

Monitor 4 of 2019– Committee correspondence

Contents

Chapter 1

Immigration (Guardianship of Children) Regulations 2018	1
Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018	2

Appendix A - Ongoing matters

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019.....	3
Fisheries Management Regulations 2019	7
Health Insurance (Diagnostic Imaging Services Table) Regulations 2019	9
Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019	11

Appendix B - Concluded matters

Charter of the United Nations (Sanctions—South Sudan) Amendment (2019 Measures No. 1) Regulations 2019	14
Child Care Subsidy Minister’s Amendment Rules (No. 1) 2019	15
Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018	16



The Hon David Coleman
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1 August 2019

Dear Minister,

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

Thank you for your response of 23 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above legislative instrument.

The committee considered your response at its private meeting on 31 July 2019. Whilst noting your advice, the committee retains strong concerns that the above instrument raises significant scrutiny issues that should be brought to the attention of the Senate. The committee's views are supported by independent, expert legal advice.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2019*, available on the committee's website at www.aph.gov.au/regords_monitor.

The committee has also resolved to place a notice of motion to disallow the instrument, to emphasise the committee's scrutiny concerns and to give the Senate additional time to consider these matters.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



The Hon David Littleproud MP
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Management
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1 August 2019

Dear Minister,

**Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management)
Regulations 2018 [F2018L01674]**

The committee refers to the response of the Assistant Secretary, Murray-Darling Policy Branch, dated 18 April 2019, in relation to the above legislative instrument. The Assistant Secretary responded to the committee on the minister's behalf because, at the time of the response, the Parliament was prorogued for the 2019 Federal election.

The committee considered the Assistant Secretary's response at its private meeting on 31 July 2019. Whilst noting the Assistant Secretary's advice, the committee retains strong concerns that the instrument raises significant scrutiny issues that should be brought to the attention of the Senate. The committee's views are supported by independent, expert legal advice.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2019*, available on the committee's website at www.aph.gov.au/regords_monitor.

The committee has also resolved to place a notice of motion to disallow the instrument, to emphasise the committee's scrutiny concerns and to give the Senate additional time to consider these matters.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



The Hon Peter Dutton MP
Minister for Home Affairs
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Via email: peter.dutton.mp@aph.gov.au
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1 August 2019

Dear Minister,

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 [F2019L00352]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Broad delegation of power

The instrument inserts new section 4DA into the Customs (Prohibited Imports) Regulations 1956 (primary regulations),¹ to prohibit the import of tobacco products into Australia without specified approvals.² Among other matters, the new section allows the minister or an 'authorised person' to grant permission to import tobacco products. New subsection 4DA(10) provides that an 'authorised person' means an APS employee of the Department of Home Affairs who is authorised in writing by the minister.

The committee generally considers that delegations of powers in instruments should be restricted to members of the Senior Executive Service (SES) or, at a minimum, that delegates be required to possess expertise appropriate to the delegated powers. The committee does not expect that particular details of delegate's qualifications, attributes or expertise be specified in the instrument. Rather, the committee considers that the relevant instrument should include some requirement that the person delegating powers and functions be satisfied that delegates possess expertise appropriate to the relevant delegation.

The explanatory statement indicates that delegation to an APS level employee is necessary to ensure that the high volume of applications for permission can be processed in a timely manner.³ The committee also understands that, in practice, the lowest level of authorised officers that the minister has approved is Executive Level 2, and that the position-holders

1 [F2019C00596].

2 These include where the minister or an authorised person has granted permission to import the tobacco product, or where the minister has approved the import of the tobacco product by legislative instrument.

3 Explanatory statement, p. 7.

responsible for issuing prohibited imports permits are experienced officers who are aware of, and diligently apply, administrative law principles.

The committee acknowledges that, owing to the high volume of applications and the need to avoid delays, it may not be possible to restrict delegations to members of the SES, even if APS level staff performed the relevant work and the SES only provided final authorisation. The committee also appreciates that, in practice, powers may be delegated only to appropriate persons.

Nevertheless, the committee is concerned that there is no legislative requirement that persons to whom powers are delegated possess qualifications, attributes and expertise appropriate to the delegated powers. The committee considers that, to ensure that the relevant powers are properly exercised, a requirement of this kind should be included in the instrument or in the enabling Act.

In light of these matters, the committee requests your advice as to the appropriateness of amending the instrument to require that the minister be satisfied that persons to whom powers are delegated possess the qualifications, attributes and expertise appropriate to the delegated powers.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments of delegated legislation 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.

As noted above, new section 4DA of the primary regulations allows the minister or an authorised person to grant permissions to import tobacco products, and to revoke such permissions if satisfied in relation to certain specified matters.

Decisions relating to the grant or revocation of permits appear to involve a significant element of discretion. In particular, the committee notes that, in determining whether to grant permission to import tobacco products, the minister or authorised person may consider 'any relevant matter'.⁴ Additionally, decisions relating to the grant or revocation of the relevant permission may affect the rights and interests of individuals. The decisions may therefore be suitable for independent merits review. However, the committee understands that the decisions are not reviewable, on the basis of their significance for the Australian economy.⁵

In this respect, the committee notes that the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*, notes that it may be appropriate to exclude policy decisions of a high political content (including decisions

4 Subsection 4DA(4). The committee understands that relevant matters include the applicant's history of paying required duties and taxes, and their record of compliance with Australian customs requirements.

5 In this respect, the committee acknowledges the significant cost of revenue evasion associated with the trade in illicit tobacco, as well as the economic and social costs of black economy activities associated with tobacco sales.

affecting the Australian economy), and financial decisions with a significant public interest element, from independent merits review.⁶

However, the guidance document also notes that it is rare for decisions to fall within these grounds. Additionally, it suggests that the grounds intend to apply to decisions which are of individual significance to the Australian economy. Examples provided include floating the dollar and setting foreign exchange rates.⁷ While the committee appreciates that decisions relating to the grant or revocation of permissions to import tobacco products are made in an economically significant context, it is not clear that *each* decision would be of such political or financial significance as to justify excluding merits review.

The committee also acknowledges that the decisions would be subject to judicial review. However, the committee does not generally consider the availability of judicial review to be sufficient justification for excluding independent merits review.

In light of these matters, the committee requests your detailed advice as to the characteristics of decisions relating to the grant or revocation of a permission to import tobacco products that would justify excluding independent merits review. The committee's consideration of this matter would be assisted if your response could identify established grounds for excluding merits review, as out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

6 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?*, 1999, [4.23], [4.34]-[4.38].

7 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?*, 1999, [4.24].

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



Senator the Hon Jonathon Duniam
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1 August 2019

Dear Assistant Minister,

Fisheries Management Regulations 2019 [F2019L00383]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Reversal of evidential burden of proof

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not unduly trespass on personal rights and liberties. This requires the committee to ensure that where offence provisions in instruments reverse the burden of proof for persons in their individual capacities, this infringement on the right to the presumption of innocence is soundly justified.

Subsections 80(4) and (6) of the instrument create two offences relating to identification codes for boats. Subsection 80(8) creates an offence-specific defence, which provides that subsections 80(4) and (6) do not apply in relation to a boat that is licenced to be used to take fish under a law of a state or territory, and which displays an identifying marking in accordance with that law. In relation to this defence, the defendant bears the evidential burden of proof.

The explanatory statement explains that the *Guide to Framing Commonwealth Offences (Guide)* has been consulted in framing the defence in subsection 80(7). It also states that it is appropriate to include such a defence as the question of whether or not a boat is authorised under state or territory law is information that would be readily available to the defendant, and would be significantly more difficult and costly for the prosecution to disprove. In this regard, the explanatory statement notes that a defendant would be readily aware of their state or territory fishing authority and could produce a relevant fishing licence or permit.¹

However, the committee notes that the *Guide* states that a matter should only be included in an offence-specific defence where it is peculiarly within the defendant's knowledge, and

1 Explanatory statement, p. 58.

where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.² In this instance, while the committee appreciates that the matters in subsection 80(7) of the instrument may be readily available to the defendant, and that it may be challenging for the prosecution (as well as for officers of the Australian Fisheries Management Authority) to identify relevant evidence, this does not mean that the matters would be *peculiarly* within the defendant's knowledge. Other entities (for example, state and territory licencing bodies) may also be apprised of the matters in subsection 80(7).

In light of these matters, the committee requests your detailed advice as to the justification for reversing the evidential burden of proof in subsection 80(7) of the instrument. The committee's assessment would be assisted if your response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

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



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1 August 2019

Dear Minister,

Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments of delegated legislation 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.

The instrument prescribes diagnostic imaging services for which Medicare benefits are payable, and the relevant Medicare amount payable to providers for each service. Subdivision A, Division 1.2 of Schedule 1 to the instrument applies 'capital sensitivity' to the services provided under the instrument, which has the effect that higher rates of Medicare reimbursement are provided for services performed on newer or upgraded equipment.

Clause 1.2.3 of Schedule 1 provides for exemptions from capital sensitivity in relation to certain equipment used in regional and remote areas. While some exemptions are automatically applied, subclause 1.2.3(4) provides that the secretary may grant exemptions in respect of diagnostic imaging equipment in inner regional areas.

Clause 1.2.4 provides that if the secretary refuses to grant an exemption under subclause 1.2.3(4), the applicant may seek reconsideration of the decision by the secretary. However, the committee understands that independent merits review is not available in relation to refusal decisions, and notes the explanatory statement does not identify any established grounds for excluding merits review.

The committee has considered this issue in relation to a previous version of the instrument. In doing so, the committee emphasised that it does not consider internal review by department officials to constitute sufficiently independent merits review, irrespective of the seniority of the officer conducting the review or whether the review process applies administrative law

principles.¹ Where an instrument provides for the making of discretionary decisions that may affect rights and interests, the committee generally considers that independent merits review should be available.

The committee also understands that there are no plans to introduce a merits review process in relation to capital sensitivity decisions, as the government plans to repeal these decisions by 1 May 2021. The committee appreciates that merits review will no longer be necessary once the relevant provisions are repealed. However, the committee considers that it would be appropriate to provide for independent merits review while the provisions remain in force.

In light of these matters, the committee requests your advice as to the appropriateness of amending the instrument to provide for independent merits review in relation to decisions to grant exemptions from capital sensitivity.

If the advice is that amending the instrument is not appropriate, the committee requests your advice as to the characteristics of the relevant decisions that would justify excluding independent merits review. The committee's consideration of this matter would be assisted if your response could identify established grounds for excluding independent merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

1 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018*, pp. 17-18, and *Delegated Legislation Monitor 10 of 2018*, pp. 55-58, in relation to Health Insurance (Diagnostic Imaging Services Table) Regulations 2018 [F2018L00858].



The Hon Nola Marino MP
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1 August 2019

Dear Assistant Minister,

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Reversal of legal burden of proof

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not unduly trespass on personal rights and liberties. This requires the committee to ensure that where offence provisions in instruments reverse the burden of proof for persons in their individual capacities (including requiring the defendant, not the prosecution, to disprove or raise evidence to disprove a matter), this infringement on the right to the presumption of innocence is soundly justified.

The instrument effectively amends the Norfolk Island *Criminal Code 2007* (Criminal Code (NI)), by amending relevant provisions of the Norfolk Island Continued Laws Ordinance 2015.¹ The amendments to the Criminal Code (NI) include the creation of two offences relating to sexual intercourse and acts of indecency with a person between 16 and 18 years of age (a 'relevant young person'), in circumstances where the defendant is in a position of trust or authority.² Each offence is punishable by 10 years' imprisonment.

In relation to each of these offences, the instrument also effectively creates two offence-specific defences. These apply where the defendant proves that:

- a valid, genuine marriage existed between the defendant and the relevant young person (marriage defence);³ or

1 [F2019C00320].

2 Sections 113A and 119A of the Criminal Code (NI).

3 Subsections 113A(3) and 119A(3) of the Criminal Code (NI).

- the defendant believed on reasonable grounds that the relevant young person was of or above the age of 18 years (belief of age defence).⁴

Each of these defences reverses the legal burden of proof, as they require the defendant to *prove* particular matters.

The committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence where it is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for prosecution to disprove than for the defendant to establish the matter. It also states that creating a defence is more readily justified if relevant matters are not central to the question of culpability, the penalty for the offence is low, and the conduct proscribed by the offence poses a grave danger to public health or safety.⁵

Additionally, the *Guide* states that placing a legal burden of proof on the defendant should be kept to a minimum, and that the explanatory materials should justify why any legal burden of proof has been imposed instead of an evidential burden.⁶

In relation to the marriage defence, the explanatory statement notes that the existence of a marriage between the defendant and the relevant young person is not needed to establish the offence, and asserts that this provides justification for reversing the legal burden of proof. In relation to the belief of age defence, the explanatory statement only notes that the defendant's reasonable belief as to a person's age would be peculiarly within their knowledge.⁷

While noting these matters, the committee does not consider that the explanatory materials provide an adequate justification for reversing the legal burden of proof. In relation to the marriage defence, while evidence of a valid marriage may be more readily available to the defendant and more difficult for the prosecution to establish, this does not mean that the matter is *peculiarly* within the defendant's knowledge. The existence of a valid marriage might be established, for example, by searches of relevant registries. Additionally, while there may be some justification for creating offence-specific defences in circumstances where a relevant matter is not central to culpability, the committee does not consider that this, of itself, is a sufficient justification for reversing the legal burden of proof.

As to the belief of age defence, the committee appreciates that the defendant's reasonable belief as to a person's age would be peculiarly within that person's knowledge, and that this reasonable belief is not central to questions of culpability. However, while these matters may justify creating an offence-specific defence, the committee does not consider that they justify reversing the legal, rather than the evidential, burden of proof.

Finally, and as noted above, the *Guide* states that an offence-specific defence is more readily justified if the relevant offence carries a low penalty. In this case, the offences carry

4 Subsections 113A(4) and 119A(4) of the Criminal Code (NI).

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

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 51-52.

7 Explanatory statement, pp. 10-11.

a very significant penalty of 10 years' imprisonment. The committee would therefore expect a more comprehensive justification for creating an offence-specific defence, particularly if the defence reverses the legal burden of proof.

In light of these matters, the committee requests your detailed advice as to:

- **why it is considered necessary and appropriate to reverse the burden of proof in relation to the offence-specific defences in sections 113A and 119A of the *Criminal Code 2007*; in particular, why it is considered appropriate to reverse the legal rather than the evidential burden; and**
- **the appropriateness of amending the instrument to include the offence-specific defences as elements of the offences to which they relate.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **15 August 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



Senator the Hon Marise Payne
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1 August 2019

Dear Minister,

Charter of the United Nations (Sanctions—South Sudan) Amendment (2019 Measures No. 1) Regulations 2019 [F2019L00112]

Thank you for your response of 22 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee acknowledges the dynamic nature of the UN sanctions environment, and notes that the use of delegated legislation in this context is intended to ensure that Australia is able to meet its international law obligations in a timely and effective manner. However, the committee remains concerned about the use of delegated legislation, rather than primary legislation, to prescribe conduct that may be punishable by 10 years' imprisonment. The committee also considers it inappropriate to apply strict liability in circumstances where such significant penalties may be imposed. The committee will continue to monitor these issues.

The committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement to the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



The Hon Dan Tehan MP
Minister for Education
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1 August 2019

Dear Minister,

Child Care Subsidy Minister's Amendment Rules (No. 1) 2019 [F2019L00107]

Thank you for your response of 25 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

The committee welcomes your undertaking to register a replacement explanatory statement on the Federal Register of Legislation. The committee will monitor this undertaking to ensure that it is implemented.

In the interests of transparency, I note that this correspondence, and your undertaking to amend the explanatory statement, will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



Senator the Hon Mathias Cormann
Minister for Finance
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Canberra ACT 2600
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1 August 2019

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018 [F2018L01723]

Thank you for your response of 25 July 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 31 July 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee considers that excluding decisions from independent merits review should be justified by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?* (ARC guide), rather than by reference to the Australian Administrative Law Policy Guide.

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

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances