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Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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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]

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

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

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

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

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

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

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 5 July and 2 August 2018 (new matters).

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

Response required

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

Instrument	**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]

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.

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

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

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

The instrument imposes a number of conditions on the holders of export licences who export sheep by sea to the Middle East.[4] These conditions are set out in Part 2 of the instrument.[5]

Part 3 of the instrument provides a framework for the secretary to exempt licensees from provisions of the instrument in certain circumstances. Subsection 13(1) allows the holder of a sheep export licence to apply to the secretary for an exemption from one or more provisions of the instrument in relation to a consignment of sheep to which the instrument applies. Subsection 14(1) provides that, on receiving an application made under section 13, the secretary may decide to grant the exemption or not to grant the exemption. Under subsection 14(3), the secretary may grant the exemption 'if the Secretary is satisfied, having regard to any matter that the Secretary considers relevant, that it is appropriate to grant the exemption'.

It appears that the secretary's decision to grant or refuse to grant an exemption from the requirements in the instrument involves a high level of discretion. The grant or refusal of such an exemption also has the potential to affect the interests of individuals seeking to export sheep to the Middle East. Consequently, it appears to the committee that such decisions would generally be suitable for merits review.

However, the explanatory statement (ES) to the instrument states that decisions under subsection 14(1) will not be reviewable. The ES states that this is because those decisions:

> are essentially based on whether animal health and welfare can be protected if an exemption is granted. The impact of such a decision is not limited to one applicant, and may affect the interests of the entire sheep export sector. As such, a decision to provide an exemption must be solely at the discretion of the Secretary in circumstances the Secretary considers appropriate. While the decision is not reviewable, a person would not be prevented from making a new application.

The committee acknowledges that exemption decisions are based on matters of animal health and welfare, and that such decisions may have the potential to affect the sheep export sector as a whole. However, it is not clear to the committee that

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4 A person transports sheep by sea to the Middle East where the vessel on which the sheep are being transported will travel through waters in the Arabian North Sea north of latitude 11°N at any time during the voyage between May and October. This is included in section 6 of the instrument, which sets out how the instrument applies.

5 The conditions include requirements relating to livestock watering systems, heat stress management plans and livestock bedding (section 8); requirements relating to whistle-blower hotline posters (section 8A); requirements relating to pen air turnover and pen space (sections 9 and 10); and a requirement that Kuwait be the first point of unloading for the vessel where Kuwait is one of the destination places for the relevant voyage (section 11).

the reasons given in the ES reflect established grounds for the exclusion of merits review.[6] Accordingly, the committee considers that the ES does not provide sufficient information to establish that decisions relating to the grant of exemptions from requirements in the instrument possess characteristics that would justify their exclusion from merits review.

The committee requests 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's 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?.*

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[7]

Offences: evidential burden of proof on the defendant[8]

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. This principle requires the committee to ensure that where offence provisions in instruments reverse the burden of proof for persons in their individual capacities (requiring the defendant, rather than the prosecution, to disprove or raise

6 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.

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

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

evidence to disprove a matter), this infringement on the right to the presumption of innocence is justified.

The instrument amends the Civil Aviation Safety Regulations 1988 (CASR) to introduce a new regulatory framework within which certain functions that would otherwise be performed by the Civil Aviation Safety Authority (CASA) may be devolved to qualified and approved self-administering organisations (ASAOs). This framework is inserted by item 1 of the instrument.

Within that framework, new section 149.015 makes it an offence of strict liability for a person to perform an aviation administration function if the person does not hold a certificate from an ASAO authorising the person to perform the function. The offence is punishable by a penalty of 50 penalty units. Subsection 149.015(2) sets out a defence, which provides that the offence does not apply if the person is permitted under the CASR or the Civil Aviation Regulations 1988 to perform the function.

In addition, new section 149.435 makes it an offence for an ASAO to issue a new authorisation to a person, knowing that the authorisation is the same in substance as another authorisation that has been suspended, varied or cancelled. The offence is punishable by a penalty of 50 penalty units. Subsection 149.435(4) sets out a defence, providing that the offence does not apply if, before the new authorisation is given, CASA has given approval to the ASAO to issue the new authorisation.

Further, new section 149.440 makes it an offence for an ASAO to issue a new authorisation to a person, knowing that an exclusion period is in force for another authorisation that is the same in substance as the new authorisation. The offence is punishable by a penalty of 50 penalty units. Subsection 149.440(2) sets out a defence, providing that the offence does not apply if, before the new authorisation is issued, CASA has given approval to the ASAO to issue the new authorisation.

In relation to each of the defences above, the defendant bears the evidential burden of proof.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important element of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence in relation to, one or more elements of an offence, interfere with this common law right.

In this instance, the defendant bears an evidential burden (requiring the defendant to raise evidence about the matters in the defences) rather than a legal burden (requiring the defendant to positively prove those matters). However, the committee expects the reversal of the burden of proof to be justified. The explanatory statement (ES) contains no such justification, merely restating the operation and

effect of the relevant provisions. The statement of compatibility also contains no justification for reversing the burden of proof from a human rights perspective.

The committee further notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[9] states that a matter should only be included as 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 and costly for the prosecution to disprove than for the defendant to establish the matter.[10]

In this case, it is not apparent to the committee that the matters set out in the defences in subsections 149.015(2), 149.435(4) and 149.440(2) are matters that would be peculiarly within the defendant's knowledge. In this respect, whether a person is permitted by the 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.

The committee requests the minister's advice as to the justification for reversing the evidential burden of proof in subsections 149.015(2), 149.435(4) and 149.440(2) of the instrument.

9 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf, pp. 50-52.

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

Instrument	**Competition and Consumer (Airservices Australia Prices Surveillance) Declaration 2018 [F2018L01013]**
Purpose	Requires Airservices Australia to notify the Australian Competition and Consumer Commission before increasing the price of certain services
Authorising legislation	*Competition and Consumer Act 2010*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[11]

No statement of compatibility[12]

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable legislative instrument to prepare a statement of compatibility in relation to that instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights. Paragraph 15J(2)(f) of the *Legislation Act 2003* requires that the statement of compatibility be included in the explanatory statement (ES) to the instrument.

With reference to these requirements, the committee notes that the ES to the instrument does not include a statement of compatibility.

The committee requests the minister's advice as to why a statement of compatibility with human rights was not included in the explanatory statement to the instrument; and requests that the explanatory statement be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003.*

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).

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[13]

Personal rights and liberties: privacy[14]

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

The instrument amends the Export Control (Animals) Order 2004 (Principal Order) to establish a scheme for approved export programs. An approved export program is defined in section 9A(2) of the *Export Control Act 1982* (Export Control Act) as a program of activities to be undertaken by an accredited veterianarian[15] or authorised officer[16] for the purpose of ensuring the health and welfare of live animals in the course of export activities.

New section 1A.49 of the Principal Order (inserted by item 11 of Schedule 1 to the instrument) provides that the secretary may publish records and reports made by accredited veterinarians or authorised officers in relation to approved export programs. In relation to that provision, the explanatory statement (ES) states:

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)(b).

15 Section 9B of the Export Control Act provides that the regulations may provide for the accreditation of veterinarians for the purposes of undertaking approved export programs, and for the variation, suspension or revocation of such accreditation.

16 Under section 20 of the Export Control Act, the secretary may, by signed instrument, appoint a person, or persons included in a class of persons, to be an authorised officer or authorised officers. Appointment as an authorised officer empowers a person to exercise specified powers and functions under the Export Control Act.

> Section 1A.49 constitutes an authorisation…for the purposes of the *Privacy Act 1988* and other laws (including the common law). It therefore provides an exception to the Australian Privacy Principles and other requirements of confidentiality. The Secretary does not require consent to publish …records and reports, and the records and reports may include personal information within the meaning of the *Privacy Act 1988*.
>
> The publication of records and reports relating to approved export programs encourages good animal welfare practices on…export voyages, and provides assurance to farmers and members of the community about oversight of the health and welfare of exported live animals.

The statement of compatibilty recognises that the right to privacy is engaged by the instrument, and states that 'there are restrictions on the use of the proposed power to publish reports or records relating to approved export programs'. In this regard, the statement of compatibility notes that the secretary may only publish records and reports given by an accredited veterinarian or authorised officer in relation to an approved export program, and may not publish other information relating to approved export programs.

However, neither the statement of compatibility nor the ES provides any further information regarding the nature of the information that may be published by the secretary under section 1A.49 of the Principal Order. In particular, no information is provided as to the personal information that may be published under that section.

The statement of compatibility also states that the publication of records and reports is intended to ensure public awareness of matters relating to the health and welfare of live animals in the course of export activities, thereby encouraging good animal welfare practices on livestock export voyages. However, it is not apparent to the committee that the publication of personal information is necessary to achieve these objectives, particularly noting that neither the instrument nor the ES provides any information regarding the nature or extent of the personal information that the secretary may publish under section 1A.49.

The committee requests the minister's more detailed 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.**

Retrospective effect[17]

Items 8, 9 and 10 of the instrument amend the Principal Order to insert the following requirements for applications in relation to export permits and health certificates:[18]

- item 8 inserts a new paragraph (ba) into subsection 1A.29(3), to require that the declaration which must accompany an application[19] state that an accredited veterinarian has undertaken required activities in relation to the preparation of livestock;
- item 9 amends subsection 1A.29(4) to enable the secretary to obtain evidence from certain authorities in relation to the matters in new paragraph 1A.29(3)(ba); and
- item 10 inserts a new subparagraph (ia) into paragraph 1A.30(1)(f), to provide that the secretary may grant an application if the secretary is satisfied as to the matters in paragraph 1A.29(3)(ba).

Item 16 of the instrument inserts a new section 7.11 into the Principal Order. New subsection 7.11(a) provides that the amendments made by items 8, 9 and 10 of the instrument apply in relation to applications made under section 1A.29 of the Principal Order that were made before Part 1 of Schedule 1 to the instrument commenced but were not yet decided at that time. The note to new section 7.11 explains that if an exporter applied before the commencement of the instrument for an export permit, or an export permit and a health certificate, and the application had not been decided by the commencement time, the exporter would need to vary the application to state the matter referred to in new paragraph 1A.29(3)(ba).

While the instrument, including section 7.11, commences prospectively, the committee is concerned that the operation of section 7.11 may nevertheless result in the instrument having a retrospective effect, to the potential detriment of persons who had lodged an application prior to the commencement of the instrument which was not yet decided at the time the instrument commenced. In this respect, the committee notes that (as outlined above) the instrument makes substantive changes to requirements relating to applications for export permits and health certificates, as

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

18 Subsection 1A.29(1) of the Principal Order provides that an exporter may apply to the secretary for an export licence and, if the importing country requirements include a requirement for a health certificate, a health certificate for the relevant livestock.

19 Paragraph 1A.29(2)(b) of the Principal Order provides that an application under subsection 1A.29(1) must include a declaration signed by the exporter in accordance with subsection 1A.29(3).

well as to the criteria that must be satisfied before the secretary may grant such applications.

The ES provides no information as to whether any person whose application was pending at the time of the commencement of the instrument may be disadvantaged by consideration of their application under the new criteria, which the person may not have had the opportunity to address at the time the application was made. The ES does not indicate, for example, how many applications will be subject to the new requirements in paragraph 1A.29(3)(ba), or whether applicants will be given an opportunity to address these requirements before their application is decided.

The committee requests 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.

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

Unclear basis for determining fees[21]

The instrument was made under section 111 of the *Industrial Chemicals (Notification and Assessment) Act 1989* (ICNA Act).[22] It amends the Industrial Chemicals

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

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

(Notification and Assessment) Regulations 1990 (Principal Regulations) to set registration charges in relation to the introduction of industrial chemicals into Australia and fees for certain services under the National Industrial Chemicals Notification and Assessment Scheme (NICNAS).

Item 1 of Schedule 1 to the instrument adds a new subsection 11AB(4) to the Principal Regulations. The subsection sets out, for the registration year[23] beginning on 1 September 2018, the amount of charge that a person must pay in order to introduce industrial chemicals into Australia. The amounts are increased from those prescribed for the previous registration year.

The committee's expectation in cases where an instrument carries financial implications via the imposition of or a change to a charge, fee, levy, scale or rate of costs or payment is that the relevant explanatory statement (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.[24]

In this instance, the ES states:

> Current government policy is that the costs of NICNAS activities are fully recovered from the regulated industry through fees and charges.
>
> The increased fees for services for 2018-19 (other than the NICNAS registration fees) are increased in line with wage cost pressures to accommodate anticipated cost increased, based on a weighted average indexation of WPI/CPI, currently 2.3 per cent. NICNAS registration fees are increased by a flat rate of $56 across all registration levels to match the resources required to undertake all regulatory processes related to the registration of introducers of industrial chemicals. Increases to core

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22 Section 111 of the ICNA Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Section 80T of the ICNA Act additionally provides that the rate of registration charge payable by a person in relation to a registration year is the amount prescribed by the regulations for the purposes of each table item in subsection 80T(2).

23 The ICNA Act defines 'registration year' as a period of 12 months beginning on 1 September 1997 or 1 September of any subsequent year.

24 In this respect, the committee notes that sections 53 and 55 of the Constitution make specific provision in relation to laws imposing taxation. Relevantly, section 55 provides that 'Laws imposing taxation shall deal only with taxation', while section 53 provides that 'a proposed law shall not be taken to…impose taxation, by reason only of its containing provisions…for the demand or payment or appropriation of…fees for services under the proposed law'.

> registration charges of 5 per cent is to provide the resources to efficiently administer the scheme, including additional work required to be undertaken in 2018-19 to prepare for reforms to the scheme that were announced in 2015.

It appears that the fees in the instrument have been determined on a cost recovery basis. However, the committee notes that the fees for the registration year beginning on 1 September 2018, set out in item 1 of Schedule 1 to the instrument, have been increased by approximately 8 to 9 per cent from the previous registration year. This does not appear to be consistent with the explanation provided in the ES, which indicates that core registration charges have increased by 5 per cent. It therefore remains unclear to the committee whether the basis on which these fees have been calculated reflects the cost recovery calculations as set out in the ES, or includes consideration of other factors.

The committee requests the minister's advice as to the basis on which the fees set out in item 1 of Schedule 1 to the instrument have been calculated.

Instrument	**Military Rehabilitation and Compensation (Family Support) Instrument (No.2) 2018 [F2018L01016]**
Purpose	Sets out family support benefits and assistance that may be available to members and former members of the Australian Defence Force, and to partners of deceased members, and prescribes associated eligibility criteria
Authorising legislation	*Military Rehabilitation and Compensation Act 2004*
Portfolio	Veterans' Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[25]

Merits review[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

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

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

citizens dependent upon judicial decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument was made under section 268B of the *Military Rehabilitation and Compensation Act 2004* (MRC Act). It provides for the grant of certain assistance to members and former members of the Australian Defence Force (ADF) who have rendered warlike service after 1 July 2004, to related persons of such members, and to the partners of deceased members. The benefits and assistance that may be granted include child care services, counselling services and household services.

Part 2 of the instrument provides for the grant of assistance or benefits to members, former members and nominated persons. Within that Part, section 8 provides that the Military Rehabilitation and Compensation Commission (Commission) may grant assistance or benefits to a member or former member, or to a nominated person of the member or former member, if the Commission is satisfied as to certain prescribed matters relating to the nature of the member's service and to their benefit entitlements.[27]

Part 3 provides for the grant of assistance or benefits to the partners of deceased members. Within that Part, section 14 provides that the Commission may grant assistance or benefits to the partner of a deceased member if the Commission is satisfied as to certain prescribed matters relating to the person's relationship to the member and to the circumstances of the member's death.[28]

Decisions by the Commission in relation to the grant of benefits and assistance have the potential to impact significantly on individuals. Moreover, it appears that such decisions may involve at least an element of discretion. For example, under section 8 the Commission must be satisfied that the member or nominated person is in need of the assistance or benefits, while under section 14 matters to be determined by the Commission include the status of a deceased member's partner and whether a member's death was related to his or her service.

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27 These matters include that the member of former member has rendered warlike service on or after 1 July 2004; that the Commission is the rehabilitation authority for the member or former member; that the Commonwealth is liable to pay compensation to the member under section 118 of the MRC Act; that the member or former member has an approved rehabilitation program; and that the member or former member, or the nominated person of the member or former member, is in need of the assistance or benefits.

28 These matters include that the person was the partner of a deceased member at the time of the member's death; that the deceased member rendered warlike service on or after 1 July 2004; and that the deceased member's death was death by suicide related to his or her service, or was a service death.

With respect to decisions by the Commission under section 14 of the instrument, the explanatory statement (ES) states:

> [T]he eligibility criteria…[do] not require the Commission to establish conclusively that the deceased member's death was a suicide related to service. For example, confirmation of death should be evidenced by a certificate of death, police report or hospital report. However, if the partner is experiencing difficulties obtaining one of them in a timely manner and is in urgent need of support, a signed statutory declaration may be sufficient to satisfy the eligibility criteria in paragraph (c)(i).

Consequently, it appears to the committee that decisions by the Commission in relation to the grant of benefits and assistance under sections 8 and 14 of the instrument would generally be suitable for merits review.

The committee notes that Part 8 of the MRC Act provides for the review of determinations ('original determinations') made under that Act by the Commission and by the Veterans' Review Board. That Part also provides that applications may be made to the Administrative Appeals Tribunal (AAT) for review of a determination revoking, varying or confirming an original determination. However, it is not clear to the committee whether the application of Part 8 extends to AAT review of decisions made by the Commission under any or all legislative instruments made under the MRC Act. In this regard, the committee notes that the ES to the instrument does not indicate whether decisions under sections 8 and 14 of the instrument to grant benefits or assistance are subject to merits review.

The committee requests the minister's advice as to whether decisions made by the Military Rehabilitation and Compensation Commission under sections 8 and 14 of the instrument are subject to independent merits review; and if not, the characteristics of those decisions that would justify their exclusion from merits review.

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[29]

Incorrect classification of instrument as exempt from disallowance[30]

The instrument was made under section 235 of the *National Vocational Education and Training Regulator Act 2011* (NVET Regulator Act). It was classified as exempt from disallowance when received by Parliament and by the committee, and was tabled in the House of Representatives and the Senate on that basis.

Table item 23A of section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 provides that instruments made under specified provisions of the NVET Regulator Act are exempt from disallowance.[31] However, regulations made under section 235 of that Act are not specified. The NVET Regulator Act also does not appear to exempt instruments made under section 235 from disallowance. Consequently, it appears to the committee that the instrument was incorrectly classified as exempt from disallowance.

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

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

31 Table item 23A of section 10 of the LEOM Regulations provides that the following instruments made under the NVET Regulator Act are exempt from disallowance: a determination made under subsection 7(2), 54(1) or 232(1); an instrument made under paragraph 157(1)(p); a direction made under subsection 160(1) or 181(1); and an instrument made under subsection 185(1), 186(1), 187(1), 188(1) or 189(1).

While the committee understands that the instrument has since been reclassified as subject to disallowance, after being drawn to the attention of the Office of Parliamentary Counsel by the committee's secretariat, the committee is concerned that its initial misclassification as exempt from disallowance has potentially hindered the effective oversight of delegated legislation by Parliament.

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 that 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.

The committee remains concerned about the process for the classification of instruments, and continues to monitor this issue.

The committee requests the minister's advice as to the incorrect classification of the instrument as exempt from disallowance.

Advice only

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

Instrument	**Industry Research and Development (National Positioning Infrastructure Capability Program) Instrument 2018 [F2018L01051]** **Industry Research and Development (Satellite-Based Augmentation System Program) Instrument 2018 [F2018L01050]**
Purpose	Establish legislative authority for funding the Satellite-Based Augmentation System Program and the National Positioning Infrastructure Capability Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018) Notice of motion to disallow must be given by 20 September 2018[32]

Parliamentary scrutiny: ordinary annual services of government[33]

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).

Under section 33 of the *Industry Research and Development Act 1986* (Industry Act), executive spending may be authorised by specifying schemes in instruments made under that Act. The money that funds these schemes is specified in an Appropriation Act, but the details of the scheme may depend on the content of the relevant instruments. Once the details of the scheme are outlined in the instruments,

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

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

questions may arise as to whether the funds allocated in the Appropriation bill were inappropriately classified as ordinary annual services of the government.

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.[34] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under section 33 of the Industry 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.

The committee's considerations in this regard are consistent with those set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.[35]

The instruments establish legislative authority for Commonwealth spending of $161 million on the Satellite-Based Augmentation System Program (SBAS Program) and $63.9 million on the National Positioning Infrastructure Capability Program (NPIC Program), respectively. The explanatory statements (ESs) to the instruments indicate that the programs will be delivered by Geoscience Australia, a portfolio agency of the Department of Industry, Innovation and Science.

The ESs state that funding for the programs has been secured through the Department of Industry, Innovation and Science 2018-19 Budget. They further state that funding for the programs will come from Program 1: Geoscience and Spatial Information Services, which is part of Outcome 1 in the Industry, Innovation and Science portfolio.

It appears to the committee that spending on the SBAS Program and the NPIC Program may be new policy not previously authorised by special legislation, and that the initial appropriation for those programs may have been inappropriately classified

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34 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.

35 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.

as 'ordinary annual services' and therefore improperly included in *Appropriation Act (No. 1) 2018-19* (which was not subject to amendment by the Senate).

The committee draws the establishment of legislative authority for what appears to be 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.

Chapter 2

Concluded matters

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

There are no concluded matters in this monitor.

Senator John Williams (Chair)