

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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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*.<sup>1</sup>

## 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

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

legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.<sup>2</sup>

### **Ministerial correspondence**

Correspondence relating to matters raised by the committee is published on the committee's website.<sup>3</sup>

### **Guidelines**

Guidelines referred to by the committee are published on the committee's website.<sup>4</sup>

### **General information**

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.<sup>5</sup>

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.<sup>6</sup>

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.<sup>7</sup>

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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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index).

3 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

4 See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines](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](http://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](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List).

7 Regulations and Ordinances Committee, *Disallowance Alert 2019*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](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 22 November 2018 and 24 January 2018 (new matters).

1.2 Guidelines referred to by the committee are published on the committee's website.<sup>1</sup>

### Response required

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

## AD/DHC-2/26 Amdt 1 Passenger Seats and Passenger Seat Attachment Fittings

<b>FRL No.</b>	F2019L00019 <sup>2</sup>
<b>Purpose</b>	Provides an additional nine months to carry out certain repetitive inspection requirements.
<b>Authorising legislation</b>	<i>Civil Aviation Safety Regulations 1998</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>3</sup>

1 See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines).

2 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

## Incorporation<sup>4</sup>

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

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

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

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

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

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

1.9 The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments or other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>5</sup>

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

5 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

1.10 With reference to these matters, the committee notes that the instrument appears to incorporate the following documents:

- 'a drawing' approved by De Havilland Canada; and
- 'a drawing' approved under the Air Navigation Regulations 2016, the Civil Aviation Regulations 1988 or the Civil Aviation Safety Regulations 1998.

1.11 The explanatory statement indicates that CASA will make the incorporated documents available for viewing at its Canberra offices to any interested person.<sup>6</sup> However, neither the instrument nor its explanatory statement appears to indicate the manner in which the documents are incorporated. Additionally, the explanatory statement only describes the incorporated documents as 'technical documents'. It does not provide any further information about the nature of the documents, such as might satisfy paragraph 15J(2)(c) of the Legislation Act.

**1.12 In light of the discussion above, the committee requests:**

- **the minister's advice as to the manner in which the documents identified at paragraph [1.10] above are incorporated; and**
- **a more detailed description of the incorporated documents, such as may satisfy the requirements in paragraph 15J(2)(c) of the *Legislation Act 2003*.**

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

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6 Explanatory statement, p. 2.

## Aged Care Quality and Safety Commission Rules 2018

<b>FRL No.</b>	F2018L01837 <sup>7</sup>
<b>Purpose</b>	Provides for the performance of the complaints and regulatory functions of the Aged Care Quality and Safety Commissioner.
<b>Authorising legislation</b>	<i>Aged Care Quality and Safety Commission Act 2018</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>8</sup>

### Consultation<sup>9</sup>

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

1.15 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>10</sup>

1.16 With reference to these requirements, the committee notes that, under the heading of consultation, the explanatory statement provides that extensive consultation was undertaken as part of a Review of National Aged Care Quality Regulatory Processes, and during the process to establish the Aged Care Quality and Safety Commission (the ACQS Commission).<sup>11</sup> It also states that:

As the Rules replace the existing applicable subordinate legislation these rules reflect the outcome of previous consultation that was undertaken

7 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

10 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

11 Explanatory statement, p. 2.

with the existing legislation. Where significant changes to processes in stage two are identified, consultation with appropriate parties will occur.<sup>12</sup>

1.17 The committee appreciates that public consultation occurred on relevant matters, and that this consultation may have informed the development of the instrument. However, it remains unclear whether consultation was undertaken in relation to the instrument as presently drafted. In this respect, the description of consultation may not satisfy the requirements of the Legislation Act, which requires the explanatory statement to describe the nature of any consultation undertaken in relation to the instrument or explain why no such consultation was undertaken.

**1.18 The committee requests the minister's advice as to:**

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

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

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### **Retrospective effect<sup>13</sup>**

1.20 The instrument gives operational effect to the processes of the ACQS Commission in relation to complaints management and resolution, and the accreditation, assessment and monitoring of aged care services. It also provides for independent review of decisions. In this respect, the instrument consolidates a number of matters that were previously dealt with under separate pieces of delegated legislation.<sup>14</sup>

1.21 Part 9 of the instrument includes a number of transitional provisions, which give effect to the transition from the previous regime to the regime administered in accordance with the present instrument. In this regard:

- Division 1 (sections 113 to 116) includes that the Aged Care Quality and Safety Commissioner (the Commissioner) may deal with a complaint made

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12 Explanatory statement, p. 2.

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

14 For example, complaints were previously dealt with in accordance with the Complaints Principles 2014 [F2014L00802] and the Complaints Principles 2015 [F2018C00377]. Accreditation and quality assurance were previously dealt with in accordance with the Quality Agency Principles 2013 [F2018C00175].

under the Complaints Principles 2014<sup>15</sup> as if it were made under the present instrument;

- Division 3 (sections 117 to 121) includes that the Commissioner may deal with an application for the accreditation of an aged care service made under the Quality Agency Principles 2013 (Quality Agency Principles)<sup>16</sup> as if it were made under the present instrument; and
- Division 7 (sections 131 to 137) includes that a request for reconsideration or review of a decision under the Quality Agency Principles is to be dealt with in accordance with the present instrument.

1.22 While these transitional provisions commence prospectively, the committee is concerned that they may result in the instrument having a retrospective effect, to the potential detriment of a person who has made a complaint, an application, or a request for reconsideration of a decision. In this respect, the committee notes that while the instrument re-enacts a number of provisions in the Complaints Principles and Quality Agency Principles, it also appears to alter relevant application and complaints processes.

1.23 The explanatory statement provides no information as to whether any person whose application, complaint or request for review was pending at the commencement of the instrument may be disadvantaged by the application of new criteria. It does not indicate, for example, how many such applications, complaints or requests will be subject to the present instrument, and whether affected persons will be given the opportunity to address any new criteria that may be relevant to their circumstances.

**1.24 The committee requests the minister's advice as to:**

- **whether any persons were, or could be, disadvantaged by the operation of the transitional provisions in Part 9 of the instrument (in particular Divisions 1, 3 and 7); and**
- **if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness for any affected persons.**

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15 [F2014L00802]. The Complaints Principles 2014 were repealed by the Complaints Principles 2015 [F2018C00377], which are repealed by the present instrument.

16 [F2018C00175].



## Privacy<sup>17</sup>

### Significant matters in delegated legislation<sup>18</sup>

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

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

1.27 Section 111 of the instrument prescribes, for the purposes of paragraph 61(1)(j) of the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act), circumstances in which the Commissioner may disclose protected information to the approved provider of an aged care service or the service provider of a Commonwealth-funded aged care service. Under section 111, the Commissioner may disclose protected information if the Commissioner believes on reasonable grounds that not disclosing the information would place the health, safety or well-being of an aged care consumer of the relevant service at risk.

1.28 'Protected information' is defined in subsection 60(2) of the ACQSC Act as information acquired under, or for the purposes of, the Act or the rules that is:

- personal information; or
- information that relates to the affairs of an approved provider or a service provider of a Commonwealth-funded aged care service.

1.29 In relation to section 111 of the instrument, the explanatory statement provides that protected information 'may only be disclosed in limited, specified circumstances, with unauthorised disclosure of protected information attracting a criminal penalty under the Act'.<sup>19</sup> The statement of compatibility further explains that:

Requiring the Commissioner to exercise his or her discretion on a case by case basis ensures the burdens imposed by this measure on the right to information privacy is proportionate in its application, while also ensuring that there is sufficient flexibility to balance other competing considerations, which will depend on the circumstances.

While there are no specific requirements to consider the privacy of an individual in making a decision under section 111, it is unlikely a decision to disclose could be properly made on the grounds it protected the safety,

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

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

19 Explanatory statement, p. 29.

health and well-being of consumers, without considering the privacy of consumers, to the extent possible.<sup>20</sup>

1.30 While it may be intended that protected information will only be disclosed under section 111 in limited circumstances, and while there appear to be some safeguards in the ACQSC Act against unauthorised disclosure, given the potentially significant impacts of improper disclosure of personal information for vulnerable aged care consumers, the committee would expect a more comprehensive explanation in the explanatory materials as to how individuals' privacy will be protected.

1.31 The committee notes that neither the explanatory statement nor the statement of compatibility explains why it is considered necessary and appropriate to prescribe additional circumstances in which protected information may be disclosed. In this regard, the committee notes that the ACQSC Act already sets out a number of circumstances in which information can be disclosed. These include where the Commissioner believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious risk to an aged care consumer.<sup>21</sup> The committee also notes that the explanatory materials do not appear to identify any *specific* safeguards against unauthorised disclosure.

1.32 Additionally, the committee's view is that significant matters, such as the circumstances in which protected information may be disclosed, are more appropriately enacted via primary rather than delegated legislation. Where significant matters are left to delegated legislation, the committee would expect a sound justification for this approach to be included in the explanatory materials. In this instance, no such justification is provided in the explanatory statement.

1.33 In this respect, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered paragraph 61(1)(j) of the ACQSC Act when the Aged Care Quality and Safety Commission Bill 2018 (ACQSC Bill) was before the Parliament. The Scrutiny of Bills committee raised concerns that the (then) proposed paragraph 61(1)(j) would leave a number of significant matters, including the persons to whom protected information may be disclosed and the circumstances in which disclosures may be made, to delegated legislation. It was unclear to the Scrutiny of Bills committee why it was necessary to take this approach, particularly given that a variety of circumstances in which protected information could be disclosed were already included in the primary legislation.<sup>22</sup>

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20 Statement of compatibility, p. 32.

21 Section 61(1)(e) of the *Aged Care Quality and Safety Commission Act 2018*.

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 4-6.

1.34 Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of allowing rules made under the ACQSC Act to specify additional persons and circumstances for the disclosure of protected information.<sup>23</sup>

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

- **why it is considered necessary and appropriate to allow the Commissioner to disclose protected information about aged care consumers in the circumstances envisaged by section 111 of the instrument (noting the already broad powers of disclosure in recently enacted *Aged Care Quality and Safety Commission Act 2018*); and**
- **what specific safeguards are in place to protect individuals' privacy, including why there is no requirement for the Commissioner to consider the privacy of affected aged care consumers, to notify the affected person or give them a reasonable opportunity to make written comments on the proposed disclosure when appropriate.**

**1.36 The committee also requests the minister's advice as to why it is considered necessary and appropriate to leave the circumstances in which protected information may be disclosed to delegated legislation.**

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### **Merits review**<sup>24</sup>

1.37 Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to be satisfied that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

1.38 Part 7 of the instrument provides for the reconsideration and review of decisions made by the Commissioner. Under that Part, a person affected by a reviewable decision may apply to the Commissioner for reconsideration of the decision.<sup>25</sup> Where the person is not satisfied with the outcome of a reconsideration process, they may apply for the Administrative Appeals Tribunal (AAT) for review of the reconsideration decision.<sup>26</sup>

1.39 Section 98 of the instrument lists the decisions that are 'reviewable decisions' for the purposes of Part 7. These appear to include the majority of decisions made under the instrument. However, it appears that decisions under sections 90 and 92 (relating to the registration of quality assessors) would not be

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23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 70-74

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

25 Sections 99, 100 and 101.

26 Section 103.

reviewable. It is unclear to the committee why these decisions would not be reviewable, particularly given their similarity to certain reviewable decisions (for example, a decision to cancel a person's registration as a quality assessor).

1.40 Additionally, the committee notes that the instrument only permits applications to be made to the AAT in relation to the reconsideration of 'regulatory reviewable decisions'. By contrast, 'complaints reviewable decisions' (including decisions to take no further action in relation to a complaint, or to end a complaints process) would not be subject to independent merits review.

1.41 Where an instrument fails to provide for or excludes independent merits review, the committee would expect the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. In this instance, the explanatory statement states that complaints reviewable decisions are unsuitable for merits review.<sup>27</sup> However, it does not provide any further information about why such decisions have been excluded, nor does it provide any information regarding the omission of decisions under sections 90 and 92 from the list of reviewable decisions.

**1.42 The committee requests that the minister provide:**

- **a list of every decision in the instrument that has not been included in the list of reviewable decisions in section 98; and**
- **more detailed advice as to what are the characteristics of each decision that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

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### **Significant matters in delegated legislation<sup>28</sup>**

1.43 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).

1.44 The instrument was made for the purposes of section 21 of the ACQSC Act. It establishes schemes for dealing with complaints to the Commissioner, for accrediting residential aged care services, and for conducting quality reviews. It also provides for the reconsideration and review of certain decisions relating to those schemes.

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27 Explanatory statement, p. 28.

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

1.45 The committee notes that the Scrutiny of Bills committee considered section 21 of the ACQSC Act when the ACQSC Bill was before the Parliament. The Scrutiny of Bills committee expressed concern that (then) proposed section 21 would leave significant matters, such as complaints and regulatory functions, to delegated legislation. In this respect, the Scrutiny of Bills committee emphasised that these significant matters should generally be included in primary rather than delegated legislation. It also drew attention to the fact that these matters would be included in rules, which are subject to a lower level of executive scrutiny than regulations.<sup>29</sup>

1.46 The committee's views regarding the inclusion of complaints and regulatory functions, and associated review rights, in delegated legislation accords with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that leave significant elements of a regulatory regime to delegated legislation. In the committee's view, these matters are more appropriate for parliamentary enactment.

**1.47 In light of the matters raised by the Scrutiny of Bills committee, the committee draws the Senate's attention to the inclusion of significant matters, such as complaints and regulatory functions relating to the provision of aged care services, and associated review rights, in delegated legislation.**

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29 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 1-4; *Scrutiny Digest 12 of 2018*, pp. 67-70.

## Air Navigation (Essendon Fields Airport) Regulations 2018

## Air Navigation (Gold Coast Airport Curfew) Regulations 2018

<b>FRL Nos.</b>	F2018L01687 and F2018L01688 <sup>30</sup>
<b>Purpose</b>	Establish a framework for the restriction of aircraft movements at Essendon Fields Airport and Gold Coast Airport.
<b>Authorising legislation</b>	<i>Air Navigation Act 1920</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>31</sup>

### Incorporation<sup>32</sup>

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

1.49 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*.<sup>33</sup>

30 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

33 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

1.50 With reference to these matters, the committee notes that each of the instruments incorporates Volume I of Annex 16 to the Chicago Convention (Annex).<sup>34</sup> The explanatory statement provides that the current version of the Annex is incorporated (that is, the version in force at the commencement of the instruments).<sup>35</sup> The explanatory statements also indicate that the Annex is available for purchase on the website of the International Civil Aviation Organisation, and that aircraft operators may request a copy of the Annex, free of charge, from the Department of Infrastructure, Regional Development and Cities.<sup>36</sup>

1.51 The committee appreciates that key users of the instruments may access the incorporated document free of charge. However, the committee is also interested in the broader issue of access for other parties who may be affected by or interested in the law. In this respect, the committee notes that the explanatory statements provide no information regarding free access to the Annex for the broader public. A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. Including information about incorporated documents in the explanatory statement enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

1.52 The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the explanatory statements to the instruments.

**1.53 The committee requests the minister's advice as to where Volume I of Annex 16 to the Chicago Convention may be accessed free of charge (including by the general public) and requests that the explanatory statements be amended to include this information.**

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### **Reversal of evidential burden of proof<sup>37</sup>**

1.54 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where

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34 Section 5 of each instrument, definition of 'Annex'.

35 Explanatory statement (each instrument), p. 3.

36 Explanatory statement, p. 3.

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

instruments reverse the burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

1.55 In this respect, the committee notes that both instruments contain a number of offences that have offence-specific defences which reverse the evidential burden of proof.<sup>38</sup> In the Air Navigation (Essendon Fields Airport) Regulations 2018 (EFA Regulations), subsection 6(1) makes it an offence for an aircraft operator to cause an aircraft to take off from, or land at, Essendon Fields Airport if the aircraft has a maximum take-off weight of 45,000kg or more. Subsection 6(2) provides that the offence does not apply if the take-off weight is no more than 50,000kg, and either the take-off or landing is permitted under section 14 of the instrument or specific circumstances apply.<sup>39</sup>

1.56 In addition, subsections 8(1) and 10(2) of the EFA Regulations and subsection 8(1) of the Air Navigation (Gold Coast Airport Curfew) Regulations 2018 (GCAC Regulations) make it an offence for an aircraft operator to cause an aircraft to take off from or land at Essendon Fields Airport or Gold Coast Airport in certain circumstances, and subsections 8(2), 10(3) and 8(2) respectively provide that the offence does not apply if the take-off or landing is permitted under certain provisions of the instrument. In relation to each of the defences identified above (that is subsections 6(2), 8(2) and 10(3) of the EFA Regulations, and subsection 8(2) of the GCAC Regulations), the defendant bears the evidential burden of proof.

1.57 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matters) rather than a legal burden (requiring the defendant to positively prove the matters), the committee expects any such reversal of the burden of proof to be justified. In this instance, the explanatory statements provide that the evidential burden of proof is reversed as the relevant matters are likely to be within the peculiar knowledge of the defendant.<sup>40</sup>

1.58 In this respect, the committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences* indicates that it may be appropriate to reverse the evidential burden of proof in relation to a matter if:

- it is peculiarly within the knowledge of the defendant; and

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38 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

39 The relevant circumstances are set out in subparagraphs 6(2)(b)(i)-(v), and include matters such as compliance with maximum noise levels, not taking off or landing during a curfew period, and using the minimum amount of necessary reverse thrust.

40 Explanatory statement, Air Navigation (Essendon Fields Airport) Regulations 2018, pp. 4-5; Explanatory Statement, Air Navigation (Gold Coast Airport Curfew) Regulations 2018, p. 4.



- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>41</sup>

1.59 However, it is not apparent to the committee that the matters in the defences identified above would be peculiarly within the knowledge of the defendant, or that they would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

1.60 For example, in relation to the defence in subsection 6(2)(a) of the EFA Regulations, the weight of an aircraft, and whether the aircraft is being used for a police operation, appear to be largely factual matters.

1.61 Moreover, it appears that the defences in subsections 8(2) and 10(3) of the EFA Regulations, and in subsection 8(2) of the GCAC Regulations, could be made out by pointing to a dispensation granted by the secretary. It is not apparent that this matter would be peculiarly within the knowledge of a defendant, given that it is a matter of which the secretary would also be apprised.

**1.62 The committee requests the minister's more detailed advice as to the justification for the reversal of the evidential burden of proof in relation to the defences identified above. The committee's assessment would be assisted if the response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.<sup>42</sup>**

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### Merits review<sup>43</sup>

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

1.64 Subsection 15(3) of the EFA Regulations provides that the secretary may, following an application by the aircraft operator, grant a dispensation allowing an aircraft to take off from, or land at, Essendon Fields Airport during a curfew period. The secretary may grant the dispensation if satisfied that:

- exceptional circumstances justify permitting the take-off or landing; and
- for a landing, when the aircraft took off the operator reasonably believed that the aircraft would land before the start of the curfew period.

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

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

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

1.65 Subsection 18(3) of the GCAC Regulations is in similar terms.

1.66 It appears that decisions by the secretary as to whether to grant, or refuse to grant, a dispensation involve at least an element of discretion. Such decisions also appear to have the potential to affect the rights and interests of individuals. Consequently, it appears that decisions of the secretary in relation to the granting of dispensations may be suitable for independent merits review.

1.67 The EFA Regulations do not appear to provide for independent merits review of decisions made under subsection 15(3) of that instrument. Similarly, while merits review is available in relation to decisions made under sections 10 and 13 of the GCAC Regulations, this does not appear to extend to decisions under subsection 18(3). Moreover, the explanatory statements do not indicate whether the decisions are reviewable.

1.68 Further, while section 23A of the *Air Navigation Act 1920* provides for the review of certain decisions by the Administrative Appeals Tribunal, it does not appear that this provision extends to decisions by the secretary under subsection 15(3) of the EFA Regulations or subsection 18(3) of the GCAC Regulations.

**1.69 The committee requests the minister's advice as to:**

- **whether decisions by the secretary to grant, or refuse to grant, a dispensation allowing an aircraft to take off from, or land at, Essendon Fields Airport or Gold Coast Airport during a curfew period, are subject to independent merits review; and**
- **if not, the characteristics of those decisions that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

## Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018

<b>FRL No.</b>	F2019L00015 <sup>44</sup>
<b>Purpose</b>	Amends the List of Exempt Native Specimens Instrument 2001 to allow export of specimens taken in the Commonwealth Northern Prawn Fishery until 6 January 2024.
<b>Authorising legislation</b>	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>45</sup>

### Compliance with authorising legislation<sup>46</sup>

1.70 Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation are made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation, including any limitations or conditions on the power to make the instrument set out in the authorising legislation.

1.71 The instrument was made under paragraph 303DC(1)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It amends the list of exempt native specimens established under section 303DB of the EPBC Act (exempt specimens list) by including and deleting items from the list.

1.72 Subsection 303DC(1A) of the EPBC Act provides that, in deciding whether to amend the exempt specimen list to include a specimen derived from a commercial fishery, the minister must rely primarily on the outcomes of any assessment in relation to the fishery carried out for the purposes of Division 1 or 2 of Part 10 of the EPBC Act. The requirement in subsection 303DC(1A) appears to be a precondition to the making of an instrument under subsection 303DC(1) to amend the exempt specimens list by including a specimen derived from a commercial fishery.

44 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

1.73 Schedule 2 to the instrument amends the exempt specimens list by including specimens derived from the Commonwealth Northern Prawn Fishery. The committee's research indicates that the fishery is a commercial fishery, and that the fishery is managed by the Commonwealth.<sup>47</sup> Consequently, it appears that the requirement in subsection 303DC(1A) of the EPBC Act would apply to the making of the instrument.

1.74 In relation to this matter, the explanatory statement explains that a strategic assessment under the provisions of Part 10 of the EPBC Act is required for fisheries managed under the *Fisheries Management Act 1991*. It also indicates that the management plan for the Commonwealth Northern Prawn Fishery was assessed under the EPBC Act in January 2006.<sup>48</sup> However, neither the instrument nor the explanatory statement appears to indicate whether the outcomes of this or another assessment were 'primarily relied on' in making the instrument.

**1.75 The committee requests the minister's advice as to whether an assessment in relation to the Commonwealth Northern Prawn Fishery was 'primarily relied on' in making the instrument, such as would satisfy subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*.**

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47 See <https://www.afma.gov.au/fisheries/northern-prawn-fishery>. The website indicates that the Northern Prawn Fishery is a commercial fishery managed by the Australian Fisheries Management Authority.

48 Explanatory statement, p. 1.

## Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018

<b>FRL No.</b>	F2018L01611 <sup>49</sup>
<b>Purpose</b>	Modifies the operation of the Lakes Ordinance 1976 as it applies to national land.
<b>Authorising legislation</b>	<i>Seat of Government (Administration) Act 1910</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 28 November 2018). Notice of motion to disallow must be given by 28 May 2018. <sup>50</sup>

### No invalidity clause<sup>51</sup>

1.76 The Schedule to the National Lands Ordinance 1989 (Lands Ordinance) adopts, modifies and applies certain Australian Capital Territory (ACT) ordinances which existed prior to ACT self-government to areas of 'national land' in the ACT. This instrument changes the way in which the Lands Ordinance modifies and applies the Lakes Ordinance 1976 (Lakes Ordinance) to areas of national land.

1.77 Modified subsection 51(1) of the Lakes Ordinance sets out which ministerial decisions made under the Lakes Ordinance may be reviewed by the Administrative Appeals Tribunal (AAT). Under subsection 51(2), the minister must notify the person affected by a reviewable decision in writing within 28 days of the decision being made. Modified subsection 51(3) of the Lakes Ordinance states that such a notice must inform the person affected by the decision that they may request a statement of reasons for the decision, and apply to the AAT for review of the decision. However, modified subsection 51(4) provides that the validity of a reviewable decision is not affected by the failure of a notice to comply with the notification requirements in subsection 51(3).

1.78 A legislative provision that indicates that an act done or a decision made in breach of a statutory requirement or administrative law norm does not result in the invalidity of that act or decision may be described as a 'no-invalidity' clause. In this instance, the inclusion of a no-invalidity clause may mean that there would be no

49 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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)(c).

consequences for a failure by the minister to notify an applicant of the reasons for an adverse decision, or the availability of review. Where such a notice is not provided, the applicant may remain unaware of their review rights, and may consequently lose the opportunity to have the adverse decision reconsidered by a court or tribunal. The committee would therefore expect a sound justification for the use of no-invalidity clause to be provided in the explanatory statement. In this regard, the explanatory statement does not appear to provide any such justification.

**1.79 The committee requests the minister's advice as to why a failure to provide notice to an applicant of the availability of review of certain decisions should not affect the validity of the decisions.**

## Australian Radiation Protection and Nuclear Safety Regulations 2018

<b>FRL No.</b>	F2018L01694 <sup>52</sup>
<b>Purpose</b>	To give effect to a number of matters under the <i>Australian Radiation Protection and Nuclear Safety Act 1998</i> , including the functions of the CEO of the Australian Radiation Protection and Nuclear Safety Agency, the Radiation Health and the Nuclear Safety Advisory Council and advisory committees, the requirements for controlled facilities, persons and apparatuses, and various licensing and safety requirements.
<b>Authorising legislation</b>	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>53</sup>

### Unclear basis for determining fees<sup>54</sup>

1.80 The instrument prescribes a number of matters necessary or convenient to give effect to the *Australian Radiation Protection and Nuclear Safety Act 1998*, including licences for facilities and sources. Division 4 of Part 5 of the instrument sets out application fees relating to various facility and source licences. While the explanatory statement indicates that certain fees are based on risks to persons and the environment,<sup>55</sup> it provides no further information regarding the basis on which the fees have been imposed.

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

52 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

55 Explanatory statement, p. 10.

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

**1.83 The committee requests the minister's advice as to the basis on which the fees set out in Division 4 of Part 5 of the instrument have been calculated.**



## CASA EX159/18 — Authorised Flight Examiners Exemption 2018

<b>FRL No.</b>	F2018L01636 <sup>56</sup>
<b>Purpose</b>	Permits a flight examiner who certified a person under the Civil Aviation Safety Regulations 1998 to conduct a flight test for that person in certain circumstances.
<b>Authorising legislation</b>	<i>Civil Aviation Safety Regulations 1998</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 4 December 2018). Notice of motion to disallow must be given by 3 June 2019. <sup>57</sup>

### Merits review<sup>58</sup>

1.84 Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to be satisfied that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

1.85 Section 5 of the instrument provides that a flight examiner to whom the instrument applies may apply to the Civil Aviation Safety Authority (CASA) for authorisation to conduct a flight test. CASA may grant the authorisation if satisfied that another flight examiner is not reasonably available to conduct the test.

1.86 The explanatory statement explains that a decision by CASA under section 5 would be subject to informal review within CASA, and may be the subject of a complaint to the CASA Industry Complaints Commissioner (ICC). It also indicates that an affected person may seek judicial review.<sup>59</sup> However, the committee does not generally consider internal review, complaints mechanisms such as the ICC or judicial review to be adequate substitutes for independent merits review.

1.87 In relation to independent merits review by the Administrative Appeals Tribunal (AAT), the explanatory statement provides that:

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56 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

59 Explanatory statement, p. 3.

As presently drafted, the Act, and regulations under the Act, do not enable such a decision to be subject to review under the *Administrative Appeals Tribunal Act 1975*. However, in light of CASA's intended beneficial operation of the instrument, CASA considers the arrangement appropriate, and does not consider that the arrangement in section 5 unduly makes the rights of affected persons dependent upon administrative decisions that are not subject to independent merits review.<sup>60</sup>

1.88 The committee notes the view that the enabling legislation does not currently permit review by the AAT of decisions made by CASA under section 5 of the instrument. However, the committee does not consider this to be sufficient justification for excluding independent merits review. Where an instrument excludes or fails to provide for independent merits review, the committee expects the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. No such grounds are identified in the explanatory statement.

1.89 The committee also notes that it raised similar concerns in relation to decisions made under CASA EX111/18 – English Language Proficiency Assessments Exemption 2018 (English Language Exemption).<sup>61</sup> In its comments on that instrument, the committee noted that relevant jurisprudence<sup>62</sup> suggests that the decisions are subject to merits review, and that the *Administrative Appeals Tribunal Act 1975* does not appear to preclude merits review in relation to such decisions.<sup>63</sup> In response, the minister advised that the decisions would be subject to merits review by the AAT, and undertook to amend the explanatory statement to reflect this position. This is considered in the committee's concluding comments on the English Language Exemption.<sup>64</sup> Decisions made under section 5 of the present instrument appear to be similar to those in the English Language Exemption. Consequently, despite the view expressed in the explanatory statement to the present instrument, it would appear that decisions under section 5 of the present instrument would similarly be subject to independent merits review by the AAT.

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60 Explanatory statement, p. 3.

61 [F2018L01214]. See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 10-12; *Delegated Legislation Monitor 14 of 2018*, pp. 10-13;

62 See, for example, *Re Seaview Lord Howe Pty Ltd and Civil Aviation Authority* (1995) 38 ALD 422.

63 See Senate Standing Committee on Regulations and Ordinates, *Delegated Legislation Monitor 14 of 2018*, pp. 10-13.

64 See paragraphs [2.22]-[2.23] below.

**1.90** In light of the minister's advice in relation to the CASA EX111/18 – English Language Proficiency Assessments Exemption 2018,<sup>65</sup> the committee requests the minister's detailed advice as to whether decisions to approve, or refuse to approve, a flight examiner to conduct a flight test are subject to independent merits review.

**1.91** If such decisions are not subject to independent merits review, the committee requests the minister's more detailed advice as to the characteristics of the decisions that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

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65 See paragraphs [2.22]-[2.23] below.

## Charter of the United Nations (Sanctions—Mali) Regulations 2018

<b>FRL No.</b>	F2018L01614 <sup>66</sup>
<b>Purpose</b>	Implements the decision of the United Nations Security Council to impose targeted financial sanctions in relations to persons or entities designated by the Mali Sanctions Committee.
<b>Authorising legislation</b>	<i>Charter of the United Nations Act 1945</i>
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 29 November 2018). Notice of motion to disallow must be given by 29 May 2019. <sup>67</sup>

### Strict liability<sup>68</sup>

### Significant matters in delegated legislation<sup>69</sup>

1.92 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments impose offences of strict liability (which negates the requirement to prove fault), this infringement on a fundamental protection of the criminal law is justified.

1.93 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).

1.94 The instrument gives effect to the decision of the United Nations Security Council<sup>70</sup> to impose targeted financial sanctions on persons or entities designated by

66 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

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

70 United Nations Security Council Resolution 2374 (2017).

the Mali Sanctions Committee to have engaged in, been complicit in, or responsible for actions or policies that threaten the peace, security or stability of Mali.<sup>71</sup>

1.95 Section 5(1) of the instrument prohibits a person from making an asset available to, or for the benefit of, a designated entity in circumstances that are not authorised by a permit. Section 6(1) prohibits a person from holding a controlled asset and using it, or allowing it be used, in circumstances that are not authorised by a permit.

1.96 Section 27 of the *Charter of the United Nations Act 1945* (Charter of the UN Act) makes it an offence to contravene a prohibition of the sanctions enforcement law. This includes the prohibitions in sections 5 and 6 of the present instrument. Such offences are punishable on conviction by imprisonment of up to 10 years, a fine, or both.<sup>72</sup>

1.97 Subsections 5(2) and 6(2) of the instrument provide that strict liability applies to the question of whether the relevant conduct was authorised by a permit. The explanatory statement to the instrument explains that:

The application of strict liability to this element of the prohibition means that the prosecution will only need to prove that a permit does not exist. The defendant will not be able to argue that the conduct has been permitted in some other way, for example through a statement by the Minister which could be taken as de facto authorisation to engage in conduct that is prohibited under the Act.<sup>73</sup>

1.98 In a criminal law offence, proving fault is usually a basic requirement, but offences of strict liability remove the fault element that would otherwise apply. This means that a person could be punished for doing or failing to do something whether or not they have a guilty intent. This should only occur in limited circumstances.

1.99 The explanatory statement does not appear to contain a justification for the application of strict liability. The statement of compatibility explains that:

The purpose of this provision is to prevent a spurious defence that a statement of the Minister could be taken as de facto authorisation to engage in conduct that is prohibited under the Charter of the United Nations Act 1945; either the permit exists or it does not.<sup>74</sup>

1.100 The committee notes the advice that the purpose of applying strict liability to elements of the offences is to prevent the use of a spurious defence regarding

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71 Explanatory statement, p. 1.

72 *Charter of the United Nations Act 1945*, section 27(3).

73 Explanatory statement, pp. 1-2.

74 Explanatory statement, pp. 11-12.

whether the minister has authorised the relevant conduct.<sup>75</sup> However, in the absence of further explanation, it remains unclear to the committee how requiring proof of fault in relation to paragraphs 5(1)(b) and 6(1)(c) of the instrument would undermine deterrence. It also remains unclear to the committee what the legitimate grounds are for penalising persons lacking fault in respect of these elements, noting that the relevant penalty may be ten years imprisonment.

1.101 More broadly, the committee is concerned about the use of this instrument, rather than primary legislation, to prescribe conduct which constitutes an offence punishable by 10 years imprisonment under the Charter of the UN Act. While the committee is aware that the Charter of the UN Act gives the regulations the power to prescribe offences which are punishable by up to ten years imprisonment, the committee is concerned that the framing of offences subject to a significant custodial penalty is a matter that would be more appropriate for parliamentary enactment rather than inclusion in delegated legislation, which is not subject to the same level of parliamentary scrutiny.

**1.102 The committee requests the minister's advice as to the justification for:**

- **applying strict liability to elements of each of the offences in the instrument. The committee's consideration of the appropriateness of a provision which imposes strict liability is assisted if the advice explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*;<sup>76</sup> and**
- **including offence provisions, which are punishable by up to ten years imprisonment, in delegated legislation, rather than primary legislation.**

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75 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 23.

76 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25.

## Civil Aviation Safety Amendment (Part 91) Regulations 2018

<b>FRL No.</b>	F2018L01783 <sup>77</sup>
<b>Purpose</b>	Amends the Civil Aviation Safety Regulations 1998 to substitute a new Part 91 – General Operating and Flight Rules.
<b>Authorising legislation</b>	<i>Civil Aviation Act 1988</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>78</sup>

### Use of force and detention of persons<sup>79</sup>

1.103 The instrument inserts a new Part 91 into the Civil Aviation Safety Regulations 1998 (CASR). The new Part prescribes general operating and flight rules. New section 91.220 provides that the operator or pilot in command of an aircraft may, with such assistance and by the use of such force as is reasonably necessary:

- remove a person or thing from an aircraft before a flight begins;
- restrain a person for the duration of a flight or part of the flight;
- seize a thing on the aircraft for the duration of a flight or part of the flight;
- place a person on the aircraft in custody; or
- detain a person or thing until the person or thing can be released into the control of an appropriate authority.

1.104 In order to exercise these powers, the operator or pilot must first believe that to do so is necessary for the safety of the aircraft, a person on the aircraft or a person or property on the ground or water.

1.105 New section 91.225 further provides that a crew member of an aircraft may, without warrant, arrest a person on the aircraft if:

77 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

79 Scrutiny principles: Senate Standing Orders 23(3)(b) and (d).

- the crew member believes on reasonable grounds that the person has been, is, or will be involved in the commission of an offence against the *Civil Aviation Act 1988* (enabling Act) or the CASR; and
- the purpose of the arrest is to ensure the safety of the aircraft or its passengers, crew or cargo or otherwise for the purposes of the enabling Act or the CASR; and
- if the crew member is not the pilot in command of the aircraft, the pilot has authorised the crew member to arrest the person without warrant.

1.106 The pilot in command of the aircraft must ensure that, as soon as practicable after the end of the flight, the person arrested is delivered into the custody of a constable (if the flight ends in Australia) or equivalent person (if the flight ends in a country other than Australia).

1.107 The committee considers that the powers in sections 91.220 and 91.225 have the potential to trespass on individual rights and liberties, and appear to be significant powers that might be more appropriately included in primary rather than delegated legislation.

1.108 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police. The Guide also states that where it is necessary to confer arrest powers on persons other than police, these powers should not exceed the limits, or contain fewer safeguards, than those set out in Part IAA, Division 4 of the *Crimes Act 1914*.<sup>80</sup> In this respect, the committee would expect the inclusion of arrest powers (including powers to restrain a person or place a person in custody) to be accompanied by a comprehensive justification in the explanatory materials.

1.109 In this instance, the explanatory statement contains no such justification. However, the statement of compatibility explains that any force:

must be exercised in accordance with criteria that are reasonable and necessary linked to ensuring the safety of aviation and the enforcement of the safety regulatory scheme under the Act. The use of force is limited to force that is "reasonable and necessary", either on the terms of the powers in regulation 91.220, or by application of relevant provisions of the *Crimes Act 1914* in relation to the powers in regulation 91.225...Any use of force that is neither unreasonable or unnecessary would be subject to the ordinary criminal law.<sup>81</sup>

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80 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 101.

81 Statement of compatibility, p. 33.



1.110 In relation to the powers of detention, the statement of compatibility further explains that:

The power...may only be exercised if the pilot in command of the relevant aircraft believes that the detention is necessary for the safety of: an aircraft, occupants of an aircraft, or persons or property on the ground. The limitation on the rights of persons is therefore directly linked to the safety of the aircraft, other persons or property.

...

The power of a pilot in command or operator of an aircraft to detain a person in the prescribed interests of safety is considered reasonable, necessary and proportionate given the potentially severe consequences of unsafe actions on aircraft and the absence of other authorities to detain persons.<sup>82</sup>

1.111 However, the statement of compatibility does not contain an explanation of the circumstances in which it is envisaged that it may be necessary to use force, or the circumstances in which it may be necessary to detain a person. Moreover, other than to note that only such force that is 'reasonable and necessary' may be used and that the powers of arrest are subject to the *Crimes Act 1914*, the statement of compatibility does not appear to discuss any safeguards in place with respect to the use of force and the powers of detention, including any training required of persons by whom such powers are exercised.

1.112 The committee further notes that neither the explanatory statement nor the statement of compatibility appears to explain why it is necessary and appropriate for the operator or pilot in command of an aircraft to use 'such assistance...as is reasonably necessary' in the exercise of powers under section 91.220. Moreover, no explanation is provided as to the circumstances in which assistance may be necessary, or as to the persons who might be called on to assist. Additionally, the committee notes that the instrument does not appear to place any limits on the persons who may assist a pilot or operator in the exercise of their powers.

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

- **the circumstances in which it is envisaged that force would be used in the exercise of powers under sections 91.220 and 91.225;**
- **the circumstances in which it is envisaged that a person would be detained or placed in custody under those sections, and the likely duration of the detention;**
- **the training, if any, in use of force and detention powers that pilots and crew undertake;**

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82 Statement of compatibility, pp. 33-34.

- the circumstances in which it is envisaged that persons would be called on to assist an operator or a pilot in the exercise of powers under section 91.220; and
- the types of persons it is envisaged may be called on to assist an operator or a pilot in the exercise of those powers, and what training, if any, such persons would have in the use of force.

**1.114** The committee also requests the minister's advice as to why it is considered necessary and appropriate to include powers of arrest without warrant, and powers to remove persons from aircraft, restrain persons, and place persons in detention or custody, in delegated legislation.

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### Reversal of evidential burden of proof<sup>83</sup>

1.115 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

1.116 With reference to this matter, the committee notes that the instrument inserts a number of offence-specific defences into the CASR. Each of these reverses the evidential burden of proof.<sup>84</sup> The committee notes that, in each case, the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter). Nevertheless, the committee expects any such reversal of the burden of proof to be justified.

1.117 The explanatory statement provides that it is appropriate to reverse the evidential burden of proof because the relevant provisions relate to matters that are peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.<sup>85</sup> The statement of compatibility to each instrument also provides a comprehensive justification for each reversal of the burden of proof.<sup>86</sup>

1.118 The committee notes that while many of the specified matters would appear to meet the test set out in the Attorney-General's Department's *Guide to Framing*

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

84 Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

85 Explanatory statement, p. 7.

86 Statement of compatibility, pp. 22-32.

*Commonwealth Offences*,<sup>87</sup> it is not clear to the committee that this would be the case for all of the defences. For example, new section 91.545 provides that it is an offence, applicable to the operator and the pilot of an aircraft, where a person is assigned a seat or berth on the aircraft and the seat or berth is not fitted with a seatbelt or shoulder harness, and the aircraft begins a flight. Subsection 91.545(2) provides that the offence does not apply if circumstances prescribed by the Part 91 Manual of Standards apply in relation to the carriage of the relevant person for the flight. This appears to be a largely factual matter, which may not be peculiarly within the knowledge of the defendant.<sup>88</sup>

1.119 A number of other offence-specific defences also appear to relate to factual matters, or to matters which would be within the knowledge of a third party.

**1.120 The committee draws to the attention of the minister and the Senate the inclusion in the instrument of a number of offence-specific defences which reverse the evidential burden of proof, including in circumstances where relevant matters may not be peculiarly within the knowledge of the defendant.**

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### **Incorporation**<sup>89</sup>

1.121 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 to indicate how it may be obtained.

1.122 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

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

88 In this respect, the committee notes that the statement of compatibility states that the matters in subsection 91.545(2) may be significantly more difficult for the prosecution to disprove than for the defendant to establish. However, the committee notes that, to justify including an offence-specific defence, the matters should also be peculiarly within the knowledge of the defendant.

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

committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>90</sup>

1.123 With reference to these matters, the committee notes that the instruments appear to incorporate a number of documents, including the Chicago Convention, manuals of standards, training and checking manuals, Aeronautical Information Publications, expositions and flight manuals. The explanatory statement provides a comprehensive description of each type of incorporated document, and indicates the manner in which it is incorporated.

1.124 The explanatory statement also indicates where the incorporated documents may be obtained. In most cases, the documents may be obtained free of charge (for example, through a listed website) or made available for viewing at CASA offices. However, the explanatory statement indicates that expositions and operations manuals would not be publicly available. In this respect, the explanatory statement explains that such documents:

are proprietary to the operator and will generally include commercial in confidence information about the operator's business. The incorporated requirements of an exposition or manual are at the operator-specific level and apply only to the operator and its personnel. Further, the operator is under obligations to make the exposition and manual available to its personnel who have obligations under the document.<sup>91</sup>

1.125 While noting this information, the committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely, and it considers all persons otherwise interested in the law should also be able to have access to its terms.

**1.126 The committee draws the Senate's attention to the apparent lack of free access to certain documents incorporated by the instrument for parties who might be affected by, or otherwise interested in, the law.**

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90 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

91 Explanatory statement, pp. 4-5.

## Customs Amendment (Product Specific Rule Modernisation) Regulations 2018

<b>FRL No.</b>	F2018L01755 <sup>92</sup>
<b>Purpose</b>	Repeals provisions relating to product specific rules for certain trade agreements, consequential on the enactment of the <i>Customs Amendment (Product Specific Rule Modernisation) Act 2018</i> .
<b>Authorising legislation</b>	<i>Customs Act 1901</i>
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>93</sup>

### Consultation<sup>94</sup>

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

1.128 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>95</sup>

1.129 In this instance, the explanatory statement notes that the instrument is consequential to amendments made to the *Customs Act 1901* (Customs Act) by the *Customs Amendment (Product Specific Rule Modernisation) Act 2018* (PSR Modernisation Act). It further explains that the amendments do not change the

92 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

95 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

operation of any of the product specific rules, but instead are 'an administrative change for consistency purposes'.

1.130 While the changes implemented by the instrument may be administrative in nature, the explanatory statement does not explicitly address whether any consultation was undertaken, or explain why no such consultation was undertaken.

**1.131 The committee requests the minister's advice as to:**

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

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

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## **Incorporation**<sup>96</sup>

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

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

1.134 The manner in which the material is incorporated into the instrument must be authorised by legislation.

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

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

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

overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

1.137 The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. This enables persons interested in or affected by an instrument to understand its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>97</sup>

1.138 With reference to the above, the committee notes that the instrument incorporates the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. However, neither the instrument nor the explanatory statement indicates the manner in which this document has been incorporated.

**1.139 The committee requests the minister's advice as to the manner in which the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 is incorporated; and requests that the explanatory statement be amended to include this information.**

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97 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

## Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018

<b>FRL No.</b>	F2018L01723 <sup>98</sup>
<b>Purpose</b>	Establishes legislative authority for a spending activity administered by the Department of Foreign Affairs and Trade.
<b>Authorising legislation</b>	<i>Financial Framework (Supplementary Powers) Act 1997</i>
<b>Portfolio</b>	Finance
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>99</sup>

### Merits review<sup>100</sup>

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

1.141 The instrument establishes legislative authority for government expenditure on the Emerging Markets Impact Investment Fund (EMIFF). The explanatory statement indicates that the EMIFF will make investments in, and provide technical assistance to, funds or companies that finance small and medium enterprises in countries where the government provides development assistance, 'based on an open, competitive process'.<sup>101</sup> It further provides that:

The Investment Committee will act as an independent decision-maker regarding the selection and terms of investments and technical assistance provided through the EMIFF. In line with standard practice for the Australian Government's aid program, there will be no provision for the independent review of funding decisions.<sup>102</sup>

98 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

101 Explanatory statement, p. 4.

102 Explanatory statement, p. 5.



1.142 The committee appreciates that funding and investment by the EMIFF may reflect established practice in Australia's aid program. However, the committee considers that, where merits review is excluded, the explanatory statement should expressly identify established grounds for excluding merits review by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. The committee notes that no such grounds have been identified in this instance.

**1.143 The committee requests the minister's more detailed advice as to the characteristics of funding and investment decisions made by the Emerging Markets Impact Investment Fund that would justify excluding independent review, by reference to the established grounds for excluding review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

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### **Parliamentary scrutiny: ordinary annual services of government<sup>103</sup>**

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

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

1.146 The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.<sup>104</sup> In

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

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

accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation Act as an 'ordinary annual service of the government', despite being spending on new policies.

1.147 The committee's considerations in this regard are set out in its Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations.<sup>105</sup>

1.148 As outlined above, the instrument establishes authority for government spending on the EMIFF. The explanatory statement indicates that the EMIFF was announced on 14 November 2017, and will be implemented over 10 years from 2018-19 to 2028-29.<sup>106</sup> The explanatory statement further provides that:

Funding of \$40 million for the EMIFF was included in the 2018-19 Budget for a period of four years commencing in 2018-19...This item sits within Program 1.2: Official Development Assistance – Administered, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.8, Foreign Affairs and Trade portfolio*.<sup>107</sup>

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

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

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105 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/FFSP\\_Regulations\\_1997](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997).

106 Explanatory statement, pp. 3-4.

107 Explanatory statement, p. 4.

## Higher Education Support (Parapharm Pty Ltd) Higher Education Provider Approval Revocation 2018

<b>FRL No.</b>	F2018L01835 <sup>108</sup>
<b>Purpose</b>	Notifies Parapharm Pty Ltd of the revocation of its approval as a higher education provider, and repeals Higher Education Provider Approval No. 2 of 2014.
<b>Authorising legislation</b>	<i>Higher Education Support Act 2003</i>
<b>Portfolio</b>	Education and Training
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>109</sup>

### Consultation<sup>110</sup>

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

1.152 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>111</sup>

1.153 With regard to these matters, the committee notes that, under the heading of consultation, the explanatory statement provides that:

The TEQSA National Register confirms that Parapharm Pty Ltd has ceased to be registered as a higher education provider, and any decisions by TEQSA to refuse an application to renew its registration or to cancel its registration, had not been set aside or quashed, and were no longer

108 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

111 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

subject to review. Further, the department's records show that Parapharm Pty Ltd is no longer providing higher education to students. No students will be affected by the Instrument and Parapharm Pty Ltd is the only higher education provider affected by the Instrument.<sup>112</sup>

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

1.155 In this case, the explanatory statement explains the basis on which the instrument was made (that is, based on information in the National Register and in the department's records). However, it does not describe the consultation that was undertaken in relation to the instrument, or explain why no consultation was undertaken.

**1.156 The committee requests the minister's advice as to:**

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

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

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112 Explanatory statement, p. 2.

## Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2018

<b>FRL No.</b>	F2018L01610 <sup>113</sup>
<b>Purpose</b>	Creates and updates certain country-specific guidelines and introduces a 'reasonableness' standard as part of importer or processor's due diligence.
<b>Authorising legislation</b>	<i>Illegal Logging Prohibition Act 2012</i>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 28 November 2018). Notice of motion to disallow must be given by 28 May 2019. <sup>114</sup>

### Incorporation<sup>115</sup>

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

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

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

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

1.161 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the instrument commences, or at a time before its commencement. However, subsection 14(2) provides that (subject to below) such other documents may not be incorporated as in

113 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides subsection 14(2) to specifically allow the documents to be incorporated in the instrument as in force or existence from time to time.

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

1.163 The committee therefore expects an instrument or its explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>116</sup>

1.164 With reference to these requirements, the committee notes that items 6 to 8 of Schedule 1 to the instrument appear to incorporate the following documents:

- Country specific guidelines for Indonesia, co-endorsed by the Government of Australia and the Government of Indonesia on 1 October 2018;
- Country specific guidelines for Malaysia, co-endorsed by the Government of Australia and the Government of Malaysia on 10 March 2017; and
- Country specific guidelines for the Republic of Korea, co-endorsed by the Government of Australia and the Government of the Republic of Korea, on 26 June 2018.

1.165 However, neither the instrument nor its explanatory statement appears to indicate the manner in which the documents identified above have been incorporated, or where the documents can be freely accessed.

**1.166 The committee requests the minister's advice as to:**

- **the manner in which the country specific guidelines identified above are incorporated into the instrument; and**
- **how these documents are or may be made readily and freely available to persons interested in or affected by the instrument.**

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116 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

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

## Immigration (Guardianship of Children) Regulations 2018

<b>FRL No.</b>	F2018L01708 <sup>117</sup>
<b>Purpose</b>	Provides for a range of matters in relation to the custodianship of non-citizen minors in Australia, including duties and obligations applying to custodians, state governments, state authorities and other persons; placement and transfer of non-citizen minors; and the application of state child welfare laws.
<b>Authorising legislation</b>	<i>Immigration (Guardianship of Children) Act 1946</i>
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>118</sup>

### Significant matters in delegated legislation<sup>119</sup>

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

1.169 The instrument was made under the *Immigration (Guardianship of Children) Act 1946* (the Act). The Act provides for the minister to become the legal guardian of non-citizen children in certain circumstances. Section 12 of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed to give effect to the Act.<sup>120</sup>

1.170 In accordance with section 12 of the Act, Part 2 of the instrument sets out the principles which must be observed in deciding whether to direct a non-citizen under the age of 18 to become the minister's ward. Section 6 provides that such a

117 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

120 Such regulations may include, but are not limited to, prescribing principles to be observed in deciding whether the child is to become the minister's ward under section 4AA of the Act (paragraph 12(aa)) and in placing children with custodians (paragraph 12(a)).



direction must not be given unless the relationship between the child and adult relative has broken down irretrievably, and the direction is necessary to protect the child from 'moral danger', enable the child to have the benefit of adequate direction and guidance, or for any other reason that the minister or delegate considers to be in the interests of the child.

1.171 The committee notes that the instrument has the effect of prescribing the grounds on which a child may become the ward of the minister. As such, the instrument could be said to affect the rights and interests of non-citizen children in a significant way. Whilst paragraph 12(a) of the Act provides that regulations can be made for this purpose, it is unclear to the committee why such matters should not be included in primary legislation.

**1.172 The committee requests the minister's advice as to why significant matters relating to the circumstances in which a non-citizen child may become the ward of the minister should be included in delegated legislation, rather than primary legislation.**

## Lands Acquisition Amendment Regulations 2018

<b>FRL No.</b>	F2018L01647 <sup>121</sup>
<b>Purpose</b>	Clarifies interest rates for the purposes of calculating interest payable under the <i>Lands Acquisition Act 1989</i> .
<b>Authorising legislation</b>	<i>Lands Acquisition Act 1989</i>
<b>Portfolio</b>	Finance
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 4 December 2018). Notice of motion to disallow must be given by 3 June 2019 <sup>122</sup>

### Consultation<sup>123</sup>

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

1.174 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>124</sup>

1.175 With reference to these requirements, the committee notes that, under the heading of consultation, the explanatory statement provides that:

The office of Best Practice Regulation (OBPR) was also consulted...on the Amendment Regulations. The OBPR considered that any amendments to clarify the interest rate would be minor and that no Regulatory Impact Statement (RIS) was required.<sup>125</sup>

121 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

124 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

125 Explanatory statement, p. 4.

1.176 No further information is provided as to any consultation undertaken in relation to the instrument.

1.177 In this regard, the committee notes that requirements regarding the preparation of a regulatory impact statement (RIS) (including any engagement or consultation with the Office of Best Practice Regulation) are separate to the requirements of the Legislation Act in relation to consultation. As set out in the committee's *Guideline on consultation*:

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

**1.178 The committee requests the minister's advice as to:**

- **whether any consultation was undertaken in relation to the instrument (that is, beyond consultation with the Office of Best Practice Regulation) and if so, the nature of that consultation; or**
- **whether no consultation was undertaken and if not, why not.**

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

## National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2018

<b>FRL No.</b>	F2018L01653 <sup>126</sup>
<b>Purpose</b>	Revokes the National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 (No. 2), and sets out knowledge, qualifications and experience requirements for applicants for registration as a greenhouse and energy auditor.
<b>Authorising legislation</b>	<i>National Greenhouse and Energy Reporting Regulations 2008</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 4 December 2018). Notice of motion to disallow must be given by 3 June 2019. <sup>127</sup>

### Merits review<sup>128</sup>

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

1.181 The instrument sets out the way in which the requirements prescribed by the National Greenhouse and Energy Reporting Regulation 2008 for registration as a greenhouse and energy auditor may be met.

1.182 Subsection 13(4) of the instrument provides that the Clean Energy Regulator (the Regulator) has the power to determine whether training undertaken by an applicant is sufficient to constitute 'knowledge of assurance'. This is a necessary precondition to registration as a Category 2 auditor.

1.183 It appears to the committee that a decision by the Regulator under subsection 13(4) involves at least an element of discretion. Moreover, it appears that this decision has the potential to affect the interests of individuals; specifically, their capacity to register as a Category 2 auditor. However, neither the instrument nor its explanatory statement appears to indicate whether decisions made under subsection 13(4) of the instrument are reviewable.

126 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

1.184 The committee notes that subsection 56(j) of the *National Greenhouse and Energy Reporting Act 2007* (principal Act) provides that decisions to refuse to register an individual in the register of greenhouse and energy auditors kept under section 75A of the principal Act are reviewable by the Administrative Appeals Tribunal. However, in the absence of clarification in the explanatory statement, it is unclear whether that provision would extend to decisions made under subsection 13(4) of the present instrument.

**1.185 The committee requests the minister's advice as to:**

- **whether decisions by the Clean Energy Regulator under subsection 13(4) of the instrument, to determine whether an individual's training is sufficient to constitute 'knowledge of assurance', are subject to independent merits review; and**
- **if not, the characteristics of those decision which would justify excluding independent merits review.**

## National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10)

<b>FRL No.</b>	F2018L01646 <sup>129</sup>
<b>Purpose</b>	Makes changes to pharmaceuticals and related conditions prescribed under the special arrangements for pharmaceutical benefits for highly specialised drugs.
<b>Authorising legislation</b>	<i>National Health Act 1953</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 4 December 2018). Notice of motion to disallow must be given by 3 June 2018. <sup>130</sup>

### Incorporation<sup>131</sup>

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

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

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

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

129 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

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

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

1.191 The committee therefore expects an instrument or its explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>132</sup>

1.192 With reference to these matters, the committee notes that the instrument appears to incorporate the Asthma Control Questionnaire. However, neither the instrument nor its explanatory statement appears to indicate the manner in which the questionnaire is incorporated, or how it may be accessed free of charge.

**1.193 The committee requests the minister's advice as to the manner in which the Asthma Control Questionnaire is incorporated by the instrument, and how it may be accessed free of charge. The committee also requests that the explanatory statement be amended to include this information.**

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132 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

## Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018

<b>FRL No.</b>	F2018L01730 <sup>133</sup>
<b>Purpose</b>	Makes various changes to controls on the supply and use of certain scheduled substances, and amendments to streamline the operation of the refrigeration, air conditioning and fire protection industry end use permit schemes.
<b>Authorising legislation</b>	<i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>134</sup>

### Incorporation<sup>135</sup>

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

1.195 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*.<sup>136</sup>

133 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

136 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).



1.196 With reference to these matters, the committee notes that the instrument incorporates the following standards:

- AS/NZS ISO 817:2016 *Refrigerants—Design and Safety Classification*;
- AS/NZS 5149.1:2016 *Refrigerating systems and heat pumps—Safety and environmental requirements—Part 1: Definitions, classification and selection criteria (ISO 5149-1:2014, MOD)*;
- AS/NZS 5149.2:2016 *Refrigerating systems and heat pumps—Safety and environmental requirements—Part 2: Design, construction, testing, marketing and documentation (ISO 5149-2:2014, MOD)*;
- AS/NZS 5149.3:2016 *Refrigerating systems and heat pumps—Safety and environmental requirements—Part 3: Installation site (ISO 5149-3:2014, MOD)*; and
- AS/NZS 5149.4:2016 *Refrigerating systems and heat pumps—Safety and environmental requirements—Part 4: Operation, maintenance, repair and recovery (ISO 5149-4:2014, MOD)*.

1.197 Item 8 of the instrument inserts a new subsection 326(5) into the Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 (principal Regulations), which provides that a reference to any of these standards is a reference to the standards as in force when the item commenced.

1.198 In relation to access to the incorporated standards, the explanatory statement explains that:

While a fee is charged to purchase the standards in their entirety, licence holders can access key requirements applicable to their work practices through training courses and guidance materials provided by industry and other organisations.<sup>137</sup>

1.199 However, neither the instrument nor the explanatory statement provides any further information regarding access to the incorporated standards.

1.200 The committee appreciates that key users of the instrument (that is, licence holders) may access key requirements in the incorporated standards through training courses and guidance material. However, it is not clear that even the key users of the instrument would be provided with free access to the standards in their entirety. Further, the committee is interested in the broader issue of access for other parties who may be affected by, or interested in, the law.

1.201 The issue of access to material incorporated into the law by reference to external documents, such as Australian and International standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. In 2016 the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament

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137 Explanatory statement, p. 17.

published a detailed report on this issue, comprehensively outlining the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.<sup>138</sup>

1.202 The committee's expectation, at a minimum, is that consideration be given to any means by which the document is or may be made available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the explanatory statements to the instruments.

**1.203 The committee requests the minister's advice as to where each of the standards identified at paragraph [1.196] above may be accessed free of charge; and requests that the explanatory statement be amended to include this information.**

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### **Reversal of evidential burden of proof<sup>139</sup>**

1.204 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

1.205 Item 26 of Schedule 3 to the instrument inserts a new section 304A into the principal Regulations. Subsection 304A(1) makes it an offence of strict liability for a person to make a representation they can provide a service involving the acquisition, disposal, storage, use or handling of an extinguishment agent and, at the time of making the representation, the person:

- does not hold a fire protection industry permit or relevant special circumstances exemption; and
- does not employ, or has not engaged, a person who holds an extinguishment agent handling licence for work of the kind necessary to provide the service.

1.206 Subsection 304A(2) sets out an offence-specific defence, which provides that subsection 304A(1) does not apply if:

- at the time of making the representation, the relevant person has entered into an agreement with a third party to provide the service; and

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

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

- the agreement contains a provision to the effect that the service must be provided by the holder of a fire protection industry permit or relevant special circumstances exemption.

1.207 The defendant bears the evidential burden of proof in relation to this defence.<sup>140</sup>

1.208 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matters) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. The committee also notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences* states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of an offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>141</sup>

1.209 In this instance, the statement of compatibility explains that:

The reversal is justified in this instance, as the matters to be proved (namely that the defendant was the holder of the required permit exemption or employed someone who held the required permit or exemption) are matters that would be in the particular knowledge of the defendant. It is expected that it would not be unreasonably difficult for the defendant to discharge the evidentiary burden.<sup>142</sup>

1.210 However, it appears that this explanation is addressed to the offence in subsection 304A(1) (and arguably also to the offence in subsection 304A(3)), rather than to the offence-specific defence in subsection 304A(2). In this respect, the committee notes that the defence in that subsection relates to the existence and content of an agreement, rather than to whether the defendant or a person in their employ possesses a particular permit or exemption. This issue appears to be repeated in the explanatory statement, which states that:

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140 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

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

142 Statement of compatibility, p. 28.

It is appropriate for this type of offence to put the burden on the defendant to show that they hold the required permit or exemption as this proof can be easily shown and is a matter of public record.<sup>143</sup>

1.211 The committee considers that it would be appropriate to amend the explanatory statement and statement of compatibility to provide an explanation for the reversal of the burden of proof in subsection 304A(2) with reference to the matters specified in the defence (rather than to the matters in subsection 304A(1) which constitute elements of the offence and for which the burden of proof is not imposed on the defendant).

1.212 Further, without further explanation it is not clear to the committee that the matters in subsection 304A(2) would be peculiarly within the knowledge of the defendant. For example, whether a person has entered into an agreement with a third party is a matter of which that third party would also be apprised. Whether an agreement requires services to be performed by a particular person would also be within the knowledge of the third party, and could also be established by considering the content of the agreement. Moreover, the committee notes that where a matter is on the public record, it is less likely to be peculiarly within the knowledge of the defendant and less likely to justify the inclusion of an offence-specific defence.

**1.213 The committee requests the minister's advice as to the justification for reversing the evidential burden of proof in subsection 304A(2). The committee's assessment would be assisted if the minister's response expressly addressed the principles set out in the Attorney-General's *Guide to Framing Commonwealth Offences*.<sup>144</sup>**

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143 Explanatory statement, p. 20.

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

## Public Service Amendment (Miscellaneous Measures) Regulations 2018

<b>FRL No.</b>	F2018L01722 <sup>145</sup>
<b>Purpose</b>	Exempts members of the Fair Work Commission from the APS Code of Conduct, and clarifies operational matters related to the functions of the Merit Protection Commissioner.
<b>Authorising legislation</b>	<i>Public Service Act 1999</i>
<b>Portfolio</b>	Prime Minister and Cabinet
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>146</sup>

### Consultation<sup>147</sup>

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

1.215 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>148</sup>

1.216 With reference to these matters, the committee notes that the explanatory statement provides no information regarding consultation.

#### **1.217 The committee requests the minister's advice as to:**

- **whether any consultation was undertaken in relation to the instrument and if so, the nature of that consultation; or**

145 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

148 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

- **whether no consultation was undertaken and if not, why not.**

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

## Telecommunications Amendment (Access to Mobile Number Information for Authorised Research) Regulations 2018

<b>FRL No.</b>	F2018L01756 <sup>149</sup>
<b>Purpose</b>	Allows for the disclosure of unlisted mobile phone numbers and their associated postcodes as recorded in the Integrated Public Number Database for certain research purposes.
<b>Authorising legislation</b>	<i>Telecommunications Act 1997</i>
<b>Portfolio</b>	Communications and the Arts
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>150</sup>

### Privacy<sup>151</sup>

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

1.220 The instrument amends the Telecommunications Regulations 2001 (principal regulations) to permit the disclosure of unlisted mobile phone numbers and associated postcodes that are recorded in the Integrated Public Number Database (IPND) to various parties for 'permitted research'. 'Permitted research' is defined broadly in the instrument to mean:

- research relevant to public health, including epidemiological research;
- research relating to an electoral matter that is conducted by:
  - a registered political party;
  - a political representative;
  - a candidate in an election for an Australian Parliament or local government authority; or

149 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

- research conducted by the Commonwealth or a Commonwealth entity that will contribute to the development of public policy.<sup>152</sup>

1.221 The statement of compatibility states that 'research entities will be subject to a range of obligations that seek to limit the impact [of the instrument] on the privacy of individuals'.<sup>153</sup> It notes, for example, that:

- all research entities will be required to comply with the Australian Privacy Principles, including those entities which are currently exempt from the *Privacy Act 1988*;<sup>154</sup>
- research entities will be bound by the conditions set out in an authorisation provided by the Australian Communications and Media Authority;<sup>155</sup> and
- research entities must seek the account holder's consent at the beginning of a call, and inform the account holder of their right to withdraw consent at any time during the call.<sup>156</sup>

1.222 The committee acknowledges that the instrument contains a number of relevant safeguards to protect the privacy of individuals. However, given that the instrument potentially enables research entities to contact people who have already elected not to have a listed number due to privacy concerns, it remains unclear to the committee why these measures are considered necessary and appropriate.

**1.223 The committee requests the minister's more detailed advice as to why it considered necessary and appropriate to permit the disclosure of unlisted mobile phone numbers and associated postcodes recorded in the Integrated Public Number Database to research entities for 'permitted research'.**

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### **Strict liability**<sup>157</sup>

1.224 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments impose offences of strict liability (which negates the requirement to prove fault), this infringement on a fundamental protection of the criminal law is justified.

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152 Explanatory statement, p. 25.

153 Explanatory statement, p. 25.

154 New section 5.19 of the principal regulations.

155 New section 5.12 of the principal regulations.

156 New section 5.20 of the principal regulations.

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



1.225 New section 5.36 of the principal regulations<sup>158</sup> sets out strict liability offences for authorised research entities that contravene a condition of their authorisation to access the relevant information, breach an APP or registered APP code, or use or disclose research information for a prohibited purpose. The penalty for each offence is 10 penalty units.

1.226 In a criminal law offence, proving fault is usually a basic requirement, but offences of strict liability remove the fault element that would otherwise apply. This means that a person could be punished for doing or failing to do something whether or not they have a guilty intent. This should only occur in limited circumstances.

1.227 The committee's expectation is that the explanatory statement to an instrument should include a justification for any strict liability offences imposed by the instrument, consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.<sup>159</sup>

1.228 The explanatory statement to the instrument outlines the operation of the offences.<sup>160</sup> However, it does not provide a specific justification for the application of strict liability to the offences.

**1.229 The committee requests the minister's advice as to the justification for the imposition of strict liability to a number of new offences. The committee's consideration of the appropriateness of a provision which imposes strict liability is assisted if the advice explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>161</sup>**

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158 As inserted by item 3 of Schedule 1 to the instrument.

159 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 22-25.

160 Explanatory statement, p. 22.

161 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25.

## Treasury Laws Amendment (Gift Cards) Regulations 2018

<b>FRL No.</b>	F2018L01754 <sup>162</sup>
<b>Purpose</b>	Amends certain parts of the Competition and Consumer Regulations 2010.
<b>Authorising legislation</b>	<i>Competition and Consumer Act 2010</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>163</sup>

### Significant matters in delegated legislation<sup>164</sup>

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

1.231 In 2018, the Australian Consumer Law (ACL), contained in Schedule 2 to the *Competition and Consumer Act 2010* (CCA), was amended to regulate certain matters relating to gift cards, including expiry periods, disclosure of expiry information, and post-supply fees.<sup>165</sup> Section 99A of the ACL defines 'gift card', and section 99D(2) defines 'post-supply fee'.

1.232 Section 99G of the ACL states that regulations may provide that some or all of the provisions do not apply in relation to certain gift cards or persons. More broadly, section 139G of the CCA empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

1.233 The instrument amends the Competition and Consumer Regulations 2010 (principal regulations). New section 89A of the principal regulations specifies that certain articles are not gift cards for the purposes of section 99A of the ACL.<sup>166</sup> These

162 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

165 *Treasury Laws Amendment (Gift Cards) Act 2018*.

166 Proposed section 89A.

include articles which are redeemable for goods or services and which may be increased in value after being issued, and articles redeemable in relation to utilities. New section 89B of the principal instrument specifies that certain fees are not post-supply fees for the purposes of section 99D(2) of the ACL.<sup>167</sup> These include certain fees or charges for making a booking, fees or charges or exchanging currencies, fees or charges relating to the reissue of a gift card which has been lost, stolen or damaged, and fees or charges that are payment surcharges.

1.234 The committee is concerned that new sections 89A and 89B of the principal regulations, inserted by the instrument, effectively amend the definition of 'gift card' and 'post-supply fee' in sections 99A and 99D(2) of the ACL.

1.235 The committee has consistently expressed concern about regulatory frameworks in which significant elements of the scheme, or significant changes to the relevant law, are made by delegated legislation, rather than primary legislation. In the committee's view, significant matters such as these are more appropriate for enactment in primary legislation.

1.236 Noting the recent nature of the amendments to primary legislation to implement the new regulatory framework for gift cards, and in the absence of further explanation in the explanatory statement, it is unclear to the committee why it was considered necessary and appropriate to effectively amend the definition of 'gift card' and 'post-supply fee' in Division 3A of Part 3-2 of the ACL by delegated legislation, rather than in primary legislation.

**1.237 The committee requests the minister's advice as to why it is considered necessary and appropriate to alter the definition of 'gift card' and 'post-supply fee' in the Australian Consumer Law by delegated legislation, rather than primary legislation.**

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167 Proposed section 89B.

## Vehicle Standard (Australian Design Rule 4/06 – Seatbelts) 2018

<b>FRL No.</b>	F2019L00026 <sup>168</sup>
<b>Purpose</b>	Prescribes certain requirements for seatbelts.
<b>Authorising legislation</b>	<i>Motor Vehicle Standards Act 1989</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>169</sup>

### Incorporation<sup>170</sup>

1.238 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 to indicate how it may be obtained.

1.239 The committee is concerned to ensure that every person interested in or affected by the law is 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*.<sup>171</sup>

1.240 With reference to these matters, the committee notes that the instrument appears to incorporate a number of documents, including UN resolutions and Australian and international standards. The explanatory statement indicates that the documents are incorporated as in force at the commencement of the instrument, and provides web references to where some of the documents may be accessed free

168 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

171 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

of charge.<sup>172</sup> However, the explanatory statement also indicates that a number of the standards incorporated by the instrument are only available for purchase. It also states that certain key users of the instrument (for example, vehicle manufacturers, seatbelt suppliers and test facilities) would have access to the standards as part of their professional libraries.<sup>173</sup>

1.241 The committee appreciates that key users of the instruments are likely to have access to the incorporated standards as part of their professional libraries. However, the committee is also interested in the broader issue of access for other parties who might be affected by, or interested in, the law.

1.242 The committee notes that it recently raised similar concerns regarding free access to standards incorporated into a number of Australian Design Rules instruments.<sup>174</sup> In response, the minister advised that online viewing of Australian standards for non-commercial use is now available through the Department of Infrastructure, Regional Development and Cities and it would consider options for making the listed incorporated documents available for viewing free of charge.<sup>175</sup> However, it is not clear whether these arrangements would also apply to the standards incorporated by the present instrument.

1.243 In this regard, the committee emphasises that its expectation, at a minimum, is that consideration be given to any means by which the document is, or may be made, available to interested or affected persons. This may be, for example, by noting availability through specific public libraries, or by making the document available for viewing on request. Consideration of this principle and details of any means of access identified or established should be reflected in the explanatory statement to the instrument.

**1.244 The committee requests the minister's advice as to whether the documents incorporated by the instruments may be accessed free of charge, and if so where; and requests that the explanatory statement be amended to include this information.**

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172 Explanatory statement, pp. 3-4.

173 Explanatory statement, p. 4.

174 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 6-8.

175 See paragraphs [2.75] to [2.80] below.

## Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018

<b>FRL No.</b>	F2018L01674 <sup>176</sup>
<b>Purpose</b>	Amends the <i>Water Act 2007</i> to incorporate changes to commitments of Contracting Governments, altered powers of the Murray-Darling Basin Authority and a new review process for the Basin Salinity Management 2030 strategy.
<b>Authorising legislation</b>	<i>Water Act 2007</i>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>177</sup>

### Incorporation<sup>178</sup>

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

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

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

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

176 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

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

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

1.250 The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>179</sup>

1.251 With reference to these matters, the committee notes that the instrument appears to incorporate the Basin Salinity Management (BSM) procedures. In this regard, the explanatory statement explains that some functions 'are to be carried out in accordance with BSM procedures made by the Basin Officials Committee'.<sup>180</sup>

1.252 However, neither the instrument nor the explanatory statement appears to indicate the manner in which the BSM principles are incorporated or where they may be accessed free of charge.

1.253 The committee notes that subclause 40A(3) of the *Water Act 2007* (Water Act) requires the Murray Darling Basin Authority to publish the BSM procedures on its website. However, the committee's secretariat has not been able to locate the procedures online. The committee also notes that the BSM procedures will be made

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179 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

180 Explanatory statement p. 2. The explanatory statement provides that this applies to items 10, 70, 74, 75, 76, 79, 90, 91, 92, 94, 96, 97, 98, 101, 103, 106, 108, 110, 111, 113, 114, 115, 116, 123, 124, 125, 128, 130, 133, 137, 161, 162, 163, 172, and 181.

under new clause 40A of the Water Act. In this respect, the committee notes that the BSM procedures may not yet exist.

1.254 The committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. In this respect, where an instrument incorporates a document—even where that document may have not yet been made—the committee would expect the instrument or its explanatory statement to indicate the manner in which the document is incorporated and how it may be accessed free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, without the need to rely on specialist legal knowledge or advice, or to consult extrinsic material. This is particularly relevant where the incorporated document imposes an obligation to comply with its terms (as in this case, where some functions are to be carried out in accordance with BSM procedures).

**1.255 The committee requests the minister's advice as to:**

- **whether the Basin Salinity Management (BSM) procedures may be accessed free of charge, and if so where;**
- **the manner in which the BSM procedures are incorporated (that is, as in force from time to time or as in force at a particular time); and**
- **if it is intended to incorporate the BSM procedures as in force from time to time, the power relied on to incorporate the BSM procedures in this manner.**

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



## Further response required

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

1.258 Correspondence relating to these matters is published on the committee's website.<sup>1</sup>

## Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018

<b>FRL No.</b>	F2018L01572 <sup>2</sup>
<b>Purpose</b>	Prescribes the Greenhouse and Energy Minimum Standards (GEMS) requirements for certain three phase cage induction motors.
<b>Authorising legislation</b>	<i>Greenhouse and Energy Minimum Standards Act 2012</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 26 November 2018). Notice of motion to disallow must be given by 15 May 2019. <sup>3</sup>

### Access to justice<sup>4</sup>

1.259 In [Delegated Legislation Monitor 15 of 2018](#), the committee requested 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.<sup>5</sup>

1 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

2 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

5 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 4-7.

**Minister's response<sup>6</sup>**

## 1.260 The minister advised:

The use of a copyright notice in this determination is necessary in order to reflect the fact that copyright in the International Electrotechnical Commission (IEC) standards referenced in the document is not owned by the Commonwealth, it is vested in the IEC. The IEC is a not-for-profit, quasi-governmental organisation whose funding comes in part from income from sales of IEC standards. The IEC relies on commercial sales through local licensees, such as SAI Global Limited in Australia, in order to continue its important work in relation to the production of harmonised standards.

The Australian Government accepts that commercial users who have ascertained that they are likely to be covered by the determination (which is possible using the readily publicly available aspects of the determination) would be expected to purchase the referenced IEC standards in order to comply with the GEMS Scheme. The Government recognises that it is not ideal that instruments of this kind incorporate material that may lead users to need to purchase additional documents. As the Committee has noted, the COAG Industry and Skills Council Standards Accessibility (ISCA) Working Group continues to work on solutions to ensure greater access to standards.

However, while the ISCA Working Group work is ongoing, I would draw to the Committee's attention that the Government is not aware of any complaints from the regulated community about its ability to comply with the determination, or about the cost of purchasing the standards referenced in the instrument. In making this Determination the Government consulted with stakeholders, including the regulated community, and the New Zealand Energy Efficiency and Conservation Authority. The adoption of the IEC Standard was a response to stakeholder input. The regulated community has consistently indicated it is comfortable with, and supports this arrangement.

In making this determination, the Government is seeking to balance the need to provide those affected by, or interested in, the determination the ability to ascertain if a product is covered by (or excluded from) the operation of the instrument with the need to protect the legitimate rights of copyright holders to be able to protect their interests in copyright material.

The Government thanks the Committee for its continuing attention to this issue. In the light of the Committee's most recent comments, I will ask the

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6 The minister responded to the committee's comments in a letter dated 20 December 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

Department of the Environment and Energy to review the copyright notice used in this determination, to ensure that notices used in determinations made in the future are as clear as they can be in relation to permitted use of referenced material.

***Committee's comment***

1.261 The committee thanks the minister for this response. The committee notes the minister's advice that the use of the copyright notice in the determination is necessary to reflect the fact that copyright in the International Electrotechnical Commission (IEC) standards referenced in the document is owned by the IEC, rather than the Commonwealth.

1.262 The committee further notes the minister's advice that the regulated community has consistently indicated its support for these arrangements and has not made any complaints about its ability to comply with the determination or meet the costs of purchasing the relevant standard.

1.263 The committee also notes the minister's advice that he will ask the department to review the copyright notice used in the instrument to ensure that such notices are as clear as possible in relation to permitted use of referenced material.

1.264 Nevertheless, the committee remains concerned that every person interested in or affected by the law should be able to readily and freely access and use its full terms, without the risk of breaching copyright. The committee reiterates that it shares the view of the Copyright Law Review Committee that copyright should not exist in legislative instruments,<sup>7</sup> because it may inhibit the capacity of people to access and use the law, and therefore potentially restrict access to justice.

**1.265 The committee reiterates its concern about the impact on access to justice of imposing copyright restrictions on the content of a legislative instrument. The committee therefore requests the minister's further advice as to whether any alternative approaches were considered that would not have required copyrighted material to be reproduced in the instrument.**

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



## Advice only

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

### ASIC Corporations (Amendment) Instrument 2018/1098

<b>FRL No.</b>	F2018L01667 <sup>1</sup>
<b>Purpose</b>	Amends the ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 to expressly provide for the review of decisions made by ASIC under section 7 of the principal instrument by the Administrative Appeals Tribunal.
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>2</sup>

#### Merits review<sup>3</sup>

1.267 This instrument amends the ASIC Corporation (Group Purchasing Bodies) Instrument 2018/751 (principal instrument), to provide for merits review of decisions made by the Australian Securities and Investments Commission (ASIC) under section 7 of that instrument.

1.268 Section 7 of the principal instrument provides that a group purchasing body cannot rely on an exemption in section 5 if ASIC has given the body a notice stating that it cannot rely on the instrument, and ASIC has not subsequently withdrawn the notice.

1.269 When the principal instrument was tabled, the committee expressed concern that merits review might not be available in respect of decisions made under section 7.<sup>4</sup> In response to the committee's concerns, the Assistant Treasurer

1 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, 17 October 2018, pp. 3-4.

confirmed that decisions under section 7 of the principal instrument were not merits reviewable, and undertook to amend the instrument to expressly provide for independent merits review.<sup>5</sup> This instrument implements that undertaking.

**1.270 The committee welcomes the amendments to the ASIC Corporation (Group Purchasing Bodies) Instrument 2018/751 which addresses the committee's concerns about the availability of independent merits review of certain decisions by the Australian Securities and Investment Commission.**

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5 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, 14 November 2018, pp. 74-76.

## Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2018

<b>FRL No.</b>	F2018L01697 <sup>6</sup>
<b>Purpose</b>	Repeal and remake the Australian Radiation Protection and Nuclear Safety (License Charges) Regulations 2000 which are due to sunset on 1 October 2019.
<b>Authorising legislation</b>	<i>Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>7</sup>

### Matters more appropriate for parliamentary enactment<sup>8</sup>

1.271 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 legislation rather than delegated legislation).

1.272 The *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* (Licence Charges Act) imposes annual charges on facility licences and source licences issued under the *Australian Radiation Protection and Nuclear Safety Act 1998*. Subsections 4(2) and 5(2) of the Licence Charges Act provide that the amount of the annual charge is prescribed by the regulations.

1.273 In accordance with subsections 4(2) and 5(2) of the Licence Charges Act, Part 2 of the instrument prescribes the annual charges for facility licences, and Part 3 prescribes the annual charges for source licences.

1.274 The charges under the Licence Charges Act, as set by the instrument, appear to be taxes. In the committee's view, one of the most fundamental functions of the Parliament is to levy taxation. Consequently, while the committee acknowledges that the Licence Charges Act gives the power for the regulations to set the rate of the tax,

6 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

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the committee considers it is more properly the role of Parliament, rather than makers of delegated legislation, to set rates of tax.

**1.275 The committee draws the Senate's attention to the setting of charges (which appear to be taxes) in delegated legislation, which is a matter that the committee considers is more appropriate for parliamentary enactment.**



## CASA EX109/18 — Width of Glider Runway Strip (Temora Aerodrome) Instrument 2018

<b>FRL No.</b>	F2018L01640 <sup>9</sup>
<b>Purpose</b>	Exempts the Temora Shire Council from certain requirements in the Manual of Standards.
<b>Authorising legislation</b>	<i>Civil Aviation Regulations 1998</i> <i>Civil Aviation Safety Regulations 1998</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 4 December 2018). Notice of motion to disallow must be given by 3 June 2019. <sup>10</sup>

### Incorporation<sup>11</sup>

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

1.277 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 a document to provide a description of the 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*.<sup>12</sup>

1.278 With reference to these matters, the committee notes that the instrument appears to incorporate the Aeronautical Information Publication Enroute Supplement (AIP-ERSA). The instrument indicates that the AIP-ERSA is incorporated

9 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

12 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

as in force from time to time.<sup>13</sup> However, neither the instrument nor its explanatory statement indicates where the AIP-ERSA may be accessed free of charge.

1.279 In this instance, the committee secretariat's research indicates that the AIP-ERSA may be accessed free of charge on the Airservices Australia website.<sup>14</sup> Nevertheless, the Legislation Act requires the explanatory statement to an instrument to contain a description of any incorporated document and to indicate how it may be obtained. The committee would therefore expect the explanatory statement to the present instrument to indicate how the AIP-ERSA may be obtained free of charge.

**1.280 The committee draws the Senate's attention to the absence of information in the explanatory statement regarding free access to the Aeronautical Information Publication Enroute Supplement, which appears to be incorporated by the instrument.**

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13 See the note to section 6 of the instrument.

14 <https://www.airservicesaustralia.com/aip/aip.asp>.

## Civil Aviation Safety Amendment – various regulations<sup>15</sup>

<b>FRL No.</b>	F2018L01782, F2018L01784, F2018L01787, F2018L01788, and F2018L01789. <sup>16</sup>
<b>Purpose</b>	Amend various parts of the Civil Aviation Safety Regulations 1998.
<b>Authorising legislation</b>	<i>Civil Aviation Act 1988</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>17</sup>

### Reversal of evidential burden of proof<sup>18</sup>

1.281 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the burden of proof for persons in their individual capacities, the infringement on well-established and fundamental personal legal rights is justified.

1.282 With reference to this matter, the committee notes that the instruments insert a number of offence-specific defences into the Civil Aviation Safety Regulations 1998 (principal regulations). Each of these reverses the evidential burden of proof.<sup>19</sup> The committee notes that, in each case, the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter). Nevertheless, the committee expects any such reversal of the burden of proof to be justified.

15 Civil Aviation Safety Amendment (Part 119) Regulations 2018 [F2018L01787]; Civil Aviation Safety Amendment (Part 121) Regulations 2018 [F2018L01784]; Civil Aviation Safety Amendment (Part 133) Regulations 2018 [F2018L01788]; Civil Aviation Safety Amendment (Part 135) Regulations 2018 [F2018L01782]; Civil Aviation Safety Amendment (Part 138) Regulations 2018 [F2018L01789].

16 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

19 Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

1.283 The explanatory statement to each of the instruments argues that it is appropriate to reverse the evidential burden of proof because the relevant provisions relate to matters that are peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.<sup>20</sup> The committee notes that this appears consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.<sup>21</sup> The statement of compatibility to each instrument also provides a comprehensive justification for each reversal of the burden of proof.<sup>22</sup>

1.284 The committee notes that while many of the specified matters would appear to meet the test set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*,<sup>23</sup> it is not clear to the committee that this would be the case for all of the defences. For example, section 133.240 of the principal regulations (inserted by the Civil Aviation Safety Amendment (Part 133) Regulations 2018) provides that the operator of a rotorcraft commits an offence of strict liability if a passenger is not given a safety briefing, instructions or demonstrations in accordance with the Part 133 of the Manual of Standards. Subsection 133.240 sets out an offence-specific defence, which provides that the offence does not apply in relation to a medical patient on a flight that is a medical transport operation. This appears to the committee to be a largely factual matter, which may not be peculiarly within the knowledge of the defendant. A number of other offence-specific defences also appear to relate to factual matters, or to matters which would be within the knowledge of a third party.

**1.285 The committee draws the attention of the minister and the Senate to the inclusion in the instruments of a number of offence-specific defences which reverse the evidential burden of proof, including in circumstances where the relevant matters may not be peculiarly within the knowledge of the defendant.**

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20 Explanatory statement, Civil Aviation Safety Amendment (Part 121) Regulations 2018, pp. 5-6; explanatory statement, Civil Aviation Safety Amendment (Part 133) Regulations 2018, pp. 2-3, explanatory statement, Civil Aviation Safety Amendment (Part 135) Regulations 2018, p. 3; and explanatory statement, Civil Aviation Safety Amendment (Part 138) Regulations 2018, p. 3.

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

22 Statement of compatibility, Civil Aviation Safety Amendment (Part 121) Regulations 2018, pp. 43-46; Statement of compatibility, Civil Aviation Safety Amendment (Part 133) Regulations 2018, pp. 44-48; Statement of compatibility, Civil Aviation Safety Amendment (Part 135) Regulations 2018, pp. 13-17; Statement of compatibility, Civil Aviation Safety Amendment (Part 138) Regulations 2018, pp. 47-48.

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

## Incorporation<sup>24</sup>

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

1.287 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.<sup>25</sup>

1.288 With reference to these matters, the committee notes that the instruments appear to incorporate a number of documents, including manuals of standards, training and checking manuals, Aeronautical Information Publications, expositions and flight manual instruments. The explanatory statement to each instrument provides a comprehensive description of each type of incorporated document, and indicates the manner in which it is incorporated.

1.289 The explanatory statements also indicate where the incorporated documents may be obtained. In a number of cases, the means of accessing a document free of charge is provided. However, the explanatory statements also indicate that certain documents are only available for a fee, or are unavailable to the public due to copyright or other restrictions. For example, the explanatory statement to the Civil Aviation Safety Amendment (Part 138) Regulations 2018 explains that:

In the case of Annex 2 [to the Chicago Convention], training and checking manuals and operations manuals of aerial work operators, and aircraft flight manual instructions, CASA considers it extremely unlikely that the relevant owner of the document would sell CASA the copyright at a price that would be an effective and efficient use of CASA funds, or otherwise permit CASA to make the document freely available. CASA has incorporated the documents in the instrument because they are appropriate and necessary to give effect to the safety regulatory scheme under Part 138, and because no other, freely available document is available that serves the purpose.<sup>26</sup>

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

25 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

26 Explanatory statement, Civil Aviation Safety Amendment (Part 138) Regulations 2018, p. 8.

1.290 Similar explanations are provided in the explanatory statements to the other instruments.<sup>27</sup>

1.291 While noting this information, the committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. In this regard, the committee notes that it does not generally consider the fact that it would be difficult or impracticable to provide free access to incorporated documents to be sufficient justification for not providing full access to the law for all persons who may be affected by, or are otherwise interested in, its terms.

**1.292 The committee draws the Senate's attention to the apparent lack of free access to certain documents incorporated by the instrument for parties who might be affected by, or otherwise interested in, the law.**

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27 Explanatory statement, Civil Aviation Safety Amendment (Part 119) Regulations 2018, p.4; explanatory statement, Civil Aviation Safety Amendment (Part 121) Regulations 2018, pp. 4-5; explanatory statement, Civil Aviation Safety Amendment (Part 133) Regulations 2018, p. 7; and explanatory statement, Civil Aviation Safety Amendment (Part 133) Regulations 2018, p. 8.

## Customs (Pacific Islands Rules of Origin) Regulations 2018

<b>FRL No.</b>	F2018L01602 <sup>28</sup>
<b>Purpose</b>	Prescribes matters relating to rules of origin for the purpose of the <i>Customs Act 1901</i> .
<b>Authorising legislation</b>	<i>Customs Act 1901</i>
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 28 November 2018). Notice of motion to disallow must be given by 28 May 2019. <sup>29</sup>

### Incorporation<sup>30</sup>

1.293 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 to indicate how it may be obtained.

1.294 The committee is concerned to ensure that every person interested in or affected by the law is 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*.<sup>31</sup>

1.295 With reference to these matters, the committee notes that the instrument appears to incorporate the Pacific Agreement on Closer Economic Relations Plus (PACER-Plus).<sup>32</sup> The explanatory statement indicates that the PACER-Plus is

28 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

31 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/Guideline\\_on\\_incorporation\\_of\\_documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents).

32 In this regard, see section 4, paragraph 7(1)(a) and subparagraphs 10(3)(b)(i) and 11(3)(b)(i). The instrument refers to the PACER-Plus as the 'Agreement'.

incorporated as in force from time to time.<sup>33</sup> However, neither the instrument nor the explanatory statement indicates where the PACER-Plus may be accessed free of charge.

1.296 The committee notes that section 4 of the instrument states that 'Agreement' has the meaning given by section 153ZKL of the *Customs Act 1901*. That section provides a definition of 'Agreement', and indicates where the PACER-Plus may be accessed free of charge. Nevertheless, in the interests of promoting clarity and intelligibility for persons interested in or affected by the law, the committee considers that the explanatory statement to the instrument should expressly indicate where the PACER-Plus may be accessed free of charge.

**1.297 The committee draws to the minister's attention the lack of information in the explanatory statement regarding free access to the Pacific Agreement on Closer Economic Relations Plus, which appears to be incorporated by the instrument.**

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33 Explanatory statement, p. 5. The committee notes that subsection 153ZKL(5) of the *Customs Act 1901* appears to provide authority to incorporate PACER-Plus in this manner.



## Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 4) Regulations 2018

<b>FRL Nos.</b>	F2018L01720 <sup>34</sup>
<b>Purpose</b>	Establishes legislative authority for a number of spending activities administered by the Agriculture and Water Resources portfolio.
<b>Authorising legislation</b>	<i>Financial Framework (Supplementary Powers) Act 1997</i>
<b>Portfolio</b>	Finance
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>35</sup>

### Parliamentary scrutiny: ordinary annual services of government<sup>36</sup>

1.298 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 legislation, rather than delegated legislation).

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

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

34 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

matters not involving the ordinary annual services of the government.<sup>37</sup> In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the appropriation Act as an 'ordinary annual service of the government', despite being spending on new policies.

1.301 The committee's considerations in this regard are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.<sup>38</sup>

1.302 The instrument establishes legislative authority for government spending on the following programs administered by the Agriculture and Water Resources portfolio:

- Murray-Darling Basin Economic Development Program;<sup>39</sup> and
- Established Pest Animals and Weeds Management Pipeline.<sup>40</sup>

1.303 The explanatory statement indicates that funding for the programs was announced during the 2018-19 Budget, with spending to commence in the 2018-19 and 2019-20 financial years.<sup>41</sup> In relation to the Murray-Darling Basin Economic Development Program, the explanatory statement further provides that:

Funding will come from Program 3.1: Sustainable Rural Water Use and Infrastructure Program, which is part of Outcome 3. Details are set out in the *Portfolio Budget Statements No. 1.1, Agriculture and Water Resources Portfolio*.<sup>42</sup>

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

38 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/FFSP\\_Regulations\\_1997](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997).

39 Item 320. The explanatory statement indicates that the funding will be used to support communities most affected by the recovery of environmental water under the Murray-Darling Basin plan.

40 Item 321. The explanatory statement indicates that the funding will be used to combat Australia's worst established pest animals and weeds, by supporting research and development, skills and knowledge development, and national coordination activities.

41 Explanatory statement, pp. 1 and 6.

42 Explanatory statement, p. 3.

1.304 A similar explanation is provided in relation to the Established Pest Animals and Weeds Management Pipeline.<sup>43</sup>

1.305 It appears to the committee that the programs for which the instrument authorises expenditure may be new policies not previously authorised by special legislation; and that the initial appropriation for those programs may have been inappropriately classified as 'ordinary annual services', and therefore improperly included in *Appropriation Act No. 1 2018-19* (which was not subject to amendment by the Senate).

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

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43 Explanatory statement, p. 6.

## Financial Sector (Transfer and Restructure) Regulations 2018

<b>FRL No.</b>	F2018L01676 <sup>44</sup>
<b>Purpose</b>	Remakes the Financial Sector (Transfer of Business) Regulations 1999 with minor amendments to align with current drafting practices.
<b>Authorising legislation</b>	<i>Financial Sector (Transfer and Restructure) Act 1999</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>45</sup>

### Matters more appropriate for parliamentary enactment<sup>46</sup>

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

1.308 The instrument is made under the *Financial Sector (Transfer and Restructure) Act 1999* (the FSTR Act). The FSTR Act provides for the transfer of business between certain financial institutions, the transfer of shares and other interests in certain financial institutions, and internal restructures within certain classes of financial institutions.

1.309 Section 47 of the FSTR Act empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In addition, subsection 43(4) of the Act provides that regulations may prescribe or modify provisions of another Act, and apply such provisions as modified, to a transfer of business or shares or restructures regulated by the Act.

1.310 In accordance with subsection 43(4) of the FSTR Act, the instrument applies, unmodified, the *Banking Act 1959*, *Foreign Acquisitions and Takeovers Act 1975* and the *Insurance Acquisitions and Takeovers Act 1975* to transfers and restructures

44 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

regulated by the FSTR Act.<sup>47</sup> It also applies a modified version of the *Administrative Decisions (Judicial Review) Act 1977* and the *Financial Sector (Shareholdings) Act 1988* to relevant transfers and restructures.<sup>48</sup>

1.311 The committee considers that there are significant scrutiny concerns with enabling delegated legislation to prescribe and modify the operation of legislation which has been passed by Parliament, as such provisions limit parliamentary oversight and may subvert the appropriate relationship between the Parliament and the executive.

1.312 The modification of the application of *Administrative Decisions (Judicial Review) Act 1977* raises additional concerns that judicial review rights may be curtailed by delegated legislation. The committee considers that such matters would be more appropriately included in primary, rather than delegated legislation.

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

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47 Schedule 1, items 7 and 9.

48 Schedule 1, items 6 and 8.

## Higher Education Support (VET) Amendment (VET Fee-Help Student Protection) Guidelines 2018

<b>FRL No.</b>	F2018L01827 <sup>49</sup>
<b>Purpose</b>	Amends the Higher Education Support (VET) Guideline 2015 to prescribe the matters to which the secretary must have regard in determining whether it is reasonably likely that a VET provider or agent engaged in 'inappropriate conduct' towards a person regarding a unit or course of study.
<b>Authorising legislation</b>	<i>Higher Education Support Act 2003</i>
<b>Portfolio</b>	Education and Training
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>50</sup>

### Matter more appropriate for parliamentary enactment<sup>51</sup>

1.314 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).

1.315 The instrument is made under the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (the Act). Section 46AA(1) of the Act permits the secretary to re-credit a person's FEE-HELP balance for a course or unit of study undertaken, if, amongst other factors, the secretary determines it is reasonably likely that the VET provider or agent engaged in 'inappropriate conduct' towards the person in relation to that unit or course of study. Subsection 46AA(2) of the Act provides that the VET guidelines may prescribe the circumstances which constitute 'inappropriate conduct'.

1.316 In accordance with subsection 46AA(2) of the Act, the instrument amends the Higher Education Support (VET) Guidelines 2015 to prescribe the matters to which the secretary must have regard in determining whether it is reasonably likely that a VET provider or agent engaged in inappropriate conduct towards a person regarding the unit or course of study.

49 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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)(d).

1.317 The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered the bill for the VET FEE-HELP Student Protection Act when it was before the Parliament. The Scrutiny of Bills committee expressed concern that, in the absence of a sound justification for using delegated legislation, the question of what constitutes inappropriate conduct in the context of the student loan re-crediting scheme appeared to be a significant matter which should be included in primary legislation. In particular, it highlighted the lack of specific guidance on the face of the bill as to the matters that may be prescribed in the guidelines. It also noted that consistency or flexibility is not generally a sufficient justification for making provision for significant matters in delegated legislation, rather than primary legislation.<sup>52</sup>

1.318 Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of including these significant matters in delegated legislation.<sup>53</sup>

1.319 The committee's views regarding the prescription of matters constituting 'inappropriate conduct' in the guidelines, rather than primary legislation, accords with those of the Scrutiny of Bills committee, which has consistently drawn the attention of the Senate to Acts that leave significant elements of a regulatory scheme to delegated legislation.

**1.320 The committee draws the attention of the Senate to the use of delegated legislation to prescribe the matters which may constitute inappropriate conduct for the purposes of re-crediting VET FEE-HELP loan amounts.**

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52 Senate Standing Committee on Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 11.

53 Senate Standing Committee on Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 23.

## National Health (Immunisation Program – Designated Vaccines) Variation Determination (No. 5) 2018

<b>FRL No.</b>	F2019L00034 <sup>54</sup>
<b>Purpose</b>	Amends vaccine listings in the National Health (Immunisation Program – Designated Vaccines) Determination 2014 (No. 1).
<b>Authorising legislation</b>	<i>National Health Act 1953</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>55</sup>

### Consultation<sup>56</sup>

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

1.322 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>57</sup>

1.323 With reference to these requirements, the committee notes that the explanatory statement to the instrument explains:

The Office of Best Practice Regulation has advised that regulatory amendments that update the listing of vaccines on the NIP and their associated price to be machinery in nature. Therefore it has been determined that further consultation is unnecessary.<sup>58</sup>

54 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

57 Regulations and Ordinances Committee, *Guideline on consultation*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

58 Explanatory statement, p. 2.



1.324 In this regard, the committee notes that the Office of Best Practice Regulation's requirements are separate to the requirements of the Legislation Act in relation to consultation. As set out in the committee's *Guideline on consultation*:

[A]lthough a RIS [regulatory impact statement] may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.<sup>59</sup>

1.325 Further, it is unclear to the committee why an instrument specifying the circumstances in which a vaccine may be provided, and, in particular, expanding the eligibility requirements for the provision of free influenza vaccines, is 'machinery in nature', such that consultation was considered unnecessary.

**1.326 The committee draws the attention of the minister to the apparent conflation of the requirements prescribed by the *Legislation Act 2003* and the Office of Best Practice Regulation regarding consultation in the explanatory statement.**

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59 Senate Standing Committee on Regulations and Ordinances, *Guideline on Consultation*, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).



## 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.<sup>1</sup>

## ASIC Corporations (Amendment) Instrument 2018/752

<b>FRL No.</b>	F2018L01566 <sup>2</sup>
<b>Purpose</b>	Removes the cessation date for the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211
<b>Authorising legislation</b>	<i>Corporations Act 2011</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 14 November 2018). Notice of motion to disallow must be given by 13 May 2019. <sup>3</sup>

### Continuing exemption<sup>4</sup>

2.3 In [Delegated Legislation Monitor 15 of 2018](#), the committee requested the Assistant Treasurer's advice as to:

- when the recommendations of the Financial Systems Inquiry (FSI) 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 (principal instrument) until 1 April 2026.

1 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

2 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

2.4 The committee also sought the Assistant Treasurer's advice as to the appropriateness of amending the principle instrument 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.<sup>5</sup>

**Assistant Treasurer's response<sup>6</sup>**

2.5 The Assistant Treasurer advised:

A working group of the Council of Financial Regulators (CoFR) is currently reviewing the broader regulatory parameters for non-cash payment facilities following the recommendations of both the Financial System Inquiry and the Productivity Commission Inquiry into Competition in the Australian Financial System - the latter completed in June 2018. A consultation paper was published by CoFR in September 2018.

The Review is considering the appropriate level of regulation for stored value facilities and thresholds for applying prudential regulation, along with broader issues for improving and clarifying the application of regulatory requirements in this market sector (which includes appropriate parameters for regulation under the financial services licensing regime).

The timeframes for completion of the review and for any subsequent law reform to implement recommendations are uncertain, but the working group is expected to provide recommendations to CoFR during the first half of 2019.

The ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 (the Primary Instrument) is intended to provide certainty to market participants while the policy settings underpinning the regulation of non-cash payment facilities are considered.

ASIC has advised that it is not of the view that the Primary Instrument will remain operating in the current form for the whole period (i.e. until April 2026). ASIC stated in the Explanatory Statement and the Media Release that accompanied the Amending Instrument that its intention is to conduct a substantive review of the Primary Instrument upon completion of the broader Government policy review.

ASIC advises that the removal of the cessation date in the Primary Instrument, thereby allowing it to remain in force until April 2026, is intended to allow sufficient flexibility for completion of the CoFR review, broader Government policy consideration and the ASIC review of the

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5 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 1-3.

6 The Assistant Treasurer responded to the committee's comments in a letter dated 22 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

provisions of the Primary Instrument while still providing certainty for market participants.

ASIC considered that removing the cessation date was the best approach to address the timing uncertainty of the broader policy consideration and ASIC's review of the Primary Instrument.

ASIC was concerned that potential outcomes of the broader policy consideration by Government may include regulations that replace or render unnecessary some or all of the existing ASIC exemptions under the Primary Instrument. If a substantive review of the Primary Instrument is undertaken by ASIC prior to completion of the broader policy consideration by Government, any changes could risk not reflecting the policy position ultimately adopted by Government. This would cause additional and unnecessary costs and burdens to persons affected by the Primary Instrument as they would be put to the additional task of reviewing, understanding and implementing first changes to the Primary Instrument, then subsequently changes stemming from the broader policy position adopted by Government.

### ***Committee's comment***

2.6 The committee thanks the Assistant Treasurer for this response, and notes the advice that a working group of the Council of Financial Regulators (CoFR) is currently reviewing the regulatory regime for non-cash payment facilities and while timeframes for completing the review and implementing its recommendations are uncertain, the working group is expected to provide its recommendations to CoFR during the first half of 2019.

2.7 The committee also notes the Assistant Treasurer's advice that it is intended to conduct a substantive review of the principle instrument after completing the broader policy review. The committee notes the advice that removing the cessation date in the principle instrument is intended to allow sufficient flexibility for completion of the CoFR review, broader policy consideration of the non-cash payments and review of the Primary Instrument, while providing certainty for market participants.

2.8 The committee further notes the advice that if a substantive review of the principle instrument were undertaken prior to completion of the CoFR review and the broader policy consideration, any resulting changes would risk not reflecting the policy position ultimately adopted by government, which would cause additional and unnecessary costs and burdens to persons affected by the principle instrument.

2.9 While noting the Assistant Treasurer's advice, the committee remains concerned that the present instrument would effectively extend the exemptions in the principle instrument by a further seven years. As outlined in its initial comments, the committee considers that it would be more appropriate to periodically extend these exemptions for a shorter period (for example, by one or two years at a time). This would ensure appropriate levels of parliamentary oversight while maintaining

any necessary exemptions while the CoFR review and broader policy considerations are completed. In this respect, it is not apparent to the committee that a substantive policy review of the principle instrument would be required in each case.

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

**2.11 The committee has concluded its examination of the instrument. However, the committee draws the attention of the Senate to the extension, for a further seven years, of a number of longstanding exemptions from provisions of the *Corporations Act 2001* relating to non-cash payment facilities.**

## Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East—Northern Winter) Order 2018

<b>FRL No.</b>	F2018L01529 <sup>7</sup>
<b>Purpose</b>	Imposes additional conditions on holders of export licenses who export sheep by sea to the Middle East between November and April.
<b>Authorising legislation</b>	<i>Australian Meat and Live-stock Industry Act 1997</i>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 November 2018). Notice of motion to disallow must be given by 2 April 2019. <sup>8</sup>

### Merits review<sup>9</sup>

2.12 In [Delegated Legislation Monitor 14 of 2018](#), the committee requested the minister's advice as to whether the explanatory statement to the instrument will be amended to clarify that decisions made under section 14 of the instrument are not subject to merits review due to the lack of availability of an appropriate remedy.<sup>10</sup>

2.13 The committee further requested that the explanatory statement to the Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018 [F2018L01010] be amended to include the same information.

### Minister's response<sup>11</sup>

2.14 The minister advised:

My department will prepare replacement Explanatory Statements that will address your concerns, in due course.

7 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

10 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 1-3.

11 The minister responded to the committee's comments in a letter dated 21 December 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

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***Committee's comment***

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that the department will prepare replacement explanatory statements addressing the committee's concerns in relation to the instrument, and the Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018, in due course.

2.16 Noting the importance of the explanatory statement as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation, the committee considers that the replacement explanatory statements should be prepared as soon as practicable.

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



## CASA 66/18 — Number of Cabin Attendants (Alliance Airlines) Direction 2018

<b>FRL No.</b>	F2018L01244 <sup>12</sup>
<b>Purpose</b>	Enables Alliance Airlines Pty Limited to continue operating designated aircraft with one cabin attendant for every 50 passenger seats or part of that number.
<b>Authorising legislation</b>	<i>Civil Aviation Regulations 1988</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 10 September 2018). Notice of motion to disallow given on 15 November 2018. <sup>13</sup>

### Merits review<sup>14</sup>

2.18 The committee initially scrutinised the instrument in [Delegated Legislation Monitor 12 of 2018](#) and sought the minister's advice.<sup>15</sup> The committee considered the minister's response in [Delegated Legislation Monitor 14 of 2018](#), and sought further advice as to:

- why decisions to approve, or refuse to approve, revisions to Alliance Airlines' (Alliance) operations manual should not be subject to independent merits review, by reference to the established ground for excluding review as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and
- if no relevant grounds for excluding independent merits review can be established, the appropriateness of amending the instrument to explicitly provide for independent merits review.<sup>16</sup>

12 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

13 Notice given by the Chair of the committee. See Disallowance Alert 2019: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts).

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

15 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, pp. 15-16.

16 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 13-15.

**Minister's response<sup>17</sup>**

2.19 The minister advised:

In relation to the Number of Cabin Attendants (Alliance Airlines) Direction 2018 – CASA 66/ 18, CASA has advised that it has recently changed its practice concerning the form of these directions and will revoke instrument CASA 66/18 and re-make it without a requirement for changes to the operations manual to be approved by CASA.

**Committee's comment**

2.20 The committee thanks the minister for this response, and notes the Civil Aviation Safety Authority's (CASA) advice that it will re-make the instrument to remove the requirement that changes to Alliance's operations manual be approved by CASA. The committee notes that this would remove the decision by CASA about which the committee initially raised concerns.

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

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17 The minister responded to the committee's comments in a letter dated 3 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

## CASA EX111/18 — English Language Proficiency Assessments Exemption 2018

<b>FRL No.</b>	F2018L01214 <sup>18</sup>
<b>Purpose</b>	Extends exemptions relating to certain English language proficiency requirements to 30 September 2021.
<b>Authorising legislation</b>	<i>Civil Aviation Safety Regulations</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 10 September 2018). Notice of motion to disallow given on 15 November 2018. <sup>19</sup>

### Merits Review<sup>20</sup>

2.22 The committee initially scrutinised the instrument in [Delegated Legislation Monitor 12 of 2018](#) and sought the minister's advice.<sup>21</sup> The committee considered the minister's response in [Delegated Legislation Monitor 14 of 2018](#), and sought further advice as to:

- why decisions to approve, or refuse to approve, a person to conduct English language proficiency assessments should not be subject to independent merits review, by reference to the established ground for excluding review as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and
- If no relevant ground for excluding merits review can be established, the committee also requested the minister's advice as to the appropriateness of amending the instrument to explicitly provide for independent merits review.<sup>22</sup>

18 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

19 Notice given by the Chair of the committee. See Disallowance Alert 2019: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts).

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

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

22 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 9-13.

**Minister's response**<sup>23</sup>**2.23** The minister advised:

CASA has further considered the regulatory scheme for the making of the relevant approvals in light of the Committee's comments and agrees with the Committee's views that decisions would be subject to a merits review by the Administrative Appeals Tribunal (AAT).

CASA has further advised that it has submitted a revised explanatory statement for the English Language Proficiency Assessments Exemption 2018 to reflect this position.

**Committee's comment**

**2.24** The committee thanks the minister for this response, and notes the Civil Aviation Safety Authority's (CASA) advice that it will submit a revised explanatory statement or the instrument to make it clear that decisions to approve, or refuse to approve, a person to conduct English language proficiency assessments are subject to independent merits review.

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

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23 The minister responded to the committee's comments in a letter dated 3 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

## Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018

<b>FRL No.</b>	F2018L01419 <sup>24</sup>
<b>Purpose</b>	Establishes legislative authority for government expenditure on the Artificial Intelligence Capability Program.
<b>Authorising legislation</b>	<i>Industry Research and Development Act 1986</i>
<b>Portfolio</b>	Industry, Innovation and Science
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 16 October 2018). Notice of motion to disallow given on 12 February 2019. <sup>25</sup>

### Constitutional authority<sup>26</sup>

2.26 The committee initially scrutinised this instrument in [Delegated Legislation Monitor 13 of 2018](#) and sought the minister's advice.<sup>27</sup> The committee considered the minister's advice in [Delegated Legislation Monitor 15 of 2018](#), and requested further, more detailed advice as to why it was considered that the implied nationhood power would support the Artificial Intelligence Capability Program (AIC Program).

2.27 The committee noted that its consideration of the matter would be assisted if the minister's response pointed to specific relevant jurisprudence. The committee also requested the minister's advice as to any other heads of power that would support the AIC Program, noting that a program may be supported by more than one head of constitutional power.<sup>28</sup>

24 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

25 Notice given by the Chair of the committee. See Disallowance Alert 2019: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts).

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

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

28 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 10-13.

**Minister's response**<sup>29</sup>

2.28 The minister advised:

Implied nationhood power

The Committee has requested more detailed advice as to why the implied nationhood power would support the AIC Program. The Committee has requested that the response point to specific relevant jurisprudence.

In particular, the Committee noted Mason J's statement in *Victoria v Commonwealth* [1975] HCA 52; 134 CLR 338 (the AAP Case) (at 398), where his Honour states that:

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 effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, 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.**

(Emphasis added by the Committee.)

The earlier comments of Mason J (at 397-398) in the AAP Case provide context to this statement. His Honour said that:

... [I]n my opinion 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.

**It is in the exercise of this capacity that the Commonwealth has established the Commonwealth Scientific and Industrial Research Organization to undertake scientific research on behalf of the nation.** The Science and Research Act 1951, as amended, is an exercise of the power conferred by s 51 (xxxix) and s 61 or perhaps of implied power. **So also the Commonwealth may expend money on inquiries, investigation and advocacy in relation to matters affecting public health, notwithstanding the absence of a specific legislative power other than quarantine** - see the Pharmaceutical Benefits Case (1945) 71 CLR, at p 257. No doubt there are other

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29 The minister responded to the committee's comments in a letter dated 25 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time.

(Emphasis added.)

I would also draw the Committee's attention to the comments of Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79 (at 110-111):

The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. **The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered.** There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood- a flag or anthem e.g. - or the benefit of many **national initiatives in science**, literature and the arts.

(Emphasis added.)

The Committee has also noted the decision of *Pape v Federal Commissioner of Taxation* [2009] HCA 23; 238 CLR 1 (Pape). The Committee has noted that Pape indicated that the implied nationhood power does not give the Commonwealth a general power to address problems of national concern (citing French CJ at 48-49). It is useful to quote from that extract, where his Honour said:

The extent of powers inherent in the fact of nationhood and of international personality had not been fully explored. They included the power to explore on foreign lands or seas **or in areas of scientific knowledge or technology** [citing the AAP Case at 3 62]. But to say of a matter that it was of national interest or concern did not attract power to the Commonwealth.

(Emphasis added.)

The cases do not say that for a program to be supported by the implied nationhood power it must **only** be able to be carried on by the Commonwealth for the benefit of the nation.

I am satisfied that the AIC Program is supported by the implied nationhood power. The AIC Program is a national initiative in science that advances and strengthens the nation's ability to participate in the broader global

digital economy through its artificial intelligence (AI) and machine learning capability. The AIC Program would advance and strengthen the interest of the nation in a particular area of science knowledge (that is, AI knowledge). It is not merely convenient for the Commonwealth to fund this activity, rather it is necessary for it to do so in order to facilitate national and international adoption of standards on AI. As I noted in my earlier response to the Committee, the development of the AI Standards requires a high degree of national coordination and integration, and the AIC Program is directed towards meeting the need for national coordination and national leadership in relation to the development of the standards. These activities are directed at advancing the nation through the development of nationally consistent scientific standards that will enable Australian stakeholders to engage with the broader global digital economy.

The Committee has asked whether there are any other heads of power that would support the AIC Program. There may be other heads of power that provide support for the expenditure. As I am of the view that the implied nationhood power comprehensively supports the AIC Program, it is not necessary to consider other heads of power.

### ***Committee's comment***

2.29 The committee thanks the minister for this comprehensive response, and notes the minister's advice that the case law supports reliance on the nationhood power to establish the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to undertake scientific research on behalf of the nation and that the nationhood power may extend to 'national initiatives in science' and includes a power 'to explore...in areas of scientific technology'.

2.30 The committee also notes the minister's advice that:

- the AIC Program is a national initiative in science that advances the nation's ability to participate in the broader global digital economy;
- the AIC Program would advance and strengthen the interest of the nation in a particular area of science knowledge (that is, artificial intelligence);
- the AIC Program requires national coordination and integration; and
- it is not merely convenient for the Commonwealth to fund the AIC Program, but rather it is necessary for it to do so to facilitate national and international adoption of standards on artificial intelligence.

2.31 However, the committee notes that while the cases identified by the minister indicate that the nationhood power supports programs carried on for the purpose of scientific *research*, the AIC Program relates to the development of standards. Funding under the AIC Program is also to be provided to Standards Australia, which does not appear to be a research organisation in the same sense as



the CSIRO. However, the committee is mindful that questions of constitutional authority are ultimately for the High Court to determine.

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

2.33 The committee also emphasises that future explanatory statements to instruments made under the *Industry Research and Development Act 1986* should include a comprehensive explanation of how the instrument is supported by the head or heads of power on which it purports to rely. The committee would expect such an explanation to provide a detailed overview of the relevant program, describe how it is supported by each head of constitutional power and, if possible, point to supporting jurisprudence.

**2.34 The committee has concluded its examination of the instrument. However, the committee remains concerned about the general issue of constitutional authority for instruments which authorise expenditure on government programs, and will continue to monitor the issue.**

## Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018

<b>FRL No.</b>	F2018L01451 <sup>30</sup>
<b>Purpose</b>	Establishes legislative authority for expenditure on the Automotive Engineering Graduate Program.
<b>Authorising legislation</b>	<i>Industry Research and Development Act 1986</i>
<b>Portfolio</b>	Industry, Innovation and Science
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 13 November 2018). Notice of motion to disallow must be given by 14 February 2019. <sup>31</sup>

### Constitutional authority<sup>32</sup>

2.35 The committee initially scrutinised this instrument in [Delegated Legislation Monitor 13 of 2018](#) and sought the minister's advice.<sup>33</sup> The committee considered the minister's advice in [Delegated Legislation Monitor 15 of 2018](#), and requested further, more detailed advice as to why it is considered that Automotive Engineering Graduate Program (AEG Program) would be supported by the corporations power under the Constitution. The committee noted that its consideration of the matter would be assisted if the minister's response pointed to specific relevant jurisprudence. The committee also requested 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.<sup>34</sup>

30 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

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

34 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 10-13.

**Minister's response**<sup>35</sup>

2.36 The minister advised:

Corporations power

The Committee has asked for further, more detailed, advice as to how the Automotive Program would be supported by the corporations power in s 51(xx) of the Constitution. The Committee has requested that the response point to specific relevant jurisprudence.

*Trading corporations*

In relation to relevant jurisprudence regarding whether an entity is a 'trading corporation I draw the Committee's attention to the following extracts from *R v Federal Court of Australia, Ex parte WA National Football League* (1979) 143 CLR 190 (Adamson's Case).

Chief Justice Barwick stated that 'once it is found that trading is a substantial and not a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open' (at 208).

Justice Murphy (at 239) stated that:

Even though trading is not the major part of its activities, the description, "trading corporation" does not mean a corporation which trades and does nothing else or in which trading is the dominant activity. A trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation. For example, a very large corporation may engage in trading which though incidental to its non-trading activities, and small in relation to those, is nevertheless substantial and perhaps exceeds or is of the same order in amount as the trading of a person who clearly is a trader. Such a corporation is a trading corporation and is the subject of the legislative power in s 51 (xx).

Justice Mason relevantly stated that in this context the concept of trading is not limited 'to buying and selling at a profit', rather, his Honour said that 'it extends to business activities carried on with a view to earning revenue' (at 235).

*Regulating constitutional corporations*

The Committee has said that it is not apparent that the requirements in the *Industry Research and Development Act 1986* (IRD Act) would be

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35 The minister responded to the committee's comments in a letter dated 25 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

sufficient to distinguish that Act from the legislation under consideration in *Williams v Commonwealth* [2014] HCA 23; 252 CLR 416 (Williams No 2).

The Committee noted 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.

In Williams No 2, the High Court was concerned with s 32B of the *Financial Management and Accountability Act 1997* (the FMA Act). The High Court stated (at [51]-[50]) that:

The impugned provisions seek to provide authority for the Commonwealth to make agreements and payments. For the purposes of considering the argument, it may be assumed that the opposite party to an agreement made for the purposes of the National School Chaplaincy and Student Welfare Program and the recipient of payments made under that program can be, even must be, a trading or financial corporation.

A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation.

The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth (Work Choices Case)* [(2006) 229 CLR 1; [2006] HCA 52], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.

However, the relevant provisions of the IRD Act are substantially different to the provisions considered by the High Court in Williams No 2. Section 34 of the IRD Act corresponds to s 32B of the FMA Act considered by the High Court in Williams No 2. However, the FMA Act contained no provision in terms equivalent to those of s 35 of the IRD Act.

Section 35(2)(b) of the IRD Act expressly requires a constitutional corporation which is a party to an arrangement for the purposes of the Program to comply with the terms and conditions specified in a written agreement between the Commonwealth and the corporation. Further, s 35(3) provides that that agreement must provide for the circumstances in which the corporation must repay amounts to the Commonwealth. The Commonwealth will enter into grant agreements with corporations approved for funding under the program. These grant agreements include an obligation to repay amounts to the Commonwealth in certain

circumstances as well other terms and conditions that the grant recipient is required to comply with in relation to the program.

In light of this distinction between the FMA Act and the IRD Act and the terms and conditions specified in grant agreements, I am satisfied that the Automotive Program is supported by the corporations power in s 51 (xx) of the Constitution, particularly when considered with the ability of the Commonwealth, empowered through s 35 of the IRD Act, to authorise or regulate the activities, functions, relationships or business through compliance with terms and conditions.

#### Social welfare power

The Committee has also asked whether the Automotive Instrument would be supported by the student benefits aspect of the social welfare power in s 51 (xxiiiA) of the Constitution and the appropriateness of amending s 6 of the Automotive Instrument to specify that the Instrument relies on that power.

The program covered by the Automotive Instrument may be capable of being supported by the student benefits aspect of the social welfare power in s 51(xxiiiA) of the Constitution.

However, in my view it is not necessary to amend s 6 of the Automotive Instrument to specify that the Instrument relies on that power. This is because, section 33(3) of the IRD Act provides that the Instrument must specify the legislative power or powers in respect of which the instrument is made. This leaves it open for the Minister to be satisfied that the powers relied upon are sufficient to provide legislative authority for the program, not that an instrument provides an exhaustive list of powers that could be relied upon. The powers relied upon in the Automotive Instrument (being the corporations power as well as the Territories power, the executive power and the express incidental power) provide sufficient legislative authority for the program.

Accordingly, I do not consider it is necessary to amend s 6 of the Automotive Instrument to include another head of constitutional power that may provide support for the Automotive Instrument.

#### ***Committee's comment***

2.37 The committee thanks the minister for this comprehensive response. The committee notes the minister's advice that the case law indicates that an entity may be a 'trading corporation' so long as trading is a substantial and not merely peripheral activity not forbidden by the rules of the entity, and trading is not limited to buying and selling at a profit, but rather extends to business activities carried on with a view to earning revenue.<sup>36</sup>

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36 See also Adamson's case at p. 235 per Mason J.

2.38 The committee also notes the minister's advice that the provisions of the *Industry Research and Development Act 1986* (Industry Act) are substantially different to the provisions of the *Financial Management and Accountability Act 1997* (FMA Act) considered by the High Court in *Williams v Commonwealth* (Williams No. 2).<sup>37</sup> The committee notes the advice that section 35 of the Industry Act expressly requires a constitutional corporation to comply the terms and conditions of a funding agreement, and requires any funding agreement to specify the terms and conditions on which funds are to be repaid. The committee further notes the minister's advice that section 35 would therefore regulate the activities of a corporation, and would constitute a law 'with respect to' corporations within the meaning of section 51(xx) of the constitution.

2.39 In light of this advice the committee makes no further comment on questions of constitutional authority in relation to this instrument. The committee is mindful that such questions are ultimately for the High Court to determine.

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

2.41 The committee also emphasises that future explanatory statements to instruments made under the Industry Act should include a comprehensive explanation of how the instrument is supported by the head or heads of power on which it purports to rely. The committee would expect such an explanation to provide a detailed overview of the relevant program, describe how it is supported by each head of constitutional power and, if possible, point to supporting jurisprudence.

**2.42 The committee has concluded its examination of the instrument. However, the committee remains concerned about the general issue of constitutional authority for instruments which authorise expenditure on government programs, and will continue to monitor the issue.**

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37 (2014) 252 CLR 416. As noted in the committee's initial comments, the court in *Williams No. 2* stated that the relevant provisions of the FMA Act were not laws with respect to a trading and financial corporation because they were not laws 'authorising or regulating the activities, functions, relationships of businesses of constitutional corporations' (at [50]).

## Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018

<b>FRL No.</b>	F2018L01573 <sup>38</sup>
<b>Purpose</b>	Establishes legislative authority for government expenditure on the Industry 4.0 Testlabs for Australia Program.
<b>Authorising legislation</b>	<i>Industry Research and Development Act 1986</i>
<b>Portfolio</b>	Industry, Innovation and Science
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 26 November 2018). Notice of motion to disallow must be given by 15 May 2019. <sup>39</sup>

### Constitutional authority<sup>40</sup>

2.43 In [Delegated Legislation Monitor 15 of 2018](#), the committee requested the minister's more detailed advice as to the constitutional authority for the Industry 4.0 Testlabs for Australia Program (Testlabs Program).<sup>41</sup>

### Minister's response<sup>42</sup>

2.44 The minister advised:

#### Corporations power

Section 6 of the Testlabs 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 noted the High Court's decision in *Williams v Commonwealth* [2014] HCA 23; 252 CLR 416 (Williams No 2), and in particular, the Court's statement (at [50]) that:

38 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

41 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 7-9.

42 The minister responded to the committee's comments in a letter dated 25 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

*A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth (Work Choices Case)* [(2006) 229 CLR 1; [2006] HCA 52], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation, it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.*

This conclusion must be understood in the context of the specific terms of s 32B of the *Financial Management and Accountability Act 1997* (the FMA Act), which was under consideration in *Williams No 2*.

As noted above, the High Court stated at [50] that this legislation was not a law with respect to trading or financial corporations because it made no provision regulating or permitting any act by or on behalf of any corporation. However, the relevant provisions of the *Industry Research and Development Act 1986* (IRD Act) are substantially different to the provisions considered by the High Court in *Williams No 2*. Section 34 of the IRD Act corresponds to s 32B of the FMA Act considered by the High Court in *Williams No 2*. However, the FMA Act contained no provision in terms equivalent to those of s 35 of the IRD Act.

Section 35(2)(b) of the IRD Act expressly requires a constitutional corporation which is a party to an arrangement for the purposes of the Program to comply with the terms and conditions specified in a written agreement between the Commonwealth and the corporation. Further, s 35(3) provides that that agreement must provide for the circumstances in which the corporation must repay amounts to the Commonwealth. The Commonwealth will enter into grant agreements with corporations approved for funding under the program. These grant agreements include an obligation to repay amounts to the Commonwealth in certain circumstances as well other terms and conditions that the grant recipient is required to comply with in relation to the program.

In light of this distinction between the FMA Act and the IRD Act, and the terms and conditions specified in grant agreements, I am satisfied that the corporations power in s 51(xx) of the Constitution supports the Testlabs Program and is appropriate when considered with the ability of the Commonwealth, empowered through s35 of the IRD Act, to authorise or regulate the activities, functions, relationships or business through compliance with terms and conditions.



**Committee's comment**

2.45 The committee thanks the minister for this response. The committee notes the minister's advice that the provisions of the *Industry Research and Development Act 1986* (Industry Act) are substantially different to the provisions of the *Financial Management and Accountability Act 1997* (FMA Act) considered by the High Court in *Williams v Commonwealth* (Williams No. 2).<sup>43</sup> In this regard, the committee notes the advice that section 35 of the Industry Act expressly requires a constitutional corporation to comply the terms and conditions of a funding agreement, and requires any funding agreement to specify the terms and conditions on which funds are to be repaid. The committee further notes the minister's advice that section 35 would therefore regulate the activities of a corporation, and would constitute a law 'with respect to' corporations within the meaning of section 51(xx) of the constitution.

2.46 In light of this advice the committee makes no further comment on questions of constitutional authority in relation to this instrument. The committee is mindful that such questions are ultimately for the High Court to determine.

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

2.48 The committee also emphasises that future explanatory statements to instruments made under the Industry Act should include a comprehensive explanation of how the instrument is supported by the head or heads of power on which it purports to rely. The committee would expect such an explanation to provide a detailed overview of the relevant program, describe how it is supported by each head of constitutional power and, if possible, point to supporting jurisprudence.

**2.49 The committee has concluded its examination of the instrument. However, the committee remains concerned about the general issue of constitutional authority for instruments which authorise expenditure on government programs, and will continue to monitor the issue.**

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43 (2014) 252 CLR 416. As noted in the committee's initial comments, the court in Williams No. 2 stated that the relevant provisions of the FMA Act were not laws with respect to a trading and financial corporation because they were not laws 'authorising or regulating the activities, functions, relationships of businesses of constitutional corporations' (at [50]).

## Inspector-General of the Australian Defence Force Amendment Regulations 2018

<b>FRL No.</b>	F2018L01428 <sup>44</sup>
<b>Purpose</b>	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.
<b>Authorising legislation</b>	<i>Defence Act 1903</i>
<b>Portfolio</b>	Defence
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 16 October 2018). Notice of motion to disallow given on 12 February 2019. <sup>45</sup>

### Privacy<sup>46</sup>

2.50 The committee initially scrutinised this instrument in [Delegated Legislation Monitor 13 of 2018](#) and sought the minister's advice.<sup>47</sup> The committee considered the response provided by the minister in [Delegated Legislation Monitor 15 of 2018](#) and requested the minister's more detailed advice as to the justification for empowering the Assistant Inspector-General of the Australian Defence Force (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.<sup>48</sup>

44 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

45 Notice given by the Chair of the committee. See Disallowance Alert 2019: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts).

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

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

48 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, pp. 17-21.

**Minister's response**<sup>49</sup>

## 2.51 The minister advised:

It is important to recognise that only an Assistant IGADF who is also a judicial officer may disclose information to 'any other person' or 'a person affected by a submission or the inquiry'. This same power is not available to an Assistant IGADF who is not a judicial officer (that is, an Assistant IGADF who is appointed under section 6), and in such a case would only be available to be exercised by the Inspector-General ADF personally.

By their nature, inquiries established under the Principal Regulation may cover a broad range of subjects and have a broad range of outcomes, and a relatively flexible power to disclose information is necessary to address all of the possible scenarios that could arise. It is reasonable and appropriate that Assistant IGADFs who are also judicial officers have this power. They are sitting judges with expertise, skill, and judgement gained through their judicial responsibilities, so are capable, skilled and highly suitable to consider privacy implications of disclosures made under the new section 28O and 28H of the Principal Regulation.

As with any statutory discretion, the power to disclose information is not unfettered. It must be applied lawfully, reasonably, and for a proper purpose, having regard to relevant considerations. This would include appropriate consideration of the privacy principles underlying the *Privacy Act 1988*, balancing other important factors such as transparency, fairness, and accountability.

It is also noted that appointment of a judicial officer as an Assistant IGADF under new Division 4A will only be made by the Inspector-General ADF in limited circumstances. For example, such an appointment might be made where the matters for inquiry are complex and involve legal questions concerning aspects of military justice or other sensitive issues. Past practice within the Office of the Inspector-General ADF has been to draw on the small cadre of ADF reserve officers who hold judicial appointments to undertake high-level, complex inquiries involving legal questions. New Division 4A is intended to formalise that practice by creating a dedicated statutory framework for such inquiries so that the judicial officer appointed as the Assistant Inspector-General has the appropriate degree of procedural and decisional autonomy to carry out the inquiry commensurate with, and compatible with, their judicial status.

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49 The minister responded to the committee's comments in a letter dated 23 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

**Committee's comment**

2.52 The committee thanks the minister for this response. The committee notes the minister's advice that a flexible power to disclose information is necessary to address all of the possible scenarios that could arise.

2.53 The committee also notes the minister's advice that the disclosure powers are limited to Assistant Inspector-Generals of the ADF who are also judicial officers, who have the appropriate skills and expertise to consider the privacy implications of disclosures made under the instrument.

2.54 The committee further notes the minister's advice that the power to disclose information must be applied lawfully, reasonably, and for a proper purpose, having regard to relevant considerations, including the privacy principles underlying the *Privacy Act 1988* (the Privacy Act).

2.55 However, in this regard, the committee notes that the instrument does not appear to require the Assistant Inspector-General ADF to exclude personal information from a report relating to a relevant inquiry. Instead, section 28G of the instrument simply states that such a report 'need not include information that the Assistant Inspector-General ADF considers would be inappropriate to include'. Further, neither the instrument nor the explanatory statement explains how the *Privacy Act* or other legislative safeguards apply to protect personal information disclosed under the instrument.

2.56 Consequently, the committee remains concerned that the instrument does not appear to oblige the Assistant Inspector-General ADF to consider the privacy implications of giving a relevant report to 'a person who is affected by a submission or the inquiry',<sup>50</sup> or 'any other person'.<sup>51</sup>

**2.57 The committee has concluded its examination of this matter. However, the committee draws the attention of the Senate to the broad powers to disclose information, which may include sensitive personal information, to 'any other person' or any person affected by a submission, and the lack of clarity regarding the safeguards in place to protect the privacy of individuals whose personal information is disclosed under the instrument.**

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50 Paragraph 28G(2)(a)(vi).

51 Paragraph 28G(2)(a)(vii).

## National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 9) (PB 74 of 2018)

<b>FRL No.</b>	F2018L01223 <sup>52</sup>
<b>Purpose</b>	Amends the list of Benefits on the Pharmaceutical Benefits Scheme (PBS).
<b>Authorising legislation</b>	<i>National Health Act 1953</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 10 September 2018). <sup>53</sup>

### Incorporation<sup>54</sup>

2.58 In [Delegated Legislation Monitor 13 of 2018](#), the committee requested the minister's advice as to whether the current edition of the DSM-5 incorporated by reference in the instrument:

- can be made available for viewing without charge at the Department of Health offices; and
- is, or can be made, available through public libraries (and if so, which public libraries).<sup>55</sup>

### Minister's response<sup>56</sup>

2.59 The minister advised:

The DSM-5 is a publication purchased by my Department and is for use by internal staff members only. This publication is the intellectual property of the publisher and access to this publication is therefore restricted.

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52 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

55 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2019*, pp. 54-56.

56 The minister responded to the committee's comments in a letter dated 17 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

My Department has confirmed that the National Library of Australia and the respective State Libraries of Victoria, New South Wales and South Australia have a copy of the DSM-5 in their collection.

You may be interested to know that the National Library's Trove online system (publicly available at [trove.nla.gov.au](http://trove.nla.gov.au)) allows any person to identify other public libraries in Australia which provide DSM-5 in their collection.

In addition, I also understand that this edition is publicly available in Australian universities and tertiary colleges.

***Committee's comment***

2.60 The committee thanks the minister for this response. The committee notes the minister's advice that the DSM-5 can be accessed at the National Library of Australia and state libraries of Victoria, New South Wales and South Australia. The committee further notes the advice that the DSM-5 can be accessed through other public libraries, which can be identified through the National Library's Trove online system, and Australian universities and tertiary colleges.

2.61 The committee considers that the information provided by the minister should be included in the explanatory statement.

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

## National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018

<b>FRL No.</b>	F2018L01547 <sup>57</sup>
<b>Purpose</b>	Enhances protections for investors in the National Rental Affordability Scheme.
<b>Authorising legislation</b>	<i>National Rental Affordability Scheme Act 2008</i>
<b>Portfolio</b>	Social Services
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 November 2018). Notice of motion to disallow must be given by 2 April 2019.

### Privacy<sup>58</sup>

2.63 In [Delegated Legislation Monitor 14 of 2018](#), the committee requested the minister's advice as to whether the information disclosed under new section 22D of the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) could include personal information and, if so, what safeguards are in place to protect the personal privacy of individuals in relation to that information.<sup>59</sup>

### Minister's response<sup>60</sup>

2.64 The minister advised:

The National Rental Affordability Scheme (NRAS) provides an annual incentive payment in relation to a rental, property for 10 years if particular conditions are satisfied. These conditions include that the property is rented to a tenant with a low to moderate income and that the rent charged to the tenant is not more than 80 per cent of the market rent.

The information that will be disclosed under the new section 22D of the NRAS Regulations, where the section is used, will include personal information of the tenant of the rental property associated with the transferred NRAS allocation.

57 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

59 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 4-5.

60 The minister responded to the committee's comments in a letter dated 2 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

To receive an annual financial incentive for an NRAS allocation, under the NRAS Regulations the approved participant must provide a Statement of Compliance to the Department of Social Service in relation to the rental property associated with the allocation. The Statement of Compliance must include information about the tenant's income, demographic information about the tenant and information about the residential tenancy agreement entered into by the tenant.

When a tenant commences renting a property covered by NRAS, the tenant is provided with a form that explains the need for the approved participant to collect personal information from the tenant for the purposes of NRAS and the need for that information to be disclosed to the Department. Tenants are asked to consent to the collection, use and disclosure, of their personal information for NRAS purposes.

Where an NRAS allocation is transferred from one approved participant to another approved participant, the including approved participant will be required by the NRAS Regulations to lodge a Statement of Compliance for the rental property associated with the allocation. As part of this process, the incoming approved participant is required to supply information to the department that includes the personal information of the tenant of the rental property.

In the absence of a requirement such as section 220, the outgoing approved participant could refuse to provide relevant information to the incoming approved participant. Such conduct would undermine the effectiveness of various processes for the transfer of allocations under the NRAS Regulations. If the gaining approved participant does not have the necessary information about the tenant to lodge as part of its Statement of Compliance, it will not receive an incentive for the allocation. This may result in the rental property no longer being rented as part of the NRAS, because without the incentive the owner of the rental property is unlikely to continue to rent the property for 80 per cent of the market rent.

Section 22D of the NRAS Regulations limits the type of information that can be covered by a request from the Secretary of the Department to information relevant to the administration of NRAS. The Secretary will only request the outgoing approved participant to provide personal information of a tenant to the incoming approved participant to the extent necessary to enable the incoming approved participant to lodge a complete Statement of Compliance under the NRAS Regulations to demonstrate that the conditions of the allocation have been met.

The Department has amended the form of consent given by tenants of NRAS properties in relation to the collection and use of personal information to cover the possible operation of section 22D of the NRAS Regulations. The Department will also provide advice to approved participants to confirm that their privacy policies provide sufficient coverage of the process for the transfer of NRAS allocations and the operation of section 22D of the NRAS Regulations.



***Committee's comment***

2.65 The committee thanks the minister for this response. The committee notes the minister's advice that the information which may be disclosed under new section 22D of the instrument will include the personal information of the tenant of the rental property associated with the transferred National Rental Affordability Scheme (NRAS) allocation. The committee further notes that new tenants of NRAS properties are informed that their personal information will need to be collected and disclosed for NRAS purposes, and are provided with an opportunity to consent to the collection and use of their personal information for such purposes.

2.66 In relation to the safeguards available to protect personal information collected in compliance with section 22D of the instrument, the committee notes the minister's advice that existing departmental privacy policies provide sufficient coverage of the process for the transfers of NRAS allocations and the operation of section 22D of the NRAS Regulations.

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

## Vehicle Standard (Australian Design Rules) – various instruments<sup>61</sup>

<b>FRL No.</b>	F2018L01513, F2018L01514, F2018L01515, F2018L01516, F2018L01517, F2018L01518, F2018L01519 and F2018L01521. <sup>62</sup>
<b>Purpose</b>	Set out standards for the design, construction and operation of vehicles supplied to the Australian market.
<b>Authorising legislation</b>	<i>Motor Vehicle Standards Act 1989</i>
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 November 2018). Notice of motion to disallow must be given by 2 April 2019. <sup>63</sup>

### Incorporation<sup>64</sup>

2.68 In [Delegated Legislation Monitor 14 of 2018](#), the committee requested the assistant minister's advice as to where the documents incorporated by the instrument may be accessed free of charge; and requested that the explanatory statements be amended to include this information.<sup>65</sup>

### Minister's response<sup>66</sup>

2.69 The assistant minister advised:

61 Vehicle Standard (Australian Design Rule 94/00 - Audible Warning) 2018; Vehicle Standard (Australian Design Rule 42/05 - General Safety Requirements) 2018; Vehicle Standard (Australian Design Rule 90/00 - Steering System) 2018; Vehicle Standard (Australian Design Rule 95/00 - Installation of Tyres) 2018; Vehicle Standard (Australian Design Rule 96/00 - Commercial Vehicle Tyres) 2018; Vehicle Standard (Australian Design Rule 23/03 - Passenger Car Tyres) 2018; Vehicle Standard (Australian Design Rule 91/00 - Rear Underrun Impact Protection) 2018; Vehicle Standard (Australian Design Rule 93/00 - Forward Field of View) 2018.

62 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

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

65 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, pp. 6-8.

66 The assistant minister responded to the committee's comments in a letter dated 12 December 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

I appreciate the Committee's concerns about access for documents incorporated by reference into legislative instruments. In this respect, the majority of the ADRs listed above offer alternative pathways to comply with the ADRs, which do not require the use of the incorporated documents or standards. For example, ADR 90/00 has two alternatives for compliance, including Paragraph 5 which provides an option that does not require the use of incorporated documents or external standards. Similar arrangements apply to ADRs 91/00, 92/00, 93/00, 94/00 and 95/00.

You would be aware that the Committee that the Council of Australian Governments (COAG) Industry and Skills Council is currently exploring how the accessibility and pricing of standards could be improved, particularly those referenced in legislation. This work is also dependent upon the publishing and licensing agreement Standards Australia has with SAI Global to distribute standards. The private commercial agreement is currently being negotiated between the two parties to determine if it will continue beyond 2018.

In addition, the Commonwealth Standards and Conformance Advisory Group (CSCAG) hosted by the Department of Industry, Innovation and Science is considering longer term solutions for public access to incorporated standards free of charge and is expecting to reach a solution in 2019.

In the short term, SAI Global has advised CSCAG that online viewing of Australian Standards for non-commercial use through Australian libraries is now available. Where this does not provide for access, the Department of Infrastructure, Regional Development and Cities will consider options for making the listed incorporated documents available for viewing free of charge. However, given that the incorporated documents are highly technical standards, which specify requirements, equipment and recommendations for testing new road vehicles, it is expected that there would be little demand for such a service. Generally, manufacturers and vehicle test facilities have for a number of years accessed these identical standards as part of their professional library.

With COAG and/or CSCAG working on resolving this issue in the longer term through a whole of government approach, I hope that the above arrangements will satisfy the Committee's concerns, without changes being necessary to the Explanatory Statements for these particular ADRs.

### ***Committee's comment***

2.70 The committee thanks the assistant minister for this response. The committee notes the minister's advice that regulated entities may comply with the instruments without using the incorporated documents and standards.

2.71 The committee also notes the advice that online viewing of Australian standards for non-commercial use is now available through Australian libraries. The committee further notes the minister's advice that, where this does not provide for access, the Department of Infrastructure, Regional Development and Cities will

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consider options for making the listed incorporated documents available for viewing free of charge.

2.72 The committee considers that it would be appropriate for the information provided by the minister to be included in the explanatory statements, noting the importance of those documents as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation. In particular, the committee considers that it would be useful for the explanatory statements to clarify the manner in which the department will make the standards and other documents incorporated by the instruments available for viewing free of charge.

**2.73 The committee has concluded its examination of the instruments.**

**Senator John Williams (Chair)**