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 9 and 21 November 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 (Amendment) Instrument 2018/752 [F2018L01566]**
Purpose	Removes the cessation date for the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211
Authorising legislation	*Corporations Act 2001*
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 14 November 2018). Notice of motion to disallow must be given by 13 May 2019[2]

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.

Continuing exemption[3]

1.4 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 primary rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with principal or enabling legislation.

1.5 The ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211[4] (Principal Instrument) exempts a number of non-cash payment facilities[5] from certain provisions of the *Corporations Act 2001* (Corporations Act). The intention of the Principal Instrument is to preserve the effect of a number of exemptions for non-cash payment facilities while the recommendations of the 2014 Financial Systems Inquiry (FSI) are considered by government.[6] The Principal Instrument was due to cease three years after its commencement.

1.6 Item 1 of Schedule 1 to the present instrument repeals item 3 of the Principal Instrument. The effect of this is to extend the operation of the Principal Instrument until the date it is due to sunset (1 April 2026). In relation to this matter, the explanatory statement explains:

> The relief in *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* is due to cease in early 2019. Government, Treasury and the relevant regulators are continuing to consider how to give effect to the FSI recommendation. The relevant Government policy settings are unlikely to be clarified by the time the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* ceases.[7]

1.7 The committee notes the importance of preserving relief for non-cash payment facilities until the FSI recommendations can be properly considered by government. However, the committee is concerned that the present instrument would effectively extend the exemptions in the Principal Instrument for a further

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

4 [F2018C00825].

5 A non-cash payment facility is a facility through which, or through the acquisition of which, a person makes payments otherwise than through the delivery of notes or coins. A non-cash payment facility is a financial product for the purposes of the Corporations Act.

6 Explanatory statement, ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 [F2018C00825], p. 4.

7 Explanatory statement, p. 3.

seven years. The committee's concerns are heightened by the fact that a number of these exemptions appear to have been in force for at least 13 years.[8]

1.8 It is also unclear to the committee when the recommendations of the FSI are likely to be implemented. Neither the explanatory statement to the present instrument nor the explanatory statement to the Principal Instrument provides any clarity in this regard. In light of this uncertainty, the committee considers that it would be more appropriate to extend the exemptions in the Principal Instrument for a set period of time (for example, one to two years), and to reconsider the need for the exemptions before they expire. This would ensure a more appropriate level of parliamentary oversight while maintaining any necessary exemptions while the FSI recommendations are implemented.

1.9 The committee seeks the Assistant Treasurer's advice as to:

- **when the recommendations of the Financial Systems Inquiry are likely to be implemented by government; and**
- **why it is considered necessary and appropriate to effectively extend the operation of the exemptions in the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 until 1 April 2026**

1.10 The committee also seeks the Assistant Treasurer's advice as to the appropriateness of amending the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to extend the date on which it is to cease to have effect (for example by a further one to two years), rather than removing the cessation date altogether.

8 In this regard, the explanatory statement to the Principal Instrument indicates that one of the relevant Class Orders was made in 2002, one was made in 2003, and the remaining five were made in 2005.

Instrument	**Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018 [F2018L01572]**
Purpose	Prescribes the Greenhouse and Energy Minimum Standards (GEMS) requirements for certain three phase cage induction motors
Authorising legislation	*Greenhouse and Energy Minimum Standards Act 2012*
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 26 November 2018). Notice of motion to disallow must be given by 15 May 2019[9]

Access to justice[10]

1.11 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, which the committee considers to include the right of access to justice.[11]

1.12 The instrument prescribes certain requirements relating to energy labelling and energy efficiency levels and associated testing for three phase cage induction motors.

1.13 The instrument contains a copyright notice, which provides that:

> This Determination includes material from International Electrical Commission (IEC) Standards, which are copyright IEC. Apart from reproduction for personal and non-commercial use, and uses permitted under the *Copyright Act 1968,* IEC material may not be reproduced without permission or licence.

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

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

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

1.14 The committee shares the view of the Copyright Law Review Committee that copyright should not exist in legislative instruments,[12] because it may inhibit the capacity of people to access and use the law, and therefore potentially restrict access to justice.

1.15 The committee notes that the copyright notice in the present instrument permits reproduction for personal and non-commercial use, and other uses permitted by the *Copyright Act 1969*. However, it remains unclear to the committee whether these exceptions are sufficiently broad to enable manufacturers and suppliers of three phase cage motors to reproduce the instrument to test and register their products in accordance with the requirements prescribed by the instrument, or otherwise reproduce the instrument in commercial contexts.

1.16 The committee requests the minister's advice as to the impact of the copyright notice on access to justice, and, in particular, the capacity of people to access and use the law in commercial contexts.

Incorporation[13]

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

1.18 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.[14]

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12 Copyright Law Review Council, *Crown Copyright*, 2005, 138, [9.38], http://www.austlii.edu.au/au/other/clrc/18.pdf.

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

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

1.19 With reference to the above, the committee notes that the instrument incorporates the following standards:

- *IEC 60034-1 Ed. 13.0 (Bilingual 2017) Rotating electrical machines – Part 1: Rating and Performance*;
- *IEC 60034-2-1 Ed. 2.0 (Bilingual 2014) Rotating electrical machines*;
- *IEC 60034-30-1 Ed. 1.0 means International Standard IEC 60034-30-1 Ed. 1.0 (Bilingual 2014) Rotating electrical machines*; and
- *IEC 60050-411 Ed. 2.0 (Bilingual 1996) International Electrotechnical Vocabulary*.

1.20 The explanatory statement provides the following information about accessing the relevant documents incorporated by the instrument:

> The Determination references International Electrotechnical Commission (IEC) standards that can be purchased from Standards Australia through its current exclusive licensee, SAI Global. The use of these international standards is consistent with the Australian Government's policy of harmonisation with international standards where appropriate. The Australian Government envisages that the parties most likely to access the referenced documents are members of industry whose products are covered by the Determination. Those parties can readily purchase the standards online at the SAI Global website.
>
> Options for accessing the standards referenced in the Determination without purchasing them are limited, as the standards subscriptions of the National and State libraries do not generally cover international standards. While this is currently the case, the COAG Industry and Skills Council Standards Accessibility Working Group (ISCSA Working Group) continues to work to develop solutions to greater public access of standards beyond their availability in National and State libraries. In April 2018, the ISCSA Working Group reported to relevant COAG Ministers its findings of a detailed investigation into access to Australian standards. Ministers agreed that recommendations on solutions to the longstanding issue of access to and charges for standards be progressed as a matter of priority.
>
> The Determination includes definitions and text extracted from the relevant IEC standards. This makes it possible to determine if a product is covered by (or excluded from) the Determination and the minimum efficiency levels without having to refer to the standards.[15]

1.21 The committee acknowledges the difficulties associated with facilitating free access to standards incorporated by legislative instruments and the ongoing work of the ISCSA Working Group to resolve these difficulties. The committee also notes the

15 Explanatory statement, pp. 1-2.

advice in the explanatory statement that the instrument contains relevant extracts from the standards to enable people to determine whether a particular product is covered by the instrument, and the relevant minimum efficiency levels, without recourse to the standards. Nevertheless, the committee remains concerned that every person interested in or affected by the law should be able to readily and freely access its full terms, rather than extracts.

1.22 The committee draws to the attention of the Senate the lack of free access in their entirety to the documents incorporated by the instrument.

Instrument	**Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018 [F2018L01573]**
Purpose	Establishes legislative authority for government expenditure on the Industry 4.0 Testlabs for Australia Program
Authorising legislation	*Industry Research and Development Act 1986*
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling (tabled Senate 26 November 2018). Notice of motion to disallow must be given by 15 May 2019[16]

Constitutional authority[17]

1.23 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.

1.24 The instrument authorises government expenditure in relation to the Industry 4.0 Testlabs for Australia Program (Industry 4.0 Testlabs Program). The explanatory statement explains that, under the program, $5 million will be provided to five Australian universities to establish five Industry 4.0 Testlabs, which in turn will 'provide innovation support for small and medium enterprises (SMEs) in priority industry growth sectors'.[18]

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 Explanatory statement, p. 1.

1.25 The committee notes that, in *Williams No. 2*,[19] 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.

1.26 Section 6 of the instrument provides that, for the purposes of subsection 33(3) of the Industry Act, the corporations power (section 51(xx) of the Constitution) is prescribed. The explanatory statement further explains that:

> [t]he Program prescribed by the Legislative Instrument singles out and confers on some constitutional corporations (namely, trading hor 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 accordance with s 35 of the IR & D Act, in relation to receipt of the benefits under the Program. Eligibility to receive funding under the Program is limited to businesses which are trading or financial corporations to which section 51(xx) applies.[20]

1.27 However, the committee notes that in *Williams (No. 2)*,[21] the High Court stated that a law giving the Commonwealth authority to make an agreement or payment to a corporation is not, in itself, a law with respect to a trading or financial corporation, because it is:

> not a law authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation.[22]

1.28 As outlined above, the instrument authorises Commonwealth expenditure on the Industry 4.0 Testlabs Program, which will provide funding to universities. It does not appear to the committee to regulate the activities, functions or relationships of those universities. Consequently, in light of the decision in *Williams*

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

20 Explanatory statement, p. 3.

21 [2014] HCA 23 (19 June 2014).

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

(No. 2), it is unclear to the committee how the instrument could be authorised by the corporations power.

1.29 The committee requests the minister's more detailed advice as to the constitutional authority for the Industry 4.0 Testlabs for Australia Program.

Further response required

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

1.31 Correspondence relating to these matters is published on the committee's website.[23]

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 the first sitting day of 2019[24]

Constitutional authority[25]

1.32 In *Delegated Legislation Monitor 13 of 2018*,[26] the committee requested the minister's more detailed advice as to the constitutional authority for the Artificial Intelligence Capability (AIC) program.

Minister's response

1.33 The Minister for Industry, Innovation and Technology advised:

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

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

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

26 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 18-21.

Implied nationhood power

Section 6 of the AI Instrument specifies the Parliament's power to make laws with respect to measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

In particular, the Committee is concerned that it is not clear that the development of Artificial Intelligence (AI) Standards 'could *only* be carried out by the Commonwealth for the benefit of the nation, such as would engage the implied nationhood power' (emphasis in original). The Committee has noted that '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'.

The Commonwealth executive power (s 61 of the Constitution) and the express incidental power (s 51(xxxix) of the Constitution) support activities that the Commonwealth can carry out for the benefit of the nation. Justice Mason in *Victoria v Commonwealth* [1975] HCA 52; 134 CLR 338 at 397 stated that 'there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.

There is a need for national coordination and national leadership in relation to the development of standards on AI. The financial assistance under the AIC Program will be directed towards meeting this need for national coordination and national leadership. The strategic framework will have a national application and requires a high degree of national coordination and integration. Standards Australia has extensively contributed to standards development and adoption both nationally and internationally.

The strategic framework that will be developed by Standards Australia will identify Australian strategic priorities and current domestic and international standardisation activities. The strategic framework will also identify opportunities for Australian stakeholders to engage with the broader global digital economy and standards fora.

The financial assistance under the AIC Program will specifically be directed at meeting a need for national coordination and national leadership in AI, accordingly I am satisfied that the implied nationhood power will support the AIC Program.

Committee's response

1.34 The committee thanks the minister for this response. The committee notes the minister's advice that the implied nationhood power supports the AIC program, on the basis that spending under the program will be directed towards meeting a

need for national coordination and leadership in relation to the development of standards for Artificial Intelligence (AI).

1.35 The committee also notes the minister's advice that the strategic framework to be developed by Standards Australia will have a national application and requires a high degree of national coordination and integration. The committee also notes the advice that the framework will identify opportunities for Australian engagement with the broader global digital economy and standards fora.

1.36 However, as noted in the minister's response, the High Court in *Victoria v Commonwealth* (*Victoria*) stated that the implied nationhood power supports activities that are 'peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[27] The Court in *Victoria* further stated:

> It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation…thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power *merely because these programmes can be conveniently formulated and administered by the national government*.[28]

1.37 It appears to the committee that, for a program to be supported by the implied nationhood power, the program must be of a kind that could *only* be carried out for the benefit of the nation. It is not sufficient that a program addresses a national issue, or would be most effectively implemented on a national basis. This also appears to be supported by the High Court's findings in *Pape v Commissioner of Taxation*, which indicated that the implied nationhood power does not give the Commonwealth a general power to address problems of national concern.[29]

1.38 In this regard, the committee reiterates that it is not apparent that activities funded under the AIC program could *only* be carried on by the Commonwealth for the benefit of the nation, such as would engage the implied nationhood power. Consequently, and noting that neither the instrument nor the explanatory statement specifies another constitutional head of power, it remains unclear to the committee that there is sufficient constitutional authority for the AIC program.

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27 *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

28 *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (emphasis added).

29 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 48-9.

1.39 The committee requests the minister's more detailed advice as to why it is considered that the implied nationhood power would support the Artificial Intelligence Capability program. The committee's consideration of this matter would be assisted if the minister's response pointed to specific relevant jurisprudence.

1.40 The committee also requests the minister's advice as to any other heads of power that would support the Artificial Intelligence Capability program. In this regard, the committee notes that a program may be supported by more than one head of constitutional power.

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[30]

Constitutional authority[31]

1.41 In *Delegated Legislation Monitor 13 of 2018*,[32] the committee requested the minister's advice as to the constitutional authority for the Automotive Engineering Graduate (AEG) Program.

Minister's response

1.42 The Minister for Industry, Innovation and Technology advised:

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

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

32 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 22-27.

The corporations power

Section 6 of the Automotive Instrument specifies the Parliament's power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (see s 51(xx) of the Constitution). The Committee has commented that it is not clear to the Committee that funding under the AEG Program would only be provided to corporations.

There are a number of restrictions on the entities to which funding will be provided under the AEG Program. Funding will not be provided in the form of direct grants to students. The description of the AEG Program in s 5 of the Automotive Instrument states that the funding will be provided to higher education providers. Section 7 of the Automotive Instrument sets out a further limitation. Section 7 provides that applicants for funding under the AEG Program must be Table A or Table B providers within the meaning of the Higher Education Support Act 2003. As noted in the Explanatory Statement, the funding under the AEG Program will only be provided to trading or financial corporations to assist those corporations to increase the pipeline of post graduate students into Australia's automotive engineering sector. Applications for funding under the AEG Program will be assessed against the eligibility criteria. Applications must include supporting information to demonstrate that the application meets the eligibility criteria.

Section 34 of the *Industry Research and Development Act 1986* provides that the Commonwealth may make, vary or administer an arrangement in relation to activities carried out by persons under a program prescribed by legislative instrument under s 33(1). Section 35(2) limits the arrangements made under s 34 so that, where a party to those arrangements is a corporation to which s 51(xx) of the Constitution applies, the arrangement must be subject to a written agreement containing terms and conditions under which money is payable by the Conm1onwealth and that the corporation must comply with the terms and conditions. The Industry Research and Development Act 1986 therefore may be distinguished from the legislative provisions considered by the High Cami in *Williams v Commonwealth (Williams (No. 2))* [2014] HCA 23; 252 CLR 416 to which the Co1mnittee refers.

Commonwealth executive power and the express incidental power and the territories power

Section 6 of the Automotive Instrument also specifies the express incidental power (s 51(xxxix) of the Constitution) and the executive power (s 61 of the Constitution) and the territories power (s 122 of the Constitution). These heads of power are specified because they also support the AEG Program. Funding under the AEG Program may be provided to providers that are established under a law of the Commonwealth or to Territory higher education providers. It is a well-

accepted principle that a law can be with respect to more than one head of constitutional power.

Social welfare power

The Committee's comments have also queried whether further constitutional support for the expenditure proposed in the Automotive Instrument might be obtained from reliance on the student benefits aspect of the social welfare power in s 51(xxiiiA) of the Constitution. As noted above, a law can be with respect to more than one head of constitutional power.

I am satisfied that the heads of constitutional power specified in s 6 of the Automotive Instrument are sufficient to establish constitutional authority for expenditure on the AEG Program.

Committee's response

1.43 The committee thanks the minister for this response. In relation to the instrument's reliance on the corporations power, the committee notes the minister's advice that funding under the AEG program will only be provided to trading or financial corporations, to assist those corporations to increase the pipeline of post graduate students into Australia's automotive engineering sector. The committee notes the advice that the funding will be limited in this manner by sections 5 and 7 of the instrument.

1.44 The committee also notes the minister's advice that, under the *Industry Research and Development Act 1986* (Industry Act), funding arrangements between the Commonwealth and a corporation to which section 51(xx) of the Constitution applies must be subject to a written agreement containing the terms and conditions under which funding will be made available. The relevant corporation would be required to comply with these terms and conditions. The committee notes the minister's view that, on this basis, the Industry Act may be distinguished from the legislative provisions considered in *Williams v Commonwealth* (*Williams No.2*). [33]

1.45 However, it is not apparent to the committee that the requirements in the Industry Act relating to funding arrangements between the Commonwealth and a corporation to which section 51(xx) applies would be sufficient to distinguish that Act from the legislation under consideration in *Williams No. 2*. In this regard, the committee notes that the legislation considered in *Williams No. 2* contemplated making arrangements subject to terms and conditions, and funding arrangements are generally subject to terms and conditions on which the relevant funding is provided. Without further information, it remains unclear to the committee that the AEG program would be supported by the corporations power under the Constitution.

33 (2014) 252 CLR 416.

1.46 The committee further notes the minister's advice that the AEG program is supported by the executive power, express incidental power and territories power, on the basis that funding may be provided to higher education providers established under a law of the Commonwealth and to territory providers.

1.47 However, as noted in the committee's initial comments, it is not apparent that the executive power and the express incidental power would provide constitutional authority for expenditure authorised by the Industry Act, or an instrument made under that Act, even noting that funding under the AEG program may be provided to higher education providers established under a law of the Commonwealth. The committee also reiterates that while the territories power may authorise the provision of funding to some universities, it is not apparent that it would cover the full scope of expenditure under the AEG program.

1.48 Finally, the committee notes that the minister's response does not address whether the AEG program would be supported by the 'student benefits' power in section 51(xxiiiA) of the Constitution, other than to note that a law may be authorised by more than one head of power. The committee therefore reiterates its view that the 'student benefits' power may provide constitutional authority for the AEG program, however, noting that section 6 of the instrument would need to be amended if it were proposed to rely on this power.

1.49 The committee requests the minister's further, more detailed, advice as to how the Automotive Engineering Graduate program would be supported by the corporations power under the Constitution. The committee's consideration of this matter would be assisted if the minister's response pointed to specific relevant jurisprudence.

1.50 The committee also seeks the minister's advice as to whether the instrument would be supported by the 'student benefits' power under the Constitution, and the appropriateness of amending section 6 of the instrument to specify that the instrument relies on that power.

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 12 February 2019[34]

Constitutional validity[35]

1.51 In *Delegated Legislation Monitor 13 of 2018*,[36] the committee requested 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.

Minister's response

1.52 The Minister for Defence advised:

> I understand the Committee is concerned about the constitutional validity of the Amending Regulations and, in particular, whether they intend to confer powers and functions on judicial officers acting in their personal capacity. In relation to this issue, when a judicial officer is appointed as an Assistant IGADF, they are appointed in a personal capacity. All functions and powers conferred on a judicial officer appointed as an Assistant IGADF are conferred on them in their personal capacity. Appointment as an Assistant IGADF in their personal capacity, and conferral of the relevant functions and powers on them, is not incompatible with a judicial officer's performance of their judicial functions.

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

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

36 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 28-31.

The explanatory statement will be updated to reflect this, by including the following words:

> *When a judicial officer is appointed as an Assistant JGADF, they are appointed in a personal capacity, and all functions and powers that are conferred on a judicial officer appointed as an Assistant IGADF are conferred on them in their personal capacity.*

It should also be noted that there are judicial officers presently appointed to the office of Assistant IGADF, and that the amendments to the Inspector-General of the Australian Defence Force Regulation 2016 are intended to clarify the powers and functions that may be exercised by an Assistant IGADF who is also a judicial officer, as well as the procedures to be followed in such a case.

Committee's response

1.53 The committee thanks the minister for this response, and notes the minister's advice that the instrument intends to confer all functions and powers on judicial officers appointed as Assistant Inspectors General of the Defence Force (IGADFs) in their personal capacity. The committee further notes the minister's advice that the relevant functions and powers are conferred on judicial officers acting in their personal capacity, and the conferral is not incompatible with the performance of their judicial functions.

1.54 The committee welcomes the minister's advice that the explanatory statement will be updated to clarify that the instrument intends to confer powers and functions on judicial officers acting in their personal capacity, in response to the committee's concerns.

1.55 The committee has concluded its examination of this issue.

Retrospective effect[37]

1.56 In *Delegated Legislation Monitor 13 of 2018*,[38] the committee requested the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of section 37 of the instrument, and, if so, what steps have been taken or will be taken to avoid such disadvantage.

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

38 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 28-31.

Minister's response

1.57 The Minister for Defence advised:

> I am advised that at the time the Amending Regulations came into operation, there were four proceedings on foot being conducted by an Assistant IGADF who was a judicial officer. Having assessed these four matters, Defence is not aware of circumstances suggesting that any person would or could be disadvantaged by the operation of section 37.
>
> In relation to the operation of new sections 28G and 28H, the powers of the Assistant IGADF reflect existing powers currently reposed in the IGADF, the Minister and the CDF. The new provisions merely clarify the existing practice where an inquiry is being run by an Assistant IGADF who is also a judicial officer. In such a context, there is unlikely to be any disadvantage suffered by any person by reason of the application of the instrument to the four proceedings.

Committee's response

1.58 The committee thanks the minister for this response, and notes the minister's advice that, of the four proceedings on foot being conducted by an Assistant IGADF who is a judicial officer, Defence is not aware of circumstances suggesting that any person would or could be disadvantaged by the operation of section 37.

1.59 The committee has concluded its examination of this issue.

Privacy[39]

1.60 In *Delegated Legislation Monitor 13 of 2018*,[40] the committee requested the minister's advice as to:

- 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 section 28G and 28H.

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

40 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 28-31.

Minister's response

1.61 The Minister for Defence advised:

> The powers of the Assistant IGADF under new sub-paragraphs 28G(2)(a)(vi) and (vii) reflect the amended powers of the IGADF: see IGADF Regulation, sub-paragraph 27(5)(a)(vii). Equally, the Assistant IGADF's power to publicly release all or part of a report reflects the powers of the Minister, the Chief of the Defence Force and the IGADF: see IGADF Regulation, section 28. Extending these powers to the Assistant IGADF promotes transparency and enables swift implementation of inquiry findings and recommendations.
>
> It removes the delays that would be associated with the Assistant IGADF needing to request IGADF, the Minister or the Chief of the Defence Force to disclose in these circumstances on his or her behalf. Importantly, the power to disclose is balanced with appropriate privacy safeguards, noting that IGADF inquiries are normally undertaken in private and so there is no expectation of publicity on the part of those involved. For example, as is the case under subsection 27(7), the report given to a person by the Assistant IGADF under new subsection 28G(4) need not include information that the Assistant IGADF considers would be inappropriate to include, including for reasons of privacy. In such circumstances, the Assistant IGADF would consider whether any personal information should be redacted prior to disclosure in accordance with existing privacy policies.
>
> Finally, the Committee should also note the IGADF's power under existing section 21 to give a direction restricting the disclosure of information in certain circumstances, including where the IGADF is satisfied that it is necessary to do so in the interests of fairness to a person who the IGADF considers may be affected by an inquiry.

Committee's response

1.62 The committee thanks the minister for this response and notes the minister's advice that the disclosure powers invested in the Assistant IGADF are consistent with the existing powers of the IGADF. In this respect, 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.

1.63 The committee also notes the minister's advice that the extension of these powers to the Assistant IGADF is designed to promote transparency and enable swift implementation of inquiry findings and recommendations, as it will remove delays associated with the Assistant IGADF needing to request the IGADF, minister or Chief of the Defence Force to disclose the information on the Assistant IGADF's behalf.

1.64 As noted in its initial comments, the committee acknowledges the justification for enabling inquiry records to be disclosed to specified statutory office holders or authorities, for the purpose of 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.

1.65 Regarding the availability of safeguards to protect the privacy of individuals whose personal information is disclosed under new sections 28G and 28H, the committee notes the minister's advice that the disclosure powers are balanced with 'appropriate privacy safeguards', noting that IGADF inquiries are normally undertaken in private and reports given to a person by the Assistant IGADF 'need not' include information that the Assistant IGADF considers would be inappropriate to include, including for reasons of privacy.

1.66 The committee also notes the minister's advice that, under section 21 of the principal regulations, the IGADF 'may' give a direction restricting the disclosure of certain inquiry-related information, including information contained in an inquiry report, where the IGADF is satisfied that it is necessary to do so in certain circumstances.

1.67 However, the committee notes that these provisions apply only at the discretion of the IGADF or Assistant IGADF, and, consequently, there does not appear to be a mandatory requirement to consider the privacy implications of disclosures relating to defence inquiries made under new section 28G and 28H of the principal regulations.

1.68 The committee requests the minister's more detailed advice as to 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), as distinct from the powers to disclose information to specified statutory office holders or authorities for the purpose of implementing inquiry findings and recommendations.

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 (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]

2.3 In *Delegated Legislation Monitor 13 of 2018*,[4] the committee requested the Assistant Treasurer's advice as to:

- the manner in which the *Investment Company Act 1940* of the United States of America, a timetable published by ASX Limited, and the official list of ASX limited are incorporated by the instrument;
- where those documents may be accessed free of charge; 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)(a).

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 11-12.

- the power in the *Corporations Act 2001* or other Commonwealth legislation that permits the incorporation of documents as in force from time to time.

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

Assistant Treasurer's response

2.5 The Assistant Treasurer advised:

> I note the Committee's concern that while the instrument includes references to the Investment Company Act 1940 of the United States of America, a timetable published by ASX Limited, and the official list of ASX Limited, the Explanatory Statement (ES) to the instrument does not indicate the manner in which they are incorporated, where they may be accessed or the power in the *Corporations Act 2001* or other Commonwealth legislation that permits their incorporation.
>
> I also note the concern regarding which legislative power permits the incorporation of S&P ASX 200 and S&P ASX 300 indexes.
>
> I have raised the Committee's concerns with the Australian Securities Investments Commission, which is responsible for the instrument. ASIC has advised me that is does not consider the above documents and indexes to be incorporated into the instrument. This is because the status of each is dependent on a question of fact, being mere references, rather than affecting the operation of the instrument.
>
> However, ASIC has agreed to update the ES to provide more information on the documents, including where they can be obtained, and the reason for their inclusion.

Committee's response

2.6 The committee thanks the Assistant Treasurer for this response, and notes the Assistant Treasurer's advice that the Australian Securities Investments Commission (ASIC) does not consider the documents identified by the committee to be incorporated. The committee notes the advice that this is because the documents are merely referred to, and do not affect the operation of the instrument.

2.7 The committee also notes the undertaking to update the explanatory statement to provide more information on the documents, including where they can be obtained and the reason for their inclusion.

2.8 The committee has concluded its examination of the instrument.

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[5]

Consultation[6]

2.9 In *Delegated Legislation Monitor 13 of 2018*,[7] the committee requested 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.

2.10 The committee also requested that the explanatory statements to the instruments be updated to include this information.

Attorney-General's response

2.11 The Attorney-General, in his capacity as Acting Minister for Home Affairs, advised:

> My Department engages in regular dialogue with industry in order to ensure that our national interests are secure. A focus of my Department is to ensure that aviation and maritime security laws are effective and enable the facilitation of trade and travel activities. My Department has a relationship with industry such

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

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

7 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 5-7.

> that it regularly receives feedback on proposed legislation change and my Department takes that into account before legislation is changed.
>
> In this case, both instruments were made in substantially the same form as the previous instruments. The only notable changes in the new instruments were to address administrative issues such as out-of-date contact information following machinery of government changes and advising when an incident concluded. I am satisfied that the nature of the consultation undertaken in regards to these instruments was appropriate and reasonably practicable in the circumstances. The explanatory statements have been updated to reflect this consultation. I am confident that industry had adequate mechanisms to comment on the proposed content of the instruments before the instruments were made.

Committee's response

2.12 The committee thanks the Attorney-General for this response, and notes the Attorney-General's advice that industry regularly provides feedback on proposed legislation changes to the department, and the department takes such feedback into account before legislation is changed.

2.13 The committee further notes the Attorney-General's view that the nature of the consultation undertaken in regard to these instruments was appropriate and reasonably practicable in the circumstances, due to the substantial similarities between the present instruments and the instruments they replace, and the adequacy of existing mechanisms to facilitate industry comments.

2.14 The committee welcomes the Attorney-General's advice that the explanatory statement has been updated to include this information.

2.15 The committee has concluded its examination of this issue.

Privacy[8]

2.16 In *Delegated Legislation Monitor 13 of 2018*,[9] the committee requested 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

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

9 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 7-8.

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

Attorney-General's response

2.17 The Attorney-General, in his capacity as Acting Minister for Home Affairs, advised:

> Security incidents can be reported to my Department via an online reporting form. The Department's privacy and security statements are accessible from each form, and the reporter is required to read and understand each statement before submitting an incident report. Security incident reporting includes the provision of limited personal information pertaining to the reporter. This is necessary information to allow the Department to contact the reporter to clarify and/or obtain further information if necessary. I also note that a security incident report may also include third-party personal information. Typically, this information will either relate to other persons involved in responding to the incident, or the person alleged to have been involved in the incident.
>
> My Department utilises security incident reporting to help capture and efficiently monitor aviation security incidents. Security incident reporting is assessed for a regulatory response. This helps to ensure the Department meets its legislated requirements to prevent unlawful interference with aviation, maritime transport or offshore facilities. The reports also provide information to enable the Australian Government to comply with its international obligations to report aviation security incidents to the International Civil Aviation Organization.
>
> My Department periodically transmits de-identified summary-level security incident information to Departmental portfolio government agencies (e.g. Australian Border Force and Australian Federal Police) to inform their operational work. De-identified security incident information may also be provided to regulated industry participants to strengthen their regulatory compliance. Information is classified at the requisite level, and does not include personal information.
>
> Should a circumstance arise where a request for personal information is requested, my Department would assess the request on its merits and in accordance with legal and policy obligations. The Department may disclose information where legally required to do so by law.
>
> The Department stores all security incident reports in a secure database. The database is housed on a PROTECTED security-rated network. Access to the database and its data is restricted to staff that hold the necessary security clearance and have a demonstrable operational need to access the data.

> Access control is achieved through a username and password that is issued to each individual. This control framework ensures that the information provided to the Department is only accessible to those who hold a genuine need to know and therefore an individual's privacy information is inherently protected.
>
> More broadly, the Department operates under the Protective Security Framework which provides direction on our information security management policies. Guidance on this framework is provided alongside each incident report form and is publicly available on the Department's website.

Committee's response

2.18 The committee thanks the Attorney-General for this response, and notes the Attorney-General's advice that personal information reported in accordance with the instruments will be used to help capture and efficiently monitor aviation security incidents, which in turn enables the department to meet its legislative requirements to prevent unlawful interference with relevant facilities and Australia's international obligations to report such incidents.

2.19 The committee further notes the Attorney-General's advice that, should the department receive a request for personal information collected in accordance with the instruments, it would assess the request on its merits and in accordance with legal and policy obligations, and may disclose such information where legally required to do so by law.

2.20 Regarding the availability of safeguards to protect personal information reported in accordance with the instruments, the committee notes the Attorney-General's advice that the department stores all security incident reports in a secure database to which access is restricted to staff members who possess the necessary security clearance and have a demonstrable operational need to access the data.

2.21 The committee further notes the Attorney-General's advice that the department operates under the Protective Security Framework which provides direction on information security management policies, and guidance on this framework is publicly available on the department's website.

2.22 The committee considers that it would be appropriate for the information provided by the Attorney-General 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.

2.23 The committee has concluded its examination of this issue.

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[10]

Merits review[11]

2.25 In *Delegated Legislation Monitor 13 of 2018*,[12] the committee requested the Treasurer's advice as to:

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

Treasurer's response

2.26 The Treasurer advised:

> I have raised the Committee's concerns with APRA, they have advised me that paragraphs 22 and 23 of CPS 520 are not subject to independent merits review. APRA does not consider that paragraphs 22 and 23 of CPS 520 ''unduly make the rights 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)(b).

12 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 8-9.

liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal" (scrutiny principle 23(3)(c)).

CPS 520 is generally concerned with ensuring that an entity subject to CPS 520 (entity) has an appropriate fit and proper policy to guide it in determining the fitness and propriety of its responsible persons. CPS 520 makes it clear that the ultimate responsibility for ensuring the fitness and propriety of the responsible persons of an entity rests with its Board of directors.

The purpose of paragraphs 22 and 23 of CPS 520 is to provide APRA with a mechanism for determining persons to be, or not be (as the case may be), responsible persons where, on [*sic*] fact, they would appropriately be considered responsible persons (or not) regardless of how the definition of responsible person in paragraph 20 applies to them. The effect of such decision is that the individual would become subject to, or no longer be subject to, the entity's fit and proper policy.

APRA advises that any potential impact on a person's rights and liberties under a fit and proper policy is subject to a further decision making process either in the control of the entity or, in APRA's case, as set out in the relevant Industry Acts (i.e. *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, *Private Health Insurance (Prudential Supervision) Act 2015*). As such, paragraphs 22 and 23 of CPS 520 merely facilitate any subsequent decision(s) regarding the fitness and propriety of responsible persons and are therefore unsuitable for merits review.

Committee's response

2.27 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the purpose of sections 22 and 23 of the instrument is to allow APRA to determine whether a person is a responsible person in circumstances where, in fact, they would appropriately be considered, or not considered, a responsible person regardless of how the definition of that term in section 20 of the instrument applies to them. The committee notes the advice that the effect of a decision under section 22 or 23 is that the relevant individual would become subject to, or no longer be subject to, an entity's fit and proper policy.

2.28 The committee also notes the Treasurer's advice that any potential impact on a person's rights and liberties under under a fit and proper policy is subject to a further decision-making process in the control of the relevant entity or, in APRA's case, as set out in relevant legislation. The committee notes the advice that, as such, paragraphs 22 and 23 of the instrument merely facilitate subsequent decision-making regarding the fitness and propriety of responsible persons, and are therefore unsuitable for review.

2.29 The Treasurer's response appears to confirm the committee's original views that decisions by APRA under sections 22 and 23 of the instrument would involve at least an element of discretion, and have the potential to affect the interests of individuals. The committee considers that such decisions are generally suitable for merits review. However, the response also indicates the decisions would be preliminary in nature. This may reflect an established ground for excluding merits review.[13]

2.30 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.

2.31 The committee has concluded its examination of this issue.

Privacy[14]

2.32 In *Delegated Legislation Monitor 13 of 2018*,[15] the committee requested 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 such an assessment 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.

Treasurer's response

2.33 The Treasurer advised:

> In relation to the Committee's second question, regarding the nature of the information that would be collected for a fit and proper assessment and how personal information collected during this process will be used, managed and protected, APRA have advised me that the information that may be collected is ultimately a matter for the entity conducting the assessment.

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13 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.3]-[4.7].

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

15 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 9-11.

> Importantly, however, the entity would need to comply with applicable privacy laws.
>
> Under CPS 520, APRA mandates that an entity must have a fit and proper policy, and at paragraph 38(b) of CPS 520, APRA requires that a fit and proper policy specify the information to be obtained in assessing the fitness and propriety of a responsible person and how it will be obtained. Notably, APRA does not mandate the type of information to be collected - that is a matter for the entity. Nonetheless, the criteria set out in paragraphs 30, 32 and 35 of CPS 520 for determining the fitness and propriety of a responsible person may provide some guidance as to the type of information an entity may collect.
>
> Any personal information collected by an entity during a fit and proper assessment will be used and managed in accordance with an entity's relevant policies. To the extent any personal information is provided to APRA by the entity, this would occur under paragraphs 55 to 60 of CPS 520. APRA would use that information for the purposes of assessing the fitness and propriety of an individual. Any such information provided to APRA will be subject to the secrecy provisions in section 56 of the *Australian Prudential Regulation Authority Act 1998* and cannot be further disclosed by APRA unless in accordance with the specific exceptions in section 56.
>
> All officers of APRA are subject to section 56 and any breach of section 56 is an offence. Further, APRA has various internal policies and guidelines which stipulate how information collected is to be securely managed and stored, as well as protections in place to ensure that sensitive information such as personal information collected by APRA is secured.

Committee's response

2.34 The committee thanks the Treasurer for this response, and notes the Treasurer's advice that the information that may be collected for a fit and proper assessment is ultimately a matter for the entity conducting the assessment. The committee notes the advice that the relevant entity would need to comply with all applicable privacy laws.

2.35 The committee also notes the Treasurer's advice that while APRA does not mandate the type of information to be collected under a fit and proper policy (as this is left to the relevant entity), the criteria set out in sections 30, 32 and 35 of the instrument may provide some guidance as to the information that is collected. The committee also notes that fit and proper policies are generally published online.

2.36 The committee also notes the Treasurer's advice that any personal information provided to APRA for the purpose of a fit and proper assessment

would be subject to the secrecy provisions in section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act). Consequently, the information cannot be further disclosed by APRA unless in accordance with the specific exceptions in that section.

2.37 The committee also notes the Treasurer's advice that all officers of APRA are subject to section 56 of the APRA Act, and the advice that any breach of that section is an offence. The committee further notes the advice that APRA has in place various policies and guidelines which stipulate how information is to be securely managed and stored, as well as protections to ensure that sensitive information (including personal information) collected by APRA is properly secured.

2.38 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. The committee also considers that it would be useful to include information regarding applicable privacy laws.

2.39 The committee has concluded its examination of the instrument.

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 15 October 2018). Notice of motion to disallow must be given by 6 December 2018[16]

Merits review[17]

2.40 The committee initially scrutinised this instrument in *Delegated Legislation Monitor 11 of 2018*.[18] The committee considered the Treasurer's

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).

response in *Delegated Legislation Monitor 13 of 2018*,[19] and sought further advice as to:

- the specific ground relied on to exclude decisions made by the Australian Prudential Regulation Authority (APRA) 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
- 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.

Treasurer's response

2.41 The Treasurer advised:[20]

> **The role of APRA's "large exposure" rules in insulating Australian banks from financial crises**
>
> …
>
> The Banking Act explicitly envisages prudential standards being tailored to the circumstances. For example, s 11AF(1A) confirms that prudential standards may impose different requirements being complied with in different circumstances or with respect to different activities, and s 11AF(2) confirms that prudential standards may provide for exercise of discretions under the standards, including not limited to approve, impose, adjust or exclude specific prudential requirements.
>
> Consistent with this, APS 221 confers discrete and appropriate discretions upon APRA to tailor the application of the "large exposure" regime to banks. For instance, if APRA identified an "emerging risk", paragraph 31 provides APRA may set additional limits on large exposures to particular types of companies, industries, countries or assets types. Further, paragraph 36 provides APRA may permit exposures on an exceptions basis

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

19 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 46-50.

20 This is an extract of the Treasurer's response. The full text of the response is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 14 of 2018* available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

where it is satisfied it would not involve excessive risk. As previously noted, APRA advised that if decisions taken under these powers were subject to merits review, this may result in delays and uncertainty that could jeopardise APRA's ability to effectively deal with an emerging problem before it becomes a pressing crisis.

Finally, Part VI Banking Act carefully sets out a carefully considered and comprehensive set of APRA decisions which are merits reviewable. Many key decisions of APRA are subject to merits review, including revoking a bank licence, imposing conditions on a bank, issuing certain types of directions to banks, and making select types (but not all types) of prudential standards, among other things. On the other hand, the legislature has seen fit to not make many decisions of APRA not subject to merits review. See further the discussion below.

The Administrative Review Council Guidelines

In terms of the Guidelines, some analogy can be made with two general factors that may justify excluding merits review.

First, a parallel can be drawn between APRA's decisions relating to banks' large exposures and 'financial decisions with a significant public interest element'. Decisions of APRA under paragraph 31 in particular could involve significant evaluation of complex market settings, and a failure to act rapidly could have a significant impact on Australian financial markets. On the other hand, it is acknowledged that certain of the sub-criteria specified in the Guidelines (e.g. Minister level decision) are not present.

Second, a parallel can also be drawn between APRA's decisions relating to banks' large exposures and 'preliminary or procedural decisions'. This is because the direct legislative consequences of a bank breaching a prudential standard - leaving aside where the entity also fails to notify APRA as required by s 62A(1B) - would be to make available to APRA two key powers under the Banking Act. These are the power to give a bank a direction to comply with the prudential standard (s 11CA(1)(b),(5A)) and the power to revoke a bank's authorisation to do banking business or impose a condition on that authorisation (s 11AAA(1),(5)). These most serious Banking Act powers of APRA are subject to merits review in accordance with Part VI of the Banking Act.

Summary

To summarise the above:

- APS 221 does not apply to natural persons but only banks;
- APS 221 is directed towards insulating the Australian banking system from financial crises, the value of which is

highlighted by prior financial crises such as the GFC and the European Sovereign Debt Crisis;

- banks are subject to bespoke and intensive prudential regulation by APRA, which is different in nature to some other modes of regulation;
- the Banking Act expressly contemplates APRA making prudential standards, including with discretions allowing further APRA decisions to tailor prudential requirements to the complexity, scale, business model and risk profile of individual banks, as well as external circumstances;
- the Banking Act contains a carefully considered and comprehensive regime specifying which specific decisions of APRA should be subject to merits review; and
- in terms of the Guidelines, some analogy can be drawn with the categories of 'financial decisions with a significant public interest element' and 'preliminary or procedural decisions'.

Alternative Approach

The Committee observed 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).

Following engagement with APRA, it is suggested that exclusion of merits review on a case-by-case basis would not be preferable, for the same reasons outlined above. Having said that, in the alternative consideration could be given by APRA to amending APS 221 to provide for merits review in general, with a power exercisable by APRA to exclude merits review on a case-by-case basis.

Committee's response

2.42 The committee thanks the Treasurer for this further response, and notes the Treasurer's advice that an analogy can be drawn between APRA's decisions relating to banks' large exposures and 'financial decisions with a significant public interest element'. In this respect, the committee notes the advice that APRA's decisions under section 31 of the instrument could involve significant evaluations of complex market settings, and the advice that a failure to act rapidly in this context could have a significant impact on Australian financial markets.

2.43 The committee further notes the Treasurer's advice that parallels can be drawn between APRA's decisions relating to banks' large exposures and 'preliminary or procedural decisions'. In this regard, the committee notes the advice that this is because the direct legislative consequences of a bank breaching a prudential standard would be to make available to APRA the

powers to give a direction to comply with the standard or to revoke or impose conditions on the bank's authorisation to do banking business. The committee notes the Treasurer's advice that these latter powers (that is, the power to issue a direction or to revoke or impose conditions on a bank's authorisation to do business) would be subject to independent merits review under Part VI of the *Banking Act 1959* (Banking Act).

2.44 Finally, the committee notes the Treasurer's advice that, following engagement with APRA, the exclusion of merits review on a case-by-case basis would not be preferable. However, the committee also notes the Treasurer's advice that consideration could be given by APRA to amending APS 221 to provide for merits review in general, with a power exercisable by APRA to exclude merits review on a case-by-case basis.

2.45 The committee appreciates that decisions made under sections 31 and 36 of the instrument may have a significant impact on Australian financial markets, such that they may be considered to be financial decisions with a significant public interest element. The committee notes that this may reflect an established ground for excluding merits review.[21] However, the committee reiterates that, in relation to such decisions, consideration should be given to making the decisions reviewable, with a discretion provided to the decision-maker to exclude merits review on a case-by-case basis.[22]

2.46 The committee also acknowledges that preliminary or procedural decisions may similarly reflect an established ground for excluding independent merits review.[23] However, it is not clear to the committee that decisions under sections 31 and 36 of the instrument would be decisions of that nature. In this regard, the committee notes that the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*, provides that a refusal to grant an extension of time should be subject to merits review, on the basis that such a decision could have a substantive effect or expose the applicant to a penalty.[24] It appears to the committee that a decision under section 31 or 36 of the instrument to set

21 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.34]-[4.38].

22 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.38].

23 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.3]-[4.7].

24 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.6]-[4.7].

limits on particular exposures, or to approve exposures that would exceed exposure limits, would similarly be more substantive than procedural.

2.47 The committee has concluded its examination of the instrument. However, the committee considers that it would be appropriate for the instrument to be amended to provide for merits review in relation to decisions under sections 31 and 36 of the instrument, with a power exercisable by the Australian Prudential Regulation Authority to exclude merits review on a case-by-case basis.

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[25]

Retrospective effect[26]

2.48 In *Delegated Legislation Monitor 13 of 2018*,[27] the committee requested the Attorney-General's advice as to whether any persons were, or

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)(b).

could be, disadvantaged by the retrospective operation 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.

Attorney-General's response

2.49 The Attorney-General advised:

> Item 15 is intended to ensure a consistent Australia wide approach to adducing foreign evidence and that parties are not disadvantaged by virtue of their location in an external territory or the Jervis Bay territory. My Department is not aware of proceedings in the external territories or the Jervis Bay territory which may be impacted by this amendment. However, should a particular case be affected then any foreign material adduced in the proceedings would be subject to the safeguards under the *Foreign Evidence Act 1994*, which gives the court a discretion to refuse to adduce evidence if, having regard to the interests of the parties to the proceedings, justice would be better served if the foreign material was not adduced. Additionally, the evidentiary rules applicable in that jurisdiction would also apply to any foreign evidence adduced in proceedings.

Committee's response

2.50 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that his department is not aware of any proceedings in the external territories or the Jervis Bay territory which may be impacted by the amendments in the instrument.

2.51 The committee also notes the Attorney-General's advice that, should a particular case be affected, any foreign evidence adduced in the proceedings would be subject to the safeguards in the *Foreign Evidence Act 1994* (FE Act). In this respect, the committee notes the Attorney-General's advice that the FE Act gives the court the discretion to refuse to adduce evidence if to do so would better serve the interests of justice. The committee also notes the advice that the evidentiary rules in the relevant jurisdiction would apply to any foreign evidence adduced in proceedings.

2.52 The committee has concluded its examination of the instrument.

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27 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 11-12.

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[28]

Merits review[29]

2.53 The committee initially scrutinised this instrument in *Delegated legislation monitor 10 of 2018*.[30] The committee considered responses provided by the Minister for Defence in *Delegated Legislation Monitor 12 of 2018*,[31] and *Delegated Legislation Monitor 13 of 2018*,[32] and sought 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 indicated that its 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.

Minister's response

2.54 The Minister for Defence advised:

> While Defence appreciates the Committee's concerns about the availability of external merits review, there is no intention at this

28 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.

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

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

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

32 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 50-53.

time to engage an independent contractor to conduct external merits review.

In relation to the program, Defence notes that:

- The Sustainable Access to Drinking Water program is advanced. Provision of support under the program has been provided in relation to almost all affected properties identified at three of the four sites (RAAF Base Williamtown, the Army Aviation Centre Oakey and RAAF Base Tindal), covering close to 500 properties. Provision of support at RAAF Base Pearce is ongoing.
- There has been one complaint to the Commonwealth Ombudsman arising from the program at RAAF Base Williamtown. The complainant was outside the geographic boundaries of the program, which were based on the investigation area determined by the New South Wales Environment Protection Agency. During the course of the Ombudsman's investigation, the boundaries of the investigation area were changed by the NSW EPA, and the complaint was thereby resolved.
- The support provided under the program has varied. In some cases, support has been provided on an individual basis, for example through the installation of water tanks. In other cases, support has been provided through the development of infrastructure connecting multiple properties to town water supplies. The support provided depends on a range of factors, including the views of affected property owners.

Defence notes that, while engaging an independent contractor would provide an independent source of advice to Defence into its administration of the program, authority to spend money under the program would necessarily remain with delegated Defence officials. This is to ensure appropriate levels of accountability for the expenditure of relevant money in accordance with the P*ublic Governance, Performance and Accountability Act 2013*. That is, an independent contractor could only make non-binding recommendations to Defence about the expenditure of relevant money. The Commonwealth Ombudsman can also provide an independent source of advice about the administration of the program, and its recommendations are treated as highly persuasive.

It is considered that the expense of engaging an independent contractor to conduct independent merits review would be disproportionate to the number and type of complaints that have been received, and are likely to be received in the future, under

the program. This is particularly so given that an independent contractor can, at most, provide recommendations to Defence, which is also within the Commonwealth Ombudsman's powers.

Defence undertakes to follow any recommendations from the Commonwealth Ombudsman in relation to complaints about the Sustainable Access to Drinking Water program, unless to do so would be inconsistent with the *Public Governance, Performance and Accountability Act 2013*. In the event that the Sustainable Access to Drinking Water program significantly expands (for example if there are changes to the Australian Drinking Water Guidelines), or there are an unexpected number of complaints about the program, Defence will re-consider its position on engaging an independent contractor to conduct external merits review.

Defence also notes that the Department of the Environment and Energy (DoEE) is designated as the program owner of the Sustainable Access to Drinking Water program, while Defence is a responsible, or implementing entity. Where a responsible entity is unable to resolve a policy query, the intention is that it will refer the query to the program owner, which will make a decision on the policy query. This decision would be communicated to the responsible entity. In instances where residents seek clarification or guidance around governance of the overall program, these can be addressed to DoEE as the program owner. In instances where residents seek clarification of matters relating to implementation of the program, these can be addressed to Defence as the implementing entity. Both DoEE and Defence will ensure this distinction is made clear on respective entity's websites.

Committee's response

2.55 The committee thanks the minister for this response, and notes the minister's advice that there is currently no intention to engage an independent contractor to conduct external merits review. The committee notes the minister's advice that a contractor could only provide non-binding advice or recommendations about expenditure under the program, and that spending authority would remain with Defence to ensure appropriate levels of accountability.

2.56 The committee also notes the minister's advice that the expense of engaging a contractor to conduct merits review would be disproportionate to the number and type of complaints that have been, and are likely to be, received under the program—particularly given that the functions of an independent contractor could also be performed by the Commonwealth Ombudsman. In this respect, the committee notes the advice that:

- the program is advanced, and support has already been provided to almost all affected properties;
- there has only been one complaint to the Ombudsman in relation to the program, which has been resolved; and
- support provided under the program varies depending on a range of factors, including identified needs and the views of the relevant property owner.

2.57 The committee further notes the minister's advice that Defence undertakes to follow any recommendations of the Ombudsman in relation to the program, unless to do so would be inconsistent with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The committee also notes the advice that, in the event that the program significantly expands, or Defence receives an unexpected number of complains, Defence will reconsider engaging an independent contractor to conduct independent merits review.

2.58 Noting that the program is in its later stages, and in light of the minister's advice regarding the disproportionate expense of engaging a contractor, the undertaking to follow all recommendations of the Commonwealth Ombudsman that are not inconsistent with the PGPA Act, and the advice that Defence will reconsider engaging a contractor if it receives an unexpected number of complaints, the committee makes no further comment in this particular instance regarding the availability of independent merits review. In this respect, the committee notes that circumstances in which the cost of a system of merits review would be vastly disproportionate to the significance of the decisions under review may reflect an established ground for excluding review.[33]

2.59 However, the committee emphasises that decisions with the potential to affect the interests of persons or entities should generally be subject to independent merits review, unless an established ground for excluding merits review is identified. The committee also emphasises that it does not consider the fact that a decision is not made under a statutory scheme to be sufficient justification for excluding merits review. In this respect, the committee reiterates 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.

33 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.56]-[4.57].

2.60 In circumstances where it is not feasible to provide for review by the Administrative Appeals Tribunal (AAT) or another independent tribunal, and no established grounds for excluding merits review are identified, the committee strongly recommends that, at a minimum, consideration be given to engaging an external contractor to conduct independent merits review.

2.61 The committee has concluded its examination of the instrument. However, the committee draws the lack of independent merits review in relation to decisions made under the Sustainable Access to Drinking Water program to the attention of the Senate.

2.62 The committee also emphasises that decisions made under programs on which spending authorised by the Financial Framework (Supplementary Powers) Regulations 1997 should generally be subject to independent merits review unless an established ground for excluding merits review is identified. The committee will continue to monitor this issue.

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.

Consultation[34]

2.63 In *Delegated Legislation Monitor 13 of 2018*,[35] the committee requested the Treasurer's advice as to why no consultation was undertaken on the instrument, and requested that the explanatory statement be updated to provide that information in accordance with the requirements of the *Legislation Act 2003*.

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

35 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 13-14.

Minister's response

2.64 The Treasurer advised:

> The Regulations are technical in nature and only implement Australia's obligations with respect to the regulation of foreign investment under the Free Trade Agreement between Australia and the Republic of Peru (PAFTA). The Government undertook extensive consultation during the negotiations of the PAFTA. The Explanatory Statement to the Regulations outlines this consultation process in detail as follows:
>
> The public consultation and stakeholder engagement process on the PAFTA negotiations commenced with the Government's announcement on 24 May 2017 that Australia and Peru would be launching PAFTA negotiations. Australia's negotiating positions were informed by the views and information provided by stakeholders through both formal and informal mechanisms. Stakeholders in the public consultation process broadly appreciated the benefits of the PAFTA.
>
> The Government tabled the text of the PAFTA and accompanying National Interest Analysis in the Parliament on 26 March 2018. The Joint Standing Committee on Treaties (JSCOT) undertook an inquiry into the Agreement, which included a public hearing on 7 May 2018. JSCOT received nine public submissions into its inquiry. On 15 August 2018, JSCOT recommended that the Government take binding treaty action to implement the P AFTA.
>
> Because of the extensive consultation that took place in relation to the PAFTA, and in light of the fact the Regulations implement the PAFTA, I consider the consultation was undertaken in relation to the Regulations and was appropriate in accordance with paragraph 17(1)(a) of the Legislation Act 2003. Further consultation on the text of the Regulations would have duplicated consultation already undertaken, and would not have been useful or reasonably practicable to undertake.

Committee's response

2.65 The committee thanks the Treasurer for this response and notes the Treasurer's advice that he considers that the consultation undertaken in relation to the instrument was appropriate due to the extensive consultation associated with the Free Trade Agreement between Australia and the Republic of Peru (PAFTA), and the fact that the instrument implements the PAFTA.

2.66 The committee further notes the Treasurer's advice that further consultation on the instrument was considered unnecessary, as it would have duplicated the consultation already undertaken, and would not have been useful or reasonably practicable.

2.67 The committee considers 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.

2.68 The committee has concluded its examination of the instrument.

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[36]

Unclear basis for determining fees[37]

2.69 In *Delegated Legislation Monitor 13 of 2018*,[38] the committee requested 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.

Minister's response

2.70 The Minister for Health advised:

> As noted by the Committee, sections 3DB and 3E of the Health Insurance Act 1973 (the Act) provide a process for medical practitioners to apply to the Minister for recognition as a specialist or consultant physician. The application must be accompanied by the prescribed fee, which is $30 per sections 14 and 15 of the Regulations.
>
> Since 1986, there have been two pathways for medical practitioners to be recognised as specialists under Medicare. The Department of Human Services would automatically process the

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

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

38 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 14-17.

registration of medical practitioners under section 3D of the Act if they were domiciled in Australia, were a fellow of a relevant organisation, and held a relevant qualification.

Medical practitioners who did not meet these requirements, but may have held the appropriate training to practice privately as a specialist under Medicare, could apply for recognition as a specialist. This included domestic medical practitioners under section 3DB of the Act or medical practitioners who were not domiciled in Australia under section 3E. Medical practitioners who wished to be recognised as a consultant physician, a type of specialist with access to a unique set of Medicare attendance items, would also need to apply via these pathways.

The fee of $30 recognised the additional administration involved in processing these applications for the Department of Human Services and the additional regulatory burden of creating a ministerial determination. Prior to Assent of the Health Insurance Amendment (Medical Specialists) Bill 2005, it also included the cost of liaising with the relevant State or Territory Specialist Recognition Advisory Committee.

Section 20AB of the Act allows the Chief Executive Medicare to approve applications for billing agents made by a person or body. Subsection 20AB(2) provides a regulation making power to specify requirements for the application and to set a fee (if any) to accompany the regulation. The fees are prescribed in section 65 of the Regulations.

The fees for the billing agent application reflect the administrative costs for the Department of Human Services to administer the process. The fee covers the assessment of the application against the criteria in the *Health Insurance (Approved Billing Agents) Instrument 2017* and notification of the outcome of the application process.

Sections 14, 15 and 65 of the Regulations do not amount to taxation. I have instrument my Department to liaise with the Department of Human Services to determine if the fees continue to appropriately reflect the cost of administration.

Committee's response

2.71 The committee thanks the minister for this response. The committee notes the advice that the fees imposed by sections 14, 15 and 65 of the instrument reflect the costs to the Department of Human Services in administering the relevant application processes, as well as the costs of meeting certain additional regulatory burdens (for example, creating a ministerial determination).

2.72 The committee further notes the minister's advice that the fees in sections 14, 15 and 65 of the instrument do not amount to taxation, and welcomes the minister's advice that he has instructed his department to liaise with the Department of Human Services to determine if those fees continue to appropriately reflect the costs of administration.

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

2.74 The committee has concluded its examination of this matter.

Incorporation[39]

2.75 In *Delegated Legislation Monitor 13 of 2018*,[40] the committee requested 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.

2.76 The committee also requested that the explanatory statement be updated to include this information.

Minister's response

2.77 The Minister for Health advised:

> Subsection 23DS(1) of the Act provides that regulations may require medical practitioners to prepare and maintain records of diagnostic imaging services rendered by them, and, in particular, may impose requirements relating to:
>
> (a) the form in which the records are to be prepared;
>
> (b) the information that must be included in the records; and

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

40 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 14-17.

(c) the manner in which the records must be kept.

Subsection 71(2) of the Regulations requires that a medical practitioner who renders a diagnostic imaging service must provide a record of the service. Subsection 71(3) requires that the record of that service must include a report of the service by the providing practitioner.

Subsection 71(4) requires that, where an ultrasound service is performed by a 'registered sonographer' under the supervision, or at the direction of, the providing practitioner, the medical practitioner's report must include the name of the registered sonographer who performed the service. Subsection 71(6) defines a registered sonographer as a person whose name is entered on the register of sonographers maintained by the Chief Executive Medicare.

The Committee has requested information about the apparent incorporation by reference of the register of sonographers into the Regulations. I would like to address the Committee's concern by providing further information about the register of sonographers, which is, in practice, primarily an administrative function by the Chief Executive Medicare.

Under section 32 of the *Human Services (Medicare) Regulations 2017*, a prescribed function of the Chief Executive Medicare is to establish and maintain a register of sonographers. It is open to the Chief Executive Medicare to put in place the required administrative arrangements to perform this function; and the register is a record of the decision made by the Chief Executive Medicare to register a sonographer.

In practice, the register is an internal departmental database used as part of auditing and compliance action in relation to Medicare benefits. This is to ensure that the providing practitioner has provided an accurate report of the service as part of a claim for the payment of Medicare benefits in circumstances where an ultrasound is performed by a sonographer under the direction or supervision of the providing practitioner.

The requirement to provide a report, which includes, if applicable, the name of the registered sonographer, is only one of many requirements that must be met for a Medicare benefit to be payable for a diagnostic imaging service. As the providing practitioner is in direct contact with the sonographer, access to the register by the providing practitioner, who is required to provide the information as part of the required records of services, is not necessary. The sonographer would know whether he or she is registered. Accordingly, the purpose of mentioning the register in subsection 71(6) of the Regulations is to define 'registered sonographer' on the basis of the provisions in the

> *Human Services (Medicare) Regulations 2017* relating to the exercise of this statutory function of the Chief Executive Medicare.

Committee's response

2.78 The committee thanks the minister for this response. The committee notes the minister's advice that the register of sonographers is an internal departmental database used as part of auditing and compliance action in relation to Medicare benefits. The committee notes the advice that the register is used to ensure that practitioners provide accurate reports in relation to benefit claims in circumstances where an ultrasound is performed by a sonographer under the practitioner's direction or supervision.

2.79 The committee also notes the minister's advice that, since the relevant practitioner would be in direct contact with the sonographer, access to the register by the practitioner is not necessary. The committee notes the advice that, accordingly, the purpose of mentioning the register in subsection 71(6) of the instrument is simply to define 'registered sonographer' on the basis of the provisions in the Human Services (Medicare) Regulations 2017 relating to the exercise of the statutory functions of the Chief Executive of Medicare. As such, it appears to the committee that the minister's advice suggests that the register of sonographers is not incorporated by the instrument.

2.80 The committee has concluded its examination of this matter.

Privacy[41]

2.81 In *Delegated Legislation Monitor 13 of 2018*,[42] the committee requested 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.

Minister's response

2.82 The Minister for Health advised:

> Subsection 16A(4)(b) of the Act provides a regulation making power to specify the requirements of pathology requests. Section 34 of the Regulations specifies the information which

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

42 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 14-17.

must be included in a request for a pathology service about the patient (subject to the requirements applying to certain 'further requests' under section 37). The request must include:

- the name of the patient;
- the address of the patient; and
- if the person is a patient in relation to a hospital, particulars about the hospital.

These provisions recognise the unique arrangement for the billing of pathology services. Like diagnostic imaging services, most pathology services are rendered pursuant to a request from a medical practitioner.

Unlike diagnostic imaging, where a patient will attend a diagnostic imaging practice to access the diagnostic imaging equipment, there is often no interaction between the pathologist and the patient. This is because the service is undertaken on a specimen of the patient, which is usually taken by the requesting medical practitioner or an approved collection centre.

This is recognised in the Act. Subsection 20A(2) of the Act allows a patient to prospectively make an offer to assign their benefit for a pathology service. The pathologist can choose to accept the patient's benefit or to set their own fees for the service.

The personal information in section 34 of the Regulations is required for pathologists to bill the service under Medicare. It would be impractical for pathologists to collect this information from patients, as a large volume of pathology services are rendered each year. In 2017-18, Medicare benefits were paid for almost 145 million pathology services.

The personal information in the pathology request is protected by the Privacy Act 1988. The rendering pathologist, or any practice administrative staff who have access to the information, can use that information for the purpose of Medicare billing.

The Chief Executive of Medicare can require that a person produce documentation, including a pathology request form, to substantiate a service under section 129AAD of the *Health Insurance Act 1973*. The use of documents provided under 129AAD is subject to the secrecy requirements in section 130 of the Act.

Committee's response

2.83 The committee thanks the minister for this response. The committee notes the minister's advice that the personal information specified in section 34 of the instrument is required for pathologists to bill services under Medicare. The committee notes the advice that it would be impractical for

pathologists to collect this information directly from patients, in light of the large number of pathology services that are rendered each year.

2.84 The committee also notes the minister's advice that the personal information in the pathology request is protected by the *Privacy Act 1988*. The committee notes the advice that the rendering pathologist, or any practice administrative staff who have access to the information, can use the information for the purpose of Medicare billing.

2.85 Finally, the committee notes the minister's advice that the Chief Executive of Medicare can require a person to produce pathology request forms under section 129AAD of the *Health Insurance Act 1973*. The committee notes the advice that the use of documents provided under section 129AAD is subject to the secrecy requirements in section 130 of the Act.

2.86 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.

2.87 The committee has concluded its examination of the instrument.

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[43]

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

Significant penalties[44]

2.88 In *Delegated Legislation Monitor 13 of 2018*,[45] the committee requested the assistant minister's advice as to the justification for imposing a custodial penalty in delegated legislation, and requested that the explanatory statement be amended to include this information.

Minister's response

2.89 The Assistant Minister for Regional Development and Territories advised:

> The Ordinance inserts new offence provisions (sections 167F, 168M and 174J) into the *Criminal Procedure Act 2007* (NI) (Criminal Procedure Act) in relation to the publication of certain sensitive material relating to sexual offence proceedings. The offences are designed both to protect witnesses' and complainants' privacy, given the nature of evidence that is heard in sexual, violent and domestic violence offence proceedings, and also further an accused person's right to a fair trial by preventing the publication of potentially prejudicial material.
>
> The maximum penalty for each offence is imprisonment for 12 months or 60 penalty units, or both, and the Committee has expressed concern about the imposition of a custodial penalty in delegated legislation.
>
> As the Committee has noted previously, ordinances made for Norfolk Island, like the other external territories, are quite different from other types of Commonwealth delegated legislation. The Ordinance was made under Section 19A of the *Norfolk Island Act 1979* (the Act) which provides that the Governor-General may, subject to the Act, make ordinances 'for the peace, order and good government of the Territory.' This legislative power is expressed in the broadest possible terms and reflects the wording used in State constitutions to confer plenary legislative power on State parliaments. Accordingly, unlike a general regulation-making power commonly found in Commonwealth legislation, Section 19A of the Act authorises the broadest range of ordinances as necessary for the good government of Norfolk Island, including to prescribe offences that are punishable by imprisonment.

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

45 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 32-35.

> The Criminal Procedure Act was made by the former Norfolk Island Legislative Assembly and has been continued in force by Section 16A of the Act. The Criminal Procedure Act covers matters that would normally be dealt with under state or territory legislation. Subsection 17(3) of the Act expressly provides that laws continued in force by Section 16A of the Act may be amended or repealed by a Section 19A Ordinance. Accordingly, the amendment of this continued law by a Section 19A Ordinance is expressly authorised by the Act.
>
> I should also point out that in the making of legislation for the external territories, the guiding objective is always to align, as far as possible, the rights and responsibilities of people in external territories with the rights and responsibilities of people in other Australian jurisdictions. Similar offences to the ones identified above and comparable penalties, including imprisonment, exist in other Australian jurisdictions.
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> …
>
> I appreciate the point the Committee has made about these matters being inadequately addressed in the Explanatory Statement for the Ordinance. As such, I have instructed the Department of Infrastructure, Regional Development and Cities to update the Explanatory Statement to include further explanation on these matters in line with the reasoning outlined above. I have enclosed for the Committee an advance copy of the updated Statement with this letter.

Committee's response

2.90 The committee thanks the assistant minister for this response, and notes the assistant minister's advice that section 19A of the *Norfolk Island Act 1979* (Norfolk Island Act) authorises the broadest range of ordinances as necessary for the good government of Norfolk Island, including ordinances which prescribe offences that are punishable by imprisonment.

2.91 The committee further notes the assistant minister's advice that subsection 17(3) of the Norfolk Island Act expressly authorises the amendment of the *Criminal Procedure Act 2007* (NI) (Criminal Procedure Act) by ordinances made under section 19A of the Norfolk Island Act, because the Criminal Procedure Act is a law made by the former Norfolk Island Legislative Assembly and continued in force by section 16A of the Norfolk Island Act.

2.92 The committee welcomes the assistant minister's advice that the explanatory statement will be updated to further explain these matters in a manner consistent with the information in the assistant minister's response.

2.93 The committee recognises the special nature of the ordinances relating to Norfolk Island and the legislative framework in which they are

made. Nevertheless, as previously noted,[46] the committee considers that, in light of the change to Norfolk Island's status in 2015, and the consequent likelihood of the further need to update and amend its criminal laws via ordinance in the future, it would be more appropriate to consider the enactment by Parliament of an express power in primary legislation, authorising the inclusion of appropriate offences and criminal penalty provisions in such ordinances.

2.94 The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate the imposition of significant criminal offences and corresponding custodial penalties in a legislative instrument.

Reversal of legal burden of proof[47]

2.95 In *Delegated Legislation Monitor 13 of 2018*,[48] the committee requested the assistant minister's advice as to the appropriateness of reversing the burden of proof, in particular, the appropriateness of imposing a *legal* burden on the defendant.

Minister's response

2.96 The Assistant Minister for Regional Development and Territories advised:

> The Ordinance inserts new Section 167F (Sexual offence proceeding - prohibition of publication of complainant's identity) and includes new Subsection 167F(2) which provides that it is a defence to a prosecution for an offence against the section if the person proves that the complainant consented to the publication before the publication happened. A note follows that advises that a defendant bears a legal burden in relation to the matter in the subsection (the defence), and refers to Section 59 of the *Criminal Code 2007* (NI) (Criminal Code).
>
> Section 59 of the Criminal Code anticipates the imposition of a legal burden on the defendant in some circumstances, providing that a burden of proof imposed on the defendant is a legal burden where, relevantly, the law expressly requires the defendant to prove the matter. In such cases, the defendant must prove the

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46 See, for example, *Delegated legislation monitor 1 of 2018*, pp. 59-62; *Delegated legislation monitor 1 of 2017,* pp. 29-31.

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

48 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, pp. 32-35.

matter on the balance of probabilities, as per Section 60 of the Criminal Code.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Offences) outlines circumstances in which it will be appropriate for legislation to provide an offence-specific defence, being where:

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

In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent ought to be in the knowledge of the person committing the act, in this case the defendant.

If that consent was received it will be significantly less difficult and less costly for the defendant to prove the existence of the consent than for the complainant or the prosecution to prove that consent does not exist. In addition, given there is a presumption against the publication of sensitive information, the defendant would be or should be aware of the need for consent and should be able to produce proof of such consent.

In any case, I note the Guide to Framing Offences goes on to provide further guidance which is relevant in this case. It indicates that creating an offence-specific defence in legislation is also more readily justified where the matter in question is not central to the question of culpability. In relation to an offence referred to in subsection 167(1), lack of consent is not something that is needed to establish the offence. This provides further justification for placing a legal burden, rather than an evidentiary burden, on the defendant in relation to the statutory defence set out in subsection 167(2).

I would note also that relevant commentary from the Australian Law Reform Commission (ALRC), which looked at the issue of placing legal burdens on a defendant in its 2016 report titled *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, supports this position. In that report, the ALRC acknowledged the appropriateness of placing a legal burden, as opposed to an evidentiary burden, on the defendant where the matter is not an essential element of the offence, or is not central to culpability.

Subsection 167F(2) must also be seen as potentially beneficial for the defendant in placing a limit on the criminal liability associated with the offence, noting that the offence itself is made out only by proving that a person published relevant material. In this way, the

> statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material.
>
> …
>
> I appreciate the point the Committee has made about these matters being inadequately addressed in the Explanatory Statement for the Ordinance. As such, I have instructed the Department of Infrastructure, Regional Development and Cities to update the Explanatory Statement to include further explanation on these matters in line with the reasoning outlined above. I have enclosed for the Committee an advance copy of the updated Statement with this letter.

Committee's response

2.97 The committee thanks the assistant minister for this response, and notes the assistant minister's advice that, in relation to the defence in new section 167F of the Criminal Procedure Act, the question of whether consent was given to the publication of certain material ought to be in the knowledge of the person who published it (the defendant). The committee also notes the assistant minister's advice that it would be significantly less difficult and less costly for the defendant to prove that the complainant consented to the publication of the relevant information, than for the complainant or prosecution to prove that consent did not exist.

2.98 However, while the committee acknowledges that the question of whether consent was given to the person who published the information should be within the knowledge of the defendant, it remains unclear to the committee how this matter could considered to be *peculiarly* within the knowledge of the defendant, when the complainant would also presumably be aware of whether they did, or did not, consent to the publication of information by the defendant. Consequently, the committee remains of the view that this matter does not appear to be a matter which would be peculiarly within the defendant's knowledge. As such, it is also not clear that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.99 The committee further notes the assistant minister's advice that it is appropriate to impose a legal burden of proof on the defendant because the matter in question is not central to the question of culpability for the offence. However, the committee notes that the question of whether a complainant has consented to the publication would appear to be a matter that should appropriately be an element of the offence, and the fact that it is not should not be used as a justification for reversing the legal burden of proof.

2.100 Finally, the committee emphasises the advice in the Attorney-General's Department's *Guide to Framing Commonwealth Offences* that 'placing a legal burden of proof on a defendant should be kept to a minimum'.[49] The committee considers that the assistant minister's response has not established the need to reverse the evidential burden of proof, let alone the legal burden of proof.

2.101 The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate and the assistant minister its concerns about the reversal of the legal burden of proof in new section 167F of the *Criminal Procedure Act 2007* (NI).

49 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 51.

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[50]

Compliance with authorising legislation[51]

2.102 In *Delegated Legislation Monitor 13 of 2018*,[52] the committee sought 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.

Minister's response

2.103 The Minister for Health advised:

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)(a).

52 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 36-37.

> In accordance with subsection 56(1) of the *Legislation Act 2003*, each of the Instruments was registered as a legislative instrument on 5 October 2018, which satisfied the requirement to be published in the Gazette.

Committee's response

2.104 The committee thanks the minister for this response. The committee notes the minister's advice that, pursuant to subsection 56(1) of the *Legislation Act 2003*, a statutory requirement to publish or notify an instrument in the *Gazette* may be satisfied by registering that instrument as a legislative instrument.

2.105 Given that each of the instruments was registered as a legislative instrument, it appears to the committee that the requirement in subsection 7(1) of the *Research Involving Human Embryos Act 2002* (that is, that instruments made under that section be notified in the *Gazette*) has been satisfied.

2.106 The committee considers that it would be appropriate for the information provided by the minister to be included in the explanatory statement to each instrument, 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.

2.107 The committee has concluded its examination of the instruments.

Senator John Williams (Chair)