The Senate

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 2018*, 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 27 September 2018 and 22 October 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	**ASIC Corporations (Short Selling) Instrument 2018/745 [F2018L01356]**
Purpose	Provides legislative relief from certain prohibitions on short selling, and exemptions from certain reporting requirements
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[2]

Incorporation[3]

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

- as in force from time to time (which allows any future amendment or version of the document to be automatically incorporated);

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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)(a).

- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

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

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

1.7 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument commences, or at a time before its commencement. However, subsection 14(2) provides that (subject to below) such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the instrument's authorising Act (or other Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

1.8 In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

1.9 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

1.10 Additionally, where a legislative instrument incorporates a document as in force from time to time, the committee expects the explanatory statement to set out the legislative authority (in the enabling legislation or another Commonwealth Act) for the incorporation of documents as in force from time to time. The committee's expectations with regard to the incorporation of documents are set out in its *Guideline on incorporation of documents*.[4]

1.11 With reference to these requirements, the committee notes that the instrument appears to incorporate the following documents:

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4 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

- the *Investment Company Act 1940* of the United States of America;[5]
- a timetable published by ASX Limited;[6] and
- the official list of ASX Limited.[7]

1.12 However, neither the instrument nor its explanatory statement indicates the manner in which those documents are incorporated, or how they may be accessed free of charge.

1.13 Additionally, the instrument appears to incorporate the following indexes:

- S&P ASX 200;[8] and
- S&P ASX 300.[9]

1.14 The instrument indicates that the indexes are incorporated as in force from time to time,[10] and provides web references for where they may be accessed. However, the explanatory statement does not indicate which provision in the *Corporations Act 2001* (Corporations Act) or other Act of Parliament was relied on to incorporate the indexes as in force from time to time.

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

- **the manner in which the documents identified at paragraph [1.11] are incorporated by the instrument (as in force at a particular time or as in force from time to time);**
- **where those documents may be accessed free of charge; and**
- **the power in the *Corporations Act 2001* or other Commonwealth legislation that permits the incorporation of the following documents as in force from time to time:**
  - **the documents identified at paragraph [1.11] (if it is intended to incorporate the documents in that manner); and**
  - **the indexes identified at paragraph [1.13].**

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5 Subparagraph 1020B(4D)(a)(ii) of the *Corporations Act 2001* (Corporations Act), as inserted by section 5 of the instrument – definition of 'exchange traded fund'.

6 Paragraph 1020B(7F)(b) of the Corporations Act, as inserted by section 11 of the instrument – definition of 'deferred settlement trading arrangements'.

7 Paragraph 1020B(7F)(b) of the Corporations Act, as inserted by section 11 of the instrument – definitions of 'listed corporation', 'listing body' and 'listing scheme'.

8 Paragraph 10(2)(c) of the instrument.

9 Subparagraph 1020B(5A)(c)(7F)(b) of the Corporations Act, as inserted by section 6 of the instrument.

10 In this regard, the instrument notes that the constituents of the indexes are subject to change from time to time.

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

Matters more appropriate for parliamentary enactment[11]

1.17 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).

1.18 Sections 5 to 7, 11, 16 and 17 of the instrument provide that Part 7.9 of the Corporations Act applies in relation to section 1020B products[12] as if section 1020B of that Act were modified or varied in the manner set out in those sections.[13] Sections 8 to 10 and 12 to 15 of the instrument provide exemptions to sections 1020B and 1020AB of the Corporations Act in particular circumstances.[14]

1.19 The instrument was made under section 1020F(1) of the Corporations Act. That provision authorises the Australian Securities and Investments Commission (ASIC) to exempt persons and financial products, and classes of persons and financial products, from all or specified provisions of Part 7.9. It also authorises ASIC to declare that Part 7.9 applies in relation to a person or class of persons, or a financial product or class of financial products, as if specified provisions were omitted, modified or varied.

1.20 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. Section 1020F of the Corporations Act (that is, the enabling provision for the instrument) appears to be akin to a Henry VIII clause, as it authorises delegated legislation to modify the operation of primary legislation. As noted above, it also enables delegated legislation to exempt persons and entities from the operation of primary legislation.

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

12 Subsection 1020B(1) of the Corporations Act defines 'section 1020B products' to include securities, managed investment products, foreign passport fund products, financial products referred to in paragraph 764A(1)(j) of the Act, and any other financial products prescribed by regulations for the purposes of the definition of 'section 1020B products'.

13 For example, section 5 of the instrument provides that Part 7.9 of the Corporations Act applies in relation to section 1020B products as if section 1020B of the Act were modified or varied by inserting additional subsections (4A), (4B), (4C) and (4D). The additional subsections permit ETF market makers to make naked short sales of units in an ETF or managed fund.

14 For example, section 10 of the instrument provides that a person who agrees to sell section 1020B products under a deferred purchase agreement does not have to comply with subsection 1020B(2) of the Corporations Act in relation to the sale.

1.21 There are significant scrutiny concerns with enabling delegated legislation to amend or override the operation of primary legislation which has been passed by Parliament, as this limits parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive. Provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation also raise scrutiny concerns, as such provisions have the effect of limiting, or in some cases removing, parliamentary scrutiny.

1.22 The explanatory statement also indicates that the instrument consolidates the provisions of a number of other ASIC class orders relating to short selling, which had been in force for between 7 and 9 years.[15] However, it does not explain why those exemptions and modifications have been retained for such a considerable period, or why they have been continued in the present instrument.

1.23 The committee draws the modification of primary legislation via delegated legislation, and the use of delegated legislation to exempt persons and entities from the operation of primary legislation, to the attention of the Senate.

Instrument	**Aviation Transport Security (Incident Reporting) Instrument 2018 [F2018L01370]** **Maritime Transport Security and Offshore Facilities Security (Incident Reporting) Instrument 2018 [F2018L01380]**
Purpose	Sets out the information that must be included in a report to the secretary in relation to a security incident, and the manner in which the report must be made
Authorising legislation	*Aviation Transport Security Act 2004*
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[16]

15 The class orders were repealed on 28 September 2018, by the ASIC Corporations (Repeal) Instrument 2018/746 [F2018L01357].

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

Consultation[17]

1.24 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.

1.25 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 regarding consultation are set out in its *Guideline on consultation*.[18]

1.26 With reference to these requirements, the committee notes that the explanatory statement to the Aviation Transport Security (Incident Reporting) Instrument 2018 explains that:

> The Department notified aviation industry participants at industry forums…that the Instrument would be remade in substantially the same form as the Principal Instrument and that the primary purpose of remaking the Instrument is to address administrative issues such as out-of-date contact information following machinery of government changes. The Department will be issuing…updated guidance in October 2018 and will be presenting on incident reporting…in November 2018.[19]

1.27 A similar explanation is provided in the explanatory statement to the Maritime Transport Security and Offshore Facilities Security (Incident Reporting) Instrument 2018.[20]

1.28 While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this instance, the statement that the Department 'notified' industry participants that the present instrument would remake other instruments in substantially the same form does not appear to satisfy the requirement in paragraph 15J(2)(d) that the explanatory statement describe the nature of any consultation undertaken in relation to the instruments. In this regard,

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

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

19 Explanatory statement to the Aviation Transport Security (Incident Reporting) Instrument 2018, p. 2.

20 Explanatory statement to the Maritime Transport Security and Offshore Facilities Security (Incident Reporting) Instrument 2018, p.2.

the committee notes that it does not generally consider 'notification' to be equivalent to consultation.

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

- **whether any consultation was undertaken in relation to the instruments and if so, the nature of that consultation; or**
- **if no consultation was undertaken, why not.**

1.30 The committee also requests that the explanatory statements to the instruments be updated to include this information.

Privacy[21]

1.31 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.

1.32 Part 6 of the *Aviation Transport Security Act 2004* (ATS Act) and Part 9 of the *Maritime Transport Security and Offshore Facilities Security Act 2003* (MTSOFS Act), respectively, set up frameworks for reporting incidents relating to the security of aviation transport and maritime transport and offshore facilities. Incidents must be reported to the Secretary of the Department of Home Affairs, the Australian Federal Police (AFP) or the police force of a State or Territory, and such other relevant persons as are specified by the Acts.[22] Paragraph 107(1)(a) of the ATS Act and paragraph 182(1)(a) of the MTSOFS Act provide that the secretary may, by legislative instrument, specify the information that must be included in incident reports. The present instruments set out this information.

1.33 The committee notes that each instrument appears to require that incident reports include personal information. For example, all incident reports would be required to include the name, contact number and email address of the person making the report.[23] In certain cases, incident reports would also be required to include personal information relating to third parties, such as the name and contact details of a person who received a threat of unlawful interference.[24]

1.34 The committee appreciates that the information required by the instrument may be necessary to ensure accurate and timely incident reporting. However, neither

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

22 For example, subsection 104(4)(c) of the ATS Act provides that an incident which relates to a part of an airport for which a lease or licence has been granted must be reported to the relevant lessee or licensee.

23 See paragraph 6(a) of each instrument.

24 See paragraph 6(k) of each instrument.

the explanatory statement nor the statement of compatibility for either instrument addresses the privacy implications of the incident reporting framework. For example, these materials do not explain the purpose for which personal information collected in accordance with the instruments will be used and managed, whether onward disclosure of the information is permitted, and what safeguards are in place to protect individuals' privacy.

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

- **how personal information reported in accordance with the instruments will be used and managed – including whether onward disclosure is permitted; and**
- **what safeguards are in place to protect individuals' privacy with respect to that information.**

Instrument	**Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 2 of 2018 [F2018L01390]**
Purpose	Extends the application of *Prudential Standard CPS 520 Fit and Proper* to private health insurers
Authorising legislation	*Banking Act 1959* *Insurance Act 1973* *Life Insurance Act 1995* *Private Health Insurance (Prudential Supervision) Act 2015*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[25]

Merits review[26]

1.36 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 of citizens

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).

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

1.37 The instrument sets out minimum requirements for certain institutions (APRA-regulated institutions) regulated by the Australian Prudential Regulation Authority (APRA) in determining the fitness and propriety of persons to hold positions of responsibility.

1.38 Section 22 of the instrument provides that, in addition to persons who meet the definition of a 'responsible person', APRA may determine that a person is a responsible person if satisfied that the person plays a significant role in the management or control of the APRA-regulated institution or group, or that the person's activities may materially impact on prudential matters.

1.39 Section 23 of the instrument further provides that APRA may determine that a person is not a responsible person in relation to a particular position, responsibility or activity. APRA must first be satisfied that the person does not play a significant role in the management or control of the APRA-regulated institution or group or that the person's activities may not materially impact on prudential matters.

1.40 It appears to the committee that decisions by APRA under sections 22 and 23 of the instrument (that is, to determine whether a person is, or is not, a responsible person) involve at least an element of discretion. Moreover, it appears that these decisions have the potential to affect the interests of individuals. Consequently, it appears that decisions by APRA under sections 22 and 23 of the instrument may be suitable for independent merits review. However, neither the instrument nor its explanatory statement indicates whether decisions under sections 22 and 23 of the instrument are reviewable.

1.41 The committee requests the Treasurer advice as to:

- **whether decisions by the Australian Prudential Regulation Authority under sections 22 and 23 of the instrument to determine that a person is, or is not, a responsible person, are subject to independent merits review; and**
- **if not, the characteristics of those decisions that would justify excluding independent merits review.**

Privacy[27]

1.42 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.

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

1.43 The instrument requires all APRA-regulated institutions to have in place a documented policy (Fit and Proper Policy) relating to the fitness and propriety of the institution's responsible persons. The Fit and Proper Policy must include, among other matters, the processes to be undertaken in assessing whether a person is fit and proper for a responsible person position (fit and proper assessment).[28]

1.44 Section 44 of the instrument provides that, when a fit and proper person assessment is conducted, the relevant APRA-regulated institution must make all reasonable inquiries to obtain information, including sensitive information as defined by the *Privacy Act 1988* (Privacy Act), that it believes may be relevant to the fit and proper assessment.

1.45 Section 45 of the instrument provides that, where the institution becomes aware of information that may result in the person being assessed as not fit and proper, the institution take all reasonable steps, including collecting further sensitive information, to ensure it can prudently conclude that no material fitness and propriety concerns exist. That section further provides that, where a concern remains, a full fit and proper assessment must be conducted.

1.46 The committee notes that 'sensitive information' is defined in the Privacy Act to include a broad range of personal information about an individual,[29] as well as health information, genetic information and biometric information. Consequently, it appears that the information collected by an APRA-regulated individual during a fit and proper assessment may include a significant amount of personal information.

1.47 The committee appreciates that APRA-regulated institutions are likely to collect information for a specific purpose (that is, determining a person's fitness and propriety). However, neither the explanatory statement nor the statement of compatibility appears to address the privacy implications of the assessment. In this regard, the explanatory materials do not provide details of the information that is likely to be collected for the purposes of a fit and proper person assessment, how the information will be used and managed (including whether onward disclosure is permitted), and what safeguards are in place to protect individuals' privacy.

1.48 The committee requests the Treasurer's advice as to:

- **the nature of the information that would be collected during a fit and proper assessment;**
- **how personal information collected during a fit and proper assessment will be used and managed (including whether onward disclosure is permitted); and**

28 See section 38 of the instrument.

29 Under section 6 of the Privacy Act, 'sensitive information' includes personal information about an individual's racial or ethnic origin, political opinions and associations, religious beliefs, sexual orientation or practices, criminal record and health.

- **what safeguards are in place to protect individuals' privacy with respect to that information.**

Instrument	**Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018 [F2018L01408]**
Purpose	Makes consequential amendments to ensure that Australia can effectively respond to requests for assistance from foreign countries and international tribunals; extends the application of foreign evidence rules to external territories; and enhances the powers of judicial officers
Authorising legislation	*Extradition Act 1988* *Foreign Evidence Act 1994* *International Criminal Court Act 2002* *International War Crimes Tribunals Act 1995* *Mutual Assistance in Criminal Matters Act 1987* *Telecommunications (Interception and Access) Act 1979*
Portfolio	Attorney General's
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[30]

Retrospective effect[31]

1.49 Item 13 of the instrument amends the Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018[32] (Principal Regulations) to add Norfolk Island to the list of states and territories specified in subsection 4(1). Items 14 and 16 of the instrument further amend the Principal Regulations to add specified proceeds of crime laws to section 6 and clause 1 of Schedule 1 to the Principal Regulations. The effect of those amendments is to provide that foreign evidence may be adduced in certain proceedings in Norfolk Island courts, as well as in certain proceeds of crime matters and related civil proceedings in Australia's external territories.

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)(b).

32 [F2018L01138].

1.50 Item 15 of the instrument inserts a new section 7 into the Principal Regulations. That section provides that the amendments to the Principal Regulations made by the instrument apply in relation to proceedings that commenced *before*, on or after the commencement of the instrument.

1.51 The explanatory statement explains that the amendments made by items 13, 14 and 16 of the instrument 'did not criminalise or penalise conduct which was otherwise lawful prior to the amendments, as the provisions…[are] entirely procedural in nature'.[33] The statement of compatibility further explains that the application provisions in the instrument apply to:

> procedural matters in proceedings to take evidence and where foreign evidenced may be admitted. They do not criminalise or penalise conduct which was otherwise lawful prior to the amendment. These application provisions therefore do not engage the prohibition on retrospective criminal laws.[34]

1.52 The committee acknowledges that the amendments in items 13, 14 and 16 of the instrument do not create liability or penalise lawful conduct, and that item 15 would therefore not create any retrospective criminal liability. Nevertheless, the committee is concerned that item 15 may result in the instrument having a retrospective effect, to the potential detriment of persons involved in proceedings to which the amendments in items 13, 14 and 16 apply.

1.53 The committee notes that neither the explanatory statement or the statement of compatibility provide any further information as to whether any party to relevant proceedings may be disadvantaged by allowing foreign evidence to be admitted. The explanatory materials do not indicate, for example, how many (if any) proceedings were on foot at the time the instrument commenced, or whether parties to those proceedings would be given the opportunity to respond to new foreign evidence that may be detrimental to their case.

1.54 The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the retrospective operation of item 15 of the instrument; and, if so, what steps have been or will be taken to avoid such disadvantage and to ensure fairness for parties to relevant proceedings.

33 Explanatory statement, p. 27.

34 Statement of compatibility, p. 14.

Instrument	**Foreign Acquisitions and takeovers Amendment (Peru-Australia Free Trade Agreement Implementation) Regulations 2018 [F2018L01376]**
Purpose	Implements Australia's obligations with respect to the regulation of foreign investment under the Free Trade Agreement between Australia and the Republic of Peru
Authorising legislation	*Foreign Acquisitions and Takeovers Act 1975*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[35]

Consultation[36]

1.55 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.

1.56 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement 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*.[37]

1.57 With reference to these requirements, the committee notes that the explanatory statement to the instrument explains that '[t]he Government did not consult on the amendments but undertook extensive consultation during the negotiations of the PAFTA'.[38]

1.58 While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description may be

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 Regulations and Ordinances Committee, *Guideline on consultation,* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/%20consultation

38 Explanatory statement, p. 2.

insufficient to satisfy the requirements of the Legislation Act. In this instance, the explanatory statement does not appear to explain why no consultation was undertaken, such as would satisfy paragraph 15(2)(e) of the Legislation Act.

1.59 The committee requests the minister's advice as to why no consultation was undertaken on the instrument; and requests that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.

Instrument	**Health Insurance Regulations 2018 [F2018L01365]**
Purpose	Sets out measures to support the provision of appropriate Medicare services
Authorising legislation	*Health Insurance Act 1973*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[39]

Unclear basis for determining fees[40]

1.60 Sections 3DB and 3E of the *Health Insurance Act 1973* (Health Insurance Act) set out a process by which a medical practitioner may apply to be recognised as a specialist or a consultant physician. Paragraph 3DB(3)(b) and subsection 3E(2) provide that applications must be accompanied by the prescribed fee. Sections 14 and 15 of the instrument prescribe a fee of $30 for each of those applications.

1.61 Section 20AB of the Health Insurance Act sets out a process by which a person may apply for approval as a billing agent. Paragraph 20AB(2)(b) provides that an application must be accompanied by the fee (if any) specified in the regulations. Subsection 65(2) of the instrument prescribes an application fee of $1000 (where the applicant has not previously been approved), or $500 (where the applicant has previously been approved) in respect of such applications.

1.62 The committee's usual expectation, in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, is that the explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated: for

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

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

example, on the basis of cost recovery. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

1.63 In this instance, while the enabling legislation for the instrument (the Health Insurance Act), authorises the imposition of the fees, the explanatory statement does not provide any information about the basis on which the fees have been calculated. It only sets out the operation and effect of the relevant provisions, and indicates that the fees remain the same as those set by the previous version of the instrument (that is, the Health Insurance Regulations 1975[41]).

1.64 The committee requests the minister's advice as to the basis on which the fees set out in sections 14, 15 and 65 of the instrument have been calculated.

Incorporation[42]

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

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

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

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

1.68 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument commences, or at a time before its commencement. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the instrument's authorising Act (or other Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

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41 [F2018LC00489].

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

1.69 In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

1.70 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference.

1.71 Additionally, where a legislative instrument incorporates a document as in force from time to time, the committee expects the explanatory statement to set out the legislative authority (in the enabling legislation or another Commonwealth Act) for the incorporation of documents as in force from time to time. The committee's expectations with regard to the incorporation of documents are set out in its *Guideline on incorporation of documents*.[43]

1.72 With reference to these requirements, the committee notes that the instrument appears to incorporate a register of sonographers.[44] However, neither the instrument nor its explanatory statement indicates the manner in which the register is incorporated or where it may be accessed free of charge. With respect to the manner of incorporation, the committee also notes that there does not appear to be any general or specific provision in the Health Insurance Act that would permit the regulations to incorporate documents as in force from time to time.

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

- **the manner in which the register of sonographers is incorporated by the instrument (as in force from time to time or as in force at a particular time);**
- **if it is intended to incorporate the register as in force from time to time, the power in the *Health Insurance Act 1973* or other Commonwealth legislation that permits the incorporation of the register in this manner; and**
- **where the register may be accessed free of charge.**

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

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43 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.

44 In this regard, subsection 71(6) provides that 'registered sonographer' means a person whose name is entered on the register of sonographers maintained by the Chief Executive Medicare.

Privacy[45]

1.75 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.

1.76 Part 3, Subdivision C of the instrument sets out a number of requirements in relation to pathology services. Section 34 provides that a request for a pathology service must include the following information about the person in relation to whom the service is requested:

- the name and address of the person;
- whether the person is a public or a private patient in a hospital; and
- whether the request is made in the course of the provision to the person of an out-patient service at a recognised hospital.

1.77 Section 34 would therefore appear to require the provision of personal information with a request for a pathology service. However, neither the explanatory statement nor the statement of compatibility address the privacy implications of the provision: for example, the purposes for which patient information would be used and managed, whether onward disclosure of the information is permitted, and what safeguards are in place to protect the privacy of the person in relation to whom the pathology service is requested.

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

- **how personal information provided with a request for a pathology service will be used and managed; and**
- **what safeguards are in place to protect the personal privacy of patients with respect to that information.**

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

Instrument	**Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018 [F2018L01419]**
Purpose	Establishes legislative authority for government expenditure on the Artificial Intelligence Capability Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2018). Notice of motion to disallow must be given by first sitting day of 2019[46]

Constitutional authority for expenditure[47]

1.79 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.

1.80 The committee notes that, in *Williams No. 2*,[48] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. In this regard, the committee notes that section 33 of the *Industry Research and Development Act 1986* (Industry Act) provides that the minsiter may, by legislative instrument, prescribe one or more programs in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs. That section also provides that a program may only be prescribed to the extent that it is with respect to one or more legislative powers of the Parliament, and that the relevant instrument must specify the legislative power or powers in respect of which the instrument is made.

1.81 The committee expects the explanatory statement for any instrument specifying a program or programs for the purpose of section 33 of the Industry Act to explicity state the constitutional authority for the relevant expenditure. The committee's expectations in this regard are consistent with those set out in its

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 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations.[49]

1.82 The instrument authorises government expenditure in relation to the Artificial Intelligence Capability Program. The explanatory statement explains that, under the program, funding will be provided to Standards Australia to develop a strategic framework for artificial intelligence (AI) standards, including identifying Australian strategic priorities, current domestic and international standardisation activities and opportunities for Australian stakeholders to engage with the broader global digital economy and standards fora.[50]

1.83 Section 6 of the instrument provides that, for the purposes of subsection 33(3) of the Industry Act, the power relied on is the impled nationhood power. The explanatory statement explains that this power:

> encompasses the Commonwealth's ability to engage in activities which are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation…
>
> In that regard, funding provided to Standards Australia under the Legislative Instrument will drive national leadership in AI standards.[51]

1.84 The committee notes that the implied nationhood power is derived from the Commonwealth having common law or 'non-statutory powers' of the Crown, subject to the federal distribution of powers effected by the Constitution.[52] This executive power has been held to empower the Commonwealth to commemorate an event of national signficance[53] or to spend in order to meet an urgent national economic problem,[54] but the courts have held this does not mean the Commonwealth has a general power to address problems of national concern.[55]

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49 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.

50 Explanatory statement, p. 1. The explanatory statement explains that $0.1 million is provided in administered funding to the Department of Industry, Innovation and Science for an AI standards roadmap to be delivered by standards Australia. The department's portfolio budget statements for the forward estimates indicate that an additional $0.4 million will be provided over the 2019-20 and the 2021-22 financial years.

51 Explanatory statement, p. 2.

52 *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J).

53 *Davis v Commonwealth* (1988) 166 CLR 79.

54 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

55 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 48-9 [92].

1.85 While the committee acknowledges that the funding authorised by the instrument will drive national leadership in AI standards, it is not clear that the devleopment of such standards could *only* be carried out by the Commonwealth for the benefit of the nation, such as would engage the implied nationhood power. In this regard, it is not apparent that Standards Australia could not develop AI standards on its initiative (with funding supported by another head of legislative power, if appropriate), or that the States could not develop such standards.

1.86 The committee requests the minister's more detailed advice as to the constitutional authority for the Artificial Intelligence Capability Program.

Parliamentary scrutiny: ordinary annual services of government[56]

1.87 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).

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

1.89 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.[57] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of instruments made under section 33 of the Industry Act therefore includes an assessment of whether measures may have been included in the Appropriation Acts as an 'ordinary annual service of the government', despite being spending on new policies.

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

57 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.

1.90 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*.[58]

1.91 As outlined above, the instrument authorises government expenditure in relation to the Artificial Intelligence Capability Program. The explanatory statement indicates that funding for the program has been secured through the Department of Industry, Innovation and Science 2018-19 Budget.[59] It also explains that:

> Funding authorised by this Legislative Instrument comes from the Department of Industry, Innovation and Science, Program 2: Growing Business Investment and Improving Business Capability, Outcome 1: Enabling growth and productivity for globally competitive industries through supporting science and commercialisation, growing business investment and improving business capability and streamlining regulation. Details are set out in Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.13A, Jobs and Innovation Portfolio (Industry, Innovation and Science).[60]

1.92 It appears to the committee that the Artificial Intelligence Capability 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 Act No. 1 2018-19* (which was not subject to amendment by the Senate).

1.93 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.

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58 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.

59 Explanatory statement, p. 1.

60 Explanatory statement, p. 2.

Instrument	**Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018 [F2018L01451]**
Purpose	Establishes legislative authority for expenditure on the Automotive Engineering Graduate Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 13 November 2018). Notice of motion to disallow must be given by the fifth sitting day of 2019[61]

Constitutional authority for expenditure[62]

1.94 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.

1.95 The committee notes that, in *Williams No. 2*,[63] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. In this regard, the committee notes that section 33 of the *Industry Research and Development Act 1986* (Industry Act) provides that the minister may, by legislative instrument, prescribe one or more programs in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs. That section also provides that a program may only be prescribed to the extent that it is with respect to one or more legislative powers of the Parliament, and that the relevant instrument must specify the legislative power or powers in respect of which the instrument is made.

1.96 The committee would expect the explanatory statement for any instrument specifying a program or programs for the purpose of section 33 of the Industry Act to explicity state the constitutional authority for the relevant expenditure. The committee's expectations in this regard are consistent with those set out in its

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

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

63 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations.[64]

1.97 The instrument authorises government expenditure in relation to the Automotive Engineering Graduate Program (AEG Program). The explanatory statement explains that, under the program, $5 million will be provided to increase the pipeline of postgraduate students into Australia's automotive engineering sector. The funding will be given to higher education providers to deliver postgraduate student stipends in areas of knowledge priority for automotive engineering.[65]

1.98 Section 6 of the instrument provides that, for the purposes of subsection 33(3) of the Industry Act, the corporations power, the express incidental power, the executive power and the territory power are prescribed.

1.99 With regard to reliance on the corporations power (paragraph 51(xx) of the Constitution), the explanatory statement explains:

> The corporations power empowers the Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth…[and] supports Commonwealth activities which assist the activities of foreign corporations, and trading or financial corporations (together, constitutional corporations). In that regard, the Program…singles out and confers on some constitutional corporations (namely, trading or financial corporations) benefits which are directed to assisting those corporations in the conduct of their ordinary activities, and imposes terms and conditions on those corporations under the grant agreements…In particular, the Program provides funding to trading or financial corporations to assist them to increase the pipeline of post graduate students into Australia's automotive engineering sector. Eligibility to receive funding under the Program is limited to businesses which are trading or financial corporations to which paragraph 51(xx) applies.[66]

1.100 The committee notes that, in *Williams (No. 2)*,[67] the High Court stated that a law giving the Commonwealth authority to make an agreement or payment to a corporation is not a law with respect to a trading or financial corporation. This is because it is 'not a law authorising or regulating the activities, functions, relationships or business of consitutional corporations generally or any particular

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64 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.

65 Explanatory statement, pp. 1-2.

66 Explanatory statement, p. 2.

67 [2014] HCA 23 (19 June 2014).

constitutional corporation'.[68] As outlined above, the instrument authorises Commonwealth expenditure on the AEG Program, which will provide funding to higher education providers. Irrespective of whether those higher education providers are trading or financial corporations, in light of the judgment in *Williams (No. 2)* it is not clear that the instrument would be authorised by the corporations power.

1.101 Additionally, it is not clear to the committee that funding under the AEG Program would only be provided to corporations. In this respect, the committtee notes that the instrument states that funding under the program will be provided to higher education providers to provide grants to students.[69] It also provides that funding recipients must be Table A providers or Table B providers within the meaning of the *Higher Education Support Act 2003* (HES Act).[70] Table A and Table B providers are universities and other tertiary education institutions.[71] While universities are not precluded from being trading corporations,[72] the status of an entity as a university or tertiary institution does not necessarily mean it is also a trading or financial corporation within the meaning of paragraph 51(xx).

1.102 In relation to reliance on the express incidental power (paragraph 51(xxxix) of the Constitution) and the executive power (section 61 of the Constitution), the explanatory statement explains:

> The express incidental power…empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in it by the Constitution. Together with the executive power…the express incidental power extends to a range of matters, including the executvie and maintenance of the Constitution, and the laws of the Commonwealth. Under the Legislative Instrument funding will assist universities that are Table A or Table B providers and are established under a law of the Commonwealth to increase the pipeline of post-graduate students into Australia's automotive engineering sector and to leverage existing post-graduate programs towards automotive knowledge priorities.[73]

1.103 The committee notes that the High Court in *Williams (No. 2)* rejected the argument that the authorisation scheme for government expenditure in section 32B of the *Financial Management and Accountability Act 1997* (FMA Act)[74] was incidental

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68 *Williams v Commonwealth of Australia* [2014] HCA 23 (19 June 2014), [50].

69 Section 5.

70 Section 7.

71 See sections 16-5 and 16-20 of the HES Act.

72 *Quickenden v O'Connor* (2001) 109 FCR 243.

73 Explanatory statement, p. 4.

74 Section 32B of the FMA Act is now section 32B of the *Financial Framework (Supplementary Powers) Act 1997*.

to the executive power.[75] The authorisation scheme established in the Industry Act is very similar to that in the (then) FMA Act. Consequently, it is not apparent to the committee that the express incidental power and the executive power would provide constitutional authority for expenditure authorised by the Industry Act, or an instrument made under that Act, even noting in this instance that funding under the AEG Program may 'assist universities that are…established under a law of the Commonwealth'.[76]

1.104 Finally, in relation to reliance on the Territories power (section 122 of the Constitution), the explanatory statement explains:

> Section 122 of the Constitution empowers the Parliament to 'make laws for the government of any territory'. Under the Legislative Instrument funding may be provided to assist Territory universities which are Table A or Table B providers to increase the pipeline of post-graduate students into Australia's automotive engineering sector and to leverage existing post-graduate programs towards automotive knowledge priorities.[77]

1.105 The committee acknowledges a connection between the AEG Program and the Territories power, noting in this regard that funding under the program may be provided to Territory universities. However, in the committee's view this power is unlikely, on its own, to be sufficient to establish authority for the full scope of expenditure on the AEG Program. In this regard, the committee notes that funding may be provided to Table A and Table B providers. These providers include universities and other tertiary institutions that are not within the Territories.

1.106 Consequently, the committee is concerned that the constitutional heads of power specified in section 6 of the instrument may not be sufficient to establish authority for expenditure on the AEG Program.

1.107 However, the committee notes that, in *Williams (No. 2)*, the High Court stated that paragraph 51(xxiiA) of the Constitution, the student benefits power, would authorise the provisions of 'material aid…[for] the human wants which the student has by reason of being a student'.[78] As noted above, section 5 of the instrument states that funding under the AEG Program will be used to provide grants to students. The explanatory statement further refers to the delivery of 'post graduate student stipends'.[79] Students grants and stipends may be the kind of 'material aid' contemplated by *Williams (No. 2)*, such as would bring the AEG Program within the 'student benefits' power in paragraph 51(xxiiA) of the

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75 *Williams v Commonwealth of Australia* [2014] HCA 23 (19 June 2014), [87].

76 Explanatory statement, p. 4.

77 Explanatory statement, p. 4.

78 *Williams v Commonwealth of Australia* [2014] HCA 23 (19 June 2014), [46].

79 Explanatory statement, p. 2.

Constitution. However, the committee notes that neither the instrument nor its explanatory statement refers to that head of power.

1.108 The committee requests the minister's more detailed advice as to the constitutional authority for the Automotive Engineering Graduate Program.

Parliamentary scrutiny: ordinary annual services of government[80]

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 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 which 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, questions may arise as to whether the funds allocated in the appropriation Act 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 matters not involving the ordinary annual services of the government.[81] In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of instruments made under section 33 of the Industry Act therefore includes an assessment of whether measures may have been included in the appropriation Acts as an 'ordinary annual service of the government', despite being spending on new policies.

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

81 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.

1.112 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*.[82]

1.113 As outlined above, the instrument authorises government expenditure in relation to the AEG Program. The explanatory statement indicates that funding for the program has been secured through the Department of Industry, Innovation and Science 2018-19 Budget.[83] It also explains that:

> Funding authorised by this Legislative Instrument comes from Program 2, Outcome 1, as set out in the *Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.13A, Industry, Innovation and Science Portfolio.*[84]

1.114 It appears to the committee that the AEG 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 Act 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.

82 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.

83 Explanatory statement, p. 1.

84 Explanatory statement, p. 2.

Instrument	**Inspector-General of the Australian Defence Force Amendment Regulations 2018 [F2018L01428]**
Purpose	Prescribes the independence, powers and functions of the Inspector-General of the Australian Defence Force (ADF) where a judicial officer is appointed as an Assistant Inspector-General ADF to inquire into a matter
Authorising legislation	*Defence Act 1903*
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 16 October 2018). Notice of motion to disallow must be given by the first sitting day of 2019[85]

Constitutional validity[86]

1.116 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.

1.117 Section 110P of the *Defence Act 1903* states that the Inspector-General of Australian Defence Force may appoint a person to be an Assistant Inspector-General of the Australian Defence Force (Assistant IGADF), if the regulations provide they are eligible for appointment. Section 6 of the Inspector-General of the Australian Defence Force Regulation 2016 (Principal Regulations) states that any person who has agreed in writing to the appointment is eligible for appointment as an Assistant IGADF.

1.118 Item 11 of Schedule 1 to the instrument inserts new Division 4A into the Principal Regulations. This new Division sets out the powers and functions of a judicial officer who is appointed as an Assistant IGADF. Item 1 of Schedule 1 to the instrument defines 'judicial officer' to mean 'a judge, magistrate or justice of a federal court or a court of a State or Territory'.

1.119 The separation of powers doctrine under Chapter III of the Constitution provides that Commonwealth judicial officers may only exercise judicial power or power that is incidental to Commonwealth judicial power.[87] However, the High Court

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

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

87 *R v. Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

has held that a federal judge may be validly appointed to perform non-judicial functions in their personal capacity, where such functions are conferred with the judge's consent, and the appointment is not incompatible with the judge's performance of their judicial functions.[88]

1.120 The committee notes that the instrument simply states that an Assistant IGADF can be a judicial officer. It does not expressly confirm that the powers and functions of the Assistant IGADF are conferred on them in their personal capacity, rather than as a court or a member of a court. Accordingly, it is unclear to the committee whether the instrument is compatible with the separation of powers doctrine.

1.121 The committee requests the minister's more detailed advice as to the constitutional validity of the instrument and, in particular, whether the instrument intends to confer powers and functions on judicial officers acting in their personal capacity.

Privacy[89]

1.122 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.

1.123 Item 11 of Schedule 1 to the instrument inserts new sections 28G and 28H into the Principal Regulations. New paragraph 28G(2)(a) provides that the Assistant IGADF may inform a range of prescribed people about the findings of an inquiry, if the Assistant IGADF 'thinks it is appropriate to do so'. These include the minister, Chief of the Defence Force, a service chief, member of the Australian Defence Force, a person affected by a submission or the inquiry, and 'any other person'.

1.124 New paragraph 28G(2)(b) of the Principal Regulations provides that the Assistant IGADF may give one or more of these people a report about the inquiry, including the findings and recommendations. Subsection 28G(3) provides that such a report may be accompanied by the record of any oral or written evidence accepted during the inquiry.

1.125 New subsection 28G(4) provides that the Assistant IGADF 'need not' include certain information in a report given under paragraph 28G(2)(b), if the Assistant IGADF considers that it would be inappropriate to include that information for any of the following reasons:

- considerations of privacy;
- the person's responsibilities;

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88 The *persona designata* exception. See *Grollo v Palmer* (1995) 184 CLR 348.

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

- the person's interest in the matter;
- the information is classified or relates to national security; or
- the relevance of the information to other information is considered not appropriate for the person because of the preceding reasons.

1.126 Finally, new section 28H provides that if the Assistant IGADF gives a person a report about an inquiry under paragraph 28G(2)(b), the IGADF may publicly release all or part of the report (including a redacted version of the report), after consulting with the Chief of the Defence Force.

1.127 The explanatory statement explains that the instrument provides the IGADF with 'greater information-sharing capacity so that inquiry records can be made available to a wider class of persons including other statutory office holders'.[90] The statement of compatibility further explains that statutory office holders may require such information 'as the inquiry may affect matters that fall within their areas of responsibilities to be dealt with'.[91]

1.128 The statement of compatibility notes that disclosures by the IGADF 'would be limited to what he or she considers appropriate and relates to his or her function as the IGADF under the *Defence Act 1903*'.[92] It adds that the IGADF's discretion under new subsection 28G(4) to exclude information from inquiry records where he or she considers it would be inappropriate to provide it, 'has the effect of ensuring that only relevant and appropriate information is disclosed to the recipient under the provision'.[93]

1.129 The committee acknowledges the justification for enabling inquiry records to be disclosed to specified statutory office holders or authorities with responsibility for implementing inquiry recommendations. However, noting the potential privacy implications of such disclosures, it remains unclear to the committee why it is necessary and appropriate to provide the Assistant IGADF with the power to disclose such information 'to any other person' or to any person affected by a submission or the inquiry. It is also unclear to the committee what, if any, safeguards are in place to protect the privacy of individuals in relation to information disclosed under new subsection 28G(2) and section 28H, particularly in circumstances in which the recipient may not be subject to the *Privacy Act 1988*, noting that there is no requirement that the Assistant IGADF give appropriate consideration to privacy concerns.

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

90 Explanatory statement, p. 1.

91 Statement of compatibility, p. 2.

92 Statement of compatibility, p. 3.

93 Statement of compatibility, p. 3.

- **the justification for empowering the Assistant Inspector-General ADF to disclose information to 'any other person' or any person affected by a submission or the inquiry in new subparagraphs 28G(2)(a)(vi) or (vii); and**
- **the legislative safeguards in place to protect the privacy of individuals in relation to personal information disclosed under new sections 28G and 28H.**

Retrospective effect[94]

1.131 Item 13 of the instrument inserts new section 37 into the Principal Regulations. This section provides that the amendments to the Principal Regulations made by the instrument apply to inquiries that begin on or after the commencement of the instrument, and, relevantly, inquiries which have begun, but not ended, before the commencement of the instrument.

1.132 While the instrument commences prospectively, the committee is concerned that the operation of the transitional provision in section 37 may result in the instrument having a retrospective effect, to the potential detriment of participants in inquiries that have begun, but not ended, before the instrument commences. In this respect, the committee notes that the instrument appears to significantly widen the class of persons to whom inquiry records may be disclosed by the Assistant IGADF.[95]

1.133 The explanatory statement notes that the instrument applies to inquiries that have already commenced at the date of commencement; however, it does not address whether the retrospective application of the provisions has the effect of disadvantaging any person.

1.134 The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of section 37; and, if so, what steps have been taken or will be taken to avoid such disadvantage.

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

95 New sections 28G and 28H of the Principal Regulations. See discussion at paragraphs [x] to [x].

Instrument	**Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018 [F2018L01377]**
Purpose	Introduces a range of measures intended to protect vulnerable people on Norfolk Island
Authorising legislation	*Norfolk Island Act 1979*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[96]

Significant penalties[97]

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).

1.136 The instrument was made under subsection 19A(1) of the *Norfolk Island Act 1979* (Norfolk Island Act), which provides that the Governor General may make ordinances for the peace, order and good government of the territory of Norfolk Island. Subsection 17(3) of the Norfolk Island Act relevantly provides that instruments made under section 19A may amend or repeal a law continued in force under section 16A of the Norfolk Island Act.

1.137 The instrument effectively amends Norfolk Island's *Criminal Procedure Act 2007* (Criminal Procedure Act) by amending relevant provisions of the Norfolk Island Continued Laws Ordinance 2015 (Continued Laws Ordinance), which in turn amends laws originally made by the Norfolk Island Legislative Assembly and continued in force by section 16A of the Norfolk Island Act.

1.138 The amendments to the Criminal Procedure Act made by the instrument include the creation of three offences relating to the disclosure of information

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

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

relating to sexual and domestic violence offences.[98] Each offence is punishable by 12 months' imprisonment, 60 penalty units, or both.

1.139 The committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences* states that regulations should not be authorised to create offences that are punishable by imprisonment, or impose fines exceeding 50 penalty units. It further states that:

> The Attorney-General's Department should be consulted at an early stage on any proposal to enable offences in subordinate legislation to be punishable by imprisonment.[99]

1.140 The explanatory statement to the instrument provides a justification for these penalties, including by reference to comparable offences in other Commonwealth, State and Territory legislation.[100] However, it does not explain whether the Attorney-General's Department was consulted; nor does it explain why it is considered necessary and appropriate to impose penalties punishable by imprisonment in delegated, rather than primary, legislation.

1.141 The committee notes that, by contrast, explanatory statements to similar instruments made under the Norfolk Island Act explain why such instruments do not comply with the *Guide to Framing Commonwealth Offences*, by reference to the 'special features' of the Norfolk Island regulatory framework. [101]

1.142 Noting the committee's longstanding concern to ensure sufficient parliamentary oversight of the imposition of criminal penalties, it is unclear to the committee that it is appropriate in this case to impose custodial penalties in delegated legislation.

1.143 The committee requests the minister's advice as to the justification for imposing a custodial penalty in delegated legislation, and requests that the explanatory statement be amended to include this information.

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98 New section 167F of the Criminal Procedure Act makes it an offence to publish prescribed information relating to a sexual offence proceeding. New section 168M of the Criminal Procedure Act makes it an offence to possess, supply, play, copy or erase an audio visual recording of a witness answering questions of a police officer in relation to the investigation of a sexual or violent offence. New section 174J makes it an offence to publish an audio visual recording made by police of a complainant answering questions of a police officer in relation to the investigation of a domestic violence offence.

99 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 44-45.

100 Explanatory statement, pp. 52, 54, 60.

101 See, for example, explanatory statement, Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017 [F2017L01499], pp. 2-3.

Reversal of legal burden of proof[102]

1.144 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, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is properly justified.

1.145 Subsection 167F(1) of the instrument makes it an offence to publish prescribed information relating to a sexual offence proceeding. Subsection 167F(2) provides that it is a defence to the offence if the defendant proves that the complainant consented to the publication of the prescribed information before it was published. The note to the subsection states that the defendant bears the legal burden of proof in relation to this defence, as a result of section 13.4 of the *Criminal Code Act 1995*.

1.146 The explanatory statement provides the following justification for reversing the legal burden of proof:

> This is appropriate in the circumstances because: the knowledge as to consent is peculiarly in the defendant's knowledge and would be readily and cheaply able to be proved by the defendant (and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish); and to publish such information without consent would pose a grave danger to the safety of complainants and their communities.[103]

1.147 While the committee acknowledges that it could be 'more difficult and costly' for the prosecution to disprove than for the defendant to establish, it is not clear that the information would be peculiarly within the defendant's knowledge or that the defendant would be readily and cheaply able to prove this information. As such, it is not apparent that these factors meet the test of when it is appropriate to reverse the burden of proof.

1.148 In addition, the committee notes that the Attorney-General's Department's *Guide to the Framing Commonwealth Offences* states that where a defendant is required to discharge a legal burden of proof, the explanatory statement should justify why a legal burden of proof has been imposed instead of an evidential burden.[104] As the reversal of the burden of proof undermines the right to be

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

103 Explanatory statement, p. 52.

104 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.149 The committee requests the minister's detailed advice as to the appropriateness of reversing the burden of proof, in particular, the appropriateness of imposing a *legal* burden on the defendant.

Instrument	**Research Involving Human Embryos (Corresponding State Law—ACT) Declaration 2018 [F2018L01402]** **Research Involving Human Embryos (Corresponding State Law—NSW) Declaration 2018 [F2018L01403]** **Research Involving Human Embryos (Corresponding State Law—QLD) Declaration 2018 [F2018L01404]** **Research Involving Human Embryos (Corresponding State Law—TAS) Declaration 2018 [F2018L01405]** **Research Involving Human Embryos (Corresponding State Law—VIC) Declaration 2018 [F2018L01406]**
Purpose	Declares that particular State and Territory laws are 'corresponding state laws' for the purposes of the *Research Involving Human Embryos Act 2002*
Authorising legislation	*Research Involving Human Embryos Act 2002*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[105]

Compliance with authorising legislation[106]

1.150 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 state. This principle requires that instruments are made in accordance with their authorising legislation as well as nay constitutional or other applicable legal requirements.

1.151 The instruments were made under subsection 7(1) of the *Research Involving Human Embryos Act 2002* (RIHE Act). They declare particular state and territory laws to be 'corresponding state laws' for the purposes of that Act.

1.152 Subsection 7(1) of the RIHE Act provides that 'corresponding state law', in relation to a state, means a law of that state[107] declared by the minister, by notice in the *Gazette*, to be a corresponding state law for the purposes of the RIHE Act. Consequently, it appears to the committee that the publication of a notice in the

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

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

107 Subsection 7(1) relevantly provides that 'state' includes the Australian Capital Territory and the Northern Territory.

Gazette is a condition on the exercise of the minister's power to declare that a law is a 'corresponding state law'.

1.153 However, neither the instruments nor their explanatory statements indicate whether a notice was published in the *Gazette* when the instruments were made. It is therefore unclear to the committee whether the condition in subsection 7(1) of the RIHE Act was satisfied.

1.154 The committee seeks the minister's advice as to whether a notice was published in the *Gazette* in relation to each of the instruments and:

- **if so, which *Gazette* or *Gazettes* contain the relevant notices, and where they can be accessed; or**
- **if not, the power relied on to make the instruments.**

Instrument	**Therapeutic Goods Legislation Amendment (2018 Measure No. 3) Regulations 2018 [F2018L01434]**
Purpose	Amends the Therapeutic Goods Regulations 1990 to reduce regulatory burden for hard surface disinfectants, and to lower the application fee for marketing approval applications for export only Class 1 medical devices
Authorising legislation	*Therapeutic Goods Act 1989*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 17 October 2018). Notice of motion to disallow must be given by the second sitting day of 2019[108]

Unclear basis for determining fees[109]

1.155 Item 1 of Schedule 1 of the instrument sets out the application fees payable under the Therapeutic Goods (Medical Devices) Regulations 2002 (Medical Device Regulations) to include certain classes of medical devices in the Australian Register of Therapeutic Goods.

1.156 The explanatory statement explains that the fee for export only devices in paragraph (f) has been reduced from $530.00 to $90.00, to reflect changes to the way in which the applications for these devices are processed.[110] However, the

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

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

110 Explanatory statement, p. 1, 4.

explanatory statement does not explain the basis on which the other fees listed in item 1 are calculated.

1.157 The committee's longstanding view is that, unless there is specific authority in primary legislation to impose fees in delegated legislation, fees imposed by legislative instruments should be limited to cost recovery. Otherwise, there is a risk that such fees are more properly regarded as taxes, which require specific legislative authority.

1.158 Consequently, the committee's expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated.

1.159 The committee acknowledges that the instrument replicates the application fees for other classes of medical devices in the Therapeutic Goods (Medical Devices) Regulations 2002. However, the fact that provisions replicate those in a previous instrument, or in similar instruments, will not, of itself, address the committee's scrutiny concerns.

1.160 The committee requests the minister's advice as to the basis on which the application fees in paragraphs (a) to (e), (g) and (h) in item 1 of Schedule 1 have been calculated.

Further response required

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

1.162 Correspondence relating to these matters is published on the committee's website.[111]

Instrument	**Australian National Maritime Museum Regulations 2018 [F2018L01294]**
Purpose	Provides for a range of matters relation to the Australian National Maritime Museum, including financial limits for the disposal of material, security arrangements and offences to protect the museum, and rules for the service of liquor
Authorising legislation	*Australian National Maritime Museum Act 1990*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018[112]

Merits review[113]

1.163 In *Delegated Legislation Monitor 12 of 2018,*[114] the committee requested the minister's advice as to:

- whether decisions by security officers under section 14 of the instrument to prohibit entry to museum premises are subject to merits review; and
- if not, what characteristics of those decisions would justify excluding merits review.

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

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

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

114 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 5-10.

Minister's response

1.164 The Minister for Communications and the Arts advised:

> Section 14
>
> Decisions by security officers under section 14 of the instrument to prohibit entry to the Australian National Maritime Museum (the Museum) premises are not subject to merits review. Decisions made by security officers appointed under the previous Australian National Maritime Museum Regulations 1991 were similarly not subject to merits review.
>
> It is intended that security officers would exercise powers under section 14 of the instrument flexibly, to ensure the safety of the public and museum staff, and to prevent the commission of offences under the instrument. It is intended that decisions to prohibit entry would be made on a case by case basis, rather than to permanently exclude individuals from entering the Museum. On this basis, the effect of such decisions on the interests of individuals is expected to be minimal, and would be unlikely to justify the costs of review. However, if the Committee is of the strong opinion that merits review should be provided for decisions under section 14 of the instrument, I would be willing to consider providing for merits review in a future amendment to the instrument.

Committee's response

1.165 The committee thanks the minister for his response and notes the minister's advice that, consistent with the Australian National Maritime Museum Regulations 1991 (the previous regulations), decisions by security officers under section 14 of the instrument to prohibit entry to museum premises are not subject to merits review.

1.166 In this regard, the committee notes the minister's advice that it is intended that decisions to prohibit entry will be made on a case by case basis, rather than to permanently exclude a person from Museum premises. Consequently, the committee notes the minister's advice that the effect of decisions under section 14 of the instrument is likely to be minimal, and therefore unlikely to justify the costs of review.

1.167 However, the committee notes that it remains possible that a person may be repeatedly prohibited from entering the premises by decisions made under section 14, such that the potential benefits of merits review in providing access to the premises may justify the cost. Consequently, the committee considers that it may be appropriate for decisions under section 14 of the instrument to be subject to independent merits review.

1.168 The committee welcome's the minister's advice that he is willing to consider providing for merits review in a future amendment to the instrument, in response to the committee's concerns.

1.169 **The committee considers it may be appropriate for the instrument to be amended as soon as possible to provide for independent merits review of decisions made under section 14 of the instrument, and seeks the minister's advice in relation to this matter.**

Reversal of evidential burden of proof[115]

1.170 In *Delegated Legislation Monitor 12 of 2018,*[116] the committee requested the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 10(2)(a), subsections 25(2) and 26(2) and section 32 of the instrument. The committee noted its assessment would be assisted if the minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences.*[117]

Minister's response

1.171 The Minister for Communications and the Arts advised:

> Paragraph 10(2)(a)
>
> The reversal of the evidential burden of proof in paragraph 10(2)(a) is appropriate, having regard to the principles in the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide).
>
> In addition to the position that it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, the matters in paragraph 10(2)(a) are also peculiarly within the knowledge of the accused person. While I acknowledge that the question of whether a person held the appropriate authorisation may not be solely within the knowledge of that person, the person would nevertheless be best placed to quickly and easily demonstrate that fact.
>
> Subsection 25(2)
>
> The reversal of the evidential burden of proof in subsection 25(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved, including whether the animal is under the control of the Museum.

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

116 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. -5-10.

117 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

It would again be significantly and disproportionately more difficult for the prosecution to prove that a person is not a person with a disability and that their animal is not an assistance animal, than it would be for any accused to raise the relevant defence by providing evidence of their own status (and that of their assistance animal). This is similarly the case in relation to proving that a person is not a police officer acting in accordance with their duties.

The intention, in the case of 25(2)(c), is to account for situations where the museum has under its control an animal that assists in the day-to-day running of the Museum or partners with organisations to allow animals on the premises for the purposes of a public attraction. It would be significantly and disproportionately more difficult for the prosecution to prove that an animal is not under the control of the Museum than it would be any accused to raise the relevant defence by providing evidence of their control of the animal at the relevant time.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 25(2) is the relatively low amount of five penalty units, which tends to support a defence provision in these circumstances.

Subsection 26(2)

The reversal of the evidential burden of proof in subsection 26(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved including whether the food or liquid was brought into or consumed by that person within an area designated for consuming food or liquid. That person would be best placed to identify where they were located while possessing or consuming the relevant food or liquid.

It would again be significantly and disproportionately more difficult for the prosecution to prove that the food or liquid was not brought or consumed in an area designated for consuming food or liquid.

I note that once the evidential burden is discharged, the legal burden of proof remains with the prosecution which would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 26(2) is the relatively low amount of five penalty units, which lends support to a defence provision in these circumstances.

In addition, I note that the defence provision in paragraph 26(2)(e) is consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia (see for example paragraph 25(2)(e) of the National Gallery Regulations 2018 which is framed in similar terms). A consistent approach to the framing of defence provisions across the

national cultural institutions is desirable, where possible, and the framing of proposed subsection 26(2) supports this approach.

Section 32

The reversal of the evidential burden of proof in section 32 is similarly appropriate. It would again be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Council had not consented in writing to a person engaging in conduct that contravenes Part 4 of the instrument, than for the person to raise evidence of the written consent. It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not one of the categories of persons listed in subsection 32(2) and was not acting in accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

Any accused could cheaply and readily raise evidence of the applicable written consent, or of their appointment or employment and associated duties.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, creating the defence is more readily justified as the offence carries a relatively low penalty of five penalty units.

In addition, I note that the defence provisions in section 32 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia and the National Portrait Gallery of Australia (see for example section 25 of the National Gallery Regulations 2018 and section 24 of the National Portrait Gallery Regulations 2013 which are framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural institutions is desirable, where possible, and the framing of proposed section 32 supports this approach.

Committee's response

1.172 The committee thanks the minister for his response.

1.173 In relation to the defences in paragraph 10(2)(a) and subsection 25(2) of the instrument, the committee notes the minister's assessment that it would be disproportionately difficult and costly for the prosecution to disprove these matters. However, the minister has not provided any advice in relation to these defences that would indicate that the matters in question are peculiarly within the knowledge of the defendant, as required by the *Guide to Framing Commonwealth Offences*.[118] For example, the minister does not explain how the relevant matters in

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

paragraph 10(2)(a) (that is, selling or supplying liquor if authorised in writing to do so by the Director) could be peculiarly within the knowledge of the defendant, where the Director-General is responsible for providing the requisite authorisation to sell or supply liquor. In addition, it is not clear how it would be peculiarly within the knowledge of the defendant that an animal is under the control of the Museum (in paragraph 25(2)(c)). Consequently, the committee remains of the view that these matters do not appear to be matters which would be peculiarly within the defendant's knowledge.

1.174 The committee also notes the minister's assessment that it is appropriate to impose an evidential burden on the defendant in subsection 26(2), because the relevant matters are likely to be within the peculiar knowledge of the defendant, it would be significantly and disproportionately more difficult for the prosecution to prove such matters, and the penalty units for contravention of the subsection are relatively low. However, it remains unclear to the committee how the question of whether food was consumed in a 'designated area'[119] could be peculiarly within the knowledge of the defendant, as required by the *Guide to Framing Commonwealth Offences*,[120] where the Museum would presumably be responsible for the designation of certain areas. Additionally, it is not clear to the committee that it would be peculiarly within the defendant's knowledge that the Director had consented in writing to certain conduct or that a person was engaged by the Museum (in section 32).

1.175 Finally, the committee notes the minister's advice that the defence provisions in sections 26 and 32 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions. On this point the committee emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns. This is particularly the case where those concerns relate to the protection of individual rights and liberties.

1.176 The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate and the minister its concerns about the reversal of the evidential burdens of proof in paragraphs 10(2)(a), 25(2)(c) and 26(2)(e) and section 32 of the instrument to the attention of the minister and the Senate, in relation to matters that do not appear to be peculiarly within the defendant's knowledge.

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119 In paragraph 26(2)(e).

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

Privacy[121]

1.177 In *Delegated Legislation Monitor 12 of 2018*,[122] the committee requested the minister's advice as to:

- how personal information collected in accordance with subsection 15(2) of the instrument will be used and managed; and
- what safeguards are in place to protect the personal privacy of individuals in relation to that information.

Minister's response

1.178 The Minister for Communications and the Arts advised:

> The Museum is subject to the *Privacy Act 1988* and all personal information collected by the Museum must be dealt with according to the Australian Privacy Principles (APPs), which are set out in Schedule 1 of the Privacy Act. Personal information collected in accordance with subsection 15(2) of the instrument will be used and managed in accordance with the APPs. I am advised that the Museum is implementing appropriate safeguards to protect the personal privacy of individuals in relation to any personal information collected by the Museum under subsection 15(2). The Museum has a Privacy Policy, Privacy Management Plan and Data Breach Procedures and is currently compiling a record of its personal information holdings.
>
> The collection and use of personal information (including photographs) under section 15(2) of the instrument will be included in the record of holdings.
>
> The Museum provides training to security officers about the instrument, including the collection, security, use and disclosure of information collected under subsection 15(2). This complements other privacy training provided to the Museum's security officers. The Museum's security officers are required to complete a "Privacy Awareness Declaration" certifying awareness of the handling of personal information consistent with the APPs.

Committee's response

1.179 The committee thanks the minister for his response and notes his advice that personal information collected in accordance with subsection 15(2) of the instrument will be used and managed in accordance with the Australian Privacy Principles (APPs) under the *Privacy Act 1988*.

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

122 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. -5-10.

1.180 The committee also notes the minister's advice that the Museum is implementing appropriate safeguards to protect personal information collected by the Museum under subsection 15(2) of the instrument. In this regard, the committee further notes the minister's advice that the museum has relevant policies and procedures in place in relation to personal information collected under subsection 15(2), and provides training to security officers about the collection, security use and disclosure of instrument under the instrument, in a manner consistent with the APPs.

1.181 The committee considers this information would have been useful for inclusion in the explanatory materials accompanying the instrument.

1.182 The committee has concluded its examination of this matter.

Instrument	**Banking (prudential standard) determination No. 4 of 2018 [F2018L01190]**
Purpose	Determines Prudential Standard APS 221 Large Exposures
Authorising legislation	*Banking Act 1959*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[123]

Merits review[124]

In *Delegated Legislation Monitor 11 of 2018*,[125] the committee requested the Assistant Treasurer's advice as to:

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

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

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

125 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2018*, pp. 1-3.

Treasurer's response

The Treasurer advised:

> The instrument requires authorised deposit-taking institutions (ADIs) to implement prudent measures and to set prudent limits to monitor and control their large exposures and risk concentrations. Its purpose is to limit the potential for large losses in the event of a counterparty failure, and to ensure that ADIs monitor, manage and control the concentration of exposures, loans or investments to counterparties, industries, countries or particular asset classes.
>
> I note the Committee's question whether decisions made by APRA to set limits on particular exposures (exercising power under paragraph 31 of Prudential Standard APS 221 Large Exposures (APS 221) and to approve exposures that would exceed certain exposure limits (exercising power under paragraph 36 of APS 221) are subject to merits review.
>
> I have raised the Committee's concerns with APRA. They have advised me that APS 221 was determined pursuant to section 11AF of the *Banking Act 1959* (Banking Act). Part V of the Banking Act sets out mechanisms for reconsideration and review of decisions, including a right to apply to the Administrative Appeals Tribunal (AAT). Reconsideration and review is only available in relation to decisions that are specified in the Banking Act to be "reviewable decisions". The Banking Act does not specify that decisions made under paragraphs 31 or 36 of APS 221 are reviewable decisions, nor does APS 221 itself do so. Consequently, decisions made under either paragraph are not subject to merits review.
>
> Paragraph 31 of APS 221 is considered by APRA to be a "reserve power". If APRA were to use this power, it would be strongly of the view that the ADI was exposed to significant losses such that if specific limits were not set on particular exposures of the ADI, the viability of the ADI, deposits in the ADI and financial stability could be materially impacted. This decision would be supported by detailed research, analysis and careful consideration by decision makers within APRA.
>
> Under paragraph 36, an "ADI must obtain approval from APRA prior to undertaking any proposed exposures which would exceed the large exposure limits under paragraph 30" of APS 221. The decision by APRA to grant a higher exposure limit to an ADI would represent a concession to the ADI. A decision to approve higher exposure limits to an ADI is to be made on an exceptions basis, only. Such a decision would involve assessments of the specific circumstances of the ADI and the ability for APRA to achieve its mandate of financial stability whilst balancing other factors.
>
> I note that under the scrutiny principle 23(3)(c) of the committee's terms of reference the Committee must ensure that legislative 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. APRA protects the Australian community by establishing and enforcing prudential standards through exercising powers under the Banking Act. Furthermore, ADIs are consulted when APRA determines prudential standards and consultation on APS 221 occurred in 2017. APRA received a number of submissions in response, none of which suggested that the powers under paragraphs 31 and 36 of APS 221 should be subject to merits review.

Under the *Australian Prudential Regulation Authority Act 1998*, APRA's primary objectives in regulating ADIs are to protect financial safety and financial system stability in Australia. To achieve this mandate, APRA adopts a prudential supervision approach where it may be necessary to adjust requirements for an ADI taking into account the particular circumstances.

APRA advises that if decisions taken in respect of powers under paragraph 31 and 36 were subject to AAT review, this may result in delays and uncertainty that could jeopardise APRA's ability to deal with an emerging problem before it becomes a pressing crisis.

APRA's decisions under APS 221 are subject to judicial review, and it is suggested that this provides an adequate safeguard for ADIs (which are all corporations) that are subject to decisions under paragraphs 31 and 36.

Consequently, it could reasonably be concluded that while ADIs do not have access to merits review, that this was not an undue imposition upon the rights of ADIs.

Committee's response

1.183 The committee thanks the Treasurer for his response, and notes the Treasurer's advice that decisions made by the Australian Prudential Regulation Authority (APRA) under sections 31 and 36 of the instrument are not subject to independent merits review, as neither the *Banking Act 1959* nor the instrument provides that such decisions are reviewable.

1.184 The committee notes the Treasurer's advice that decisions under section 31 to set limits on particular exposures would only be made if APRA were strongly of the view that the relevant ADI was exposed to significant losses, such that if specific limits were not set on exposures, the viability of the ADI, deposits in the ADI and financial stability could be materially impacted. In relation to decisions made under section 36 to allow an ADI to exceed prescribed exposure limits, the committee notes the Treasurer's advice that such decisions would be made on an exceptions basis only, and would involve an assessment of the specific circumstances of the ADI and APRA's ability to achieve its mandate of ensuring financial stability.

1.185 The committee further notes the Treasurer's advice that APRA's primary objectives in regulating ADIs are to protect Australia's financial safety and financial system stability. The committee notes the advice that, to achieve these objectives, it may be necessary for APRA to adjust requirements for ADIs taking into account their

particular circumstances. The committee notes the Treasurer's advice that, if decisions under sections 31 and 36 of the instrument were subject to merits review, this may result in delays and uncertainty that could jeopardise APRA's ability to deal with an emerging problem before it becomes a pressing crisis.

1.186 The Treasurer's advice suggests that decisions made under sections 31 and 36 of the instrument may be financial decisions with a significant public interest element. The committee notes that it this may be an accepted ground on which it may be appropriate to exclude such decisions from merits review.[126] However, the committee also notes that the minister's response does not expressly provide that decisions under sections 31 and 36 of the instrument are decisions of this kind, nor does it identify any other bases for excluding review by reference to the Administrative Review Council's (the ARC) guidance document, *What decisions should be subject to merit review?*.

1.187 Additionally, the committee notes that the ARC's guidance document suggests, in relation to financial decisions with a significant public interest element, that the relevant decision-maker be given the discretion to exclude decisions from merits review on a case-by-case basis (rather than excluding all such decisions from merits review).[127] In this regard, the committee considers that it may be appropriate for the instrument to be amended to require APRA to exclude merits review in relation to decisions made under sections 31 and 36 on a case-by-case basis (rather than globally).

1.188 Finally, the committee notes the Treasurer's advice that APRA's decisions under the instrument are subject to judicial review, and the advice that this is considered to provide an adequate safeguard for ADIs that are subject to decisions under sections 31 and 36. While noting this advice, the committee emphasises that it does not generally consider the availability of judicial review to be sufficient justification for excluding independent merits review.

1.189 In light of the discussion above, the committee seeks the Treasurer's further advice as to:

- **the specific ground relied on to exclude decisions made by the Australian Prudential Regulation Authority under sections 31 and 36 of the instrument from independent merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and**

126 See Administrative Review Council, *What decisions should be subject to merit review*? (1999), [4.34]-[4.38].

127 See Administrative Review Council, *What decisions should be subject to merit review*? (1999), [4.38].

- **the appropriateness of amending the instrument to provide that decisions made by APRA under sections 31 and 36 be subject to independent merits review, unless APRA makes a decision on a case-by-case basis to exclude merits review.**

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 given on 12 November 2018[128]

Merits review[129]

1.190 The committee initially scrutinised this instrument in *Delegated legislation monitor 10 of 2018*.[130] The committee considered the response provided by the Minister for Defence in *Delegated Legislation Monitor 12 of 2018*[131] and requested further advice as to why decisions in relation to the provision of support under the Sustainable Access to Drinking Water program would not be subject to independent merits review.

Minister's response

1.191 The Minister for Defence advised:

> In our previous advice to the Committee, we outlined the largely objective criteria that will apply in relation to this program, and the measures in place to provide for internal review in the unlikely event a request is refused and a resident seeks reconsideration.
>
> Review by the AAT, or any other independent merits review tribunal, is not feasible or appropriate for a number of reasons:

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

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

130 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018,* pp. 26-27.

131 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 52-55.

- The Sustainable Access to Drinking Water program is not a statutory scheme. It is an administrative scheme established within the Department of Defence.
- The program has been included in the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations) to provide absolute certainty that there is legal authority for the expenditure of funds for this program. The FF(SP) Regulations ensure that there is legal authority to make and administer arrangements and grants for the purposes of the programs listed, but do not otherwise establish or regulate the programs. The Regulations are made under subsection 32B(1) of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), which provides:

  If:

  (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:

  (i) an arrangement under which relevant money or other CRF money is, or may become, payable by the Commonwealth; or

  (iii) a grant of financial assistance to a person other than a State or Territory; and

  (b) the arrangement or grant, as the case may be:

  …

  (iii) is for the purposes of a program specified in the regulations; the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be.
- There is therefore no appropriate legislative vehicle to provide for review of the decisions in this program by the AAT (see subsection 25(1) of the *Administrative Appeals Tribunal Act 1975*). The FF(SP) Act does not provide for this: it neither confers such a function on the AAT generally nor provides for the FF(SP) Regulations to do so specifically.
- Decisions under the FF(SP) Act relating to programs specified in the FF(SP) Regulations are expressly excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (see paragraph (he) in Schedule 1 to that Act).
- There is no intention to establish the Sustainable Access to Drinking Water program on a statutory basis at this time. The program is one of a number of actions being taken in Defence to mitigate the possible effects of per- and poly-fluoroalkyl substance contamination resulting from activities at several Defence Force bases. Defence's actions need to be responsive to residents' requirements and the developing scientific evidence. The delivery of this program is advanced, with the majority of affected properties in Williamtown, Oakey, Katherine and

Pearce having already received support to ensure sustainable access to drinking water.

While independent merits review by the AAT will not be available, the Commonwealth Ombudsman is able to investigate any complaints made in relation to the administration of the program, and make recommendations to Defence.

Committee's response

1.192 The committee thanks the minister for his response. The committee notes the minister's advice that decisions under the Sustainable Access to Drinking Water program (the Program) will be made on the basis of largely objective criteria, and that there are measures in place to provide for internal review in the event that a request for support is refused and a resident seeks reconsideration.

1.193 The committee also notes the minister's advice that the Program is not a statutory scheme, and there is therefore no appropriate vehicle to provide for review of decisions under the Program by the Administrative Appeals Tribunal (AAT). The committee notes the advice that there is currently no intention to establish the Program on a statutory basis.

1.194 The committee further notes the advice that the delivery of the Program is advanced, with the majority of affected properties having already received support to ensure sustainable access to drinking water.

1.195 Finally, the committee notes the minister's advice that while independent review by the AAT will not be available, the Commonwealth Ombudsman is able to investigate any complaints made in relation to the administration of the Program, and make recommendations to Defence.

1.196 While noting this advice, the committee reiterates that it does not consider internal review to constitute sufficiently independent merits review. The committee also emphasises that it does not consider the ability to make complaints to the Ombudsman to be an adequate substitute for independent merits review. In this regard, the committee notes that the Ombudsman only has jurisdiction to consider and investigate complaints, and to make formal recommendations to government. Unlike a tribunal conducting merits review, the Ombudsman cannot override government decisions or issue directions as to how they should be made.

1.197 The committee also acknowledges that it may in some cases be appropriate to exclude decisions based on objective criteria from merits review (that is, where the decision is effectively automatic or mandatory). However, in this instance it appears that there may be scope for disagreement regarding facts and evidence on which decisions under the Program are based. As outlined in its previous comment, this may mean that decisions under the Program would be suitable for merits review—even if only to determine whether the relevant facts and evidence exist. Additionally, while acknowledging that the majority of affected properties may have already received support under the program, the committee considers that merits

review may be still be appropriate for to those persons who have not received support or who consider the support received to be inadequate.

1.198 The committee further emphasises that it does not consider the fact that decisions are not made under a statutory scheme to be an appropriate basis for excluding all forms of independent merits review. While the committee acknowledges that it may not be possible to confer jurisdiction on the AAT in relation to decisions made under the Program, it is not apparent that another form of independent review could not be provided. The committee notes that Commonwealth departments have in some cases engaged independent contractors to review administrative decisions made under non-statutory schemes.[132] 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.

1.199 In light of the discussion above, the committee seeks the minister's further advice as to why decisions made under the Sustainable Access to Drinking Water program would not be subject to independent merits review. The committee's consideration of this matter would be assisted if the minister's response would address whether it would be possible to engage an independent contractor to conduct the review process.

132 For example, certain protection decisions relating to asylum were previously reviewed under the Independent Protection Assessment (IPA) and Independent Merits Review (IMR) systems. These processes were carried out by an independent assessor who undertook an impartial assessment of applicants' protection claims.

Instrument	**National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 9) (PB 74 of 2018) [F2018L01223]**
Purpose	Amends the list of Benefits on the Pharmaceutical Benefits Scheme (PBS)
Authorising legislation	*National Health Act 1953*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[133]
Previously reported in	*Delegated Legislation Monitor 12*

Incorporation[134]

1.200 In *Delegated Legislation Monitor 12 of 2018,* [135]the committee requested the minister's advice as to whether volume 5 of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) is incorporated, and, if so:

- the manner in which the DSM-5 is incorporated;
- if it is intended to incorporate the document from time to time, the provision in the enabling legislation or other Commonwealth law relied on to incorporate the DSM-5; and
- how the DSM-5 is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.

Minister's response

1.201 The Minister for Health advised:

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

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

135 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 32-34.

1. Incorporation of other documents

I can advise that the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) is referenced by the above instrument, but only to the extent that it is relevant in the diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) for patients eligible to receive pharmaceutical benefits available for guanfacine or atomoxetine under the Pharmaceutical Benefits Scheme (PBS).

2. Manner of incorporation

The above Instrument incorporates DSM-5 as part of the Authority Required (Streamlined) benefits for two medicines on the PBS for the treatment of ADHD. It is intended that the Instrument incorporates the DSM-5 as the current edition of the DSM.

The purpose of incorporating the DSM-5 as the current edition of the DSM is to ensure that the provision of pharmaceutical benefits under the PBS reflects current clinical practice. To this end, based on expert clinical advice from the Pharmaceutical Benefits Advisory Committee (PBAC), the DSM-5 is a key resource utilised by health professionals treating ADHD patients to diagnose and classify mental disorders.

a. Legislative authority for incorporation

I refer the Committee to section 101 (3C) of the *National Health Act 1953* (the Act). Under this provision the Pharmaceutical Benefits Advisory Committee (PBAC) is able to recommend that pharmaceutical benefits shall only be available in the circumstance set out in its recommendation.

As part of its recommendation documented in the Public Summary Document for guanfacine from the PBAC July 2017 meeting (accessible online at www.pbs.gov.au), the PBAC recommended that the pharmaceutical benefits for guanfacine should be restricted in circumstances that include a positive diagnosis of ADHD in accordance with DSM-5 criteria made by a treating doctor who must be a paediatrician or psychiatrist.

The PBAC also recommended that the restrictions for atomoxetine be aligned with guanfacine and is reflected by an amendment to the restrictions for atomoxetine to change the reference to DSM-IV to DSM-5 and this change is also reflected in the above Instrument.

In accordance with section 88A of the Act, I or my delegate determined under subsection 85(7) that pharmaceutical benefits for guanfacine and atomoxetine are authorised only in the specified circumstances as recommended above by the PBAC.

3. Description and access to incorporated documents

The DSM-5 may be accessible free of charge to affected persons, being the patients at the point of care, as it is expected the medical practitioners involved in the treatment of ADHD have access to the DSM-5 to consult the relevant diagnostic criteria. Alternatively, a person affected by the

above Instrument may access the document through specialist biomedical libraries at most major universities.

Committee's response

1.202 The committee thanks the minister for his response, and notes the minister's advice that the instrument incorporates by reference the current edition of the DSM-5. The committee also notes the minister's advice that the DSM-5 may be accessible free of charge to affected persons via their medical practitioners or, alternatively, through specialist biomedical libraries at most major universities.

1.203 However, the committee reiterates that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. Where documents (including diagnostic criteria) are incorporated by reference into an instrument, the committee's expectation is that, at a minimum, consideration be given to any means by which those documents may be made available free of charge to any interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the documents available for viewing on request, for example, viewing at Department of Health offices.

1.204 In this regard, it remains unclear to the committee whether people interested in or affected by the law who do not have free access to a relevant medical practitioner or specialist biomedical library can otherwise freely access the DSM-5.

1.205 The committee requests the minister's further advice as to whether the current edition of the DSM-5 incorporated by reference in the instrument:

- **can be made available for viewing without charge at the Department of Health offices; and**
- **is, or can be made, available through public libraries (and if so, which public libraries).**

Advice only

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

Instrument	**ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894 [F2018L01413]**
Purpose	Changes reporting dates in the *Corporations Act 2001*, and makes minor technical modifications to address unintended consequences asociated with the financial adviser professional standards reforms
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[136]

Modification of primary legislation by delegated legislation[137]

1.1 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).

1.2 The provisions in Part 2 of the instrument modify the operation of various provisions in Part 10.23A of the *Corporations Act 2001* (Corporations Act), which relate to Divisions 8A and 9 of Part 7.6 of the Act.[138]

1.3 The instrument is made under subsection 926A(2) of the Corporations Act, which authorises ASIC to exempt persons from specific Chapters and Parts of the Corporations Act, and to declare that the specific Chapters and Parts of the Act apply as if specified provisions were omitted, modified or varied.

1.4 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. Section 1020F of the Corporations Act (that is, the

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

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

138 Sections 10 and 11 modify provisions in Part 10.23A of the Corporations Act which relate to Division 8A of the Act, while sections 5-9 and 12 modify provisions in Part 10.23A of the Corporations Act which relate to Division 9 of the Act.

enabling provision for the instrument) appears to be akin to a Henry VIII clause, as it authorises delegated legislation to modify and exempt entities from compliance with primary legislation. As noted above, it also enables delegated legislation to exempt persons and entities from the operation of primary legislation.

1.5 There are significant scrutiny concerns with enabling delegated legislation to amend or override the operation of primary legislation which has been passed by Parliament, as this limits parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive. Provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation also raise scrutiny concerns, as such provisions have the effect of limiting, or in some cases removing, parliamentary scrutiny.

1.6 The committee draws the modification of primary legislation via delegated legislation to the attention of the Senate.

Instrument	**Civil Aviation Order 82.0 Amendment Order (No. 1) 2018 [F2018L01415]**
Purpose	Amends Civil Aviation Order 82.0 to omit redundant provisions
Authorising legislation	*Civil Aviation Act 1988*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[139]

Drafting[140]

1.207 The instrument amendments Civil Aviation Order 82.0[141] to omit certain provsions that are no longer required after the commencement of the Civil Aviation Amendment (Fuel and Oil Requirements) Regulations 2018[142] and CASA 29/18 — Civil Aviation (Fuel Requirements) Instrument 2018.[143]

1.208 Item 1 of Schedule 1 to the instrument inserts a new definition of 'minimum safe fuel' into paragraph 2.1 of Civil Aviation Order 82.0. The definition provides that

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

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

141 [F2015C00204].

142 [F2018L00599].

143 [F2018L00664].

'minimum safe fuel' has the meaning given by the legislative instrument issued by CASA under regulation 234 of the Civil Aviation Regulations (CAR), as in force from time to time.

1.209 The committee notes that the explanatory statement explains that, at the time the present instrument commences, section 10 of CASA 29/18 will be the relevant provision of the legislative instrument made under regulation 234 of CAR that contains the definition of 'minimum safe fuel'.[144]

1.210 However, in the interests of promoting the clarity and intelligibility of the instrument for anticipated users, the committee considers that the instrument itself should specify that other instrument (CASA 29/18) from which the definition of 'minimum safe fuel' is dervived.

1.211 The committee draws the minister's attention to item 1 of Schedule 1 to the instrument, which currently provides that 'minimum safe fuel' has the meaning given by the legislative instrument issued under section 234 of the Civil Aviation Regulations, without specifying the relevant instrument.

Instrument	**Corporations Amendment (Crowd-Sourced Funding) Regulations 2018 [F2018L01379]**
Purpose	Extends crowd-sourced funding framework to proprietary companies and makes amendments to enhance the crowd-sourced funding framework
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[145]

Matters more appropriate for parliamentary enactment[146]

1.212 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).

144 Explanatory statement, p. 3.

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

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

1.213 Items 16 and 17 of Schedule 1 of the instrument insert a number of provisions into the Corporations Regulations 2001 (Corporations Regulations), which in turn modify section 738X and Part 7.9 of the *Corporations Act 2001* (Corporations Act). These modifications are authorised by paragraphs 742(1) and 1020G(1)(c) of the Corporations Act, which provide that the relevant provisions of the Corporations Act apply as omitted, modified or varied by the regulations.

1.214 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. These paragraphs are akin to 'Henry VIII clauses', as they enable the regulations to modify the operation of primary legislation. There are significant scrutiny concerns with Henry VIII clauses, as such provisions may limit parliamentary oversight and may subvert the appropriate relationship between the Parliament and the executive.

1.215 The committee draws the modification of primary legislation via delegated legislation to the attention of the Senate.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulations 2018 [F2018L01423]**
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 16 October 2018). Notice of motion to disallow must be given by first sitting day of 2019[147]

Merits review[148]

1.216 Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instrments do not unduly make the rights and liberties of citizens dependent on adminsitrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

1.217 The instrument adds three new items to Part 4 of Schedule 1AB to the Finanancial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations), establishing legislative authority for expenditure on activities

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

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

administered by the Health portfolio. One of these is item 307, 'Value in Prescribing Program' (ViP Program).

1.218 The explanatory statement indicates that the ViP Program will provide grant funding for the delivery of educational information and resources to promote the appropriate and efficient use of medicines and immunoglobulin blood products. It also states that the department will use an open, competitive process to award grants in accordance with the *Public Governmance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2017*.[149] The explanatory statement further explains that:

> The provision of funds to the successful grantee(s) is not considered suitable for independent merits review because the expenditure is one-off, time-limited and will only have a maximum of two grants available…
>
> The open competitive approach to market is to test who is interested in delivering the grant activities. It is expected that it may have a single, or at most two, grant recipients. It is expected that few organisations will have the capability and necessary expertise to available to deliver the requirements.
>
> To reconsider the decision under merits review would substantially delay commencement and implementation of the program.[150]

1.219 The committee acknowledges that funding under the Program will be provided by way of a one-off-grant, and that reconsideration of the grant decision may delay implementation of the Program. However, the committee considers that, where it is proposed to exclude merits review, the explanatory statement should expressly identify established grounds for excluding merits review by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. The committee notes that no such grounds are identified in the explanatory statement.

1.220 The committee draws to the attention of the minsiter the exclusion of merits review in relation to grant decisions made under the Value in Prescribing Program, in the absence of any express reference in the explanatory statement to established grounds for excluding merits review.

Parliamentary scrutiny: ordinary annual services of government[151]

1.221 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more

149 Explanatory statement, pp. 6-7.

150 Explanatory statement, p. 8.

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

appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

1.222 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 Act, 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.

1.223 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.[152] 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 Act as an 'ordinary annual service of the government', despite being spending on new policies.

1.224 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.[153]

1.225 As outlined above, the instrument establishes legislative authority for government spending on the ViP Program. In relation to funding for the ViP Program, the explanatory statement explains that:

> Funding was included in the 2018-19 Budget under the measure *'Improving Access to Medicines – Strengthening the Quality Use of Healthcare Services'* for a period of four years commencing in 2018-19. Details are set out in *Budget 2018-19, Budget Measures, Budget Paper No. 1.9, Health Portfolio*…

152 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.

153 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.

> Funding for this item will come from Program 4.3: Pharmaceutical Benefits, which is part of Outcome 4 and Program 1.1: Health Policy Research and Analysis, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.9, Health Portfolio.*[154]

1.226 It appears to the committee that the ViP 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 Act No. 1 2018-19* (which was not subject to amendment by the Senate).

1.227 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.

Instrument	**National Health (Privacy) Rules 2018 [F2018L01427]**
Purpose	Prescribes the rules for the handling information obtained by any agency in connection with a claim for a payment or benefit under the Medicare Benefits Program and the Pharmaceutical Benefits Program
Authorising legislation	*National Health Act 1953*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[155]

Significant matters in delegated legislation[156]

1.7 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).

154 Explanatory statement, p. 7.

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

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

1.8 The instrument, made by the Australian Information Commissioner, prescribes the circumstances in which claims information relating to sensitive health information can be linked and used by relevant government agencies.

1.9 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered aspects of the rule-making powers of the Australian Information Commissioner in the *National Health Act 1953* (National Health Act) when they were inserted by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*. In its initial comments, the committee expressed the view that important matters relating to the collection, use or disclosure of personal information, should be included in primary legislation.[157]

1.10 The Scrutiny of Bills committee did not comment directly on section 135AA of the National Health Act, under which the instrument is made. However, the committee considers that the use and linkage of sensitive health information appears to be a similarly significant matter to that addressed by the Scrutiny of Bills committee that would be more appropriately included in primary, rather than delegated legislation.

1.11 The committee draws to the attention of the Senate the collection, use or disclosure of personal information in delegated legislation, which may be a matter more appropriate for inclusion in primary legislation.

Instrument	**Norfolk Island Continued Laws Amendment (Statutory Appointments and Other Matters) Ordinance 2018 [F2018L01378]**
Purpose	Confers a range of powers and functions on the General Manager of the Norfolk Island Regional Council and amends certain continued laws relating to fuel and waste management levies
Authorising legislation	*Norfolk Island Act 1979*
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[158]

157 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2012*, p. 80.

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

Levying of taxation[159]

1.228 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).

1.229 The instrument is made under subsection 19A(1) of the *Norfolk Island Act 1979* (Norfolk Island Act), which empowers the Governor-General to make ordinances for the peace, order and good government of the Territory. Subsection 17(3) of the Norfolk Island Act provides that instruments made under section 19A may amend or repeal a law continued in force under section 16A of the Norfolk Island Act

1.230 The instrument effectively amends Norfolk Island's Waste Management Regulations 2004 (Waste Management Regulations) and *Fuel Levy Act 1987* (Fuel Levy Act), by amending relevant provisions of the Norfolk Island Continued Laws Ordinance 2015 (Continued Laws Ordinance), which in turn amends laws, originally made by the Norfolk Island Legislative Assembly, which were continued in force by section 16A of the Norfolk Island Act.

1.231 The amendments to the Waste Management Regulations set a levy of $100 per cubic metre or tonne (whichever is greater) on motor vehicles imported into Norfolk Island by sea or air, and increase the rate of existing levies imposed on containers of livestock and goods.[160] The amendments to the Fuel Levy Act increase the levy on each litre of fuel drawn from an approved storage facility by a registered fuel importer from 20 to 25 cents. They also authorise a person who sells fuel to another person to increase the price by 25 cents, rather than 10 cents.[161]

1.232 In relation to these amendments, the explanatory statement explains that:

> The changes to these levies have been made at the request of NIRC [Norfolk Island Regional Council] and are consistent with the proposed fees and charges in the schedule of fees and charges contained in its 2018-19 Operational Plan. This draft Operational Plan was subject to formal community consultation on Norfolk Island before adoption by NIRC. The increases in these levies are intended to cover the operational costs of NIRC, including the provision of roads maintenance and capital investment and its waste management services.[162]

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

160 See items 343E-343L of the Continued Laws Ordinance, inserted by item 62 of the instrument.

161 See items 97N and 97Q of the Continues Laws Ordinance, inserted by item 26 of the instrument.

162 Explanatory statement, p. 2.

1.233 The committee acknowledges the unusual legislative framework in which Norfolk Island laws are made and operate. However, regarding taxation-related matters, the committee shares the views of the Scrutiny of Bills committee, which has repeatedly emphasised that one of the most fundamental functions of the Parliament is to levy taxation, and consequently it is for Parliament, rather than makers of delegated legislation, to set a rate of tax.

1.234 The committee draws the Senate's attention to the setting of levies in relation to Norfolk Island via delegated legislation.

Instrument	**Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2018 [F2018L01393]**
Purpose	Prescribes professional standards schemes for the purposes of a statutory cap on civil liability for misleading and deceptive conduct
Authorising legislation	*Australian Securities and Investments Commission Act 2001* *Competition and Consumer Act 2010* *Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[163]

Incorporation[164]

1.235 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 to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

1.236 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated

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

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

document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[165]

1.237 With reference to these matters, the committee notes that the instrument appears to incorporate a number of State government gazettes.[166] In each case, the instrument appears to incorporate a particular version of the relevant gazette (that is, a version in force at a particular time). However, neither the instrument nor its explanatory statement indicates where the gazettes may be accessed free of charge.

1.238 In this instance, the committee's secretariat has observed that the relevant gazettes are available for free online.[167] Nevertheless, the Legislation Act requires the explanatory statement to an instrument to contain a description of any incorporated document and to indicate how it may be obtained. The committee would therefore expect the explanatory statement to the present instrument to indicate how each of the gazettes incorporated by the instrument may be obtained free of charge.

1.239 The committee draws to the minister's attention the absence of information in the explanatory statement regarding free access to the State government gazettes incorporated by the instrument.

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165 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.

166 For example, item 1 of the instrument prescribes the CPA Australia Ltd Professional Standards (Accountants) Scheme for the purpose of subsection 12GNA(2) of the *Australian Securities and Investments Commission Act 2001*. The scheme is prescribed by reference to the New South Wales Government Gazette No. 138, 22 December 2017.

167 For NSW Government Gazettes, see https://legislation.nsw.gov.au/#/gazettes/; for Queensland Government Gazettes, see https://publications.qld.gov.au/; for South Australian Government Gazettes, see http://governmentgazette.sa.gov.au/.

Instrument	**Woomera Prohibited Area Rule 2014 Suspension of Permission in the Woomera Prohibited Area [F2018L01394]**
Purpose	Suspends standing permission for travel on the Stuart Highway and on the Tarcoola to Darwin railway line
Authorising legislation	*Woomera Prohibited Area Rule 2014*
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[168]

Consultation[169]

1.240 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.

1.241 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*.[170]

1.242 The instrument suspends a standing permission to travel on the Stuart Highway and on the Tarcoola to Darwin railway line between 2 and 7 October 2018. Under the heading 'consultation', the explanatory statement provides that:

> Consultation was not required in relation to this instrument on the basis that the suspension of permission to use certain access routes is an administrative process.[171]

1.243 While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this instance, the statement that consultation

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

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

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

171 Explanatory statement, p. 1.

was not required on the basis that the suspension of permission is an administrative process does not appear to satisfy the requirements in the Legislation Act. In this regard, the explanatory statement does not describe the nature of any consultation that has been undertaken in relation to the instrument, or state that no consultation was undertaken and provide reasons.

1.244 Noting that the suspension enacted by the instrument is no longer in force, the committee draws the attention of the minister and the Senate to the overly bare description of consultation in the explanatory statement.

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	**ASIC Corporations (Amendment) Instrument 2018/825 [F2018L01335]**
Purpose	Amends the ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150 to continue the relief until 1 October 2021
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[2]

Matters more appropriate for parliamentary enactment[3]

2.3 In *Delegated Legislation Monitor 12 of 2018*,[4] the committee requested the Assistant Treasurer's more detailed advice as to:

- the appropriateness of extending for a further three years, an exemption in relation to employee redundancy funds from requirements in the *Corporations Act 2001* (Corporations Act), noting that the exemption has now been in force for more than 18 years;
- when a new regulatory regime for employee redundancy funds is likely to be implemented; and

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)(d).

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 1-3.

- what steps are currently being taken to amend the Corporations Act and *Australian Securities and Investments Act 2001* (ASIC Act) to permanently remove employee redundancy funds from the managed investment scheme and associated provisions.

Assistant Treasurer's Response

The Assistant Treasurer advised:

> ASIC Corporations (Amendment) Instrument 2018/825 and earlier ASIC instruments provide relief to the operators of employee redundancy funds from the managed investment and associated provisions of the Corporations Act. In light of the industrial relations character and the practices and objectives of these funds which diverge so fundamentally from conventional managed investment schemes it is not clear whether Parliament intended that these funds should be caught by the managed investment scheme framework of the Corporations Act. This framework imposes considerable compliance burdens on persons operating the funds and the protections for persons benefiting from these funds under the managed investment regime are not tailored for the circumstances of these beneficiaries.
>
> Every public consultation undertaken by ASIC has confirmed that an exemption should continue and regulation under the Corporations Act and ASIC Act of employee redundancy funds is not appropriate. The alternative to continuing the exemption, regulation under the managed investment provisions of the Corporations Act, does not appear to have any public support (although ASIC was asked to consider this by the Royal Commission into Trade Union Governance and Corruption). In essence, doing so would involve regulating redundancy funds as an investment vehicle.
>
> ASIC considered a 36-month extension to the relief provided by ASIC Instrument 2015/1150 was necessary to allow sufficient time for the passage of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill) which will introduce a new regulatory regime for worker entitlement funds. The Bill has been passed by the House of Representatives and is currently in the Senate. The timing of its passage is a matter for Parliament. When the Bill commences, worker entitlement funds will be subject to the new regulation under the Fair Work (Registered Organisations) Act 2009 and will be permanently excluded from regulation under the Corporations Law and no further changes will be required to the Corporations Act or ASIC Act.
>
> The new regulatory regime for worker entitlement funds will commence on a day to be fixed by Proclamation within six months from the date of Royal Assent.

Committee's Response

2.4 The committee thanks the Assistant Treasurer for his response, and notes the Assistant Treasurer's advice that it is unclear whether Parliament intended employee redundancy funds to be caught by the regulatory framework for managed investment schemes in the Corporations Act. In this regard, the committee notes the advice that this framework imposes considerable compliance burdens on the operators of employee redundancy funds, and that protections in the framework are not appropriately tailored to relevant beneficiaries.

2.5 The committee also notes the Assistant Treasurer's advice that every public consultation undertaken by the Australian Securities and Investments Commission (ASIC) in relation to the regulation of employee redundancy funds has confirmed that an exemption should continue, and that regulating such funds under the Corporations Act and the ASIC Act is not appropriate.

2.6 The committee further notes the Assistant Treasurer's advice that ASIC considered the 36-month extension to the relief provided by the ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150[5] to be necessary to allow time for the passage of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (Fair Work Bill), which is currently before the Senate.[6]

2.7 Finally, the committee notes the Assistant Treasurer's advice that, if the Fair Work Bill is enacted, worker entitlement funds will be subject to a new regime under the *Fair Work (Registered Organisations) Act 2009*, and will be permanently excluded from regulation under the corporations law. The committee notes the advice that this new regime will commence on a day to be fixed by proclamation, within six months of the date on which the Fair Work Bill receives Royal Assent.

2.8 The committee has concluded its examination of the instrument.

2.9 The committee draws to the attention of the Senate the extension, for a further three years, of exemptions in relation to employee redundancy funds from requirements in the *Corporations Act 2001*. However, the committee notes the advice that these exemptions are considered necessary to ensure the appropriate management of employee redundancy funds until such time as the Fair Work Amendment (Proper Use of Worker Benefits) Bill 2017 may be enacted.

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5 [F2017C00678].

6 The Fair Work Bill was introduced in the Senate on 13 November 2017.

Instrument	**ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 [F2018L01313]**
Purpose	Continues relief provided by ASIC Class Order [CO 08/1] beyond that order's sunset date, and extends that relief to additional licensees
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 20 September 2018). Notice of motion to disallow must be given by 5 December 2018[7]

Merits review[8]

2.10 In *Delegated Legislation Monitor 12 of 2018*,[9] the committee requested the Assistant Treasurer's advice as to:

- whether decisions by the Australian Securities and Investments Commission (ASIC) to notify a group purchasing body that it cannot rely on the exemption provided by section 5 of the instrument are subject to merits review; and
- if not, what characteristics of those decisions would justify excluding merits review.

Assistant Treasurer's Response

2.11 The Assistant Treasurer advised:

> ASIC's view is that decisions made under section 7 of Instrument 2018/751 are not subject to independent merits review by the AAT because the instrument does not provide for it.
>
> The AAT only has the power to review a decision where an 'enactment' provides that an application may be made to the AAT for review of decisions made either in exercise of powers conferred by that enactment or in the exercise of powers conferred by another enactment having effect under the enactment

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

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

9 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 3-4.

(section 25(1) of the Administrative Appeals Tribunal Act 1975 (the AAT Act)).

The definition of 'enactment in section 3 of the AAT Act includes 'an instrument (including rules, regulations or by-laws) made under an Act'. Instrument 2018/751 is an instrument made under subsections 601QA(1), 926A(2), 951B(1) and 992B(1) of the Corporations Act 2001 (Corporations Act) and so falls within the definition of 'enactment'. However, as it is currently worded, Instrument 2018/751 does not provide for applications to be made to the AAT for a review of decisions by ASIC under section 7 of Instrument 2018/751.

ASIC has also considered whether the Corporations Act provides for an application to be made to the AAT for review of decisions made under section 7. Section 1317B of the Corporations Act provides that 'applications may be made to the AAT for review of decisions made under this Act'. While section 9 of the Corporations Act defines 'this Act' as including regulations, it makes no reference to legislative instruments issued by ASIC (such as the Instrument). Further, ASIC holds the view that an exercise of power under section 7 of Instrument 2018/751 is an exercise of incidental powers under section 11(4) of the Australian Securities and Investments Commission Act 2001 (ASIC Act). Exercise of this ASIC Act power is not a decision made under the Corporations Act (as required by section 1317B) so is not reviewable by the AAT. Section 244 of the ASIC Act identifies decisions under the ASIC Act which are reviewable by the AAT. These do not include decisions under section 11(4) of the AAT Act.

In response to the Committee's concern ASIC has reviewed whether decisions made under section 7 of Instrument 2018/751 should be excluded from merits review, and advised that it will progress amendments to the instrument to enable applications to the AAT to review these decisions.

Committee's Response

2.12 The committee thanks the Assistant Treasurer for his response, and notes the Assistant Treasurer's advice that decisions made under section 7 of the instrument are not currently subject to merits review by the Administrative Appeals Tribunal (AAT), because the instrument does not provide for review.

2.13 In this regard, the committee notes the Assistant Treasurer's advice that ASIC considers an exercise of power under section 7 of the instrument to be an exercise of incidental powers under the *Australian Securities and Investments Commission Act* (ASIC Act), which is not a decision made under the Corporations Act and is therefore is not subject to independent review by the AAT.

2.14 The committee further notes the Assistant Treasurer's advice that ASIC has reviewed whether decisions made under section 7 of the instrument should be excluded from merits review, and welcomes the undertaking to amend the instrument to enable applications to be made to the AAT for review of those decisions.

2.15 The committee has concluded its examination of the instrument.

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 given on 17 October 2018[10]

Merits review[11]

2.16 The committee initially scrutinised this instrument in *Delegated legislation monitor 10 of 2018*[12] and sought the minister's advice. The committee considered the response provided by the Assistant Treasurer in *Delegated Legislation Monitor 12 of 2018*,[13] and requested further advice as to:

- the nature of each of the decisions that may be made by the Australian Statistician under paragraphs 11(1)(a) to (e) of the determination and how, in each instance, such decisions are purely factual and do not require the Australian Statistician to form an opinion or make a determination; and

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)(c).

12 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 16-17.

13 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 49-52.

- the grounds on which it is considered appropriate to exclude merits review of the Australian Statistician's decision to impose conditions on the disclosure of statistical information.

Assistant Treasurer's response

The Assistant Treasurer advised:

> **Nature of decisions under Section 11(1)(a) to (e)**
>
> In relation to the Committee's first question, the classes of statistical information that are covered by these subsections in the Determination are statistics that relate to:
>
> - an official body;
> - foreign trade, being statistics derived wholly or in part from customs or import documents;
> - interstate trade, being statistics which are the result of compilation and analysis of information provided by Tasmania;
> - building and construction, not being the costs or net returns of individual builders or contractors;
> - agriculture, apicultural, poultry, dairying and pastoral activities not being the costs or net returns of individual operators.
>
> The only decision that the Australian Statistician must make under subsections 11(1)(a) to (e) is whether the particular piece of information to be disclosed is of a kind specified in one of those subsections.
>
> Whether or not a particular piece of information is covered by one of the above classes is a question of fact. Such decisions rely on classifications of information which are determined on an objective basis, having regard to the nature of the information, and for certain classes, the manner in which it was collected. For example, if the Australian Statistician were considering release of information about the poultry industry under subsection 11(1)(e), he/she would need to be satisfied that the information related to organisations that are classified by the Australian and New Zealand Standard Industrial Classification (ANZSIC) to the poultry farming industry and did not disclose the costs or net returns of individual operators.
>
> These types of considerations by the Australian Statistician are subject to judicial review under Administrative Decisions (Judicial Review) Act 1977, which ensures that the classification of a particular piece of information can be reviewed by the Courts.
>
> Of note, in addition to the decisions that the Committee referred to under subsections 11(1)(a) to (e), the Australian Statistician is

prohibited by subsection 11 (2) from releasing information where an individual or the responsible officer of an organisation has shown that the disclosure of the information would be likely to enable the identification of the individual or organisation. Where an objection of this kind is satisfied based on factual evidence, the Australian Statistician cannot authorise the disclosure of information under section 11, irrespective of whether it is of the kind referred to in subsections 11(1)(a) to (e).

Conditions on disclosure of statistical information

The various conditions that the Australian Statistician imposes on individuals and organisations allow the disclosure of information on a confidential basis, to be accessed through a safe and controlled environment. In practice, the Australian Statistician seeks to understand requests to disclose information and applies the most appropriate conditions to balance user requirements with compliance with the Act. Such requirements can relate to, for example, the manner in which the information can be accessed (such as only through a secure data laboratory facility), the specific individuals who can access the data and the use to which it can be put.

The Australian Statistician has demonstrated a willingness to agree to appropriate terms and conditions governing access arrangements with users, insofar as the conditions do not conflict with the general requirements imposed on the Australian Statistician under the Act. The general requirements of the Act (such as the general requirement in section 13 which prohibits the disclosure of information that would likely to enable the identification of particular persons) take precedence over any provision in the Determination.

A merits review of the conditions proposed by the Australian Statistician may be ineffective as, given the general requirements in the Act, there may be no appropriate remedy. For example, a remedy may require a variation to a condition imposed by the Australian Statistician in an undertaking. Any suggested variation to the conditions may result in information not being able to be disclosed at all because such conditions were imposed to ensure compliance with the Act. Further, the costs associated with a merits review process may be disproportionate to the potential limited benefits such a process could deliver.

On this basis, I consider the Determination strikes an appropriate and accepted balance between the disclosure of information and the critical protections enshrined in the Census and Statistics Act 1905, and that the Australian Statistician's decision to impose conditions on the disclosure of information under should not be subject to merits review.

Committee's response

2.17 The committee thanks the Assistant Treasurer for his response and notes his advice that the decisions that may be made by the Australian Statistician under paragraphs 11(1)(a) to (e) of the instrument are determined on an objective basis, having regard to the nature of the information, and, for certain classes, the manner in which the information was collected.

2.18 While decisions that are mandatory or procedural in nature (that is, based on an obligation to act on the existence of specified circumstances) are generally considered to be a class of decision that may not be considered suitable for independent merits review, it remains unclear to the committee whether the decisions made under paragraphs 11(1)(a) to (e) of the instrument can be characterised in this way.

2.19 In this regard, the committee notes that the Assistant Treasurer's advice that the Australian Statistician would need to be 'satisfied' that certain information related to particular organisations, and will have regard to the nature of that information in reaching that decision, indicates that there may be scope for disagreement about the relevant matters. The Administrative Review Council's guidance document, *What decisions should be subject to merit review?*, relevantly states:

> Where … there is scope for disagreement about whether or not particular factors have occurred the automatic or mandatory character of the decision flowing from those facts will not mean that the decision is inappropriate for review, although the review will necessarily be confined to ascertaining whether or not the relevant facts have occurred.[14]

2.20 The committee also notes the Assistant Treasurer's advice that decisions made by the Australian Statistician under the instrument to impose conditions on the disclosure of information to prospective recipients may be unsuitable for merits review because there may be no effective remedy. The Assistant Treasurer explains that this may arise in circumstances where the outcome of merits review prevents information being disclosed at all. However, in the committee's view, the possibility of such an outcome is entirely consistent with nature and purpose of merits review, in which the merits reviewer has all the powers and discretions of the initial decision-maker.

2.21 The committee further notes the Assistant Treasurer's advice that decisions to impose conditions on the disclosure of information may also be unsuitable for merits review because the costs associated with a merits review

14 Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), [3.12].

process may be disproportionate to the potential limited benefits such a process could deliver. In this regard, the committee notes that the Administrative Review Council's guidance refers specifically to situations in which the cost of review 'would be **vastly** disproportionate to the significance of the decision under review'.[15] Noting the possible benefits of review to both potential applicants and the Australian Statistician as a means of clarifying the Statistician's decision-making powers under the instrument, it is unclear to the committee that the cost of review would be 'vastly disproportionate' to the potential benefits of review.

2.22 The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate the failure to provide independent merits review of decisions made by the Australian Statistician under the instrument.

Instrument	**Corporations (Passport) Rules 2018 [F2018L01272]**
Purpose	Gives effect to Passport Rules agreed by the participating economies to the Asia Region Funds Passport scheme
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[16]

Incorporation[17]

2.23 In *Delegated Legislation Monitor 12 of 2018*,[18] the committee requested the Assistant Treasurer's advice as to:

- the manner in which a number of documents (identified at paragraph [1.69] of the initial entry) are incorporated by the instrument (that is, as in force from time to time or as in force at a particular time);

15 Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999), [4.56].

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

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

18 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 16-21.

- where each of those documents may be accessed free of charge; and
- where it is intended to incorporate a document as in force from time to time, the specific provision in the *Corporations Act 2001* (Corporations Act) or other Commonwealth legislation that permits incorporation in this manner.

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

Assistant Treasurer's response

The Assistant Treasurer advised:

> Manner of incorporation
>
> Parts 1, 4 and 9 of the Corporations (Passport Rules) 2018 (the Passport Rules) include tables which refer to the laws in other participating economies.
>
> In Part 1, the table at section 4 lists the types of documents that are 'constituent documents' of a passport fund under the laws of each of the participating economies. In relation to the table at section 4, the explanatory statement states, on page 2:
>
> > The table…does not seek to incorporate the laws of the participating economies by reference. Instead, the provision merely turns on whether, as a matter of fact, the document has a particular status under the law of another jurisdiction.
>
> In Part 4 of the Passport Rules, tables referring to the laws of other participating economies are used in section 7 and sections 13 to 16.
>
> The table at section 7 is relevant for determining whether the operator of a passport fund meets the financial resources test. An operator meets the financial resources test if its equity is greater than USD 1,000,000 plus an additional capital amount. Equity is calculated by using the operator's 'balance sheet prepared in accordance with relevant accounting standards'. The table at section 7 then lists the relevant accounting standards in each of the participating economies and is used to determine whether the financial record has the status of a 'balance sheet prepared in accordance with relevant accounting standards'. The table is designed to assist in determining whether, as a matter of fact, a document is a 'balance sheet' under section 7. It is not designed to incorporate those foreign accounting standards into Australian law.
>
> The table at section 13 is used to determine which entity has the status of 'the responsible holding party' for a passport fund. As subsection 13(1) notes, this entity holds the status of a responsible holding party under the laws of the participating economy. The table does not seek to incorporate the laws of the participating economy into Australian law.

The table at section 14 is relevant for determining which entity is the 'independent oversight entity'. Again, the independent oversight entity holds its status under the laws of the participating economy and the table does not incorporate those foreign laws into Australian law.

Similarly, the table at section 15 is used to determine which entity has the status of the 'implementation reviewer'. This depends on whether the entity holds a particular designation or accreditation under the laws of the fund's home economy. Again, the section does not seek to incorporate those foreign laws into Australian law.

Section 16 includes two tables at subsections (4) and (6). These tables operate differently to the other tables in the Passport Rules. Under section 16, the operator of a passport fund must prepare financial statements that are in accordance with the financial reporting requirements in their home economy. The operator must also ensure that the financial statements are audited and that an audit report is prepared in accordance with the audit requirements in their home economy. The tables in section 16 therefore incorporate the laws of a foreign economy. These laws are incorporated from time to time, rather than at a particular point in time.

In relation to the tables in Part 2 of the Passport Rules, page 6 of the explanatory statement explains that:

> [Part 2] includes tables which refer to the laws of another jurisdiction. In most instances, the laws of another jurisdiction are only relevant for determining whether or not, as a matter of fact, a party has a particular status. One exception is section 16 which incorporates the financial reporting and auditing requirements in certain specified international instruments as in force from time to time.

The explanatory statement, on page 6, then sets out two reasons why incorporation from time to time is necessary:

> First, section 16 of the Rules mirrors the corresponding section in Annex 3 which is also intended to incorporate certain specified international instruments as in force from time to time. If the Rules did not incorporate the specified international instruments as in force from time to time, the rules in Australia would not be substantially the same as Annex 3 [of the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport(MOC)] and the requirements of section 1211 could not be met. As a result, Australia could not give effect to its commitments under the MOC.

> Second, Annex 3 and the Rules would become unworkable if the instruments were not incorporated as in force from time to time. Amendments to the specified instruments are likely to be made with reasonable frequency. If these amendments were not automatically incorporated, the Joint Committee would need to undertake the potentially lengthy process for changing Annex 3 set out in paragraph 9 of the MOC. The participating economies would also need to take the necessary steps to incorporate the amendments into their domestic laws.

Section 56 in Part 9 includes a table which lists the entity that is the operator for different collective investment schemes. This table includes references to foreign laws but this is only for the purpose of identifying, as a matter of fact, which entity is the operator for particular types of collective investment schemes. For example, if a scheme is registered in New Zealand under the Financial Markets Conduct Act 2013, the operator is the entity licensed to be the manager of the investment scheme licensed under that Act. Section 56 does not incorporate the Financial Markets Conduct Act 2013 or any other laws into Australian law.

If section 56 or any of the other sections in Parts 1 or 2 are taken to incorporate the laws of a foreign economy by reference, the same logic would apply. That is, the instruments would need to be incorporated from time to time, rather than at a point in time.

<u>Power to incorporate</u>

The power to make the Passport Rules is contained in subsection 1211(1). The subsection only gives me, as the relevant Minister, the power to make rules which are substantially the same as Annex 3 of the MOC. This limitation on my power to make rules is required to give effect to the MOC which Australia signed on 28 April 2016. The MOC envisages that there will be a single set of uniform rules that apply in all participating economies. The benefits of the Asia Region Funds Passport Regime would be lost if there were substantial differences between the passport rules that apply in each participating economy.

Annex 3 of the MOC is the same as the Passport Rules in all material respects. It also includes tables in Parts 1 and 2 which refer to the laws in the participating economies. In relation to the tables at section 16, Annex 3 seeks to incorporate the foreign laws as they are in force from time to time.

Therefore, I only have power to make passport rules which incorporate the foreign laws as in force from time to time in the same way as in Annex 3 of the MOC. The rules that I made would not be substantially the same as Annex 3 of the MOC if they did not include the tables which list the foreign laws in Parts 1 and 2. Nor

would the rules be substantially the same if they caveated the way in which these tables were to operate. For this reason, the footnote on page 6 of the explanatory statement suggests that 'section 1211 can be seen as manifesting by necessary implication, an intention that the Rules may incorporate other instruments as in force from time to time as required by section 14 of the Legislation Act 2003'.

Accessing the foreign laws[19]

The explanatory statement includes a table which lists where each of the foreign laws in section 16 can be accessed online free of charge. The table lists only the foreign laws in section 16 because this is the only section which seeks to incorporate the laws of another country by reference.

The table below lists the foreign laws which are mentioned in other sections in the Passport Rules and where those foreign laws can be accessed free of charge.

…

Alternatively, a person may contact the Australian Securities and Investments Commission (ASIC) to source a copy of the foreign laws that are mentioned in the Passport Rules. ASIC's Customer Contact Centre may be contacted on 1300 300 630 within Australia or +61 3 5177 3988 outside Australia during standard business hours (8:30am to 5:00pm Monday to Friday). ASIC is also preparing guidance on these foreign laws and this will be made available on ASIC's website at https://asic.gov.au before the official start date of the ARFP regime in February 2019.

The explanatory statement will be amended to include the additional information sought by the Committee.

Committee's response

2.25 The committee thanks Assistant Treasurer for his response, and notes the Assistant Treasurer's advice that sections 4, 7, 13 to 15 and 56 of the instrument do not seek to incorporate the laws of participating economies, and associated accounting standards, into Australian law. The committee notes the advice that those provisions only intend to refer to the laws and

19 This is an extract of the minister's response, which does not include the table listing the relevant laws and accounting standards and where they can be accessed. The full text of the minister's response, including the table, is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 13 of 2018* available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

standards in order to establish certain factual matters relevant to the operation of the instrument.[20]

2.26 However, the committee generally considers material to be incorporated by reference in an instrument where the instrument gives legal effect to provisions contained in that material, thereby creating or defining rights, powers or obligations. Accordingly, it remains unclear to the committee why the laws and associated accounting standards to which sections 4, 7, 13 to 15 and 56 refer are not incorporated by reference.

2.27 In this regard, the committee notes that sections 4, 7, 13 to 15 and 56 of the instrument appear to define the rights and obligations of entities participating in the Asia Region Funds Passport (ARFP) scheme by reference to the laws of foreign jurisdictions and associated accounting standards. For example, as set out in the minister's response, section 7 of the instrument provides that an operator of a passport fund meets the financial resources test if its equity, calculated by using the operator's balance sheet prepared in accordance with 'relevant accounting standards', is greater than USD $1 million plus an additional capital amount. Under subsection 7(4), the 'relevant accounting standards' for a particular participating economy are the standards specified in the table in that subsection. It appears that whether an operator meets the financial resources test turns, at least in part, on matters set out in the accounting standards. Consequently, the standards appear to the committee to be incorporated by reference.

2.28 However, in relation to the incorporation of documents, the committee is primarily concerned with ensuring that instruments, and their associated explanatory statements, set out the manner in which materials are incorporated (that is, as in force from time to time or as in force at a particular time) and how those materials may be accessed free of charge.[21] In this regard, the committee notes the Assistant Treasurer's advice that, if section 56, or any of the other sections in Parts 1 or 2 (which include sections 4, 7, and 13 to 15) of the instrument were to incorporate the laws of a foreign economy, those laws would need to be incorporated from time to time.

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20 For example, whether a document is a 'constituent document' (section 4), whether a document is a document is a 'balance sheet' (section 7), whether an entity has the status of a 'responsible holding party' (section 13), whether an entity has the status of an 'independent oversight entity' (section 14), whether an entity has the status of an 'implementation reviewer' (section 15), and whether an entity is an operator under particular collective investment schemes (section 56).

21 See 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.

2.29 The committee also notes that the Assistant Treasurer has included in his response a table which provides web references for where the relevant laws and associated accounting standards may be accessed free of charge. The Assistant Treasurer has also advised that a person may contact the Australian Securities and Investments Commission (ASIC) to source a copy of the foreign laws mentioned in the instrument. Additionally, the Assistant Treasurer has advised that ASIC is preparing guidance on these foreign laws, to be made available before the commencement of the ARFP regime in February 2019.

2.30 In relation to section 16 of the instrument, the committee notes the Assistant Treasurer's advice that the laws of participating economies and associated accounting standards to which that section refers are incorporated as in force from time to time. As noted above, the Assistant Treasurer has provided web references where those laws and accounting standards may be accessed free of charge.

2.31 Finally, in relation to the power to incorporate material by reference, the committee notes the Assistant Treasurer's advice that the power to make passport rules, in subsection 1211(1) of the *Corporations Act 2001*, only gives the minister the power to make rules that are substantially the same as Annex 3 to the Memorandum of Cooperation (MOC) on the establishment and implementation of the ARFP. The committee notes the advice that, as a consequence, the minister only has the power to make passport rules that incorporate foreign laws as in force from time to time.

2.32 The committee notes the minister's undertaking to amend the explanatory statement to include the additional information sought by the committee in relation to the incorporation of material by reference.

2.33 The committee has concluded its examination of the instrument.

Instrument	**Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018 [F2018L01337]**
Purpose	Allows the Secretary of the Department of Agriculture and Water Resources to accredit properties for the purposes of the export control regime
Authorising legislation	*Export Control (Orders) Regulations 1982*
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[22]

No invalidity clause[23]

2.34 In *Delegated Legislation Monitor 12 of 2018*,[24] the committee requested the minister's more detailed advice as to why a failure by the secretary to provide notice to an applicant of a decision to refuse to grant, renew or vary a property accreditation, or to alter an accredited property, would not affect the validity of the relevant decision.

Minister's response

2.35 The Minister for Agriculture and Water Resources advised:

> The provisions operate to ensure that a failure to notify, in those situations described above, does not in and of itself give rise to invalidity of that decision. That is, its inclusion in the instrument ensures that the decision remains valid notwithstanding the communication or otherwise of that decision.
>
> In making decisions whether to accredit a property, renew or vary a property accreditation or alter an accredited property the Secretary must reach a level of satisfaction having regard to matters that the Secretary considers relevant, as provided for in the instrument. This is a lengthy process, based on the considerations that the Secretary must take into account, set out in subsections 9B.2, 9G.3 and 9K.5. These include:

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 12 of 2018*, pp. 22-25.

- that the Secretary is satisfied that the prescribed goods will meet importing country requirements;
- that conditions of accreditation have been met and are being complied with; and
- that the manager of the property has complied with the requirements of the *Export Control Act 1982* and the Export Control (Plant and Plant Products) Order 2011.

The instrument contains express requirements for the Secretary to notify applicants of decisions, in subsections 9D.2, 9J.2 and 9L.3. The inclusion of these provisions imposes a positive obligation on the Secretary to communicate adverse decisions. It is expected that applicants will in all cases receive notice in accordance with these subsections.

Subsections 9D.3, 9J.3 and 9L.4 are intended to ensure that, in a rare case where there is an unintended failure to provide written notice, the validity of the Secretary's decision is unaffected. This is because the Secretary's decision will have been based on the relevant matters as set out above.

Australia's two billion dollar horticulture export industry relies heavily on ensuring the high standards of our exported goods. If a decision made by the Secretary to refuse to grant, renew or vary a property accreditation, or to alter an accredited property, could be invalidated due to a failure to notify, it could have significant consequences for ensuring the appropriate regulation of the export of goods.

Committee's response

2.36 The committee thanks the minister for his response. The committee notes the minister's advice that it is expected that applicants will in all cases receive notice of adverse decisions (including reasons and associated review rights) relating to the accreditation of properties and the alteration of accredited properties.

2.37 The committee notes the minister's advice that the no-invalidity clauses in the instrument are intended to ensure that, in the rare cases where there is an unintended failure to provide written notice, the validity of the relevant decision will be unaffected. The committee notes the advice that if a decision by the secretary could be invalidated due to a failure to notify, it could have significant consequences for the appropriate regulation of exports.

2.38 However, the committee remains concerned that the no-invalidity clauses in subsections 9D.3, 9J.3 and 9L.4 of the instrument could have potentially significant consequences for persons affected by an adverse decision. As outlined in the committee's initial comments, where a notice is not provided an applicant may remain unaware of their review rights, and may

consequently lose the opportunity to have the adverse decision reconsidered by a court of tribunal. The no-invalidity clauses would mean the courts could not adequately consider any failure by the secretary to notify an applicant of the reasons for an adverse decision or the availability of review.

2.39 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.

2.40 The committee has concluded its examination of this matter. However, the committee draws the inclusion of 'no-invalidity' clauses in the instrument to the attention of the Senate.

Retrospective effect[25]

2.41 In *Delegated Legislation Monitor 12 of 2018*,[26] the committee requested the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of the transitional provisions in sections 53 to 57 of the instrument; and, if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness.

Minister's response

2.42 The Minister for Agriculture and Water Resources advised:

> The transitional provisions of the Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018 (the Order), including sections 53 to 57, are intended to ensure that there is minimal disadvantage resulting from the commencement the Order.
>
> The transitional provisions ensure that managers making applications to be export listed properties or have their export listing renewed continue to be eligible to participate in the production and preparation of goods for the relevant export season(s) and the export of horticulture products from Australia in accordance with legislative requirements will not be disrupted during the transition away from administered policy arrangements of export listed properties.
>
> The receipt and processing of applications for accreditation and renewal prior to each horticulture commodity export season is time

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

26 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 22-25.

critical to ensure that all applications can be considered, and the Department of Agriculture and Water Resources can undertake physical assessments of properties to which each application relates, prior to the commencement of the export season(s). Paragraphs 53.3(b), 54.3(b) and 55.3(b) intend to limit any disadvantage caused by the commencement of the Order by providing that the relevant applications will be taken to comply with the application requirements in subsection 9ZG.1. Furthermore, paragraphs 53.3(a), 54.2(a) and 55.3(a) provide that applications arc taken to be applications to which Division 7 of Part 2A applies. The operation of these paragraphs provides the Secretary with the power to request that the applicant give the Secretary further information or documents relevant to the application to assist with consideration of the application (paragraph 9ZJ.1(a)). Due to the high value of horticulture exports to protocol markets and the timing of export seasons, the department, on behalf of the Secretary, works closely with industry and managers, and utilises the section 9ZJ powers for dealing with applications, to ensure that all information and documentation, necessary to support consideration of applications and timely decision making, is available.

The criteria for consideration by the Secretary, set out in subsections 9B.2, 9G.2 and 9K.5 of the Order, are the same as the criteria that were applied to the consideration of applications to export list a property, renew or vary an export listing, or alter an export listed property under administrative arrangements, prior to the commencement of the instrument. The exception to this is the criterion provided at paragraphs 9G.2(c) and 9K.5(c) relating to compliance with the requirements of the Export Control Act 1982 (Act), the Export Control (Plants and Plant Products) Order 2011, and any other instrument in force under the Act that applies in relation to the accreditation, the operations, and prescribed goods covered by the accreditation. Any disadvantage imposed as result of including this additional criterion is justified by:

- avoiding disadvantage that would otherwise be imposed on a manager if they were required to submit an additional application to the Secretary following commencement of the instrument; and
- the importance of the Secretary being able to consider this criterion to achieve the objects of the Act and the Order-to protect Australia's trade reputation and market access from adverse impacts.

Guidance on how to meet the conditions and requirements for accreditation, and the criteria for approval are detailed in publicly available documents that were developed in consultation with

relevant horticulture industries. The transitional provisions reflect the outcomes of this consultation with stakeholders on both the publicly available documents and the instrument. These steps were taken to further mitigate any disadvantage imposed by the retrospective effect of the transitional provisions.

As sections 53, 54 and 55 provide that the applications are taken to be applications under the instrument, the Secretary's decision in relation to the application is subject to notice requirements specified in the Order. Furthermore, the Secretary's decision in relation to the application is also subject to reconsideration and review provisions under Part 16 of the Export Control (Prescribed Goods-General) Order 2005. As such, these provisions provide formal procedural fairness to those managers who had applied for export listing of their properties, to renew or vary the export listing of their property, or alter an export listed property, prior to commencement of the Order.

A manager's application can be withdrawn at any time prior to a decision being made on the application under the Order. Even if a property is accredited or an accreditation renewed as a result of the application, subsection 9X.3 provides that the Secretary must revoke the accreditation where the manager requests that the Secretary revoke the accreditation of the property.

Sections 55, 56 and 57 are intended to minimise disadvantage, caused by the commencement of the Order, to a manager who has requested that the Secretary vary, suspend or revoke the accreditation or a property, or approve an alteration to an accredited property. The provisions intend to reduce the time that it takes to receive and process a manager's application or request to limit disadvantage to the manager and ensure a manager will have certainty regarding the legal obligations, conditions and requirements they will and will not be required to meet in relation to their accreditation, as soon as possible. The extent that sections 55, 56 and 57 impose a disadvantage on the manager of an accredited property through their operation is justified by assisting the Australian Government to protect Australia's trade reputation and market access. The intention is that the provisions will contribute to achieving this outcome by reducing the likelihood of non-compliant behaviour by managers or exporters that may otherwise occur if the Secretary's decision making was delayed.

Additionally, as sections 56 and 57 provide that the relevant request is taken to be a request under the instrument the Secretary must suspend or revoke the accreditation as requested, and the suspension or revocation must be undertaken through written notice to the manager in accordance with subsections 9R.1 and 9X.3.

> It is rare that managers make requests to suspend or revoke their accreditation, or apply to vary their approval or alter their property, because export listed property approvals and accreditations are made annually. Immediately prior to commencement of this instrument the Secretary had not received any applications from managers seeking approval to vary the export listing of the property or alter the export listed property, or requests from managers for their export listing to be suspended or revoked. Irrespective, the department has processes in place to ensure managers who apply to vary their export listing or alter their property, or request that that the export listing be suspended or revoked, are contacted to confirm their intention before a decision is made by the Secretary. These steps were taken in consultation with industry to avoid any disadvantage that would be caused by the retrospective effect of the transitional provisions.

Committee's response

2.43 The committee thanks the minister for his comprehensive response, and notes the minister's advice that the transitional provisions are intended to minimise disadvantage resulting from the commencement of the instrument, and to minimise disruption to the horticulture export regime during the transition away from existing policy arrangements relating to export listed properties.

2.44 The committee notes the minister's advice that sections 53 to 55 intend to limit any disadvantage caused by the commencement of the instrument, by providing that relevant applications will be taken to comply with the new application requirements. The committee also notes the minister's advice that the criteria under which applications are assessed are largely the same as those by which applications were assessed under the previous 'export listed properties' regime. The committee notes the advice that the only new criterion relates to compliance with certain statutory requirements for accredited properties, and the advice that any disadvantage imposed as a result of this additional criterion is justified by avoiding the burden associated with submitting a new application and the importance of protecting Australia's trade reputation and market access from adverse impacts.

2.45 The committee further notes the minister's advice that guidance on how to meet the conditions and requirements for accreditation, and the criteria for approval, are detailed in publicly available documents developed in consultation with relevant horticulture industries. The committee notes the advice that the transitional provisions in the instrument reflect the outcomes of consultation with stakeholders on the instrument and the associated guidance material. The committee further notes the minister's advice that

adverse decisions on applications to which sections 53 to 55 apply are subject to reconsideration and review.

2.46 The committee also notes the minister's advice that, immediately prior to the commencement of the instrument, the secretary had not received any applications from managers seeking approval to vary the export listing of a property or to alter an export listed property, or requests from managers for their export listing to be suspended or revoked.

2.47 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.

2.48 The committee has concluded its examination of the instrument.

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 given on 12 November 2018[27]

Merits review[28]

2.49 In *Delegated legislation monitor 10 of 2018*,[29] the committee requested the minister's detailed advice as to the characteristics of decisions

27 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

29 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 28-31.

in relation to participation in programs funded under the Regional Employment Trials program that would justify excluding merits review.

2.50 The committee also requested 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 noted that its assessment would be assisted if the minister's response expressly identified the criteria on which these decisions are based.

2.51 The committee also indicated that its 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 merit review*?

Minister's response

2.52 The Minister for Jobs and Industrial Relations advised:

> **Decisions in relation to participation in projects funded under the Regional Employment Trials program**
>
> Job seekers who are participating in *jobactive*, ParentsNext or Transition to Work within a trial region may participate in projects funded under the RET program.
>
> Employment services providers may make decisions about whether particular job seekers can participate in RET projects, such as a project involving mentoring or an internship. In practice, providers are very likely to encourage job seekers to participate in RET projects, rather than prevent them from doing so, as the projects will be generally relevant to their need to find and keep paid work.
>
> Participating in projects funded under the RET program may assist job seekers to maintain their eligibility for their Newstart Allowance, Youth Allowance (other) or Parenting Payment under the social security law. These payments, sometimes known as participation payments, involve participation requirements which recipients need to meet to maintain eligibility to receive their payment.
>
> However, participation in a RET project is not the only way a job seeker could meet their participation requirements - there is a wide range of other ways in which they could do so.
>
> These ways include, for example, engaging in voluntary work; the National Work Experience Programme; the New Enterprise Incentive Scheme; the Skills for Education and Employment Program; Work for the Dole; part-time work; part-time study in an eligible course; participation in accredited language, literacy and numeracy training; drug and alcohol treatment and other non-

vocational treatments; and involvement in the Australian Defence Force Reserves.

A decision to deny a job seeker access to participation on a RET project, which as noted above is unlikely to occur in practice, would not substantially affect that job seeker's interests, whether or not the job seeker was subject to participation requirements at the time.

This is because of the availability of other activities and programs that provide employment experience and training opportunities. Examples of these activities and programs are above. These may be used not only to help the job seeker find and keep paid work, but also to assist the job seeker meet any applicable participation requirements and therefore maintain their eligibility to receive participation payments while looking for work.

In practice, there is no realistic prospect that denying a job seeker access to a RET project would affect their eligibility to receive participation payments, for the reason above.

However, if a job seeker nonetheless considered that their ability to meet their participation requirements had been impacted by non-access to a RET project, for example because they considered that none of the alternative activities were suitable for them, and they were subject to compliance action for failing to participate, they could seek review by the Department of Human Services (DHS) of any decision to reduce, cancel or suspend their payment. If dissatisfied by the DHS decision, they could seek review of the decision by the Administrative Appeals Tribunal, both on the merits and in relation to questions of law, if any.

Decisions in relation to early access to the Relocation Assistance to Take up a Job Programme

The Relocation Assistance to Take up a Job Programme is an Australian Government program that provides financial assistance to eligible participants who need to relocate to take up ongoing, full-time employment. Relocation assistance helps participants find work outside of their local area and assists to remove some of the barriers that prevent them from relocating for work. Funding is flexible and can be used for a range of relocation related costs.

Generally, job seekers are eligible to access the Relocation Assistance to Take up a Job Programme if they:

- apply before they move and start their job;
- are registered as a fully eligible job seeker with a *jobactive* provider, an Intensive Stream participant with a ParentsNext provider or participating in Disability Employment Services;

- have activity test or participation requirements under social security law; and
- have been receiving Newstart Allowance, Youth Allowance (other) or Parenting Payment for the last 12 months.

Participants in Structural Adjustment Programmes, as well as the Stronger Transitions package, have immediate access to this assistance as long as they are registered with a *jobactive* provider as a fully eligible participant.

Under the RET program, rather than needing to meet the 12 month requirement outlined in the fourth dot point above, Stream A job seekers will be able to access relocation assistance after three months of being on a participation payment. This is an objective matter, not involving discretion. Streams B and C job seekers will be able to access assistance immediately after commencement in *jobactive*. This is also an objective matter, not involving discretion.

Job seekers are placed in Stream A, Stream Band Stream C within *jobactive* depending on their needs using a classification and assessment tool called the Job Seeker Classification Instrument (JSCI). Stream A job seekers need the least support and Stream C job seekers need the most support. The JSCI is a questionnaire conducted by OHS or employment services providers.

Whether a job seeker is in Stream A, Stream B or Stream C can be objectively determined and does not involve discretion. There is only a need to ascertain which stream they have been placed in as a result of the JSCI assessment. Such a determination is therefore not suitable for merits review as it is mandatory or procedural in nature.

Committee's response

2.53 The committee thanks the minister for her response. In relation to the Regional Employment Trials (RET) program, the committee notes the minister's advice that, in practice, employment providers are very likely to encourage job seekers to participate in RET projects, rather than prevent them from doing so, as projects will be generally relevant to job seekers' need to find and keep paid work.

2.54 The committee also notes the minister's advice that, in addition to participation in a RET project, there are a variety of activities and programs available to help job seekers find and keep paid work and to assist job seekers to meet their participation requirements. The committee notes the advice that there is no realistic prospect that denying a job seeker access to a RET project would affect their ability to receive participation payments.

2.55 The committee further notes the minister's advice that, if a job seeker considered that their eligibility to meet their participation requirements had

been impacted by non-access to a RET project, they could seek review by the Department of Human Services (DHS) to reduce, cancel or suspend their payment. The committee notes the advice that, if dissatisfied with the DHS decision, the job seeker could also seek review of that decision by the Administrative Appeals Tribunal (AAT).

2.56 In relation to the Relocation Assistance to Take up a Job Programme, the committee notes the minister's advice that a job seeker would be eligible to receive assistance if they meet certain criteria relating to the timing of their application and applicable social security arrangements.

2.57 The committee also notes the minister's advice that Stream A job seekers in the *jobactive* program would be able to access relocation assistance after three months of being on a participation payment (rather than the usual 12 months), while Streams B and C job seekers will be able to access the assistance immediately after commencing with *jobactive*. The committee notes the advice that whether a job seeker is in a particular stream, and whether a job seeker is eligible to access relocation assistance, will be objective matters not involving an element of discretion.

2.58 The minister's response suggests that a person's eligibility for the Relocation Assistance to Take up a Job Programme would be based on largely objective criteria, and would rarely involve the exercise of discretion on the part of a decision-maker. The committee notes that this may be an acceptable ground for excluding such decisions from merits review.[30]

2.59 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.

2.60 The committee has concluded its examination of the instrument.

30 See Administrative Review Council, *What decisions should be subject to merit review*? (1999), [3.8]-[3.12]. The committee notes that the minister's response does not expressly identify any grounds for excluding review set out in the Administrative Review Council's guidance document *What decisions should be subject to merit review*?.

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2018 [F2018L01195]**
Purpose	Determines Reporting Standard ARS 221.0 Large Exposures
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[31]

Incorporation[32]

2.61 In *Delegated Legislation Monitor 11 of 2018*,[33] the committee requested the Treasurer's advice as to:

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

Treasurer's response

2.62 The Treasurer advised:

> The objective of reporting standard ARS 221.0, the instrument No. 41 0/201 in question, is to determine the requirements for the provision of information to APRA relating to an authorised deposit-taking institution's (ADIs) large exposures.
>
> I note the Committee's question whether the ISO standards 3166 and 17442 are intended to incorporated in the instrument. I have raised the Committee's concerns with APRA. They have advised me that the ISO standards are not intended to be incorporated in the

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

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

33 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2018*, pp. 1-4.

instrument because the contents of these standards are not relevant to understanding the terms of the instrument.

APRA advises ARS 221.0 requires ADIs to report the counterparty country as 'the name English country code of defined the under relevant [ISO country 3166]' as and assigned the by Legal the Entity ISO 3166 Identifier Maintenance {LEI) as 'the Agency 20-digit, alpha numeric code issued by a Local Operating Unit in accordance with [ISO 17442]'.

APRA further advises the ISO 3166 Maintenance Agency assigns the country names and country codes under ISO 3166, however, up-to-date information about the names and codes is only available online via the Online Browsing Platform or by purchasing the Country Codes Collection. Consequently, for the purpose of reporting the counterparty country in ARS Codes 221.0, an ADI is expected to refer to the information online and not to ISO 3166. Similarly, Operating Units {LOUs) provide registration services for entities that wish to be issued a Local LEI code. LEIs are only searchable via an online database. LEIs are not contained in ISO 17442, and it would not be possible for an ADI to determine an entity's LEI by referring to the standard.

Committee's response

2.63 The committee thanks the Treasurer for his response. The committee notes the Treasurer's advice that ISO standards 3166 and 17552 are not intended to be incorporated in the instrument, because the contents of those standards are not relevant to understanding the terms of the instrument. In this regard, the committee also notes the Treasurer's advice that, for the purpose of meeting the requirements in the instrument, authorised deposit-taking institutions (ADIs) are expected to refer to information available in online databases, rather than to the ISO standards.[34]

2.64 However, given that ADIs would be required to use the online databases to comply with certain reporting requirements under the instrument, it seems arguable that the databases themselves may be incorporated (although this is not clear on the face of the instrument). In this regard, the committee notes that while the explanatory statement (and the Treasurer's response) provides web references for where the databases may

34 The committee notes that the information in these databases is generated in accordance with the ISO standards. However, ADIs are expected to refer to the databases, rather than to the standards themselves.

be accessed free of charge,[35] no information is provided as to the manner in which those databases are incorporated.

2.65 Further, and as outlined in the committee's initial comments, while the enabling legislation for the instrument allows for the incorporation of documents as in force from time to time, it appears that the exercise of this power is restricted to making provision for matters related to reporting under the *Major Bank Levy Act 2017*.[36] It is unclear to the committee whether the power to incorporate documents as in force from time to time would extend to the incorporation of the relevant databases (if they are in fact incorporated by the instrument).

2.66 The committee considers that it would be appropriate for the information provided by the Treasurer to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

2.67 The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate the possible incorporation by the instrument of two online databases, in the absence of information in the instrument or the explanatory materials as to the manner in which those databases may be incorporated.

35 The country codes assigned by reference to ISO 3166 are available online at http://www.iso.org/iso/country_codes, while the legal entity identifiers issued in accordance with ISO 17442 are available online at: https://www.gleif.org/en/lei/search.

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

Instrument	**Historic Shipwrecks Regulations 2018 [F2018L01322]**
Purpose	Continue protections for historic shipwrecks until the commencement of the *Underwater Cultural Heritage Act 2018*
Authorising legislation	*Historic Shipwrecks Act 1976*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[37]

Consultation[38]

2.68 In *Delegated Legislation Monitor 12 of 2018*,[39] the committee requested the minister's advice as to:

- the nature of the consultation undertaken in relation to the instrument; and
- whether more recent consultation was undertaken and if so, the nature of that consultation; or if more recent consultation was not undertaken, why not.

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

Minister's response

2.70 The Minister for the Environment advised:

> Public consultation was undertaken as part of the review of the Act carried out in 2009. The review encouraged and received submissions from the general public, non-government organisations, collecting institutions (museums, etc.) and Commonwealth, state and territory government departments. A review website was established and a discussion paper was publicly available. Received submissions were posted on the web and can be accessed at:

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

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

39 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 26-30.

http://environment.gov.aulheritagelhistoric-shipwrecks/review-act-1976

Of particular relevance to the Regulations, was the broad support in submissions for the establishment and regulation of protected zones as a mechanism for protecting historic shipwrecks.

As the Regulations are due to be repealed when the Act is repealed by the commencement of the Underwater Cultural Heritage Act and the regulatory landscape has not significantly changed since public consultation was conducted in 2009, further public consultation was considered unnecessary.

An approved replacement explanatory statement to the Regulations has been enclosed with this correspondence to include the additional information requested about consultation. The replacement explanatory statement will be published on the Federal Register of Legislation in due course.

Committee's response

2.71 The committee thanks the minister for her response, and notes the minister's advice that extensive consultation was undertaken in 2009 and more recent consultation was not considered necessary as the regulatory landscape has not changed significantly since that time.

2.72 The committee notes the minister's undertaking to register a replacement explanatory statement, which explains why more recent consultation was considered unnecessary, on the Federal Register of Legislation.

2.73 The committee has concluded its examination of this matter instrument.

Reversal of evidential burden of proof[40]

2.74 In *Delegated Legislation Monitor 12 of 2018*,[41] the committee requested the minister's advice as to the justification for reversing the evidential burden of proof in the defences set out in subsection 8(3) of the instrument. The committee noted that its assessment would be assisted if the

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

41 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 26-30.

minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences*.[42]

Minister's response

2.75 The Minister for the Environment advised:

> Subsection 8(1) of the Regulations prohibit various conduct within protected zones declared under the Act unless the person is acting in accordance with a permit or has a reasonable excuse. Part 4.3 of the Guide to Framing Commonwealth Offences (the Guide) provides that it may be appropriate for a matter to be included in an offence-specific defence where the matter is peculiarly within the knowledge of the defendant and where it would be difficult, burdensome or costly for the prosecution to raise evidence about a matter.
>
> A defendant would have peculiar knowledge about the details of their conduct, and whether the conduct was engaged in accordance with the permit. Further, there may be situations where a person may need to allow a vessel to enter a protected zone without a permit for the purposes of safe navigation, saving human life, preventing serious environmental harm or securing the safety of an endangered vessel. In these circumstances, a defendant would be best placed to raise matters concerned as they would be peculiarly within the knowledge of the defendant. Additionally, defendants will likely be able to easily and inexpensively present evidence relating to the matters relevant to the defences.

Committee's response

2.76 The committee thanks the minister for her response, and notes the minister's view that it is appropriate to place the evidential burden of proof on the defendant for the defences in subsection 8(3), because the defendant will have peculiar knowledge about the nature and motivation of their own conduct, and whether such conduct accorded with their permit.

2.77 The committee also notes the minister's advice that there may be some situations where a person may need to allow a vessel to enter a protected zone without a permit depending on the particular circumstances and that these matters would be peculiarly within the knowledge of the defendant.

2.78 While the committee considers that whether a defendant has a 'reasonable excuse' is a matter likely to be peculiarly within the knowledge of the defendant, it is not clear to the committee that whether a person acts in

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42 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

accordance with a permit is a matter that would similarly be peculiarly within the defendant's knowledge. It would appear to the committee that whether a person's actions were taken in accordance with a permit (issued by a regulatory authority), would be matters the prosecution could raise evidence about. As such, this matter appears to be one more appropriate to be included as an element of the offence.

2.79 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.

2.80 The committee has concluded its examination of this matter. However, the committee draws to the attention of the minister and the Senate the reversal of the evidential burden of proof in relation to matters that do not appear to be peculiarly within the defendant's knowledge.

Matters more appropriate for parliamentary enactment[43]

2.81 In *Delegated Legislation Monitor 12 of 2018*,[44] the committee requested the minister's advice as to the appropriateness of imposing a penalty of imprisonment in regulations, and whether the Attorney-General's Department was consulted in relation to the imposition of this penalty, by reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences.*[45]

Minister's response

2.82 The Minister for the Environment advised:

> As noted by the Committee, section 14 of the Act provides that the regulations may make provisions prohibiting or restricting certain activities in protected zones and prescribe penalties for any contravention of those provisions. The Act limits the penalty to a maximum fine of $1000, or imprisonment for one year, or both.
>
> The Guide notes that offences should generally not be delegated from an Act to a subordinate instrument if it would be more appropriate for that content to receive the full consideration and scrutiny of the Parliament. Nonetheless, it notes that offence

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

44 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 26-30.

45 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

> content may be more acceptable in Regulations than other kinds of subordinate instruments as they are considered by the Federal Executive Council and subject to scrutiny, and therefore disallowance, by the Parliament (part 2.3.4 of the Guide).
>
> I note that equivalent offences are provided for in section 29 of the Underwater Cultural Heritage Act. Further, the Underwater Cultural Heritage Act provides for 5 years imprisonment, or 300 penalty units, or both, as a deterrent against those offences. The Attorney-General's Department was consulted on the imposition of imprisonment as a penalty against prohibited conduct in protected zones under the Underwater Cultural Heritage Act.
>
> The Underwater Cultural Heritage Act is due to commence on a day fixed by Proclamation within the 12 months following receipt of the Royal Assent, or by 25 August 2019 at the latest.
>
> I am advised by the Department that, while not ideal, it considered it was appropriate to maintain the offence provision in the Regulations until the Underwater Cultural Heritage Act commences and the Act and Regulations are repealed. This will ensure the continuity of the existing regulatory regime while the new underwater cultural heritage protection legislation is implemented.

Committee's response

2.83 The committee thanks the minister for her response and notes the minister's advice that equivalent offences with more substantive penalties were included in the *Underwater Cultural Heritage Act 2018* (UCH Act), following consultation with the Attorney-General's Department. In this regard, the committee notes that its particular concern relates to the imposition of penalties in delegated legislation, rather than in primary legislation.

2.84 The committee also notes the minister's advice that it was considered appropriate to replicate the offence provisions in the previous Historic Shipwreck Regulations until the UCH Act commences and the instrument is repealed, to ensure the continuity of the existing regulatory regime.

2.85 In this regard, the committee reiterates its previous comments that the fact that a provision replicates a provision in a previous instrument does not, of itself, address the committee's scrutiny concerns.

2.86 The committee has concluded its examination of this matter. However, the committee draws its concerns regarding the imposition of a penalty of imprisonment in regulations to the attention of the Senate.

Instrument	**National Health Security Regulations 2018 [F2018L01247]**
Purpose	Provides for the operational details of the Security Sensitive Biological Agent Regulatory Scheme
Authorising legislation	*National Health Security Act 2007*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018[46]

Privacy[47]

Matters more appropriate for parliamentary enactment[48]

2.87 In *Delegated Legislation Monitor 12 of 2018*,[49] the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow persons to disclose protected information (which could include significant personal information) to the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO);
    - the type of protected information that it is envisaged would be disclosed to the those agencies, and how that information would be used and managed; and
    - what safeguards are in place to protect individuals' privacy.

2.88 The committee also drew the attention of the minister and the Senate to the prescription of intelligence agencies to which protected information may be disclosed (that is, without committing an offence) in delegated legislation.

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)(b).

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

49 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 34-36.

Minister's response

2.89 The Minister for Health advised:

(1) Why it is considered necessary and appropriate to allow persons to disclose protected information (which could include significant personal information) to the Australian Federal Police and the Australian Security Intelligence Organisation.

There may be extraordinary, unforeseen circumstances related to National Security or criminal activity that may require the disclosure of protected information (including personal information) to the AFP or ASIO to prevent harm to the Australian community under Part 2 of the *National Health Security Act 2007* which relates to public health surveillance. Some examples of when this may occur include the following situations:

- the National Focal Point, within my Department, could conceivably be notified by another country that an individual who has intentionally infected or contaminated themselves with a biological, radiological or chemical agent or other serious infectious disease, is travelling to Australia and intends to cause widespread harm;
- a state or territory health authority has identified a patient infected or contaminated with a security sensitive biological, radiological or chemical agent and the circumstances are unusual, for example a patient has presented with inhalational anthrax and the source is unknown; or
- there is evidence that suggests that an individual who has means to access, infect or contaminate themselves with, and spread a security sensitive agent or serious infectious disease, intends to deliberately infect or contaminate others.

(2) The type of protected information that it is envisaged would be disclosed to those agencies, and how that information would be used and managed.

The type of information disclosed would depend on the situation, however could include, name, date of birth, passport number, State of residence, possibly matching Incoming Passenger Card if available, which contains an accommodation address, telephone number and emergency contact. In addition, any other personal information that may have been provided by the original notifier may be disclosed to assist in locating the threat e.g. workplace or recent movements.

Intelligence agencies would use the protected information to locate, prevent or interrupt the threat to minimise harm to the Australian community. Early intervention is critical to ensure harm prevention and/or minimisation.

(3) What safeguards are in place to protect individuals' privacy?

The information disclosed would be handled in accordance with the Protective Security Policy Framework and would only be shared over an appropriately classified network, to authorised individuals, that hold an appropriate security clearance, on a need-to-know basis.

Where personal information is required to be shared with the AFP or ASIO, my Department would share the information over either the Commonwealth Protected or Australian Secret Network, depending on the classification of the information. Personal information would also be sent in two parts i.e. disease specific information would be sent separately to personal identifiers and could also be encrypted.

I further note that it is the Committee's view that significant matters, such as the intelligence agencies to which protected information may be disclosed, are more appropriately enacted via primary rather than delegated legislation. A review of the *National Health Security Act 2007* has commenced and consideration will be given to this through that process.

Committee's response

2.90 The committee thanks the minister for his response. The committee notes the minister's advice that there may be extraordinary, unforeseen circumstances relating to National Security, criminal activity or public health that require the disclosure of protected information to the AFP or ASIO to prevent harm to the Australian community.

2.91 The committee also notes the minister's advice that the type of information disclosed would vary depending on the circumstances, but may include an individual's name, date of birth, passport number and State of residence, as well as any personal information held by the entity that provided the original notification of the relevant threat.

2.92 The committee further notes the minister's advice that any information disclosed to the AFP or to ASIO would be handled in accordance with the Australian government's Protective Security Policy Framework, and would only be shared over an appropriately classified network, to authorised individuals holding an appropriate security clearance, on a need-to-know basis. The committee notes the advice that the information would be shared over the Commonwealth Protected or Australian Secret Network, and would be shared in two parts so as to separate identifying information from disease-specific information.

2.93 Finally, the committee welcomes the minister's advice that consideration will be given to specifying the agencies to which protected

information may be disclosed in primary rather than delegated legislation during the review of the *National Health Security Act*.

2.94 The committee considers that it would be appropriate for the information provided by the minister relating to the disclosure of protected information 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.

2.95 The committee has concluded its examination of the instrument.

Instrument	**National Library Regulations 2018 [F2018L01295]**
Purpose	Make provision for a range of matters relation to the National Library including financial limits for the purchase and disposal of assets, security arrangements and offences to protect the library, and rules for the service of liquor
Authorising legislation	*National Library Act 1960*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018[50]

Reversal of evidential burden[51]

2.96 In *Delegated Legislation Monitor 12 of 2018*,[52] the committee requested the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 9(2)(a), subsections 24(2), (4) and (6), subsections 28(2) and 29(2), and section 32 of the instrument. The committee noted its assessment would be assisted if the minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences.*[53]

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

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

52 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 36-39.

53 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

Minister's response

2.97 The Minister for Communications and the Arts advised:

The reversal of the evidential burden of proof in paragraph 9(2)(a) is appropriate, having regard to the principles in the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide).

In addition to the position that it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. The matters in paragraph 9(2)(a) are also peculiarly within the knowledge of the accused person. While I acknowledge that the question of whether a person held the appropriate authorisation may not be solely within the knowledge of that person, the person would nevertheless be best placed to quickly and easily demonstrate the relevant authorisation.

Subsections 24(2), (4) and (6)

The reversal of the evidential burden of proof in subsections 24(2), (4) and (6) is appropriate, having regard to the principles in the Guide.

In regard to subsection 24(2), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person removed an item of library material from a storage area or reading room or placed something on an item of library material to copy or trace the library material without being authorised to do so in writing by an authorised officer than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.

In regard to subsection 24(4), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person removed an item of library material from library prope1iy without being authorised to do so in writing by an authorised officer or through a loan record for the item approved by an authorised officer than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation or loan record. An accused could cheaply and readily raise evidence of the authorisation or loan record.

In regard to subsection 24(6), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person handled library

material in a way that was likely to damage the library material without being authorised to do so by the Director-General to undertake work for the purposes of maintaining and developing library collection material than it would be for a person raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.

Subsection 28(2)

The reversal of the evidential burden of proof in subsection 28(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved. These matters are whether the person has a disability (within the meaning of the *Disability Discrimination Act 1992*); whether an animal belonging to that person or in their charge is an assistance animal; and whether the person is a member of a police force acting in accordance with their duties.

It would again be significantly and disproportionately more difficult for the prosecution to prove that a person is not a person with a disability and that their animal is not an assistance animal, than it would be for any accused to raise the relevant defence by providing evidence of their own status (and that of their assistance animal). This is similarly the case in relation to proving that a person is not a police officer acting in accordance with their duties.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 28(2) is the relatively low amount of five penalty units, which tends to support a defence provision in these circumstances.

Subsection 29(2)

The reversal of the evidential burden of proof in subsection 29(2) is also appropriate. This is because the matters specified in that subsection are likely to be within the peculiar knowledge of the person involved, including whether the food or liquid was brought into or consumed by that person in an area designated for consuming food or liquid. That person would be best placed to identify where they were located while possessing or consuming the relevant food or liquid.

It would again be significantly and disproportionately more difficult for the prosecution to prove that the food or liquid was not brought or consumed in an area designated for consuming food or liquid.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, as noted, the penalty for contravention of subsection 29(2) is the relatively low amount of five penalty units, which lends support to a defence provision in these circumstances.

Section 32

The reversal of the evidential burden of proof in section 32 is similarly appropriate. It would again be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Director-General had not consented in writing to a person engaging in conduct that contravenes Part 3 of the instrument, than for the person to raise evidence of the written consent.

It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not one of the categories of persons listed in subsection 32(2) and was not acting in accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

Any accused could cheaply and readily raise evidence of their written consent, or of their appointment or employment and associated duties.

I note that once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In addition, I note that the defence provision in section 32 is consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions, such as the National Gallery of Australia (see for example section 25 of the National Gallery Regulations 2018 which is framed in similar terms). A consistent approach to the framing of defence provisions across the national cultural institutions is desirable, where possible.

Committee's response

2.98 The committee thanks the minister for his response.

2.99 In relation to the defences in paragraph 9(2)(a) and subsections 24(2), (4) and (6) of the instrument, the committee notes the minister's assessment that it would be disproportionately more difficult and costly for the prosecution to disprove these matters than the defendant. However, the minister has not provided any advice in relation to these defences that would indicate that the matters in question are peculiarly within the knowledge of the defendant, as required by the *Guide to Framing*

Commonwealth Offences.[54] For example, the minister does not explain how the relevant matters in paragraph 9(2)(a) could be peculiarly within the knowledge of the defendant, where the Director-General is responsible for providing the requisite authorisation to sell or supply liquor. The committee reiterates that at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. The fact that evidence may be 'readily and cheaply' raised by the defendant is not the relevant test (noting that an accused is often less likely to have the same resources available to them as the prosecution). Consequently, the committee remains of the view that these matters do not appear to be matters which would be peculiarly within the defendant's knowledge.

2.100 The committee notes the minister's advice that the defence set out in subsection 28(2), in relation to a person with a disability assistance animal or a police officer acting within their duties, are matters that are likely to be within the peculiar knowledge of the defendant, and makes no further comment in relation to this.

2.101 The committee also notes the minister's assessment that it is appropriate to impose an evidential burden on the defendant in subsection 29(2), because the relevant matters are likely to be within the peculiar knowledge of the defendant, it would be significantly and disproportionately more difficult for the prosecution to prove such matters, and the penalty units for contravention of the subsection are relatively low. However, it remains unclear to the committee how the question of whether food was consumed in a 'designated area'[55] could be peculiarly within the knowledge of the defendant, as required by the *Guide to Framing Commonwealth Offences*,[56] where the Museum would presumably be responsible for the designation of such areas.

2.102 Additionally, it is not clear to the committee that it would be peculiarly within the defendant's knowledge that the Director had consented in writing to certain conduct or that a person was engaged by the Museum (in section 32). Finally, the committee notes the minister's advice that the defence provisions in section 32 are consistent with the approach taken in similar regulations governing the operation of certain other national cultural institutions. On this point the committee emphasises that the fact that

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

55 Paragraph 29(2)(c).

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

provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns. This is particularly the case where those concerns relate to the protection of individual rights and liberties.

2.103 The committee has concluded its examination of this instrument. However, the committee draws to the attention of the Senate and the minister its concerns about the reversal of the evidential burdens of proof in paragraph 9(2)(a), subsections 24(2), (4) and (6), paragraph 29(2)(c) and section 32 of the instrument to the attention of the minister and the Senate, in relation to matters that do not appear to be peculiarly within the defendant's knowledge.

Instrument	**Radiocommunications (Invictus Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018 [F2018L01343]**
Purpose	Provides an exemption to members of the Australian Federal Police from particular provisions of the *Radiocommunications Act 1992*, to facilitate security measures associated with the Invictus Games
Authorising legislation	*Radiocommunications Act 1992*
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[57]

Incorporation[58]

2.104 In *Delegated Legislation Monitor 12 of 2018*,[59] the committee requested the minister's advice as to the manner in which the Radiocommunications (Radionavigation-Satellite Service) Class Licence 2015 and the Australian Radiofrequency Spectrum Plan 2017 are incorporated.

2.105 The committee also requested the minister's advice as to the appropriateness of amending the instrument to remove paragraph 6(a), which

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

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

59 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 34-36..

provides that a reference in the instrument to any other legislative instrument is a reference to that other instrument as in force at the time it was made.

Minister's response

2.106 The Minister for Communications and the Arts advised:

> I am advised that in making the determination, the Australian Communications and Media Authority (the Authority) intended that the Radiocommunications (Radionavigation-Satellite Service) Class Licence 2015 and the Australian Radio frequency Spectrum Plan 201 7 would be incorporated into the determination as in force at the time they were made. This is consistent with the effect of paragraph 6(a) of the determination and therefore no amendments to the determination are required.
>
> The explanatory statement to the determination incorrectly states, however, that the instruments mentioned above are incorporated as in force from time to time. I am advised that the Authority plans to lodge an updated explanatory statement that will correct this error, on or before Friday 26 October.

Committee's response

2.107 The committee thanks the minister for his response. The committee notes the minister's advice that it is intended for the Radiocommunications Radionavigation-Satellite Service) Class Licence 2015 (Class Licence) and the Australian Radiofrequency Spectrum Plan 2017 (Spectrum Plan) to be incorporated into the instrument as in force at the time they were made.

2.108 The committee notes that a supplementary explanatory statement, which provides that the Class Licence and the Spectrum plan are incorporated as in force on the day they were made, has been registered on the Federal Register of Legislation.

2.109 The committee has concluded its examination of the instrument.

Instrument	**Taxation (Interest on Overpayments and Early Payments) Regulations 2018 [F2018L01288]**
Purpose	These regulations repeal and replace the Taxation (Interest on Overpayments and Early Payments) Regulations 1992
Authorising legislation	*Taxation (Interest on Overpayments and Early Payments) Act 1983*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018[60]

Consultation[61]

2.110 In *Delegated Legislation Monitor 12 of 2018,*[62] the committee requested the Assistant Treasurer's more detailed advice as to the nature of the consultation undertaken in relation to the instrument; and requests that the explanatory statement be amended to include this information.

Assistant Treasurer's response

2.111 The Assistant Treasurer advised:

> As stated in the Explanatory Statement to the instrument, targeted consultations were undertaken on the exposure draft regulations and the exposure draft Explanatory Statement. This occurred between 24 July 2018 and 1 August 2018. Stakeholders who participated in this consultation included relevant members of the Tax Treaties Advisory Panel (TTAP). These members were contacted in their capacity as representatives of professional bodies (accounting and legal) as they were likely to have an interest in these regulations. The TTAP is a consultative panel established to assist Treasury in the development of tax treaty policy and it is made up of representatives from the peak industry bodies. The Australian Taxation Office (ATO) was also consulted on the draft regulations. No significant issues were raised as a result of

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

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

62 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 41-44.

> consultation. However, feedback on several minor issues from the TTAP and the ATO was taken into account. This resulted in minor changes to the new instrument and the Explanatory Statement.
>
> …The explanatory statements will be amended to include additional information about the nature of consultation undertaken.

Committee's response

2.112 The committee thanks the Assistant Treasurer for his response, and notes the Assistant Treasurer's advice that stakeholders who participated in targeted consultation included relevant members of the Tax Treaties Advisory Panel and the Australian Taxation Office, and that matters raised during consultation were taken into account in preparing the instrument and its explanatory statement.

2.113 The committee notes the minister's undertaking to amend the explanatory statement to include additional information about the nature of consultation undertaken.

2.114 The committee has concluded its examination of the instrument.

Instrument	**Therapeutic Goods Order No. 98 – Microbiological Standards for Medicines 2018 [F2018L01287]**
Purpose	Specifies testing requirements for certain medicines
Authorising legislation	*Therapeutic Goods Act 1989*
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018[63]

Consultation[64]

2.115 In *Delegated Legislation Monitor 12 of 2018,*[65] the committee requested the minister's advice as to:

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

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

65 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 1-4.

- whether any consultation was undertaken in relation to the instrument and if so, the nature of that consultation; or
- if no consultation was undertaken, why not.

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

Minister's response

2.117 The Minister for Health advised:

> Therapeutic Goods Order No. 98 - Microbiological Standards for Medicines 2018 (TGO 98) was principally designed to replace Therapeutic Goods Order No. 77 - Microbiological Standards for Medicines (TGO 77), which was repealed on 1 October 2018 under the sunsetting provisions of the Legislation Act 2003, without substantial changes.
>
> The TGA undertook consultation on the proposal to remake TGO 77 without substantially altering the arrangements for microbiological standards for medicines that were in place under that instrument, with the proposal available on the TGA web site (www.tga.gov.au) for public comment between 6 February and 6 March 2018. Eight submissions were received, with most supporting the action on the basis that TGO 77 continued to be efficient and effective. One submission disagreed with the proposal, and several requested a small number of technical modifications. Some of those were not able to be implemented in TGO 98 for microbiological safety reasons. However, a request to exclude multidose low water activity preparations from the need to comply with requirements relating to preservative efficacy was considered not to raise safety concerns and was reflected in TGO 98.
>
> A replacement explanatory statement, including the above explanation, will be arranged as soon as possible.

Committee's response

2.118 The committee thanks the minister for his response, and notes the minister's advice that the instrument remakes Therapeutic Goods Order No. 77 – Microbiological Standards for Medicines (TGO 77) without substantial changes. The committee notes the minister's advice that the Therapeutic Goods Administration (TGA) undertook consultation on the proposal to remake TGO 77 without substantial changes, with the proposal available on the TGA website for public comment for a period of one month.

2.119 The committee notes that a replacement explanatory statement, including the information regarding consultation set out in the minister's response, has been registered on the Federal Register of Legislation.

2.120 The committee has concluded its examination of this matter.

Incorporation[66]

2.121 In *Delegated Legislation Monitor 12 of 2018*,[67] the committee drew the minister's attention to the absence in the explanatory statement of information regarding the manner in which the following documents are incorporated, and how those documents may be accessed free of charge:

- a 'default standard';
- the British Pharmacopoeia;
- the European Pharmacopoeia; and
- the United States Pharmacopoeia-National Formulary.

Minister's response

2.122 The Minister for Health advised:

> In relation to each of the British Pharmacopoeia (BP), European Pharmacopoeia (EP) and the United States Pharmacopeia-National Formulary (USP), those documents are defined in section 4 of TGO 98 as having the same meaning as in the Therapeutic Goods Act 1989 (the Act). The definitions of those documents in subsection 3(1) of the Act refer, as the Committee has noted, to the publications of each of those documents as in effect immediately before the commencement of the relevant definition, and to any subsequent amendments or editions (the definition of 'default standard' in subsection 3(1) also points – in effect – to a monograph of any of those three pharmacopoeia, as defined). So the intention was that, by including those definitions, the instrument would (when read alongside the Act), make the intended manner of incorporation clear.
>
> However, it has since been identified that at the time of its making, incorporating these documents as in force from time to time in TGO 98 was precluded by subsection 14(2) of the Legislation Act 2003. An amendment to section 10 of the Act to allow such instruments to adopt matters contained in an instrument or other writing as in force or existing from time to time commenced on 22 September 2018 (item 2 of Part 1 of Schedule 2 to the Therapeutic Goods Amendment (2018 Measures No. 1) Act 2018 refers), but TGO 98 was made before that amendment commenced (TGO 98 was made on 12 September 2018).
>
> Information will therefore be included in the replacement explanatory statement to identify that those pharmacopoeia are

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

67 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 1-4.

adopted by reference to the editions in place at the time of TGO 98's commencement (separately, it is likely that TGO 98 will be replaced by a similar instrument that is able to utilise the recent amendment to section 10, following specific consultation).

The replacement explanatory statement will also include information about how the pharmacopoeia may be accessed (https://www.pharmacopoeia.com/ for the BP, http://online.edgm.eu/EN/entry.htm for the EP and https://www.uspnf.com/ for the USP).

Unfortunately these publications are not available for free (a range of prices may apply depending on whether a person wishes to take out a subscription (and if so how many users would be involved), or purchase a particular edition). However, it is expected that the persons most affected by their adoption - in this case, medicines sponsors and manufacturers – would be aware of their terms and have access to them. As important international benchmarks for the safety and quality of therapeutic goods, it would not be feasible from a regulatory perspective (particularly in relation to such an important area as ensuring that medicines are free from microorganisms that might cause harm) to not adopt such benchmarks because they are not available for free.

It should also be noted that the National Library's Trove online system (https://trove.nla.gov.au) allows users to identify libraries in Australia that are open to the public where (in most cases, earlier) editions of these pharmacopoeia may be viewed (for example, the University of Tasmania or the University of Western Australia in relation to the BP). Members of the public may also approach any library that participates in inter-library loans to request an inter-library loan with such university libraries, to obtain a photocopy of a particular part or monograph for personal study or research (but not for commercial purposes), at a usual cost of $16.50 per request (enquiries should be made with local libraries, State libraries and the National Library).

The Committee's remarks in relation to the Medical Devices Standards Order (Endotoxin Requirements for Medical Devices) 2018 and the Therapeutic Goods (Permissible Ingredients) Determination No.3 of 2018 are also noted, and replacement explanatory statements will also be arranged for both as soon as possible.

Committee's response

2.123 The committee thanks the minister for his response. The committee notes the minister's advice that the *Therapeutic Goods Act 1989* (TGA) refers to versions of the British Pharmacopoeia, the European Pharmacopoeia and the United Standard Pharmacopoeia-National Formulary (the

pharmacopoeias) as in effect immediately before the commencement of the relevant definition and to any subsequent amendments or editions. The committee notes the advice that the intention was that the instrument would, when read alongside the TGA, make clear the manner in which the pharmacopoeias were incorporated (that is, as in force from time to time).

2.124 The committee notes the minister's advice that, despite this intention, at the time of making the present instrument the incorporation of the pharmacopoeias as in force from time to time was precluded by subsection 14(2) of the *Legislation Act 2003*. The committee notes the advice that the pharmacopoeias are therefore incorporated as in force at the time the instrument commences.

2.125 The committee further notes the minister's advice that, while the pharmacopoeias are not available for free, persons most affected by their adoption would be aware of their terms and would have access to them. The committee also notes the advice that these documents can be accessed through certain public libraries, which can be identified through the National Library's Trove online system. The committee notes the minister's advice that it would not be feasible from a regulatory perspective not to adopt the pharmacopoeias only because they are not available for free, noting that the pharmacopoeias are important international benchmarks for the safety and quality of therapeutic goods. However, the committee considers that best practice would be for the explanatory statement to identify the specific public libraries through which the pharmacopoeias are available, and/or to provide that the pharmacopoeias are available for viewing at the offices of the department or another relevant agency.

2.126 The committee notes that the explanatory statement to the instrument has been amended to clarify that the pharmacopoeias are incorporated as in force at the time that the instrument commenced, and to provide information about how those documents may be accessed. The committee notes that the explanatory statements to the Medical Devices Standards Order (Endotoxin Requirements for Medical Devices) 2018[68] and the Therapeutic Goods (Permissible Ingredients) Determination No. 3 of 2018[69] has also been updated to include this information.

2.127 The committee has concluded its examination of the instrument.

Senator John Williams (Chair)

68 [F2018L01280]. The committee commented on this instrument in *Delegated Legislation Monitor 12 of 2018*, pp. 64-66.

69 [F2018L01342]. The committee commented on this instrument in *Delegated Legislation Monitor 12 of 2018*, pp. 66-68.