assistance may be necessary. The committee also notes that the instrument does not place any limits on the persons who may assist authorised officers in exercising powers under a warrant, nor any requirements as to those persons' qualifications or expertise. The ES also fails to provide any information as to categories of persons who it is envisaged may be called on to assist an authorised officer.

1.39 The committee requests the minister's more detailed advice as to:

- **the circumstances in which it is envisaged that force would be used in the execution of a search warrant, and any safeguards in place;**
- **the circumstances in which it is envisaged that persons would be called on to assist authorised officers in the execution of warrants; and**
- **the types of persons it is envisaged may be called on to assist authorised officers in the execution of warrants, and their qualifications and expertise.**

1.40 The committee also seeks the minister's advice as to the appropriateness of amending the instrument to provide that, where an authorised officer obtains the assistance of another person in executing a warrant, the authorised officer must be satisfied that the person assisting has appropriate expertise, skills and training to assist in the execution of the warrant.

1.41 The committee otherwise draws its concerns regarding the appropriateness of including in delegated legislation the power to grant and execute warrants to search for and seize returnable property to the attention of the Senate.

Disposal of property[25]

1.42 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties, including property rights and freedom of expression.

1.43 Division 2 of Part 4 of the instrument sets out a framework for the disposal and retention of property by the Commissioner and other authorised officers of the AFP. For example, subsection 74(1) provides that the Commissioner may direct the disposal of 'live animals', 'perishable goods', or 'property that is difficult to store'. Subsection 76(1) provides that the Commissioner may direct the immediate disposal

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

of property where the Commissioner is reasonably satisfied that the property represents a danger to public health or safety or is 'offensive in nature'.

1.44 In relation to subsection 76(1), the instrument does not provide any guidance as to the meaning of 'offensive in nature'. The ES provides examples of the types of property that may be offensive in nature ('racist materials, pornography in various formats, or material that depicts violent or sexual activity').[26] However, it also states that 'property that is offensive in nature is not defined in the regulations', and provides no further guidance as to how the Commissioner's power to order the disposal of property under subsection 76(1) would be exercised.

1.45 The committee is concerned that Division 2 of Part 4 of the instrument has the potential to trespass unduly on personal rights and liberties—particularly rights relating to personal property and, in relation to subsection 76(1), freedom of speech. This is because the subsection gives a broad discretionary power to the Commissioner to dispose of property that he or she considers 'offensive', without regard to any established principles or guidance.

1.46 It also appears that persons with an interest in property that is disposed of in Division 2 of Part 4 may have limited recourse to appeal the Commissioner's decision or to be appropriately compensated for the loss of their property. In this regard, the committee notes that subsections 75(2) and 76(5) provide that a person who had an interest in property prior to its disposal does not have a right of action against the Commonwealth. The ES provides no justification for conferring this immunity. Further, while subsection 76(2) provides for the publication of a notice that property has been disposed of, the notice is only required to be published *after* the disposal takes place. Similarly, while section 75 provides for the notice of a proposed sale of unclaimed property under sections 72-74 of the instrument, it does not appear to require notice of the disposal of property by other means.

1.47 Additionally, while section 77 of the instrument provides that certain courts may order the Commonwealth to pay a person an amount equal to the market value of the claimable property, the committee notes that the court must be satisfied that 'the circumstances for disposing the property do not exist'. This appears to indicate that a person would not be entitled to able to recover the market value of property where, for example, the Commissioner ordered the disposal of the property on the basis that it was considered to be 'difficult to store' under paragraph 74(1)(c), or 'offensive in nature' under section 76.

1.48 The committee requests the minister's detailed advice as to:

26 ES, p. 46.

- **why it is considered appropriate to provide the Commissioner with a broad discretion to order the disposal of property that he or she considers to be offensive;**
- **the appropriateness of amending the instrument to insert (at least high-level) guidance concerning what constitutes 'offensive' property for the purposes of section 76 of the instrument;**
- **why it is considered necessary and appropriate to confer a broad immunity from suit on the Commonwealth in relation to the disposal of property under sections 75 and 76 of the instrument; and**
- **why it is considered appropriate not to permit a property owner to claim the market value of property under section 77 that has been lawfully disposed of under sections 74 and 76.**

Subdelegation[27]

1.49 Section 79 of the instrument provides that the Commissioner may, in writing, delegate any of the Commisioner's powers, functions and duties under the instrument to a Deputy Commissioner, an AFP employee, or a special member.[28] The powers, functions and duties that may be delegated include a number of significant powers associated with the administration of the AFP.[29] The instrument does not appear to set any further limits on the seniority of the persons to whom powers may be delegated, nor any requirements as to the qualifications or expertise that delegates must possess.

1.50 The explanatory statement (ES) states that the purpose of section 79 'is to provide sufficient flexibility to ensure the Commissioner can delegate powers, where appropriate, in order for the AFP to fulfil its statutory functions efficiently and effectively'.[30] However, the ES does not contain any further information regarding why it is necessary and appropriate to allow the delegation of the Commissioner's

---

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

28 Section 40E of the AFP Act provides that the Commissioner may, on such terms as he or she determines in writing, appoint a person as a special member of the Australian Federal Police to assist in the performance of its functions.

29 For example, it appears that the Commissioner may delegate powers to suspend AFP employees from duties, powers to authorise persons to direct AFP appointees to undergo drug and alcohol testing, and powers in relation to the disposal and destruction of property.

30 ES, p. 48.

powers to a broad range of persons, nor any information about how the power of delegation will be exercised in practice.

1.51 The committee's expectations in relation to subdelegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legisaltion that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that some limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated. The committee's expectation is not that details of the qualifications and attributes for delegates be specified in the instrument. Rather, the committee considers that the instrument should include some requirement that the person delegating powers and functions be satisfied that delegates have the qualifications and attributes appropriate to the powers delegated.

1.52 Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the ES. The committee notes in this regard that it does not generally consider a desire for operational or adminstrative flexibility to be a sufficient justification for allowing the delegation of powers to officials at any level.

1.53 The committee seeks the minister's more detailed advice as to why it is considered necessary and appropriate to allow the Commissioner to delegate any of their powers, functions and duties under the instrument to any employee of the Australian Federal Police, and to any special member.

1.54 The committee also seeks the minister's advice as to the appropriateness of amending the instrument to require that the Commissioner be satisfied that persons to whom powers, functions and duties are delegated have the expertise appropriate to the powers delegated.

Unclear basis for determining fees[31]

1.55 Section 80 of the instrument provides for the fees that are imposed in relation to services rendered by the AFP to the public (including individuals, bodies corporate and other organisations) and to authorities of the Commonwealth.

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

Subsection 80(2) provides that, subject to subsections 80(3) and 81(3),[32] the fees that may be charged are set out in Schedule 3. Schedule 3 sets out the fees that may be charged for various police services. These include services such as making copies of documents and information, attending premises in response to alarms, and arranging medication examinations. The prescribed fees range from $15 to $366. The committee notes that, in relation to some services,[33] no dollar amount is set, and the fee prescribed is the 'cost to the AFP for the use of the AFP appointee's time'.

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

1.57 The committee notes that paragraphs 70(c) and (d) of the AFP Act provide that regulations may make provision for fees to be charged in relation to the rendering of police services. However, the committee notes that the ES to the instrument does not specify the basis on which the fees in Schedule 3 have been calculated. In relation to section 80, the ES merely restates the operation and effect of the relvant provisions. In relation to Schedule 3, the ES restates the operation and effect of the relevant provisions, and notes that some changes have been made to the fees prescribed by the previous version of the instrument.[34]

1.58 The committee requests the minister's advice as to the basis on which the fees in Schedule 3 of the instrument have been calculated.

32 Subsection 80(3) provides that, for items 1, 2 and 4 of the table in Schedule 3 (which relate to searching AFP records and to taking and giving sets of fingerprints), the fee prescribed is the sum of the amount mentioned in the item, and any amount payable to the AFP in the course of providing the service. Subsection 81(2) provides an exemption from fees for activities conducted for a charitable purpose.

33 For example, attending court proceedings, providing a police escort, and compiling a medical report.

34 ES, p. 52. The previous version of the instrument was the Australian Federal Police Regulations 1979 [F2016C00111].

Instrument	**Carbon Credits (Carbon Farming Initiative—Sequestering Carbon in Soils in Grazing Systems—Revocation) Instrument 2018 [F2018L01113]**
Purpose	Revokes the Carbon Credits (Carbon Farming Initiative) (Sequestering Carbon in Soils in Grazing Systems) Methodology Determination 2014
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 16 August 2018) Notice of motion to disallow must be given by 15 October 2018[35]

Compliance with authorising legislation[36]

1.59 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.

1.60 The instrument was made under subsection 123(1) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (authorising legislation). It revokes the Carbon Credits (Carbon Farming Initiative) (Sequestering Carbon in Soils in Grazing Systems) Methodology Determination 2014.

1.61 Subsections 123(2) and (3) of the authorising legislation provide that, before revoking a methodology determination, the minister must request the Emissions Reduction Assurance Committee (ERAC) to advise whether the minister should revoke the determination, and must have regard to ERAC's in making the decision. Subsection 123A(2) requires the ERAC to give the requested advice to the minister. The explanatory statement (ES) to the instrument confirms that the minister had regard to the advice of ERAC in deciding to revoke the relevant methodology determination.[37]

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

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

37 Explanatory statement (ES), p. 1.

1.62 However, subsection 123(5) of the authorising legislation also provides that, if the minister decides to revoke a methodology determination, the minister must cause a copy of any advice given by the ERAC under subsection 123A(2) to be published on the department's website as soon as practicable after making the decision. Neither the instrument nor its ES clarifies whether the ERAC advice has been published, and the advice does not appear to be readily accessible on the department's website. It is therefore unclear to the committee whether the condition in subsection 123(5) of the authorising legislation has been satisfied.

1.63 The committee requests the minister's advice as to whether the advice given by the Emissions Reduction Assurance Committee regarding the revocation of a methodology determination has been published on the department's website (that is, whether the condition in section 123(5) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* has been satisfied).

Instrument	**Census and Statistics (Information Release and Access) Determination 2018 [F2018L01114]**
Purpose	Sets out a framework for the Australian Bureau of Statistics to disclose statistical information
Authorising legislation	*Census and Statistics Act 1905*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 August 2018) Notice of motion to disallow must be given by 15 October 2018[38]

Merits review[39]

1.64 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.

1.65 Part 2 of the instrument sets out the general requirements for the disclosure of information provided to the Statistician under the *Census and Statistics Act 1905*

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

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

(authorising legislation). Section 8 of the instrument provides that information can only be disclosed under the instrument 'if the Satistician has approved the disclosure of the information in writing'. More broadly, Parts 2 and 3 of the instrument also provide that different types of information may be disclosed where certain conditions are satisfied.[40]

1.66 It appears that the Statistician's decision to approve the disclosure of information under section 8, and decisions relating to the disclosure of information under Parts 2 and 3, involve at least an element of discretion. Moreover, the disclosure of statistical information has the potential to affect the interests of persons seeking access to the relevant information. Consequently, it appears that those decisions may be suitable for merits review.

1.67 However, neither the instrument nor the authorising legislation appears to provide for merits review in relation to the Statistician's decision to authorise the disclosure of information, or in relation to the disclosure of information under Parts 2 or 3 of the instrument. The explanatory statement also provides no indication of whether those decisions are reviewable.

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

- **whether decisions by the Statistician to authorise the disclosure of information, and decisions relating to disclosure under Parts 2 and 3 of the instrument, are subject to merits review; and**
- **if not, the characteristics of those decisions that would justify their exclusion from merits review.**

40 For example, subsection 15(1) provides that information in the form of individual records may be disclosed where all direct identifiers have been removed, the manner of disclosure is not likely to enable the identification of an individual, and the individual or organisation who will receive the information has made an undertaking in compliance with subsection 15(2).

Instrument	**Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018 [F2018L01082]**
Purpose	Specifies Al-Shabaab for the purposes of the definition of 'terrorist organisation' in the *Criminal Code Act 1995*
Authorising legislation	*Criminal Code Act 1995*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[41]

Drafting[42]

1.69 Division 102, Subdivision B of the *Criminal Code Act 1995* (Criminal Code) creates a series of offences relating to terrorist organisations.[43] 'Terrorist organisation' is defined in subsection 102.1(1) of the Code to include an organisation that is specified for the purposes of paragraph 102.1(1)(b). The instrument revokes and remakes the Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2015 [F2015L01235]. This has the effect of extending the period during which Al-Shabaab is specified as a terrorist organisation for the purposes of the Criminal Code to 4 August 2021. The specification of an organisation as a 'terrorist organisation' makes it an offence under the Criminal Code to engage in certain forms of conduct with respect to that organisation.

1.70 Subsection 5(2) of the instrument sets out the names by which Al-Shabaab is also known. Paragraph 5(2)(u) lists the 'Young Mujahideen Movement in Somalia', while paragraph 5(2)(v) lists the 'Youth Wing'.

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

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

43 These include directing the activities of a terrorist organisation (section 102.2), being a member of a terrorist organisation (section 102.3), recruiting for a terrorist organisation (section 102.4), providing, receiving or participating in training involving a terrorist organisation (Section 102.5), getting funds to, from or for a terrorist organisation (section 102.6), providing support to a terrorist organisation (section 102.7), and associating with a terrorist organisation (102.8). The offences are punishable by terms of imprisonment ranging from 3 to 25 years.

1.71 The committee notes that the previous version of the instrument[44] listed in paragraph 5(2)(u) the 'Young Mujahideen Movement in Somalia, Youth Wing' (combining the references in paragraphs 5(2)(u) and 5(2)(v) of the present instrument). The statement of reasons in the explanatory statement (ES) to the present instrument similarly refers to the 'Young Mujahideen Movement in Somalia, Youth Wing'.[45]

1.72 It is unclear to the committee whether it was intended in the present instrument to list the 'Youth Wing' as a separate name by which Al-Shabaab is known. In this regard, the committee is concerned that separately listing the 'Youth Wing' may have the effect of creating uncertainty as to the operation of the terrorism offences in Subdivision B, Division 2 of the Criminal Code as they relate to the organisation known as Al-Shabaab.

1.73 The committee requests the minister's advice as to whether it was intended to list the 'Young Mujahideen Movement in Somalia' and the 'Youth Wing' as separate entries in paragraphs 5(2)(u) and 5(2)(v) of the instrument.

44 Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2015 [F2015L01235].

45 Explanatory statement (Attachment B), p. 9.

Instrument	**Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2018 [F2018L01135]**
Purpose	Revise export and import controls to account for the enactment of the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Regulations 2008.
Authorising legislation	*Customs Act 1901*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018) Notice of motion to disallow must be given by 12 November 2018[46]

Merits review[47]

1.74 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.

1.75 Item 2 of the instrument repeals subsection 13CO(2) of the Customs (Prohibited Exports) Regulations 1958 (Exports Regulations), and replaces it with new subsections 13CO(2), (2AA) and (2AB). New subsection 13CO(2) provides that, subject to subsection 13CO(2AA), the export of all goods to the Democratic People's Repblic of Korea (DPRK) is prohibited without the express written permission of the Foreign Minister or an authorised person.[48]

1.76 Similarly, item 6 of the instrument repeals subsection 4Y(2) of the Customs (Prohibited Imports) Regulations 1956 (Imports Regulations), and replaces it with new subsections 4Y(2), (2AA) and (2AB). New subsection 4Y(2) provides that, subject to subsection 4Y(2AA), the import of all goods to the DPRK is prohibited without the express written permission of the Foreign Minister or an authorised person.

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

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

48 Subsection 13CO(1) of the Exports Regulations provides that 'authorised person' means an officer of the department authorised by the Foreign Minister to give permissions under section 13CO. Subsection 4Y(1) of the Import Regulations provides an identical definition of 'authorised person' for the purposes of section 4Y.

1.77 New subsection 13CO(2) of the Exports Regulations and new subsection 4Y(2) of the Imports Regulations, respectively, appear to allow the Foreign Minister and authorised persons to make decisions in relation to the grant of permission to export and import goods to the DPRK. Such decisions appear to involve at least an element of discretion, and have the potential to affect the interests of individuals. Consequently, it appears that these decisions may be suitable for merits review.

1.78 However, neither the instrument, the Exports Regulations nor the Imports Regulations appears to provide for review of decisions made by the Finance Minister of authorised persons in relation to the export of goods to, or the import of goods from, the DPRK. The ES to the instrument also provides no information regarding whether such decisions are subject to merits review.

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

- **whether decisions by the Foreign Minister and by authorised persons in relation to the grant of permission for the export of goods to, and the import of goods from, the Democratic People's Republic of Korea, would be subject to merits review; and**
- **if not, the characteristics of those decisions that would justify their exclusion from merits review.**

Instrument	**Export Control (Animals) Amendment (Notices of Intention to Export) Order 2018 [F2018L01118]**
Purpose	Amends the Export Control (Animals) Order 2004 to enable the Secretary of the Department of Agriculture and Water Resources to grant notices of intention to export
Authorising legislation	*Export Control (Orders) Regulations 1982*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 August 2018) Notice of motion to disallow must be given by 18 October 2018[49]

Consultation[50]

1.80 Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

1.81 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement (ES) to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.[51]

1.82 With reference to these matters, the committee notes that the explanatory statement (ES) to the instrument advises that the department 'informed the Australian Livestock Export Council, Australian Livestock Corporation Limited and the RSPCA'.[52] However, it is unclear to the committee whether relevant stakeholders were also *consulted* in relation to the instrument, as opposed to being merely informed.

---

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

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

51 Regulations and Ordinances Committee, *Guideline on consultation,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

52 Explanatory statement (ES), p. 2.

1.83 The committee further notes that, under the heading of consultation, the ES states that:

> The legislative amendments did not require a regulatory impact statement, as they are likely to have no more than minor regulatory impacts on business, community organisations or individuals.[53]

1.84 In this regard, the committee notes that requirements regarding the preparation of a RIS are separate to the requirements of the Legislation Act in relation to consultation. As set out in the committee's *Guideline on consultation*:

> [A]lthough a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

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

- **whether any stakeholders were consulted in relation to the instrument (as opposed to being merely informed); or**
- **if no consultation was undertaken, why not.**

The committee also requests that the explanatory statement be amended to include this information.

53 ES, p. 2.

Instrument	**Federal Circuit Court Amendment (Costs and Other Measures) Rules 2018 [F2018L01088]**
Purpose	Increases costs associated with certain court services, and makes other miscellaneous amendments.
Authorising legislation	*Federal Circuit Court of Australia Act 1999*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[54]

Drafting[55]

1.86 The instrument makes a series of amendments to the Federal Circuit Court Rules 2001 (Principal Rules). Part 1 of Schedule 1 to the instrument increases the itemised amount of costs that may be awarded by the Federal Circuit Court under the Principal Rules. Part 2 of Schedule 1 replaces redundant terminology relating to dispute resolution, and specifies certain Federal Court Rules that are applied by the Federal Circuit Court. The instrument contains no further schedules.

1.87 Under the heading of consultation, the explanatory statement (ES) to the instrument states:

> In respect of the amendments in Schedule 2 which extends the time for the filing and service of a response from 14 days to 28 days, there has been consultation with the professional associations including the Family Law Section and the Law Council of Australia.[56]

1.88 Further, under the heading 'Explanation and Commencement of the Rules', the ES states that '[t]he amendments in Schedule 2 commence three months after registration'.[57]

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

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

56 Explanatory statement (ES), p. 2.

57 ES, p. 2. The committee notes that the commencement provision for the instrument (section 2), provides that the rules as a whole commence the day after registration.

1.89 The ES appears to refer to a Schedule (Schedule 2) that is not included in the instrument. In this regard, the committee also notes that neither the general outline of amendments nor the clause-by-clause explanation included in the attachment to the ES make reference to Schedule 2.

1.90 The committee further notes that, under the heading 'General outline of amendments', the ES states that 'the amendments in Schedule 1 Part 2 comprise other miscellaneous amendments to the Rules including:'.[58] No further text is included to describe the amendments in Schedule 1, Part 2.

1.91 In the interests of promoting the clarity and intelligibility of instruments, the committee notes its expectation that instruments and their ESs should be drafted with sufficient care and precision to avoid potential confusion for anticipated users. This includes ensuring that relevant information is not omitted and that incorrect information is not included.

1.92 The committee requests the minister's advice as to the omission of information relating to Schedule 1, Part 2 from the explanatory statement, and the inclusion of information relating to a Schedule 2 (which does not appear in the instrument).

58 ES, p. 1.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2018 [F2018L01128]**
Purpose	Establishes legislative authority for a spending activity administered by the Department of Defence.
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018) Notice of motion to disallow must be given by 12 November 2018[59]

Merits review[60]

1.93 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.

1.94 The instrument establishes legislative authority for Commonwealth expenditure on the Supporting Sustainable Access to Drinking Water program, administered by the Department of Defence (the department). The explanatory statement (ES) explains that the funding will be used to provide a sustainable source of drinking water to properties reliant on bores for drinking water containing per- and poly-fluoroalkyl substances above Australian Drinking Water Guidelines value. The program will be available to residents in communities surrounding particular Commonwealth military bases.

1.95 The ES indicates that there will be no formal application process for the program, but that the department will work with affected residents to determine their eligibility and appropriate water support arrangements. Final decisions on eligibility and the provision of support will be made by a delegate of the secretary of the department. In relation to the review of decisions, the ES states that:

> Property owners will be able to request an internal merits review for decisions in relation to the provision of assistance under the program. Internal reviews will be conducted by a senior departmental public official at a level…higher than the…original decision-maker.

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

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

> An external merits review (such as the Administrative Appeals Tribunal) will not be available to property owners, as the program will not be a legislative scheme.[61]

1.96 The committee is concerned that the ES does not appear to identify any established ground for the exclusion of decisions in relation to the provision of assistance from merits review. In this regard, the committee draws attention to the accepted guidelines for government on the issue of merits review, contained in the Attorney-General's Department, Administrative Review Council document, *What decisions should be subject to merits review?*. The committee emphasises that it does not generally consider internal review by departmental officials to constitute sufficiently independent merits review.

1.97 The committee further notes that it does not consider the fact that decisions are not made under a legislative scheme to be an appropriate basis for excluding decisions relating to the expenditure of Commonwealth funds from merits review. Rather, the committee would expect that, if merits review by the Administrative Appeals Tribunal (AAT) is appropriate for decisions made in relation to an activity, the necessary reference to AAT review should be included in the relevant instrument or in primary legislation.

1.98 In this regard, the committee emphasises that the use of the Financial Framework (Supplementary Powers) Regulations 1997 to authorise spending on programs that otherwise lack legislative authority should not give rise to an effective 'loophole', excluding rights that persons should have to independent merits review of decisions that affect them.

1.99 The committee requests the minister's advice as to the characteristics of decisions in relation to the provision of assistance under the Supporting Sustainable Access to Drinking Water program that would justify excluding merits review. The committee's assessment would be assisted if the minister's response expressly identified one or more grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

---

61 Explanatory statement (ES), pp. 2-3. The committee notes that the discussion of merits review in the ES also makes reference to the availability of complaint to the Commonwealth Ombudsman. The committee notes that complaint to the Commonwealth Ombudsman is not a form of merits review.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 2) Regulations 2018 [F2018L01133]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Jobs and Small Business.
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018) Notice of motion to disallow must be given by 12 November 2018[62]

Merits review[63]

1.100 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.

1.101 The instrument establishes legislative authority for Commonwealth expenditure on the Regional Employment Trials (RET) Program. The explanatory statement (ES) indicates that funding will be used to engage new employment facilitators, and to set up a Local Employment Initiative (LEI) Fund. The ES explains that the LEI Fund will provide grant funding of $1 million in each of the 10 regional areas selected for the RET Program, for projects and activities aimed at connecting jobseekers with employers, identifying employment, training and work experience opportunities, and identifying skills gaps.[64]

1.102 The ES also indicates that participants in certain programs administered by the department will in some cases be able to fulfil participation requirements under those programs by joining projects funded under the RET Program. Additionally,

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

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

64 Explanatory statement (ES), p. 8.

eligible job seekers in trial regions will have earlier access to assistance under the Relocation Assistance to Take up a Job program.[65]

1.103 The ES appears to indicate (although it does not expressly state) that decisions in relation to participation in projects funded under the RET Program, and eligibility for early access to the Relocation Assistance to Take up a Job program, would not be subject to merits review. In this regard, the ES states that:

> [d]ecisions around job seekers' participation in funded projects do not involve significant discretionary elements. Broadly, job seekers will be able to participate in projects where the project involves participation (for eample, a mentoring program).
>
> Decisions about eligibility for early access to the Relocation Assistance to Take up a Job program are based on objective criteria. These decisions are mandatory or procedural in nature, that is, based on an obligation to act on the existence of specified circumstances.[66]

1.104 While decisions around participation in funded projects may not involve significant elements of discretion, it nevertheless appears that the decisions would involve some discretion by the relevant decision-maker. Moreover, a decision to refuse to allow a job seeker to participate in a project may substantially affect their interests—particularly where the jobseeker is seeking to fulfil requirements under a social security program. It therefore appears that decisions in relation to participation in funded projects may be suitable for merits review. The committee notes that the ES provides no further information regarding any policy considerations or program characteristics that would justify excluding merits review.

1.105 In relation to decisions about early access to the Relocation Assistance to Take up a Job program, the committee acknowledges that mandatory or procedural decisions may be appropriate to exclude from merits review.[67] However, in the absence of information about the relevant eligibility criteria, it is unclear that decisions about eligibility for that program would be mandatory or procedural in nature. In this regard, the committee notes that apparently mandatory criteria may be expressed in a manner that requires the decision-maker to make an assessment

---

65 Relocation Assistance to Take up a Job is an Australian Government program that provides financial assistance to persons who need to relocate in order to take up ongoing, full time employment. See https://www.jobs.gov.au/relocation-assistance-take-job.

66 ES, p. 10.

67 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx, [3.8]-[3.12]

or judgement in particular cases. The committee would generally consider that decisions based on such criteria may be appropriate for merits review.

1.106 The committee requests the minister's detailed advice as to the characteristics of decisions in relation to participation in programs funded under the Regional Employment Trials program that would justify excluding merits review.

1.107 The committee also requests the minister's detailed advice as to the characteristics of decisions in relation to early access to the Relocation Assistance to Take up a Job program, that would justify excluding merits review. The committee's assessment would be assisted if the minister's response expressly identified the criteria on which these decisions are based.

1.108 The committee's assessment in relation to each of the decisions outlined above would be assisted if the minister's response also expressly identified one or more grounds for excluding merits review set out in the Administrative Review Council's guidance document *What decisions should be subject to merits review?*

Parliamentary scrutiny: ordinary annual services of government[68]

1.109 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

1.110 Under the provisions of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), executive spending may be authorised by specifying schemes in regulations made under that Act. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

1.111 The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all

68 Scrutiny principle: Senate Standing Order 23(3)(d).

matters not involving the ordinary annual services of the government.[69] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.

1.112 The committee's considerations in this regard are set out in its *Guideline on regulations* that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations.[70]

1.113 As outlined above, the instrument establishes legislative authority for Commonwealth expenditure on the RET Program, announced in the 2018-19 Budget. In relation to funding for the RET Program, the ES further states:

> Funding of $18.4 million was provided in the 2018-19 Budget under the measure 'Regional Employment Trials Program — establishment' for a period of three years commencing in 2018-19. Details are set out in Budget Paper 2018-19, Budget Paper No. 2 2018-19.[71]

1.114 It appears to the committee that the RET Program may be new policy not previously authorised by special legislation; and that the initial appropriation for the program may have been inappropriately classified as 'ordinary annual services', and therefore improperly included in Appropriation Bill (No. 1) 2018-19 (which was not subject to amendment by the Senate).

1.115 The committee draws the establishment of legislative authority for what appears to be a new policy not previously authorised by special legislation, and the classification of the initial appropriation for it as ordinary annual services of the government, to the attention of the minister, the Senate and relevant Senate committees.

---

69 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp. 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017*, pp. 1-5.

70 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

71 ES, p. 9.

Instrument	**Migration Amendment (Skilling Australians Fund) Regulations 2018 [F2018L01093]**
Purpose	Implement changes to the *Migration Act 1958* made by the *Migration Amendment (Skilling Australians Fund) Act 2018*, and make other minor amendments.
Authorising legislation	*Migration Act 1958*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[72]

Merits review[73]

1.116 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.

1.117 The *Migration Amendment (Skilling Australians Fund) Act 2018* amended the *Migration Act 1958* to, among other matters, require employers who nominate workers under the temporary and permanent skilled migration programmes to pay a nomination training contribution charge (NTTC). The NTTC is imposed under the *Migration (Skilling Australians Fund) Charges Act 2018*, and is intended to offset expenditure from the Skilling Australians Fund.[74]

1.118 The instrument makes a number of amendments to the Migration Regulations 1994 (Principal Regulations) to prescribe nominations that attract the NTTC, alter sponsorship arrangements with respect to temporary work visas, and provide for the refund of NTTC (and other fees) in certain circumstances.

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

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

74 See explanatory memorandum, Migration Amendment (Skilling Australians Fund) Bill 2018, p. 2. The Skilling Australians Fund is administered by the Department of Education and Training, and is intended to support skills development of Australians (particularly apprentices and trainees).

1.119 Item 41 of the instrument inserts a new section 5.37A into the Principal Regulations. New subsection 5.37A(1) provides that the minister may refund fees and NTTC paid in relation to particular nominations,[75] if:

- any of subsections 5.37A(2) to (9) apply;[76] and
- the minister:
  - receives a written request from the person who paid the amount; or
  - considers it reasonable in the circumstances to refund the amount without receiving a written request for a refund.

1.120 Section 2.73AA of the Principal Regulations similarly provides that the minister may refund certain fees where specified conditions are met.[77] Items 27 to 29 amend section 2.73AA to provide that the minister may also refund NTTC that has been paid in relation to particular nominations,[78] and to insert additional grounds on which refunds may be made.[79]

1.121 The minister's power to grant or refuse to grant a refund under sections 2.73AA and 5.37A appears to be discretionary. Decisions not to grant a refund may also affect the interests of businesses required to pay the relevant fees or charges—particularly in circumstances where a business has paid the fee or charge but has not received any corresponding benefit. It therefore appears that decisions in relation to refunds may be suitable for merits review.

---

75 The fees and charges that may be refunded under section 5.37A include the fee payable for a nomination in relation to subclass 186 and 187 visas, and NTTC payable in relation to such nominations. NTTC payable in relation to nominations for subclass 186 and 187 visas is set by the Migration (Skilling Australians Fund) Charges Regulations 2018 [F2018L01092] at $5,000 for a business with an annual turnover of over $10 million, and $3,000 in any other case.

76 Subsections 5.37A(2)-(9) set out grounds for the refund of fees and charges. These include: an application for approval of a nomination being made because of a mistake by Immigration; an application being withdrawn before certain decisions are made; the grant of the relevant visa being refused; and the nominated person failing to commence employment.

77 These conditions are identical to the conditions set out in subsection 5.37A(1), outlined above.

78 The fees and charges that may be refunded under section 2.73AA include the fee payable for a nomination in relation to subclass 457 and 482 visas, and NTTC payable in relation to such nominations. NTTC payable in relation to nominations for subclass 457 and 482 visas is set by the Migration (Skilling Australians Fund) Charges Regulations 2018 [F2018L01092] at $1800 for each year in the period of stay (which may be between 1 and 4 years) for businesses with an annual turnover of over $10 million, and $1,200 for each year in any other case.

79 The additional grounds on which refunds may be made are identical to those included in subsections 5.37A(2)-(9), outlined above.

1.122 However, the ES to the instrument states that 'no provision has been made for Administrative Appeal Tribunal (AAT) review of decisions to refuse to provide a refund'.[80] The ES states that this is because:

> most of the refund grounds are objectively framed. For the small number of cases where there could be a genuine dispute that could be determined by the AAT, the costs of AAT review and the limited interests at stake (access to a relatively small refund) make AAT review inappropriate.[81]

1.123 While decisions relating to refunds may in some cases be based on largely factual matters (for example, whether a nomination has been withdrawn), it does not appear that the minister has any obligation to act in a certain way on the occurrence of a specified set of circumstances. This is confirmed by the ES, which states that 'the minister has a discretion, rather than a duty, to provide a refund'.[82] Consequently, decisions in relation to the refund of fees and NTTC do not appear to be mandatory or automatic (which may justify excluding them from merits review).[83]

1.124 Further, while the committee acknowledges that it may be appropriate to exclude merits review where the costs of review cannot be justified,[84] it is not clear that the costs of reviewing decisions relating to the grant of refunds would outweigh the financial interests at stake. In this regard, the committee notes that smaller businesses (that is, those with an annual turnover of less than $10 million) may be required to pay NTTC of up to $4,800 for each nomination relating to a temporary visa, and up to $3,000 for each nomination relating to a permanent visa.[85] A decision by the minister not to refund NTTC paid in relation to such nominations may therefore have significant financial impacts on the relevant business.

1.125 The committee also considers that individual businesses may be best-placed to determine whether to bring a merits review action in particular circumstances. In

---

80 Explanatory statement (ES), pp. 15 and 21.

81 ES, pp. 15 and 21.

82 ES, pp. 15 and 19.

83 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx, [3.8]-[3.12]

84 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx, [4.56]-[4.57].

85 See sections 5 and 6 of the Migration (Skilling Australians Fund) Charges Regulations 2018 [F2018L01092].

this regard, it is unclear why it would not be appropriate to provide for merits review for decisions relating to the refund of fees and charges, and to allow affected businesses to determine whether it is in their best interests to seek review.

1.126 The committee requests the minister's more detailed advice as to why it is considered appropriate to exclude decisions relating to the refund of charges and fees, made under sections 2.73AA and 5.37A, from merits review. In particular, the committee requests the minister's advice as to why it would not be appropriate to provide for merits review in relation to such decisions, and allow affected businesses to determine whether it is in their interests to seek review.

Advice only

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

Instrument	**Biosecurity Charges Imposition (Customs) Amendment (Approved Arrangements) Regulations 2018 [F2018L01124]** **Biosecurity Charges Imposition (General) Amendment (Approved Arrangements) Regulations 2018 [F2018L01125]**
Purpose	Introduce a charge for the entry of information into the automated entry processing system in relation to certain types of biosecurity approved arrangements
Authorising legislation	*Biosecurity Charges Imposition (Customs) Act 2015* *Biosecurity Charges Imposition (General) Act 2015*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018) Notice of motion to disallow must be given by 12 November 2018[86]

Matters more appropriate for parliamentary enactment[87]

1.127 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

1.128 The instruments were made under the *Biosecurity Charges Imposition (Customs) Act 2015* (Customs Charges Act) and the *Biosecurity Charges Imposition (General) Act 2015* (General Charges Act). Section 7 of each of those Acts provides that a regulation may prescribe a charge in relation to a prescribed matter connected with the administration of the *Biosecurity Act 2015*, and that the charges are imposed as taxes. Subsection 8(2) of each of those Acts provides that, before the

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

87 Scrutiny principle: Senate Standing Order 23(3)(d).

Governor-General makes a regulation prescribing a charge, the minister must be satisfied that the amount of the charge prescribed is set at a level that is designed to recover no more than the Commonwealth's likely costs.

1.129 The instruments amend the Biosecurity Charges Imposition (Customs) Regulations 2016 and the Biosecurity Charges Imposition (General) Regulations 2016, to introduce a new charge of $18 for each entry of information into the automated entry processing system about goods to be brought into Australian territory.

1.130 The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered the bills for the Customs Charges Act and the General Charges Act when those bills were before the Parliament.[88] The Scrutiny of Bills committee raised concerns that the bills sought to allow a number of significant elements of the charging framework (such as the matters on which charges would be imposed, the method for calculating the amount of charges, and the persons liable to pay the charges) to be provided for in delegated legislation.

1.131 The Scrutiny of Bills committee emphasised that it is for Parliament, rather than the makers of delegated legislation, to set rates of tax. The Scrutiny of Bills committee also expressed concerns that, while the bill contained a requirement that the minister be satisfied that any charges imposed be limited to cost recovery, there was nothing on the face of the bill that would directly limit the amount of tax that could be set by delegated legislation or ensure appropriate parliamentary scrutiny.[89]

1.132 Ultimately, the Scrutiny of Bills committee reiterated that it is for the Parliament to proactively set the rate of any tax. It also reaffirmed its view that, where key elements of the administration of charges under a bill are dealt with by regulations, there must be appropriate safeguards in place and an adequate level of parliamentary scrutiny. However, as the bills had already passed both Houses of Parliament by the time of the Scrutiny of Bills committee's concluding report, no further comment was made on the matter.[90]

1.133 The committee's views accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts enabling delegated legislation to set a rate of tax. While the committee recognises that the instruments are lawfully made,

---

88 The committee notes that, at the time of the Scrutiny of Bills committee's comments, the bills were named the Quarantine Charges (Imposition—Customs) Bill 2014 and the Quarantine Charges (Imposition—General) Bill 2014. The relevant Act were renamed following enactment of the *Biosecurity Act 2015*, which superseded the *Quarantine Act 1908*.

89 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2014*, pp. 26-29.

90 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2014*, p. 226.

the committee emphasises that the imposition of tax is more appropriate for enactment in primary legislation.

1.134 The committee draws the Senate's attention to the setting of charges (which are imposed as taxes) in delegated legislation.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 3) Regulations 2018 [F2018L01126]** **Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 2) Regulations 2018 [F2018L01132]** **Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2018 [F2018L01136]**
Purpose	Establish legislative authority for spending activities administered by the following portfolios: • Attorney-General's [F2018L01126] • Communications and the Arts [F2018L01132] • Health [F2018L01136]
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018) Notice of motion to disallow must be given by 12 November 2018[91]

Parliamentary scrutiny – ordinary annual services of the government[92]

1.135 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

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

92 Scrutiny principle: Senate Standing Order 23(3)(d).

1.136 Under the provisions of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), executive spending may be authorised by specifying schemes in regulations made under that Act. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government.

1.137 The Senate has resolved that ordinary annual services should not include spending on new proposals, because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.[93] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service ofthe government', despite being spending on new policies.

1.138 The committee's considerations in this regard are set out in its Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations.[94]

1.139 With regard to the matters above, the committee notes that the instruments establish legislative authority for Commonwealth expenditure on the following programs and policies, which were announced in the 2018-19 Budget:

- Elder Abuse Service Trials;[95]

---

93 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp. 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017*, pp. 1-5.

94 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

95 Item 294, inserted by the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 3) Regulations 2018 [F2018L01126]. The explanatory statement (ES) to the instrument indicates that $22 million will be provided over four years from 2018-19 to establish trials of specialist frontline elder abuse services in selected areas, to support older people and their families seeking help with elder abuse.

- Location Incentive Funding Program; and[96]
- The following 'Prioritising mental health' measures:[97]
  - Aftercare following a suicide attempt;
  - Suicide prevention campaign;
  - Lifeline Australia—enhanced telephone and online crisis service.

1.140 It appears to the committee that these may be new policies or programs not previously authorised by special legislation; and that the initial appropriations for the relevant expenditure may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2018-19 (which is not subject to amendment by the Senate).

1.141 The committee draws the establishment of legislative authority for what appears to be a number of new policies not previously authorised by special legislation, and the classification of the initial appropriation for those policies as ordinary annual services of the government, to the attention of the minister, the Senate and relevant Senate committees.

96 Item 295, inserted by the Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 2) Regulations 2018 [F2018L01132]. The ES to the instrument indicates that $140 million will be provided over four years from 2019-20 to provide grants to Australian film and television industry participants, in order to support the capabilities of the industry and help ensure its future viability.

97 Items 300, 301 and 302, inserted by the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2018 [F2018L01136]. The ES to the instrument indicates that the measures will, respectively, fund the expansion of *beyondblue's* Way Back Support Service ($37.6 million over four years from 2018-19); support SANE Australia to develop and test a targeted suicide awareness campaign model ($1.2 million in 2018-19); and support Lifeline Australia to deliver and enhance their 24 hour national crisis support and suicide prevention service ($33.8 million over four years from 2018-19).

Chapter 2

Concluded matters

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

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

Instrument	**Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018 [F2018L01010]**
Purpose	Imposes conditions on the holders of export licences who export sheep by sea to the Middle East
Authorising legislation	*Australian Meat and Live-stock Industry Act 1997*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[2]

Merits review[3]

2.3 In *Delegated legislation monitor 9 of 2018*[4] the committee requested the minister's advice as to the characteristics of decisions made under section 14 of the instrument that would justify excluding merits review. The committee stated that its assessment would be assisted if the minister's response expressly identified one or more of the grounds for excluding merits review set out in the Administrative Review Council's guidance document *What decisions should be subject to merit review?*.

Minister's response

2.4 The Minister for Agriculture and Water Resources advised:

---

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)(c).

4 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 1-3.

Section 14 of the instrument seeks to enable the Secretary to decide whether to grant an exemption from one or more provisions of the instrument in relation to a consignment of sheep after receiving an application from the holder of a sheep export licence.

A decision to grant or not grant an exemption is about determining the circumstances in which it is acceptable to exclude a consignment of goods from the requirements of the legislation. The department expects exporters to comply with the legislation, and does not foresee exemptions being granted except in exceptional circumstances.

The Secretary may only grant an exemption if he or she is satisfied that it is appropriate to do so. The Explanatory Statement to the instrument states that this reflects the importance of ensuring animal health and welfare is maintained if an exemption is granted, and that the circumstances that must be taken into account will be specific to the consignment to which the exemption relates and may be difficult to foresee. As such, it is difficult to articulate the characteristics of decisions made under section 14 of the instrument.

The Administrative Review Council's publication '*What decisions should be subject to merit review*?' (1999) indicates that decisions for which there is no appropriate remedy may be suitable to be excluded from merits review.

In circumstances where a consignment of sheep has already been loaded onto a vessel, merits review would not result in a suitable remedy. For example, if an exemption was not granted before sheep departed to the Middle East, the Secretary may subsequently grant an exemption if a vessel loaded with sheep is unable to first dock at Kuwait (as required by the instrument) due to an extreme and unforeseeable weather event that could compromise the welfare of the sheep. In these circumstances, the urgency to grant an exemption justifies the exclusion of merits review, as uncertainty could compromise the welfare of the sheep while the decision was being reviewed. In circumstances where an exemption is not granted before sheep are exported, the holder of an export licence is not prevented from making a new application for an exemption.

A decision to grant an exemption may also have implications beyond the interests of an individual exporter, including adversely impacting trading partners' confidence in the Australian Government's regulatory oversight of exported goods. This in turn may affect the interests of the export industry or a segment of that industry.

The purpose of the instrument is to impose additional conditions on holders of export licences who export sheep by sea to the Middle East. The instrument provides a legal basis for the implementation of several recommendations of the McCarthy Review.

Committee's response

2.5 The committee thanks the minister for his response, and notes the minister's advice that the circumstances that must be taken into account when granting an exemption from the requirements in the instrument will be specific to the consignment of sheep to which the exemption relates. The committee notes the minister's advice that, as a consequence, it is difficult to articulate the characteristics of decisions under section 14 of the instrument.

2.6 The committee also notes the minister's advice that, where a consignment of sheep has already been loaded onto a vessel, merits review would not result in a suitable remedy.[5] The committee further notes the minister's advice that a decision to grant an exemption has the potential to adversely impact trading partners' confidence in the Australian government's regulatory oversight of exported goods, and thereby to affect the interests of the export industry.

2.7 The committee considers that it would be appropriate for the information provided by the 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.

2.8 The committee has concluded its examination of the instrument.

5 The committee notes in this regard that the Administrative Review Council has identified the lack of an appropriate remedy as a ground for excluding merits review. See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx, [4.48]-[4.50].

Instrument	**Civil Aviation Legislation Amendment (Part 149) Regulations 2018 [F2018L01030]**
Purpose	Introduces a framework for the regulation of self-administering aviation organisations
Authorising legislation	*Civil Aviation Act 1988*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[6]

Offences: evidential burden of proof on the defendant[7]

2.9 In *Delegated legislation monitor 9 of 2018*[8] the committee requested the minister's advice as to the justification for the reversal of the evidential burden of proof in subsections 149.015(2), 149.435(4) and 149.440(2) of the instrument.

Minister's response

2.10 The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development advised that:

> I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee regarding the evidential burden of proof being placed on the defendant in relation to sections 149.015, 149.435 and 149.440 440 which relate to the issue of authorisations and aviation administration functions by an Approved Self-administering Organisation (ASAO). The penalties for offences, such as the issue of authorisations or undertaking other tasks without being properly authorised to do so, is 50 penalty units.
>
> The regulations set out a defence that the offence does not apply if the person is permitted under the civil aviation regulations to perform the function or if, before the new authorisation is given, CASA has given approval to the ASAO to issue the new authorisation.
>
> As these provisions express matters that could be considered excuses for not complying with these regulations, a defendant who wishes to rely on

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

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

8 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 3-5.

> the relevant matter bears an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists.
>
> The Committee has requested the justification for reversing the evidential burden of proof. CASA has advised that a prosecution would require a reasonable belief that there was no authorisation, which would be difficult for a prosecutor to establish. The penalties for the offences are low, and reversal of the burden of proof in relation to the existence of an authorisation is reasonable in order to ensure the effectiveness of these provisions.
>
> CASA considers that the reversal of the evidential burden of proof is considered to be appropriate, having regard to the principles in the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers because it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused did something without being authorised to do so than it would be for a person to raise evidence of the defence, that is, that they held the appropriate authorisation.

Committee's response

2.11 The committee thanks the minister for his response, and notes the minister's advice that the Civil Aviation Safety Authority (CASA) considers the reversal of the burden of proof to be appropriate, on the basis that it would be disproportionately more difficult and costly for the prosecution to disprove than for the defendant to establish that the defendant 'did something without being authorised to do so'.

2.12 While noting this advice, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence where:

- the matter is peculiarly within the knowledge of the defendant; *and*
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[9]

2.13 As outlined in the committee's initial comments, whether a person is permitted by regulations to perform a function appears to be a matter of fact and law, while whether CASA has given approval to an ASAO to issue an authorisation appears to be a matter of which CASA would be particularly apprised. In this regard, the committee notes that the relevant defences do not appear to require a 'reasonable belief' that no authorisation or permission exists. Rather, the defences appear to require that conduct is authorised under the regulations, or that CASA has

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

in fact given a particular approval. It is not apparent that these matters would be peculiarly within the knowledge of the defendant.

2.14 The committee has concluded its examination of the instrument. However, the committee draws its concerns about the reversal of the evidential burden of proof in subsections 149.015(2), 149.435(4) and 149.440(2) of the instrument to the attention of the minister and the Senate.

Instrument	**Civil Aviation Order 95.32 (Exemption from Provisions of the Civil Aviation Regulations 1988 — Weight-Shift-Controlled Aeroplanes and Powered Parachutes) Instrument 2018 [F2018L00959]**
Purpose	Exempts certain aeroplanes that are weight-shifted control aeroplanes or powered parachutes from specified provisions of the Civil Aviation Regulations 1988, subject to conditions
Authorising legislation	Civil Aviation Regulations 1988 Civil Aviation Safety Regulations 1998
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[10]

Access to incorporated documents[11]

2.15 In *Delegated legislation monitor 8 of 2018*[12] the committee requested the minister's advice as to how the standards issued by the American Society for Testing and Materials for aeroplanes defined as 'light aircraft' (LSA standards), which appear to be incorporated in the instrument, are or may be made readily and freely available to persons interested in or affected by the instrument; and requested that the explanatory statement be amended to include this information.

Minister's response

2.16 The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development advised that:

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

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

12 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 5-7.

> I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee on the manner of incorporation and access to incorporated documents in relation to this instrument, in particular the 'LSA standards' as defined in regulation 21.172 of the *Civil Aviation Safety Regulations 1988* as standards issued by the American Society for Testing and Materials for aeroplanes defined as 'light aircraft'.
>
> CASA will make the relevant sections of the documents available, in its Canberra or regional offices, by arrangement, and for reading only, to any aircraft operator who is affected by the direction instrument, or to any interested person.
>
> I am advised CASA will lodge a replacement explanatory statement explaining how and where the documents can be viewed.

Committee's response

2.17 The committee thanks the minister for his response, and notes the minister's advice that the Civil Aviation Safety Authority will make relevant sections of the LSA standards available for reading only, in its Canberra or regional offices, to any interested person.

2.18 The committee also notes the minister's undertaking to lodge an amended explanatory statement, including information regarding how the relevant sections of the LSA standards may be accessed free of charge, for registration on the Federal Register of Legislation.

2.19 The committee has concluded its examination of the instrument.

Instrument	**Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018 [F2018L00819]**
Purpose	Increase fees payable in the federal courts and tribunals, and juror remuneration in the Federal Court of Australia
Authorising legislation	*Administrative Appeals Tribunal Act 1975* *Family Law Act 1975* *Federal Circuit Court of Australia Act 1999* *Federal Court of Australia Act 1976* *Judiciary Act 1903* *Migration Act 1958* *Native Title Act 1993*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 25 June 2018) Notice of motion to disallow must be given by 13 September 2018[13]

Unclear basis for determining fees[14]

2.20 In *Delegated legislation monitor 8 of 2018*[15] the committee requested the Attorney-General's advice as to the detailed basis on which each of the increased fees imposed by the instrument has been calculated, and how this relates to cost recovery for the provision of the relevant documents and services; and if any of the increased fees amount to more than cost recovery, the legislative authority which is relied on for the levying of taxation by the instrument.

Attorney-General's response

2.21 The Attorney-General advised:

> Firstly, it is worth noting that, fees collected by federal courts and tribunals form part of the Commonwealth's consolidated revenue. This characterises the approach of the Commonwealth that (outside true cost recovery organisations) revenue is not hypothecated to fund dedicated expenditure. For this reason, the revenue generated by particular fee

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

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

15 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 7-10.

> increases should not be described as recovering the costs of providing particular court services.
>
> Notwithstanding this, the cost of operating federal courts and tribunals is significantly higher than the revenue that is generated from fees, including the anticipated revenue from these fee increases. In 2018-19, Commonwealth funding to the federal courts and tribunals is estimated at around $465 million, in comparison to anticipated total fee revenue of around $125 million, including the fee increases in the Regulations. If this were to be considered as a true cost recovery regime, this would amount to a cost recovery rate of around 27 per cent. Further, the increased fees in the High Court, Federal Court and Federal Circuit Court does not materially alter that, as the additional revenue expected to be raised in 2018-19 is around $1.6 million.
>
> The Productivity Commission's 2014 report into Access to Justice Arrangements acknowledged that as a share of the costs recouped by government, court fees in Australia are relatively low, and noted that cost recovery in most courts is between 20 to 35 per cent.
>
> With regard specifically to the change in the frequency of indexation from biennial to annual, this will allow fees to better align with increased costs in the provision of services provided by courts and tribunals due to inflation. As such, it does not represent an increase in fees, or in cost recovery, in real terms.

Committee's response

2.22 The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the operating costs of federal courts and tribunals significantly exceed revenue generated through fees, and that the fee increases enacted by the instrument do not materially alter the percentage of costs recovered.

2.23 The committee further notes the Attorney-General's advice that the change in the frequency of indexation from biennial to annual will allow fees to better align with cost increases in the provision of services due to inflation, and does not represent an increase in fees, or in cost recovery, in real terms.

2.24 However, the committee also notes that the explanatory statement (ES) to the instrument states that the revenue generated through the change in the frequency of fee indexation 'will be applied to Budget repair and priorities within the Attorney-General's and the Minister for Home Affairs' portfolios'.[16] As outlined in the committee's initial comments, this suggests that these fee increases go beyond cost recovery (and may therefore constitute a tax, for which there is no specific authority in the instrument's enabling legislation).

16 Explanatory statement, p. 2.

2.25 The Attorney-General's response now indicates that the court and tribunal fees increased by the instrument fall well below cost recovery, and as such would not constitute a tax. The committee considers that this information would have been useful in the ES, so as to avoid any confusion as to the nature of the fees increased by the instrument.

2.26 The committee has concluded its examination of the instrument.

Instrument	**Export Control (Animals) Amendment (Approved Export Programs and Other Measures) Order 2018 [F2018L01011]**
Purpose	Establishes a scheme for approved programs to ensure the health and welfare of exported live animals
Authorising legislation	Export Control (Orders) Regulations 1982
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[17]

Personal rights and liberties: privacy[18]

2.27 In *Delegated legislation monitor 9 of 2018*[19] the committee requested the minister's advice as to the nature of the personal information that may be published by the secretary pursuant to new section 1A.49 of the Export Control (Animals) Order 2004 (inserted by item 11 of Schedule 1 to the instrument); and why it is considered necessary and appropriate to allow the secretary to make this public.

Minister's response

2.28 The Minister for Agriculture and Water Resources advised:

> Section 1A.49 provides that the Secretary of the Department of Agriculture and Water Resources may publish records and reports that are made by accredited veterinarians or authorised officers in relation to approved export programs. An approved export program is a program of activities to be undertaken by an accredited veterinarian or an authorised officer for

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)(b).

19 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 7-10.

the purpose of ensuring the health and welfare of eligible live animals in the course of export activities.

The publication of records and reports relating to approved export programs encourages good animal welfare practices on livestock export voyages. It also provides assurance to farmers and members of the community about oversight of the health and welfare of exported live animals. Records and reports may include photographs and video footage.

The publication of material under the new section 1A.49 is important to promote transparency and demonstrate the Australian Government's commitment to promoting a culture focused on animal welfare outcomes. In practice, I expect that publication under this section is likely to only be in limited and exceptional circumstances, and only where it is considered necessary to protect animal welfare outcomes. Personal information may include names, for example, of livestock exporters, accredited veterinarians, stockpersons as well as persons in management and control of livestock export companies. This is intended to deter people from engaging in behaviour which puts the welfare of livestock at risk.

Through these amendments, the Australian Government is continuing to implement measures to improve the regulation of the export of livestock and promote improved animal welfare outcomes. The amendment supports the implementation of the recommendations in the *Independent Review of Conditions for the Export of Sheep to the Middle East during the Northern Hemisphere Summer* undertaken by Dr McCarthy (the McCarthy Review).

Committee's response

2.29 The committee thanks the minister for his response, and notes the minister's advice that the publication of records and reports relating to approved export programs encourages good animal welfare practices on livestock export voyages. The committee also notes the minister's advice that, in practice, the secretary is only likely to publish material under new section 1A.49 in exceptional circumstances, and only where to do so is considered necessary to protect animal welfare.

2.30 The committee also notes the minister's advice that personal information published under new section 1A.49 may include the names of livestock exporters, accredited veterinarians and stockpersons, as well as other persons engaged in management and control of livestock export companies. The committee further notes the advice that the publication of this information is intended to deter people from engaging in behaviour that puts the welfare of livestock at risk.

2.31 The committee considers that it would be appropriate for the further 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.

2.32 The committee has concluded its examination of this matter.

Retrospective effect[20]

2.33 In *Delegated legislation monitor 9 of 2018*[21] the committee requested the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of subsection 7.11(a) of the Export Control (Animals) Order 2004 (inserted by item 16 of Schedule 1 to the instrument); and if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness for applicants.

Minister's response

2.34 The Minister for Agriculture and Water Resources advised:

> Subsection 7.11(a) seeks to ensure that the amendments to the *Export Control (Animals) Order 2004* apply to applications for export permits and health certificates for livestock that had been made before commencement, but had not been decided before that time.
>
> The reason for the retrospective effect of the instrument, in relation to applications for export permits and health certificates that had been made but not yet decided, is to ensure that animal welfare outcomes can be improved and implemented immediately on commencement.
>
> One application was impacted by the commencement of this instrument. The Department of Agriculture and Water Resources (the department) worked closely with this applicant. Advising this applicant of additional information required to be included in their application and assisting them to understand the additional requirements ensured that there was no disadvantage and that there was procedural fairness.
>
> As the regulator, the department is committed to engaging with the livestock export sector to promote compliant behaviour and improved animal welfare outcomes, in accordance with this instrument, which supports the implementation of the recommendations in the McCarthy Review. Through this instrument, the Australian Government is continuing to implement measures to improve the regulation of the export of livestock and promote improved animal welfare outcomes for livestock.

Committee's response

2.35 The committee thanks the minister for his response, and notes the minister's advice that only one application was impacted by the commencement of the instrument. The committee notes the minister's advice that the department worked closely with this applicant (including providing advice and assistance with respect to

---

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

21 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 9 of 2018*, at pp. 7-10.

the additional requirements enacted by the instrument) to ensure that the applicant was not disadvantaged, and was afforded procedural fairness.

2.36 The committee has concluded its examination of the instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2018 [F2018L00842]**
Purpose	Establishes legislative authority for spending activities administered by the Department of Health
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018) Notice of motion to disallow must be given by 17 September 2018[22]

Merits review[23]

2.37 In *Delegated legislation monitor 8 of 2018*[24] the committee requested the minister's advice as to whether new grant decisions made under the Rural and Remote Health Infrastructure Projects activity will be subject to independent merits review; and if not, what characteristics of those decisions justify their exclusion from merits review.

Minister's response

2.38 The Minister for Finance and the Public Service advised:

> The purpose of the RRHIP is to provide the flexibility to deliver the current projects originally commenced under the Health and Hospitals Fund (HHF) and the authority to vary the project scope without modifying the program objectives. The purpose of the RRHIP is therefore not to provide an additional competitive grant opportunity, but to provide a path for existing projects to be completed. The scope of the RRHIP does not involve decisions concerning new grant recipients.
>
> RRHIP will continue to provide funding to support the delivery of existing health infrastructure but with increased flexibility to address specific

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

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

24 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 15-16.

regional, rural and remote needs. RRHIP will run over four years from 2018-19 to 2021-22.

The objectives of the RRHIP are to:

• deliver improved health infrastructure in regional, rural and remote areas; and

• improve regional and remote health outcomes.

The expected outcomes of the RRHIP include:

• enhanced health care facilities, directly benefiting local communities; and

• improved access to better and more timely health care, delivered closer to home.

Due to the abolition of the HHF Program Board, the existing HHF projects no longer have the flexibility to be adjusted to allow them to continue under the HHF. The RRHIP was announced in the 2018-19 Budget for the sole purpose of continuing the existing HHF projects which could not continue without this flexibility. These projects have already commenced, with the majority of these projects also commencing construction activity. As such it would not be value for money to open a grant opportunity up to new applicants to start projects from scratch. It is therefore intended to offer the grants only to the existing recipients of the original HHF projects. The direct source arrangements are considered appropriate as these grants are to enable the completion of projects already commenced under the HHF.

Committee's response

2.39 The committee thanks the minister for his response, and notes the minister's advice that the sole purpose of the Rural and Remote Health Infrastructure Projects (RRHIP) activity is to provide funding for the completion of existing projects commenced under the Health and Hospitals Fund (HHF). The committee also notes the minister's advice that it is intended to offer grants under the RRHIP only to the existing recipients of funding under the HHF, and that the scope of the RRHIP does not involve decisions concerning new grant recipients.

2.40 However, the committee also notes that the explanatory statement (ES) to the instrument states that 'decisions in relation to new funding recipients may be subject to a merits review process'.[25] As outlined in the committee's initial comments, this suggests that the RRHIP will extend to providing grants for new health infrastructure projects. The minister's response now indicates that the RRHIP will provide a pathway for the completion of existing infrastructure projects, and will not involve decisions concerning new grant recipients.

---

[25] Explanatory statement (ES), p. 17.

2.41 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.

2.42 The committee has concluded its examination of the instrument.

Instrument	**Health Insurance (Diagnostic Imaging Services Table) Regulations 2018 [F2018L00858]**
Purpose	Prescribes a new table of diagnostic imaging services for which Medicare benefits will be payable, incorporating minor policy changes and machinery amendments
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 27 June 2018) Notice of motion to disallow must be given by 18 September 2018[26]

Merits review[27]

2.43 In *Delegated legislation monitor 8 of 2018*[28] the committee requested the minister's advice as to whether refusal of an application for exemption made under clause 1.2.3 of Schedule 1 to the instrument would be subject to independent merits review; and if not, what characteristics of such a decision would justify its exclusion from merits review.

Minister's response

2.44 The Minister for Health advised:

> As noted by the Committee in its report, clause 1.2.3 provides exemptions from the capital sensitivity provisions contained within the instrument under which higher rates of Medicare reimbursement are provided for services performed on newer or upgraded equipment. Clause 1.2.2 provides for the new effective life age and maximum extended life age for specified types of diagnostic imaging equipment. For example, for

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

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

28 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 17-18.

ultrasound, computed tomography, mammography and angiography diagnostic imaging equipment, the new effective life age and maximum extended life age are 10 and 15 years respectively. Clause 1.2.3 of Schedule 1 provides for exemptions from capital sensitivity for (older) equipment used in regional and remote areas. While some exemptions are automatically applied such as those for diagnostic imaging equipment [including those upgraded equipment the age of which exceeds the maximum extended life for the equipment in outer regional, remote or very remote areas (refer to subclause 1.2.3(3)], subclause 1.2.3(4) provides that the Secretary may grant exemptions in respect of diagnostic imaging equipment in inner regional areas, where the equipment is operated on a rare and sporadic basis, and provides crucial patient access to diagnostic imaging services.

Access to high quality and accurate diagnostic imaging services is crucial in the effective diagnosis of conditions, injuries and diseases. The purpose of the capital sensitivity provisions is to help ensure that patients have access to quality diagnostic imaging services by encouraging providers to regularly replace their older and outdated equipment with new or upgraded equipment. For example, newer computed tomography equipment is able to deliver less ionising radiation during the capture of images than older machines.

Taking into consideration the purpose of the capital sensitivity provisions, the exemption provisions in subclause 1.2.3(4) only apply in very strict and limited circumstances:

(a) the equipment is operated on a rare and sporadic basis; and

(b) it provides crucial patient access to diagnostic imaging services.

In assessing criterion (a), the Secretary or the delegate of the Secretary takes into consideration the usage and number of patients accessing the diagnostic imaging services. In relation to criterion (b), the applicant must provide evidence that the equipment provides crucial patient access to the diagnostic imaging services in which the equipment is used. In addition to these strict criteria, the relevant proprietor of the equipment may only apply if they satisfy the threshold criteria set out in subclause 1.2.3(6). Subclause 1.2.3(6) provides that a relevant proprietor may only apply for an exemption under subclause (4) if the age of the diagnostic imaging equipment exceeds the maximum extended life age for the diagnostic equipment by less than three years and the matters set out in paragraph (4)(a) or (4)(b) all apply. As the extension on the possible use of the equipment after the specified maximum extended life age is limited to less than three years, this also limits the number of proprietors that can apply for exemption. At the same time it is also noted that applying for an exemption and/or reconsideration under subclause 1.2.3(4) and (5), respectively allows the proprietor to continue to provide diagnostic imaging services without the capital sensitivity restrictions applying to the equipment (refer to clause 1.2.1). This is because the exemption from

capital sensitivity applies where the application has been made under subclause 1.2.3(4) or (5) and a decision has not been made by the Secretary or the delegate of the Secretary.

These criteria, together with the explicit requirements in clause 1.2.5 (Delegation) that applications need to be assessed by delegated senior executive officers, reflect the public health benefit importance of the capital sensitivity provisions as noted earlier and the stringent decision making statutory requirements applying to the granting of these exemptions.

Since the introduction of these provisions in 2011, my Department has recorded 58 applications for exemptions under subclause 1.2.3(6) of which 34 were approved and 24 were not approved. Of the applications that were not approved, there were two reconsiderations.

In relation to reconsideration decisions, I reiterate that the internal review process of my Department applies principles of administrative law to ensure the decision is reconsidered in a fair, independent and robust manner. When an application is refused and the applicant makes a request for reconsideration, another, more senior officer will review the decision against the exemption criteria in clause 1.2.3(4). To enhance confidence in the independence of the reviewing officer and the internal review, steps are taken to ensure that the initial decision-maker is not involved in the reconsideration process.

The reviewing senior officer reconsiders the merits of the application in regards to:

• the applicant's initial application and the justification for meeting each criterion; and

• the reasoning of the applicant in asking for a reconsideration of the decision and any new material provided by the applicant as part of the reconsideration process.

Given that the independent internal reviews are being carried out by a senior executive officer, the small number of reconsideration applications that my Department has received since 2011, and the stringent criteria that the applicant must meet for the delegate of the Secretary to grant an exemption, I am of the view that the current statutory review provisions are consistent with the purpose of the capital sensitivity provisions.

Committee's response

2.45 The committee thanks the minister for his response, and notes the minister's view that the current statutory review provisions, which provide for internal review of exemption decisions made by the secretary, are consistent with the purpose of the capital sensitivity provisions. In this regard, the committee notes the minister's advice that internal review is conducted by a senior officer, and that the review process applies principles of administrative law to ensure that exemption decisions are reconsidered in a fair, independent and robust manner.

2.46 While noting this advice, the committee emphasises that it does not generally consider internal review by a departmental official to constitute sufficiently independent merits review, irrespective of the seniority of the officer conducting the internal review or whether the review process applies administrative law principles. The committee further notes that the minister's response does not appear to identify any established grounds that would justify excluding merits review.[29]

2.47 The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate the lack of independent merits review in relation to decisions by the secretary to grant exemptions from capital sensitivity, in the absence of any established grounds for excluding merits review.

Instrument	**Health Insurance (General Medical Services Table) Regulations 2018 [F2018L00766]**
Purpose	Prescribes a new table of general medical services for the 12-month period beginning on 1 July 2018
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[30]

Incorporation of document[31]

2.48 In *Delegated legislation monitor 8 of 2018*[32] the committee requested the minister's advice as to the manner in which the Australian Type 2 Diabetes Risk Assessment Tool is incorporated into the instrument. The committee also requested that the instrument or its explanatory statement be amended to include this information.

29 See Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx.

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

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

32 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 19-20.

Minister's response

The Minister for Health advised:

> I note that it is not clear in the instrument or the accompanying explanatory statement that the Australian Type 2 Diabetes Risk Assessment Tool is incorporated as in force at the commencement of the instrument. This was an administrative oversight that will be corrected in line with the example cited by the Committee in *Delegated legislation monitor 8 of 2018*. The Health Insurance (General Medical Services Table) Regulations 2018 will be amended accordingly and the accompanying explanatory statement will also make the manner of the incorporation clear.

Committee's response

2.49 The committee thanks the minister for his response, and notes the minister's advice that the Australian Type 2 Diabetes Risk Assessment Tool is incorporated as in force at the commencement of the instrument. The committee also notes the minister's undertaking to amend the instrument and its explanatory statement to make this clear.

2.50 The committee has concluded its examination of the instrument.

Instrument	**Marine Order 501 (Administration — national law) Amendment Order 2018 [F2018L00756]**
Purpose	Updates prescribed standards for the purposes of the National Law for marine safety of domestic commercial vessels
Authorising legislation	*Marine Safety (Domestic Commercial Vessel) National Law Act 2012*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[33]

Incorporation of documents[34]

2.51 In *Delegated legislation monitor 8 of 2018*[35] the committee requested the minister's advice as to the manner in which the National Standard for Commercial

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)(a).

Vessels (NSCV) and the Uniform Shipping Laws (USL) Code are incorporated, and where they may be accessed. The committee also requested that the explanatory statement be amended to include this information.

Minister's response

2.52 The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development advised:

> I have sought advice from the Australian Maritime Safety Authority (AMSA) about the concerns raised by the Committee on the manner of incorporation and access to incorporated documents in relation to this instrument, in particular:
>
> • National Law-Marine Surveyors Accreditation Guidance Manual 2014
>
> • National Standard for Commercial Vessels (NSCV)
>
> • Uniform Shipping Laws Code (USL Code)
>
> Section 164 of schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (national law) allows Marine Orders to make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in any written instrument in force or existing from time to time, including but not limited to the NSCV and the USL Code. Subsection 159(2) and section 163 of the national law allow Marine Orders to prescribe standards for the purpose of the national law.
>
> Accordingly, Section 6 of Marine Order 501 (Administration - national law) 2013 prescribes the National Law - Marine Surveyors Accreditation Guidance Manual 2014, specific parts of the NSCV, and the USL Code as existing from time to time as standards for the purpose of the national law.
>
> AMSA has advised that each of these documents is freely available online on AMSA's website at www.amsa.gov.au.
>
> I am advised AMSA will lodge a replacement explanatory statement amended to include this information.

Committee's response

2.53 The committee thanks the minister for his response. The committee notes the minister's advice that the NSCV and the USL Code are incorporated as in force from time to time, and can be freely accessed on the AMSA website.

---

35 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 23-25.

2.54 The committee notes the minister's undertaking to lodge a replacement explanatory statement, including information on the manner in which the NSCV and USL Code are incorporated and how those documents may be accessed free of charge, for registration on the Federal Register of Legislation.

2.55 The committee has concluded its examination of the instrument.

Instrument	**Marine Order 507 (Load line certificates — national law) 2018 [F2018L00764]**
Purpose	Repeals and replaces Marine Order 507 relating to load line certificates for domestic commercial vessels
Authorising legislation	*Marine Safety (Domestic Commercial Vessel) National Law Act 2012*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[36]

Offences: legal burdens of proof on the defendant[37]

2.56 In *Delegated legislation monitor 8 of 2018*[38] the committee requested the minister's advice in relation to the justification for reversing the burden of proof in subsections 15(4) and (5) and 16(4), (5) and (6) of the instrument, including why it is considered necessary to reverse the legal, rather than merely the evidential, burden.

Minister's response

2.57 The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development advised:

> The Committee has sought advice in relation to the justification for reversing the burden of proof in subsections 15(4) and (5) and in subsections 16(4), (5) and (6) of the instrument, including why it is considered necessary to reverse the legal, rather than merely the evidential, burden.

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

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

38 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 25-28.

I understand the relevant subsections have been retained from the previous version of this Marine Order. The relevant offence and defence provisions are therefore not new.

The Australian Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where it is peculiarly within the knowledge of the defendant and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish the matter.

The purpose of a vessel's load line is to identify the legal limit to which a ship may be safely loaded in order to maintain buoyancy. These markings help ensure that a vessel is not overloaded and all persons, including crew and shore based personnel, involved in the loading and unloading of the vessel are aware the vessel's stability. Awareness of a vessel's stability could help prevent the vessel from becoming unseaworthy and mitigate multiple risks including loss of the vessel, loss of life and threats to the marine environment.

Paragraphs 15(1)(c)(iii) and 16(1)(c)(iii) of the instrument create strict liability offences for the master and owner of a vessel for operating a vessel with the load line submerged.

Subsections 15(4) and 16(5) set out possible defences for an owner or master respectively on the basis the load line was submerged only because the vessel was listing (leaning) in the water. Similarly, subsections 15(5) and 16(6) set alternative possible defences on the basis the load line was submerged only because of the density of the water.

The reversal of legal and evidential burden is appropriate for these offences because the operational circumstances which may lead to a vessel's load line being submerged are peculiarly within the knowledge of the owner or master. This defence is only relevant if a prosecution can first establish that an offence has been committed.

For example, the owner or master are uniquely positioned to explain and prove why their vessel may have been listing legitimately as a result of uneven loading, flooding or damage. Similarly, the owner or master are uniquely positioned to explain and prove that local variations in water salinity, type, or temperature at the specific time and location may have caused their vessel's load line to become submerged.

Subsection 16(4), sets out a possible defence for an owner from the same offence on the basis that the owner had appropriately caused a load line mark to be displayed and had no means of knowing that it was no longer displayed. Owners may also be the operator of their vessels, owners should be aware of their obligations under the law and should take all reasonable steps to ensure compliance with the law.

> The reversal of legal and evidential burden is appropriate because it is peculiarly within the knowledge of an owner whether or not they have taken any and all reasonable steps to ensure compliance with the load line requirements, and that they had no means of knowing the load line mark had been removed. Again, this defence is only relevant if a prosecution can first establish that an offence has been committed.
>
> I am advised AMSA will lodge a replacement explanatory statement amended to include this information.

Committee's response

2.58 The committee thanks the minister for his response, and notes the minister's advice that the reversal of the burden of proof is appropriate because the matters in the relevant provisions are peculiarly within the knowledge of the defendant. In this regard, the committee also notes the examples provided as to how the defendant would be 'uniquely positioned' to explain and prove the relevant matters.

2.59 However, the committee also notes that where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.[39] In this regard, the committee notes that while the minister's response provides a general justification for reversing the burden of proof, it does not distinguish between the evidential and the legal burden.

2.60 The committee notes the minister's undertaking to register a replacement explanatory statement, which includes a justification for reversing the burden of proof, on the Federal Register of Legislation.

2.61 The committee has concluded its examination of the instrument.

39 See Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 52.

Instrument	**National Vocational Education and Training Regulator Amendment (Enforcement and Other Measures) Regulations 2018 [F2018L01034]**
Purpose	Amends the National Vocational Education and Training Regulator Regulations 2011 to provide that certain matters are subject to civil penalties and infringement notices, and to provide that certain matters must be entered on the National Register
Authorising legislation	*National Vocational Education and Training Regulator Act 2011*
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[40]

Incorrect classification of instrument as exempt from disallowance[41]

2.62 In *Delegated legislation monitor 9 of 2018*[42] the committee requested the minister's advice as to the incorrect classification of the instrument as exempt from disallowance.

Minister's response

2.63 The Minister for Small and Family Business, Skills and Vocational Education advised:

> The Department of Education and Training advises me that the incorrect classification of the Regulation as exempt from disallowance was an isolated clerical error that occurred during the lodging process of the Regulation on the Federal Register of Legislation. The error was corrected by the department as soon as the Office of Parliamentary Counsel brought it to the department's attention.
>
> As noted by the Committee, the correct classification of instruments is of utmost importance to ensure the effective oversight of delegated legislation by Parliament. The department assures me that its officers involved with the classification of instruments are aware of the importance of correct classification and the department has implemented

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 9 of 2018*, at pp. 15-16.

changes to its processes relating to the classification of instruments to ensure such an error does not occur again.

Committee's response

2.64 The committee thanks the minister for her response, and notes the minister's advice that the incorrect classification of the instrument as exempt from disallowance was due to a clerical error during the process of lodging the instrument on the Federal Register of Legislation. The committee also notes the minister's advice that the error was corrected by the department as soon as it was brought to the department's attention by the Office of Parliamentary Counsel.

2.65 The committee also welcomes the minister's advice that the department has implemented changes to its process relating to the classification of instruments to ensure such an error does not occur again.

2.66 However, the committee remains concerned about the classification process for instruments more generally, and the potential for administrative errors to hinder the effective oversight of instruments by Parliament. As outlined in the committee's initial comments, this is because section 42 of the *Legislation Act 2003* allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow the instrument. Where an instrument is initially and incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument during the period that it is incorrectly classified.

2.67 The committee has concluded its examination of the instrument. However, the committee remains concerned that the initial incorrect classification of the instrument as exempt from disallowance may have hindered the effective oversight of the instrument by Parliament.

2.68 In these circumstances, the committee has resolved to place a protective notice of motion on the instrument to extend the disallowance period by 15 days. The committee will continue to monitor the classification of instruments.

Instrument	**Parking Permit Fees Rule 2018 [F2018L00799]** **Pay Parking Fees Rule 2018 [F2018L00798]**
Purpose	[F2018L00798] Sets hourly and daily fees for parking on National Land [F2018L00799] Sets fees for permits issued by the CEO of the National Capital Authority for parking on National Land
Authorising legislation	*National Land (Road Transport) Ordinance 2014*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 21 June 2018) Notice of motion to disallow must be given by 12 September 2018[43]

Unclear basis for determining fees[44]

2.69 In *Delegated legislation monitor 8 of 2018*[45] the committee requested the assistant minister's advice as to the basis on which the fees in each of the instruments have been calculated.

2.70 The Assistant Minister for Regional Development and Territories advised:

> Pay Parking Fees Rule 2018 Schedule 1 sets an hourly fee of $2.90 and a daily fee of $14.00. Schedule 2 to that instrument sets a fee of $67.50 for pre-paid tickets allowing parking for five days. Parking Permit Fees Rule 2018 Schedule 1 prescribes a rate of $14.00 per parking space per business day for construction and special event permits.
>
> The Australian Government introduced pay parking on National Land on 1 October 2014, through the *National Land (Road Transport) Ordinance 2014 (Cth)* ('the Ordinance'), which established the pay parking scheme on National Land and set out administrative arrangements. The Ordinance applies ACT Laws (generally about paid parking) to National Land. Under the Ordinance, the Minister has the authority to determine fees with application of section 96 (determination of fees, charges and other amounts) of the *Road Transport (General) Act 1999 (ACT)*.

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

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

45 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 28-29.

> Prior to the introduction of pay parking on 1 October 2014, it was agreed by the Australian Government that pricing would be set at the then current market rate, based on the rates of nearby parking areas managed by the ACT government. This approach is consistent with the Resource Management Guideline 302 - Australian Government Charging Framework. This price point was utilised to ensure the incentive for commuters to encroach on National Land was removed, thereby maintaining accessibility to the national institutions.
>
> Between the introduction of pay parking in 2014 and the commencement of the Rules on 1 July 2018, fees for pay parking on National Land have remained unchanged. In comparison, ACT government pricing has increased annually. The current comparable ACT government parking rate is $13.90 per day. The determination of the 1 July 2018 fees maintains the original intent of the pay parking scheme on National Land being consistent with market rates.

Committee's response

2.71 The committee thanks the assistant minister for her response, and notes the assistant minister's advice that the authority to determine fees for parking on National Land appears in section 96 of the *Road Transport (General) Act 1999* (ACT), which is applied by the authorising legislation for the instrument.

2.72 The committee also notes the assistant minister's advice that, prior to the introduction of pay parking in October 2014, it was agreed by the Australian Government that pricing would be set at the market rate. In this regard, the committee notes the advice that fees for parking on National Land have remained unchanged since the introduction of pay parking in 2014, and that the instrument brings fees for parking on National Land into line with current market rates (consistent with the original intent of the pay parking scheme).

2.73 The committee considers that it would be appropriate for the information provided by the 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.

2.74 The committee has concluded its examination of the instruments.

Instrument	**Privacy (Credit Reporting) Code 2014 (Version 2) [F2018L00925]**
Purpose	Updates the Privacy (Credit Reporting) Code 2014 to clarify obligations, reflect current industry practice and ensure consistency with the *Privacy Act 1988*
Authorising legislation	*Privacy Act 1988*
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[46]

Incorporation of document[47]

2.75 In *Delegated legislation monitor 8 of 2018*[48] the committee requested the Attorney-General's advice as to the manner in which *ISO 10002-2006 Customer Satisfaction – Guidelines for complaints handling in organizations* is incorporated into the instrument; and how that document is or may be made readily and freely available to persons interested in or affected by the instrument. The committee also requested that the instrument and/or its explanatory statement be amended to include this information.

Attorney-General's response

2.76 The Attorney-General advised:

> On 29 May 2018 the acting Australian Information Commissioner approved the CR Code under subsection 26T(5) of the *Privacy Act 1988*. The varied instrument commenced on 1 July 2018. Paragraph 21.1 of this instrument incorporates into the law by reference the *ISO 10002-2006 Customer Satisfaction-Guidelines for complaints handling in organizations*. This document had previously been incorporated by reference to the CR Code (Version-1.0), which commenced on 12 March 2014.
>
> In accordance with the *Legislation Act 2003*, paragraph 21.1 of the CR Code (Version 2.0) refers to a 2006 publication in existence at the time the instrument commenced, rather than to a document existing from time to time. The Australian Information Commissioner has advised that new

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

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

48 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 30-32.

versions of this standard are released with the year of publication incorporated into the title. For instance, *ISO 10002-2006* has been successively superseded by *ISO 10002-2006 AMDT 1*, *ISO 10002-2014*, and *ISO 10002- 2018*. However, paragraph 21.1 specifically refers to the 2006 version of the Standard.

ISO 10002-2006 is available for purchase by the public by visiting the SAI Global web shop at www.saiglobal.com. However, the Standard is also freely available at the National Library of Australia and at a number of public libraries, such as the State Libraries of New South Wales and Queensland. I am advised that the Office of the Australian Information Commissioner will source a copy of the Standard and make it available for inspection.

The Commissioner will lodge an amended explanatory statement (ES) with OPC for this instrument (which will be registered and tabled in Parliament in due course). The amended ES will include the following in relation to paragraph 21.1:

• a reference to sections 26M and 26T(5) of the Privacy Act, which, consistent with the Legislation Act, provide the authority to incorporate *ISO 10002-2006* into the law by reference

• a description of *ISO 10002-2006* and of the manner in which *ISO 10002-2006* is incorporated by reference, which makes clear that the 2006 document applies; and

• information that *ISO 10002-2006* can be readily and freely accessed at certain named public libraries, and upon request through the Office of the Australian Information Commissioner.

Committee's response

2.77 The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that *ISO 10002-2006 Customer Satisfaction – Guidelines for complaints handling in organisations* is incorporated as in force at the time the instrument commenced, and that the standard is freely available at the National Library of Australia and certain public libraries. The committee also notes the Attorney-General's advice that the Office of the Australian Information Commissioner will source a copy of the standard and make it available for inspection.

2.78 The committee notes the Attorney-General's undertaking to lodge an amended explanatory statement, including information on the manner in which *ISO 10002-2006* is incorporated and how it may be accessed free of charge, for registration on the Federal Register of Legislation.

2.79 The committee has concluded its examination of the instrument.

Instrument	**Regional Investment Corporation Operating Mandate Direction 2018 [F2018L00778]**
Purpose	Directs the Regional Investment Corporation as to the performance of its functions, particularly in relation to the administration of farm business concessional loans and water infrastructure loans
Authorising legislation	*Regional Investment Corporation Act 2018*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 19 June 2018) Notice of motion to disallow must be given by 10 September 2018[49]

Merits review[50]

2.80 In *Delegated legislation monitor 8 of 2018*[51] the committee requested the minister's advice as to whether decisions made by the Regional Investment Corporation (RIC) in relation to the grant of farm business loans are subject to merits review by an independent tribunal and if those decisions are not subject to such merits review, the characteristics of the decisions that would justify excluding merits review.

Minister's response

2.81 The Minister for Agriculture and Water Resources advised:

> Decisions made by the Regional Investment Corporation (RIC) on whether to grant farm business loans are subject to an internal review process within the RIC, rather than merits review by an independent tribunal. This approach reflects the governance arrangements of the RIC and its role in managing Commonwealth funds.
>
> The RIC is a corporate Commonwealth entity with an independent expertise-based Board, whose role is to ensure the proper, efficient and effective performance of the RIC's functions. Section 11(1) of the *Regional Investment Corporation Operating Mandate Direction 2018* (the Mandate) requires the RIC to undertake all aspects of loan management in a prudential manner to minimise the risk of default. Allowing a tribunal to

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

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

51 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 32-34.

have authority over the RIC's decision to grant a loan may jeopardise the capacity of the Board to ensure the RIC is adequately managing the financial risk to the Commonwealth associated with granting a loan.

As stipulated in subsections 9(2) and 9(3) of the Mandate, the RIC can only offer farm business loans in accordance with certain loan specifications, and must be satisfied an applicant fulfils mandatory requirements before offering a farm business loan. These specifications and requirements include that the business is in financial need of a concessional loan, has the capacity to repay the loan, and is financially viable or has sound prospects of a return to financial viability. While a decision-maker's specialised expertise does not in and of itself justify the exclusion of merits review, the RIC is a unique position to determine if the granting of a loan meets the requirements set out in the Mandate. For example, as part of its consideration of loan applications, the RIC will undertake a commercial assessment of the business applying for a loan, with consideration given to the financial circumstances of the business and the outlook for the agricultural activities being undertaken. The RIC will also make its loan decisions in accordance with policies and procedures set by the Board.

Internal review process

Under Section 12 of the Mandate, the RIC's Board is required to establish an internal review procedure that is transparent, robust and fair. Section 12 of the Mandate also sets out requirements for this procedure, including that internal reviews and decisions on internal reviews are undertaken by an individual who was not the primary decision maker in the original decision. In addition, the farm business loan guidelines prepared by the RIC must include details of the right to request a review of application decisions and the process for requesting a review. This is an appropriate and sufficient mechanism, and ensures applicants can have loan decisions reviewed in a transparent, robust and fair manner.

Committee's response

2.82 The committee thanks the minister for his response, and notes the minister's advice that decisions made by the RIC in relation to the grant of farm business loans are subject to internal review, rather than merits review by an independent tribunal. The committee also notes the minister's advice that external merits review 'may jeopardise the capacity of the Board to ensure the RIC is adequately managing…financial risk to the Commonwealth'.

2.83 The committee further notes the minister's advice that the RIC is in a unique position to determine if the granting of a loan meets the requirements set out in the RIC's Operating Mandate, and that the internal review provided for under the Mandate is 'an appropriate and sufficient mechanism'.

2.84 While noting this advice, the committee reiterates that it does not consider internal review, on its own, to constitute sufficiently independent merits review. The committee is also concerned that the minister's response does not appear to identify

any established grounds for excluding decisions in relation to the grant of farm business loans from merits review. In this regard, the committee notes that the Administrative Review Council document, *What decisions should be subject to merit review?,* expressly states that 'decisions that are made by an expert body, or that require specialist expertise, should be reviewable'.[52] While the RIC may be best or even 'uniquely' placed to decide eligibility for farm business loans, the committee does not consider this, on its own, to be sufficient justification for excluding decisions in relation to such loans from merits review.

2.85 The committee has concluded its examination of this instrument. However, the committee draws to the attention of the Senate its concern about the exclusion from merits review of decisions relating to the grant of farm business loans by the Regional Investment Corporation.

Instrument	**Remuneration Tribunal (Members' Fees and Allowances) Amendment Regulations 2018 [F2018L00706]**
Purpose	Increases fees payable to members of the Remuneration Tribunal
Authorising legislation	*Remuneration Tribunal Act 1973*
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[53]

Consultation[54]

2.86 In *Delegated legislation monitor 8 of 2018*[55] the committee requested the minister's advice as to whether any consultation was undertaken in relation to the instrument and if so, the nature of that consultation; or whether no consultation was undertaken and if not, why not. The committee also requested that the explanatory statement be amended to include this information.

52 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), paragraphs 5.17 and 5.18.

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

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

55 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 36-37.

Minister's response

2.87 Minister for Finance and the Public Service advised:

> These Amendment Regulations 2018 provide for a two per cent increase in fees payable to the two members and the President of the Remuneration Tribunal.
>
> The Department of the Prime Minister and Cabinet initially consulted the Remuneration Tribunal Secretariat, staffed by APS employees in the Australian Public Service Commission, on the proposal to increase the Remuneration Tribunal members' fees. However, as the Remuneration Tribunal is the Australian Government statutory authority with responsibility to determine, report on or provide advice about remuneration, including for part-time holders of various public offices, the Department did not consult any further. The Department also reviewed trends and market forces and had regard to general increases across the public sector and sources, such as the wage price index produced by the Australian Bureau of Statistics. This is in line with the Government's approach to a transparent and consistent method of remunerating senior public officials.
>
> I attach a revised Explanatory Statement reflecting this advice for your consideration. The Department has arranged for it to be published on the Federal Register of Legislation.

Committee's response

2.88 The committee thanks the minister for his response, and notes the minister's advice that the Department of the Prime Minister and Cabinet initially consulted the Remuneration Tribunal Secretariat on the proposal to increase the Remuneration Tribunal members' fees. The committee also notes the minister's advice that, owing to the nature of the Remuneration Tribunal's responsibilities, the department did not consult further.

2.89 The committee notes the minister's undertaking to register a revised explanatory statement, including the information provided in the minister's response, on the Federal Register of Legislation.

2.90 **The committee has concluded its examination of the instrument.**

Instrument	**Superannuation Amendment (PSS Trust Deed) Instrument 2018 [F2018L00707]**
Purpose	Amends the Public Sector Superannuation Trust Deed and Rules to take account of proposed and recent enactments, and simplify and update other provisions
Authorising legislation	*Superannuation Act 1990*
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 18 June 2018) Notice of motion to disallow must be given by 23 August 2018[56]

Subdelegation[57]

2.91 In *Delegated legislation monitor 8 of 2018*[58] the committee requested the minister's advice as to why it is considered necessary and appropriate to permit the Finance Minister to delegate any or all of his or her powers and functions under the PSS Trust Deed to any member of staff of the Commonwealth Superannuation Corporation (CSC); and the appropriateness of amending the instrument to require that the minister be satisfied that persons to whom powers are delegated under paragraph 13.1(a) of the Deed have the expertise appropriate to the power delegated.

Minister's response

2.92 The Minister for Finance and the Public Service advised:

> The Committee has sought my advice on the amendment provided for by Item 7 of Schedule 1 to the PSS Amending Deed. The item enables the Finance Minister to delegate all or any of his or her powers under the PSS Trust Deed, other than the power of delegation itself, to the Commonwealth Superannuation Corporation (CSC) *or a member of the staff of CSC*. The PSS Trust Deed previously included a similar provision enabling the Finance Minister to delegate all or any of his or her powers to staff of ComSuper, which administered the Commonwealth schemes before the organisation's merger with CSC in 2015. The PSS Amending Deed, therefore, preserves and continues the possibility of the delegation

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

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

58 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, at pp. 38-39.

of certain powers to staff of CSC, the trustee and administrator of the scheme.

I should point out that the powers conferred on the Finance Minister by the PSS Trust Deed are, in themselves, limited. Additionally, these powers have never been delegated, and there are no plans to do so. Were I to do so, I can assure the Committee that rigorous consideration would be given to limiting the delegation to particular senior positions.

As you may be aware, the PSS Trust Deed is made under the *Superannuation Act 1990*. The amendment made by Item 7 of Schedule 1 of the PSS Amending Deed is equivalent to an amendment previously made by the *Governance of Australian Government Superannuation Schemes Legislation Amendment Act 2015*, to the Finance Minister's delegation power in paragraph 47(a) of the *Superannuation Act 1990*.

Nevertheless, I appreciate the Committee's concerns with the scope of the delegation power under paragraph 13.1(a) of the PSS Trust Deed. Given the powers involved, I am satisfied that delegation of the powers can reasonably be limited to CSC staff in senior positions appropriate to the power delegated. I therefore propose amending the PSS Trust Deed at the next available opportunity to provide for this.

Committee's response

2.93 The committee thanks the minister for his response, and notes the minister's advice that the delegation of powers conferred on the Finance Minsiter under the PSS Trust Deed can reasonably be limited to CSC staff in senior positions appropriate to the powers delegated. The committee welcomes the minister's undertaking to amend the instrument at the next available opportunity to provide for this.

2.94 The committee has concluded its examination of this instrument.

Senator John Williams (Chair)