TREASURER

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

Thank you for your correspondence on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice in relation to the *Banking (prudential standard) determination No. 1 & 2 of 2018* (the instruments). The instruments contain rules to determine whether a central counterparty (CCP) is a qualifying CCP (QCCP) under the prudential standards.

I note the Committee's concern that while the instruments include references to the Committee on Payment and Market Infrastructures and International Organisation of Securities Commission's Principles for Financial Market Infrastructures (CPMI-IOSCO Principles), the Explanatory Statements (ESs) to the instruments do not provide a description of the incorporated document or indicate where it could be freely accessed.

I have raised the Committee's concerns with the Australian Prudential Regulation Authority (APRA), which is responsible for the instruments. APRA has advised me, that it does not consider the relevant paragraphs incorporate the CPMI-IOSCO principles into the instruments. This is because the status of an institution as a QCCP is dependent on a question of fact, rather than an application of the CPMI-IOSCO principles.

However, APRA has agreed to lodge replacement ESs for inclusion on the Register of Legislative Instruments if, after considering my response, the Committee remains of the view that the CPMI-IOSCO principles have been incorporated by reference.

Yours faithfully

The Hon Scott Morrison MP
19 / 2018

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure and Transport
Leader of The Nationals
Federal Member for Riverina

Ref: MC18-005470

23 JUL 2018

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear John Senator Williams

Thank you for the Committee's letter of 28 June 2018 regarding the legislative instrument *CASA 33/18 – Required Communication Performance and Required Surveillance Performance (RCP 240 and RSP 180) Capability Declarations – Direction 2018 [F2018L00616]*, for which I am responsible as Minister for Infrastructure and Transport.

I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee on the manner of incorporation and access to incorporated documents in relation to this instrument, in particular EUROCAE ED-100A/RTCA DO-258A and ICAO Doc 9869 *Performance-based Communications and Surveillance*.

The aforementioned documents are proprietary documents which may be purchased from EUROCAE, RTCA Inc. or ICAO. As a current subscriber, CASA will make the relevant sections of the documents available, in its Canberra or regional offices, by arrangement, and for reading only, to any aircraft operator who is affected by the direction instrument, or to any interested person.

I am advised that CASA will lodge a replacement explanatory statement explaining how and from where the documents can be obtained.

Thank you again for taking the time to write to me on this matter and I trust this is of assistance.

Yours sincerely

Michael McCormack

The Hon Michael McCormack MP
Parliament House Canberra | (02) 6277 7520 | minister.mccormack@infrastructure.gov.au
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The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for the Centenary of ANZAC

MS18-002084

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Thank you for your letter of 21 June 2018 to the Minister of Defence on behalf of the Senate Standing Committee on Regulations and Ordinances regarding Defence Determination 2018/15, Flexible Service Determination Amendment [F2018l00496]. The Minister has asked me to respond on her behalf.

The Committee has requested further advice on the consultation undertaken during the making of this Determination, the reason for an absence of information in the explanatory statement to the instrument regarding the manner of incorporation of Defence Force Remuneration Tribunal Determination No. 2 of 2017, and where that document may be freely accessed.

The Department of Defence has confirmed that extensive internal consultation was undertaken in the making of the Determination with the Chiefs of Service Committee, Navy, Army and Air Force Personnel Branches, relevant areas across Defence People Group and Defence Legal. External consultation was limited to the Defence Force Remuneration Tribunal, as Defence Determination 2018/15 relates directly to the determinations of the Tribunal.

In addition, People Capability Division within the Defence People Group undertook "town hall" type briefings at Defence sites around Australia, and each Service has communicated with members on the intent of the Total Workforce Model for the ADF, which underpins the changes proposed in this Determination. The Total Workforce Model is designed to provide more flexible patterns of service for Australian Defence Force (ADF) members than are currently available so as to assist with workforce attraction and retention. It also makes it easier for former members to return to the ADF and provide service under a range of more flexible arrangements.

Defence has now amended the explanatory statement to note the extensive consultation that was undertaken.

In accordance with your request, Defence has also amended the explanatory statement to specify that Defence Force Remuneration Tribunal Determination No. 2 of 2017 is incorporated by reference, as in force from time to time. Section 1.2.5A of the Defence Determination 2016/19, *Conditions of Service*, the determination which is amended by Defence Determination 2018/15, expressly provides that instruments are incorporated as in force from time to time unless otherwise stated.

The amended explanatory statement notes that the Defence Force Remuneration Tribunal Determination No. 2 of 2017 can be located on the Defence Pay and Conditions website where the document may be freely accessed.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

DARREN CHESTER

24 JUL 2018

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Senator the Hon. John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Williams John

I refer to the matters raised by the Senate Standing Committee on Regulations and Ordinances (Committee) in the *Delegated legislation monitor 6 of 2018* regarding the *Export Control (Animals) Amendment (Export of Livestock) Order 2018* (instrument).

The Committee requested advice as to why no consultation was undertaken in relation to the instrument and that the explanatory statement be amended to include this information.

The instrument makes provision for costs associated with the export of livestock as provided for in the *Export Control Act 1982* (Act). It requires exporters of livestock to pay reasonable costs of activities undertaken within or outside Australia by an authorised officer under section 9D or 9E of the Act in relation to an approved export program that applies to the export activities of the exporter.

It was not reasonably practicable to undertake consultation as the instrument was required as a matter of urgency, in order to implement the government's response to provide better assurance of animal welfare for livestock exports to the Middle East. Part of the response entailed the provision of authorised officers to act as independent observers on vessels carrying Australian livestock. Significant public concern and community expectations of a swift government response prevented ordinary consultation processes being undertaken on this occasion.

My department has prepared a replacement explanatory statement which includes additional information in relation to why no consultation was undertaken. I hope that this information will be of assistance to the Committee.

Yours sincerely

DAVID LITTLEPROUD MP

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MC18-019139

14 JUL 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I am writing with regard to the Senate Regulations and Ordinances Committee's consideration of the Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018.

I note the Committee's report and enclose my response to the matters raised.

I trust this information will be of assistance.

Yours sincerely

DAVID LITTLEPROUD MP

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

Enclosure

Clarification of issues raised by the Senate Regulations and Ordinances Committee relating to the Export Control (Animals) Amendment (Information Sharing and Other Matters) Order 2018 (the Order)

The nature of agriculture regulators

1. The Committee seeks advice regarding the nature of the agriculture regulators to whom information may be disclosed.
2. As defined in the Order, an agriculture regulator is a Commonwealth, state or territory authority or other body that is responsible for the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production; or a body that is authorised to perform functions or exercise powers in relation to the health and welfare of animals, the health and condition of animal reproductive material or the regulation of agricultural production under a Commonwealth law or the law of a state or territory.
3. Legislative responsibility for animal welfare within Australia rests primarily with state and territory governments. All states and territories have contemporary and comprehensive animal welfare legislation in place.
4. Examples of agricultural regulators include (but are not limited to):
    - Commonwealth regulatory bodies, such as the Department of Agriculture and Water Resources
    - state and territory animal welfare authorities (for example, the NSW Department of Primary Industries)
    - the National Livestock Identification System Limited (where it is authorised to perform functions or exercise powers by a state or territory).

Whether agriculture regulators will be subject to the *Privacy Act 1988*

5. The *Privacy Act 1988* (Privacy Act), applies to Australian Government agencies, including those agencies defined as agricultural regulators.
6. The Privacy Act regulates the handling of personal information by Australian Government agencies (and the Norfolk Island Administration), and some private sector organisations. Other Australian states and territories have their own equivalent legislative frameworks in place.
7. Those agriculture regulators which are state or territory bodies or who have been authorised by a state or territory to perform functions or exercise powers will be required to comply with the privacy legislation in place in that state or territory.

6 JUL 2018

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-014585

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair John

I refer to the letter of 21 June 2018 from Ms Anita Coles, Committee Secretary to the Senate Standing Committee on Regulations and Ordinances, concerning the *Health Insurance (Eligible Collection Centres) Approval Amendment (Application Form) Principles 2018* [F2018L00489] (the Principles).

I note the Committee requested advice as to whether any consultation was undertaken in relation to the instrument and the nature of that consultation or, if no consultation was undertaken, why not. In addition, the Committee also requested that the Explanatory Statement be amended to include this information.

The amendments to the Principles form part of a broader strategy for strengthening enforcement by the Department of legislative requirements relating to pathology Approved Collection Centres (ACCs), consistent with the 2017-18 Budget measure: Pathology ACCs – Enhanced Compliance. The amendments in the Principles are administrative in nature. They support the implementation of the Budget measure through enhancements to existing data collection by requiring applications for ACC approval to provide a response to each question in the prescribed form and include information necessary to support the application.

My Department has consulted extensively with the Pathology and GP sectors since July 2017 on implementation of the Budget measure, including the updating and release of the 'Red Book – Guidance on Laws Relating to Pathology and Diagnostic Imaging – Prohibited Practices' on 30 January 2018 and in roundtable meetings with key stakeholders.

At its November 2017 roundtable with the Pathology and GP sectors, my Department advised that it would be updating the ACCs approval application form to make all fields mandatory from 1 July 2018, giving effect to the amendments in the Principles. There was no objection to this proposal.

As the changes implemented by the Principles are relatively minor and administrative in nature and key stakeholders were informed of their effects at the roundtable, further consultation regarding the Principles was not considered necessary.

I have instructed my Department to lodge a replacement Explanatory Statement for the Principles which provides a description of the consultation that was undertaken, as outlined above.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

MC18-011032

10 JUL 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Williams~~ John,

I refer to the email from the Senate Standing Committee on Regulations and Ordinances concerning the Committee's scrutiny of the Norfolk Island National Park and Norfolk Island Botanic Garden Management Plan 2018-2028 ('the management plan'). The Committee requested clarification on the manner of incorporation of four documents, and advice on where these four documents may be obtained.

The Department of the Environment and Energy and the Director of National Parks note that the General Safety Rules cannot be incorporated in the management plan as in force from time to time. In accordance with paragraph 14(l)(b) and subsection 14(2) of the *Legislation Act 2003* ('Legislation Act'), the General Safety Rules may only be incorporated in the management plan as in force at the time the plan commenced. The General Safety Rules refer to an emerging area of policy relating to the use of remote operated aircraft – often referred to as drones – and it is expected that the Rules will need to be updated as the technology and its use evolves.

The Committee also requested clarification on the manner of incorporation of the Parks Australia Compliance and Enforcement Manual, the Chief Executive Instructions made under the *Public Governance Performance and Accountability Act 2013* and the Director of National Parks Climate Change Statement 2017-2032 Action Plan. In accordance with the Legislation Act, these documents are incorporated as in force at the time the management plan commenced. However, these documents also need to be updated during the life of the management plan to maintain best practice and adaptive management.

I advise that the management plan will be amended at the earliest possible opportunity to remove the incorporation of these four documents.

Thank you for raising this matter with me.

Yours sincerely

MELISSA PRICE

Minister for Revenue and Financial Services

Minister for Women

Minister Assisting the Prime Minister for the Public Service

The Hon Kelly O'Dwyer MP

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John

A representative of the Senate Regulations and Ordinances Committee wrote to my office on 21 June 2018 requesting a response in relation to the scrutiny issues outlined in Senate Standing Order 23 and the Committee's *Delegated Legislation Monitor No. 6 of 2018.*

The Committee has sought information about *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Regulations 2018.*

The Committee requested further information about whether the Australian/New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organisations* (**Standard**) is, or may be, made readily and freely available to persons interested in or affected by the Standard. The Committee also requested that the explanatory statement be amended to include my response. The Government's response to the Committee's inquiry is set out below.

Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Regulations 2018

The *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Regulations 2018* made amendments to paragraphs 7.6.02(1)(a) and 7.9.77(1)(a) of the *Corporations Regulations 2001* (the **Corporations Regulations**), and paragraph 10(1)(a) and item 2.20 of Schedule 2 of the *National Consumer Credit Protection Regulations 2010* (**Credit Regulations**). These amendments substituted a new reference to the updated Standard into these provisions. For example, the Corporations Regulations formerly referred to a version of the Standard published on 5 April 2006, and the

Credit Regulations referred to a version of the Standard in force at the time the Credit Regulation commenced.

The Standard is referred to in the Corporations and Credit Regulations for the purposes of requiring that ASIC must have regard to the Standard when it considers whether to make or approve standards or requirements relating to internal dispute resolution (IDR) systems. ASIC is able to readily source a complete published copy of the Standard when publishing policy like any other person who wishes to obtain a copy as explained below. Further, any IDR requirements set by ASIC based on the Standard are publically available to financial services and credit licensees, or any consumer wishing to use an IDR system: see https://download.asic.gov.au/media/4772056/rg165-published-18-june-2018.pdf

The Explanatory Statement explained that the Standard is available by visiting the Standards web shop at www.saiglobal.com.au or the Standards New Zealand website at www.standards.co.nz (the **Standards Websites**). As a result, the Standard is publicly available.

I note that if a person wishes to access a complete copy of the Standard, the person would need to purchase the Standard from the Standards Websites. However, I also note that the Standard is also freely available at the National Library of Australia and at State and Territory public libraries.

I hope this information will be of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MS18-002547

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ John,

I refer to the Senate Standing Committee on Regulations and Ordinances Committee's (the Committee) correspondence of 21 June 2018 in relation to the Trade and Customs Legislation Amendment (Miscellaneous Measures) Regulations 2018 (the Trade and Customs Amendment Regulations) and the Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 (the Defence Amendment Regulations).

Please find my detailed response to the questions posed by the Committee at **Attachment A** for the Trade and Customs Amendment Regulations and **Attachment B** for the Defence Amendment Regulations.

Thank you for bringing these matters to my attention.

Yours sincerely

ANGUS TAYLOR

Attachment A

Trade and Customs Legislation Amendment (Miscellaneous Measures) Regulations 2018

Undue trespass on personal rights and liberties

Question – the committee requests the minister's advice as to the justification for using an offence-specific exception that reverses the burden of proof in relation to the offence in new section 8A of the Commerce (Trade Descriptions) Regulation 2016, inserted by item 1 of Schedule 1 to the instrument.

The *Commerce (Trade Descriptions) Regulation 2016* (the CTD Regulation) is a core piece of legislation that ensures that goods imported into Australia are accurately labelled in accordance with their country of origin, composition and characteristics. When goods are sold domestically, consumers ought to be able to rely on labelling information applied to the goods to make informed purchasing decisions.

Importers and foreign exporters of goods to Australia are required to apply a trade description in accordance with the CTD Regulation. It is expected that such importers and exporters have knowledge of the country of origin, composition and characteristics of their goods, and any other relevant information that would provide information as to the safety of the goods in accordance with Australian consumer protection legislation.

The CTD Regulation lists goods that are prohibited from importation to Australia without a trade description applied in accordance with Division 2. In addition, sections 11 and 12 of the CTD Regulation detail goods that may be imported without a trade description. Collectively, these lists enable importers and exporters to clearly and readily identify those goods requiring a trade description.

Importers and exporters of goods to Australia are in a stronger position than the Commonwealth to understand the nature of their goods and are equipped to apply accurate labelling information onto these goods. Therefore, where an importer or exporter is alleged to have committed an offence against subsection 8(1) of the CTD Regulation, an importer or exporter who seeks to rely on the defence that a trade description has been applied in accordance with Division 2 will be best placed to readily provide evidence in accordance with subsection 8(2). The need to provide evidence that is not readily accessible to the Commonwealth would be exceptionally costly, whereas this same information would be easily provided by importers and exporters in support of their defence. It should be noted that this is an evidential burden only in accordance with section 13.3 of the *Criminal Code Act 1995.*

This position in respect of evidential burden placed on the defence in new section 8 is also consistent with the original section 8 of the CTD Regulation (and its predecessor, regulation 7 of the *Commerce (Imports) Regulations 1940*). The exception in the original section 8 has merely been removed, and placed in a stand-alone subsection to put it beyond doubt that it is a defence to the offence.

Attachment B

Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018

Regulation 13E of the Customs (Prohibited Exports) Regulations 1958 (the Export Regulations) prohibits the export of defence and strategic goods from Australia unless permission has been granted by the Minister for Defence, or an approved delegate.

The Minister for Defence has portfolio responsibility for Australia's defence policy, including the export of defence and strategic goods. The Minister for Defence requested the Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 (the Defence Amendment Regulations) be made to amend regulation 13E of the Export Regulations to align the Export Regulations with the *Defence Trade Controls Act 2012*.

The Department of Defence administers the defence and strategic goods provisions of the Export Regulations, including issuing permits and providing policy guidance on their operation. The Department of Home Affairs and the Australian Border Force (ABF) implement and enforce the controls respectively.

The Department of Home Affairs has consulted with the Department of Defence on the Committee's questions to the Defence Amendment Regulations and below are the responses provided by the Department of Defence.

Subdelegation

Question 1 – why it is necessary to allow subdelegation of the minister's and secretary's powers to employees below senior executive service level in new sections 13EJ and 13EK of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument)

Minister's delegations within Department of Defence

Subregulation 13EJ(1) of the Export Regulations provides authority for the Minister for Defence (the Minister) to delegate her/his powers under regulation 13E, subregulations 13EB(4), 13EB(5), 13EB(6) and regulation 13EC. Subregulation 13EJ(1) provides that the Minister may delegate her/his powers to an Australian Public Service Employee who holds, or is acting in, an Executive Level 1 (EL 1) position, or an equivalent or higher position, in the Department of Defence.

The Committee's comment that it prefers delegation powers be limited to Senior Executive Service (SES) officers, or those that possess appropriate qualifications or attributes, is noted.

The delegation to officers below SES level is required due to the volume of permissions granted by the Defence Export Controls Branch (DEC), which administers the scheme set out in Division 4A of the Regulations. DEC assesses approximately 2,200 permit applications a year under the Export Regulations. Due to this large volume, it would not be appropriate or possible for SES officers to administer the workload without resulting in significant processing delays by DEC and consequent business delays for Australian industry.
In addition, the delegation is appropriate as these officers have appropriate training to administer export controls.

The Minister's delegation is limited to approving permits and imposing, varying or removing conditions on those permits, along with requesting information, deferring consideration of an application and approving a form. These decisions need to be made regularly and relate directly to DEC's application assessment operations. Restricting the delegation to SES level officers would result in application assessment timeframe increases and unnecessarily delay Australian business and research operations. Having these decisions delegated to EL officers allows DEC to assess and determine low to medium risk applications in a timely manner, resulting in minimal impact to applicants' business operations.

All delegates must make decisions having regard to the statutory criteria set out in regulation 13E(4) of the Export Regulations. The Minister's delegation of power involves a limited exercise of discretion – that is, whether or not a permit application may engage any of the statutory criteria. Accordingly, it was considered appropriate that junior officers be able to make a decision to approve or vary an export permit. The power to make an adverse decision, that is, to refuse or revoke a permit, cannot be delegated and must be made by the Minister.

Minister's delegation to an officer of Customs

Subregulation 13EJ(3) of the Export Regulations provides that the Minister may delegate to an officer of Customs the power under regulation 13E to grant permission to export goods listed in Part 1 of the Defence and Strategic Goods List.

ABF officers are located at all sovereign ports and border checkpoints. The dispersed and often remote location of these officials necessitates the delegation of the Minister's powers below the SES and EL levels. This is because the officials at these locations are typically staffed by Australian Public Service officers at APS 1 to 6 work levels.

The delegation of power to officers of Customs is, in practice, restricted to officers identified by a functional area in the instrument of delegation. Furthermore, it is restricted to circumstances where a bona fide traveller is exporting no more than four firearms and the firearms are exported as part of the person's accompanied personal effects.

Secretary's Delegations within Department of Defence

Regulation 13EK of the Export Regulations prescribes the manner in which the Secretary of the Department of Defence (the Secretary) may delegate his/her powers under regulation 13EI. The Committee's comment that it prefers delegation powers be limited to SES officers or those that possess appropriate qualifications or attributes is noted.

The delegation of the Secretary's power under regulation 13EI is restricted to EL 1 officers and above operating within DEC. This level of delegation is appropriate as these officers have appropriate training to administer the export controls. Furthermore, all Defence personnel are bound by existing safeguards when authorising the disclosure of information. The Department of Defence must comply with the Australian Privacy Principals, contained in Schedule 1 of the *Privacy Act 1988* (Privacy Act) when collecting, using and disclosing personal information. The Australian Privacy Principals offer a range of safeguards to ensure appropriate protection of personal information. Any access, use or disclosure of personal information will only occur in accordance with privacy law and policy.

Question 2 – the appropriateness of amending the instrument to require that the minister or secretary, respectively, be satisfied that officials to whom powers are delegated under sections 13EJ and 13EK have the expertise appropriate to the power delegated

Although no specific qualifications are required to hold the delegation of powers under sections 13EJ and 13EK of the Export Regulations, the delegation is in practice restricted to EL officers in DEC, and ABF officers in certain functional areas as stated previously. These officers have the appropriate training to administer export controls legislation according to their delegation, including an understanding of export control legislation and their responsibilities in relation to it, good strategic awareness and experience in the security or defence environment.

EL officers within DEC have daily communication with Australian industry and other sectors that apply for export permits and through this contact, develop a good understanding of the nature of transactions they are deciding upon. Officers that are more senior in classification are not in a position to have this level of interaction with applicants. EL officers within DEC have the relationships, knowledge, experience and daily oversight of operations that is required to give full credit to the decision making process.

Undue trespass on person rights and liberties: privacy

Question 3 – whether information covered by new section 13EI of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) could include personal and sensitive information

Regulation 13EI of the Export Regulations permits the Secretary to disclose information, or give a document, obtained or generated for the purposes of Division 4A of the Export Regulations, to certain persons and entities. Information obtained or generated under Division 4A includes information provided by persons applying for permission to export goods, and information obtained by the Department of Defence, to assess whether the export of defence or strategic goods may prejudice the security, defence or international relations of Australia. Information disclosed under regulation 13EI of the Export Regulations could include limited personal information; for example name, address or employment details of applicants. Sensitive information is not obtained or generated for the purposes of Division 4A of the Export Regulations.

Accordingly, sensitive information would not be disclosed under regulation 13EI of the Export Regulations.

Question 4 – if so in respect of question 3, the justification for authorising the secretary to disclose such information to a broad range of persons and entities, including foreign governments, and persons or entities who may be later determined by legislative instrument

The committee has sought advice in relation to the Secretary's authority to disclose information to the broad range of persons and entities set out in subregulation 13EI(1) of the Export Regulations.

The ability for the Secretary to disclose information to a Minister of the Commonwealth, State or Territory, the head of a Commonwealth entity, a State or Territory or an authority of a State or Territory, is necessary to ensure that the administration and enforcement of export controls is not stymied through the inability to exchange information with relevant persons or entities. For example, while the Department of Defence is responsible for the administration of the permit scheme set out in Division 4A of the Export Regulations, the enforcement is undertaken by the ABF. It is therefore essential that the Secretary can disclose information to the ABF where there has been a suspected breach of export controls to ensure that appropriate enforcement measures can be taken.

The ability for the Secretary to disclose information to a foreign country is also necessary. There are some circumstances under which governments, or authorities of governments, of foreign countries may require to be notified of information collected through a defence export application. For example, in some instances Australia reports export information to foreign countries in line with reporting obligations set out in the international export regimes of which Australia is a member. Under the Wassenaar Arrangement, Australia has agreed to voluntarily exchange information that will enhance transparency and that will lead to discussions among participating countries on arms transfers. It is in Australia's interest to continue to meet its reporting obligations in line with its international commitments for continued effective international relations. The Secretary's ability to disclose information to foreign governments and authorities, as provided for in regulation 13EI, is essential to allow this reporting to occur.

Information generated for the purposes of Division 4A of the Export Regulations relates to the export of defence and strategic goods and technologies. In many circumstances, information pertaining to such exports will directly relate to national security or the international relations of Australia. It is necessary that the Secretary has the authority to disclose information gathered under Division 4A to the broad range of people and entities listed in regulation 13EI(1) where the information has implications for the security, defence or international relations of Australia. Disclosure to these persons and entities may be necessary to mitigate the potential risk to national security.

Question 5 – what safeguards are in place to protect the privacy of individuals in relation to such information

While the list of recipients specified in subregulation 13EI(1) is broad, the Regulations provide safeguards to any disclosure. Firstly, information may only be disclosed to those entities and persons in very limited circumstances. Specifically, the Secretary can only disclose information to persons and entities where the disclosure is in connection with the administration of Division 4A of the Export Regulations. This may include where the Department of Defence is collecting information from another Commonwealth entity in order to assess a permit application, and is required to disclose the name and address of the applicant to allow the Commonwealth entity to confirm the identity of the applicant. Therefore, disclosure powers can only be exercised in specific circumstances.

Further, under regulations 13EI(3) and (4), the power is limited so that the Secretary may only disclose the information or give the document if he or she is satisfied that the recipient will not disclose the information or document to anyone else without the Secretary's consent. This provides a further level of assurance that any personal information which is disclosed by virtue of regulation 13EI will still be accorded protection.

Additionally, there are existing privacy safeguards in place under the Privacy Act, which the Department of Defence complies with when collecting, using and disclosing personal information. The Australian Privacy Principals are a broad range of safeguards to ensure appropriate protection of personal information and the Department of Defence complies with these principals. Any access, use or disclosure of personal information will only occur in accordance with these existing privacy laws.

The Department of Defence informs applicants that information may be disclosed to a range of entities for the purpose of administering the defence export laws. In accordance with Australian Privacy Principal 5, at the time that an individual lodges an application to export a controlled good, they are provided a privacy notice by the Department of Defence.
The privacy notice specifies who is collecting the information and the purpose for which the information is collected. It stipulates that protected information, including any personal information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering export controls, counter proliferation and arms control laws or fulfilling Australia's international obligations in this respect. If an applicant has concerns with this stipulated use of their personal information, they can contact the Department of Defence.

Retrospective effect

Question 6 – the committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of subsection 18(3) of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 12 of Schedule 1 to the instrument); and if so, what steps have been or will be taken to avoid such disadvantage and to ensure natural justice for applicants

In response to the committee's request for advice, the Department of Defence is aware that, as per subsection 12(2) of the Legislation Act 2003, a provision with retrospective application does not apply to a person retrospectively to the extent that it would affect the person's rights so as to disadvantage them.

The Department of Defence confirms that while the relevant amendments made by the Defence Amendment Regulations apply prospectively, they will apply even where a regulation 13E application for permission was lodged prior to the commencement of the Defence Amendment Regulations, so long as the Minister had not made a decision on the application when the Defence Amendment Regulations came into force.

This has not had an adverse impact on applicants, nor will it in the future. The decision making criteria, which are now specified in subregulation 13E(4), closely reflect the decision-making criteria considered by the Minister prior to the commencement of the Defence Amendment Regulations. The previous decision-making criteria were listed in policy guidelines, which were publicly available on the Department of Defence's website. Subregulation 13E(4) was drafted to replicate the existing policy guidelines, except for item 12, which was introduced to provide more protections for Australian economic interests. Therefore, applicants are not disadvantaged by the commencement of new regulation 13E, regardless of when they submitted their applications, due to the subregulation 13E(4) decision-making criteria being consistent with policy guidelines which have existed for many years.

Additionally, the Department of Defence complies with the principle of procedural fairness in all administrative decision-making processes. The Department of Defence informs applicants prior to any recommendation to the Minister that an application not be granted, providing the opportunity to amend or withdraw the application should the applicant choose to do so. If an applicant became aware of obligations under the subregulation 13E(4) criteria that they had failed to identify in the guidelines previously available, they would be provided ample opportunity to amend their application.

Procedural fairness is paramount to the Department of Defence, and the new regulation does not disadvantage the rights of, or impose a liability on, any individuals for an act that took place before the date the Defence Amendment Regulations were made.

Merits review

Question 7 – the impact that the minister withholding reasons for a decision under new section 13EH of the Customs (Prohibited Exports) Regulations 1958 (inserted by item 4 of Schedule 1 to the instrument) may have on the ability of an applicant to seek effective merits review of the decision by the Administrative Appeals Tribunal

An exporter is not precluded from seeking merits review of a decision where the Minister has withheld reasons for a decision under section 13EH of the Export Regulations on the basis that the release of those reasons would prejudice the security, defence or international relations of Australia. The provision is intended to prevent the public release of information subject to a national security classification. By being subject to a national security classification, it is deemed that it is not in the public interest for such information to be publicly released. The Department of Defence anticipates that where the Minister considers that reasons cannot be disclosed as the release would prejudice Australia's security, defence or international relations, a statement setting out the nature of the reasons would be made available to the applicant. The statement would include as much detail as possible without prejudicing the defence, security or international relations of Australia. In the Department of Defence's view, this high-level statement of reasons would be sufficient for applicants to be able to address the concerns held by the Minister as part of the merits review process.

Question 8 – how the proposed operation of section 13EH would interact with the provisions of the Administrative Appeals Tribunal Act 1975 relating to the disclosure of reasons and consideration of reasons in AAT proceedings, particularly sections 28 and 36 of the Act

Where a notice of a decision made under Division 4A of the Export Regulations is required to include reasons for that decision, regulation 13EH of the Export Regulations provides that the notice must not disclose any reasons where the Minister considers such a disclosure would prejudice the security, defence or international relations of Australia. This may occur where, for example, the reasons for the decision are based on information subject to a national security classification, which cannot be disclosed publicly.

Subsection 28(1) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) provides that applicants may request that the decision maker give them a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the original decision. However, as per subsection 28(4) of the AAT Act, such an entitlement to request a statement under subsection 28(1) only exists if a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision has not already been given to the applicant.

Where the Minister has provided the applicant with a notice of a decision under Division 4A of the Export Regulations, this notice would provide as much information as possible on the evidence upon which the Minister's decision was based. This is despite the notice not disclosing all reasons on the basis that such a disclosure would prejudice the security, defence or international relations of Australia. In this instance, it is the Department of Defence's view that the applicant would not be entitled to request a statement from the Minister under subsection 28(1) of the AAT Act by virtue of subsection 28(4) of the AAT Act as a statement of reasons would, subject to the requirements in section 13EH of the Export Regulations, already have been given to the applicant.

As per subsection 35(4) of the AAT Act, the Department of Defence anticipates that, should a matter proceed to review by the Administrative Appeals Tribunal (the Tribunal), the Minister would apply for an order from the Tribunal directing that some information provided to the Tribunal be prohibited or restricted from publication or disclosure to some or all parties to the matter. Information would be made available, to the extent possible, to the other parties to the proceedings, or even to appropriately cleared counsel for those parties.

Alternatively, due to the nature of the Minister's decisions under regulation 13EH, the Minister may request that the Attorney-General issue a public interest certificate under section 36 of the AAT Act. Where the Attorney-General issues such a certificate, the Tribunal is required to ensure the information contained in such a document is not disclosed to any person other than a member of the Tribunal for the purpose of the specified review proceedings. As above, information would be made available, to the extent possible, to the other parties to the proceedings.

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure and Transport
Leader of The Nationals
Federal Member for Riverina

Ref: MC18-005333

28 JUN 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

John

Dear Senator Williams

I refer to the letter of 21 June 2018 from Ms Anita Coles, Committee Secretary, Senate Regulations and Ordinances Committee (the Committee) regarding the Air Navigation (Aircraft Noise) Regulations 2018 [F2018L00448].

The Committee has sought responses to a number of issues raised regarding the Air Navigation (Aircraft Noise) Regulations 2018 (the Regulations) which are provided below.

Offences: strict liability

The committee's expectation is that the explanatory statement (ES) to an instrument should include a justification for any strict liability offences imposed by the instrument, consistent with the Attorney-General's Department Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Offences Guide).

Response

I understand the Committee's concern regarding the inclusion of strict liability offences. The strict liability offences were reviewed as part of the sunsetting process in accordance with the *Legislation Act 2003*. The review of the offences found that the offences remain appropriate to provide a deterrent effect. The offences have existed since the introduction of the Air Navigation (Aircraft Noise) Regulations in 1984 and have resulted in sufficient deterrence that no offences for breaches of the Regulations have been prosecuted within the preceding 10 years. Conduct of such nature in breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protections of the community with the ability to facilitate industry productivity and growth. A revised ES including justification of strict liability offences will be developed and registered on the Federal Register of Legislation in due course.

The Hon Michael McCormack MP
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Offences: evidential burden of proof on the defendant

The Committee requests the minister's advice as to the justification for using an offence-specific defence that reverses the burden of proof in subsection 21(4) of the instrument.

Response

The offence in Section 21 of the Regulations is an offence for which the return of the card is completely within the defendant's knowledge and not available to the prosecution. The offence listed in Section 21 also carries a low penalty (1 penalty) unit. The offence has been put in place to ensure that only aviation inspectors duly authorised can carry out inspections on aircraft. The offence prescribed also ensures there is no danger to public safety through the unauthorised inspection of aircraft which may be unlawful. A revised ES including the evidential burden of proof on the defendant will be developed and registered on the Federal Register of Legislation in due course.

Subdelegation

The Committee seeks the minister's advice as to:

- *why it is necessary to allow such broad delegation of the secretary's powers under the instrument, to all employees of three government agencies; and*
- *the appropriateness of amending the instrument to require that the secretary be satisfied that officials to whom powers are delegated under section 24 have the expertise appropriate to the power delegated.*

Response

I understand the Committee's concerns regarding the delegation of the Secretary's powers under the instrument. The Department of Infrastructure, Regional Development and Cities (the Department) is currently conducting a review of the Secretary's Delegation Instrument to the Regulations to ensure that individuals have both the relevant qualifications and attributes or are members of the Senior Executive Service. It is expected that the Secretary's Delegation Instrument will only delegate powers to relevant officers with defined roles in those agencies with relevant qualifications and attributes. An amendment will be made to the Regulations to require that the Secretary is satisfied that officials to whom powers are delegated have the expertise appropriate to the power delegated, where these employees are not members of the Senior Executive Service.

The Department as part of sunsetting arrangements is currently preparing other amendments to legislative instruments made under the *Air Navigation Act 1920* and the amendment to the Regulations will be progressed at the same time as other legislative instruments. It is anticipated these instruments will be considered by the end of 2018.

Incorporation of document

The committee requests the minister's advice as to:

- *whether the requirement in section 10 is that noise certificates contain information required by the Annex as in force at the date of commencement of the instrument, consistent with the definition in section 4 and with the requirements of the Legislation Act 2003; and*
- *how the Annex is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.*

The Committee also requests that the instrument and/or its explanatory statement be amended to include this information.

Response

Annex 16, Volume I of the Convention on International Civil Aviation (the Chicago Convention) is adopted to increase the stringency of aircraft noise management. The Chicago Convention allows Australia to adopt practices which incentivise industry to update to modern aircraft types, and it reduces the effects on the community of aircraft noise. It is also adopted to give effect to Australia's obligations as a signatory to the Chicago Convention. Not adopting relevant provisions of Annex 16, Volume I could result in Australia being non-compliant with its international obligations. All Contracting States as members of the International Civil Aviation Organization (ICAO) have access to all Annexes of the Chicago Convention. The form and content of a noise certificate is specified in Attachment G of Annex 16 Volume I. Noise certificates are only issued by Contracting States of ICAO.

The application form for a noise certificate may be amended from time-to-time to ensure that noise certificates issued remain up-to-date, consistent with guidance material and other Contracting States can accept Australian registered aircraft, which are certified by Airservices Australia. Section 14(4) of the *Legislation Act 2003* specifies that if a legislative instrument provides for a form to be used, section 14 does not apply in relation to the form. The information required in the application form for a noise certificate is considered a form for the purposes of the *Legislation Act 2003*. All other remaining provisions of Annex 16, Volume I are those in force at the time of making of the instrument, that is, 1 April 2018.

Annex 16, Volume I is available for purchase on the ICAO website //store.icao.int/annex-16-environmental-protection-volume-1-aircraft-noise-english-printed.html. Aircraft operators can request a copy of Annex 16, Volume I from the Department without charge.

Consistent with the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003* the ES indicates how incorporated documents may be obtained, but does not appear to require that such documents be obtainable without charge. Any person subject to the law is able to obtain a copy upon request. A revised ES including reference that those subject to the law can obtain a copy of Annex 16, Volume I upon request to the Department will be developed and registered on the Federal Register of Legislation in due course.

I trust this advice is of assistance to the Committee.

Yours sincerely

Michael McCormack

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

MC18-010045

10 JUL 2018

Dear Senator ~~Williams~~ John,

I refer to the letter from the Committee Secretary concerning the Amendment of List of Exempt Native Specimens - NSW Estuary Prawn Trawl, NSW Ocean Trawl and NT Demersal Fisheries [F2018L00575] (the Instrument).

I am advised by the Department of the Environment and Energy (the Department) that the fisheries identified in the Instrument are commercial fisheries within the meaning of subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The Department also advised me that no assessment for the purposes of Division 1 or Division 2 of Part 10 of the EPBC Act was required to be carried out for the three fisheries named in the Instrument. This is because there is no relevant agreement under section 146 of the EPBC Act for the purpose of Division 1 and Division 2, which relates to Commonwealth-managed fisheries. Part 10 is not applicable to the fisheries in question as they are not managed by the Commonwealth. As such, the requirement in subsection 303DC(1A) of the EPBC Act does not apply in the case of these fisheries.

The Australian Government and state and Northern Territory governments have negotiated Offshore Constitutional Settlement (OCS) agreements that set out the responsibilities for each jurisdiction in the management of offshore fisheries. The *Fisheries Management Act 1991* (Cth) and reciprocal state and Northern Territory legislation provide the legal and administrative basis for governments to make the necessary arrangements to ensure that fishery resources are managed sustainably. The OCS agreements generally provide for state/Northern Territory laws to apply inside three nautical miles (nm), and for Commonwealth laws to apply from three to 200 nm, although there are many variations outlined in the specific agreements.

The Department has assessed the management arrangements for these three fisheries against the *Guidelines for the Ecological Sustainable Management of Fisheries – 2nd Edition*, and in accordance with Parts 13 and 13 A of the EPBC Act. The Department will ensure future explanatory statements are updated to more explicitly explain this arrangement.

I trust this advice is of assistance to the Committee.

Yours sincerely

MELISSA PRICE