



12 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]

Thank you for your response of 23 August 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 11 September 2019.

The committee has resolved to place a protective notice of motion to disallow the instrument to provide the committee with additional time to consider the scrutiny issues raised by the instrument and the matters outlined your response.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, 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



12 September 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Air Services Regulations 2019 [F2019L00371]

Thank you for your response of 23 August 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 11 September 2019.

The committee welcomes your undertaking to amend the instrument to limit immunity from civil liability to Airservices Australia and its employees.

While these amendments remain outstanding the committee has resolved to place a protective notice of motion to disallow the instrument to ensure that the undertaking is implemented. The committee will withdraw the notice once the instrument is amended in accordance with your undertaking.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, 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



12 September 2019

The Hon Jason Wood MP
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: Jason.Wood.MP@aph.gov.au
CC: amo.dlo@homeaffairs.gov.au

Dear Assistant Minister,

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

Thank you for your response of 9 August 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 11 September 2019. The committee remains concerned about the scrutiny issues outlined below, and has therefore resolved to seek further information in relation to this matter.

Broad delegation of power

The committee notes your advice that delegating powers under the instrument to Executive Level 2 (EL2) officers within the department strikes an appropriate balance between the need to process a high volume of applications, facilitating legitimate trade, and ensuring sufficient oversight and judgment in the permit application process. The committee also notes that you are satisfied that the current delegates possess appropriate expertise.

Whilst acknowledging this advice it remains unclear to the committee that it is appropriate to delegate the relevant powers to officers at the EL2 level in this case. In this respect, the committee notes your advice that at least some of the relevant decisions are of such significance to the Australian economy as to justify excluding merits review. While this may reflect established grounds for excluding merits review,¹ it is unclear that such significant decisions should be made by officers at the EL2 level. Conversely, if the decisions are more routine, and are therefore appropriately made by EL2 officers, it is unclear why the decisions should not be reviewable.

1 In this respect, it is noted that it may be appropriate to exclude policy decisions of a high political content, and financial decisions with a significant public interest element, from merits review. See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review*, 1999, <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx#pol>, [4.22]-[4.30]; [4.34]-[4.38].

It is also unclear whether the volume of applications makes it necessary, from a staff and resourcing perspective, to delegate the relevant powers to EL2 officers. The committee's consideration of this matter would be assisted by more detailed information about the number of applications that are processed within a particular period of time.

The committee therefore remains concerned that the instrument does not restrict the relevant delegations to members of the SES, or expressly require the minister to be satisfied that delegates possess appropriate experience, qualifications or expertise. In this respect, while current delegates may possess appropriate expertise, the committee considers that—in the absence of such a restriction—there is a risk of the powers being delegated in the future to persons who do not.

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

- **the average number of permit applications that are processed each month, and the nature of those applications; and**
- **why it is considered appropriate for officers occupying Executive Level 2 positions to decide any permit application, regardless of its economic significance.**

The committee also considers that it may be appropriate to amend the instrument to expressly require that the minister be satisfied, before delegating powers to approve permit applications, that the persons to whom powers are to be delegated possess appropriate qualifications, attributes and expertise. The committee requests your further advice in relation to this matter.

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. Consequently, the committee has resolved to place a 'protective' notice of motion to disallow the instrument, to provide it with additional time to consider your response.

To facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 September 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

The committee's longstanding view is that significant matters, including those with a substantial impact on personal rights and liberties, whether negative or positive, are more appropriately enacted via primary legislation. This is to ensure that such matters are subject to the full range of parliamentary scrutiny inherent in the passage of an Act of Parliament. Given the reduced parliamentary scrutiny of delegated legislation, the committee does not generally consider flexibility, on its own to be sufficient justification for including significant matters in delegated legislation.

In light of these matters, the committee considers that it may be appropriate for at least the core principles governing the use of restrictive practices to be set out in primary, rather than delegated, legislation. This is to ensure appropriate parliamentary oversight of matters that may have a substantial impact on personal rights and liberties. In this regard, the committee reiterates that other jurisdictions (for example, Victoria) appear to take this approach.¹

In light of the matters outlined above, the committee requests your advice as to whether consideration has been given to setting out the core principles governing the use of restrictive practices in the aged care setting in primary legislation. The committee also requests your advice as to why this approach has not been taken, noting the additional parliamentary scrutiny that attaches to primary legislation.

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. In this instance, the committee has resolved to give a notice of motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider the information received.

To facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 September 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, for example, section 140 of the *Disability Act 2006* (Vic). That section provides (among other matters) that restraint or seclusion can only be used if necessary to prevent a person from causing physical harm to themselves or others, including in circumstances involving the destruction of property. The section also provides that the use and form of restraint or seclusion must be the least restrictive option available in the circumstances, and must accord with the relevant person's behaviour management plan.



12 September 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Road Vehicle Standards Rules 2018 [F2019L00198]

Thank you for your response of 23 August 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 11 September 2019.

While noting your advice, the committee remains concerned that the instrument appears to incorporate the relevant intergovernmental agreements, and that neither the instrument nor its explanatory statement appears to describe the agreements, identify the manner in which they are incorporated, or indicate where they may be accessed free of charge.

The committee notes your undertaking to amend the instrument to clarify that the agreements are not incorporated. In light of this undertaking, and noting your advice that the explanatory statement to the amending instrument will specify where the agreements may be accessed, the committee makes no further comment on this matter.

However, while these amendments remain outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee may withdraw the notice once the instrument is amended in accordance with your undertaking, provided the amendment satisfies the committee's concerns.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, 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



12 September 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650]

The Senate Standing Committee on Regulations and Ordinances' secretariat has been corresponding with your department and the Australian Fisheries Management Authority (AFMA) on the committee's behalf regarding the above legislative instrument.

On 3 September 2019, the secretariat received advice from your department that AFMA has undertaken to revoke the instrument in response to the committee's concerns.

The committee welcomes this undertaking, as well as the advice that AFMA will ensure that future instruments correctly address the committee's concerns.

While the revocation remains outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee will withdraw the notice once the instrument is revoked in accordance with AFMA's undertaking.

Please note that, in the interests of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish to provide further information in relation to this matter, 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

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



12 September 2019

The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

Dear Minister,

Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532]

Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604]

Thank you for your response of 20 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 11 September 2019.

The committee considers that it would be appropriate for the information provided in your 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 needed, as extrinsic material to assist with interpretation.

On the basis of your advice, the committee has concluded its consideration of the instruments.

However, the committee also reiterates that significant matters – particularly where these are central to a regulatory scheme – should generally be enacted via primary legislation. In the context of a loans scheme, these may include broad principles for loan management, the circumstances in which foreclosure action may be taken, and the processes by which Commonwealth funds may be acquired and used.

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



12 September 2019

The Hon David Littleproud MP
Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Parliament House
Canberra ACT 2600
Via email: David.Littleproud.MP@aph.gov.au
CC: DLO-MO@agriculture.gov.au

Dear Minister,

**Regional Investment Corporation Operating Mandate (Amendment) Direction 2019
[F2019L00434]**

Thank you for your response of 20 August 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instruments.

The committee considered your response at its private meeting on 11 September 2019. On the basis of your advice, the committee has concluded its consideration of the instrument.

However, the committee reiterates that significant matters – particularly where these are central to a statutory scheme – should generally be enacted via primary legislation. In the context of a loans scheme, such significant matters may include minimum loan amounts and eligibility criteria for financial assistance. The committee also draws your attention to the comments of the Senate Standing Committee for the Scrutiny of Bills on this matter.¹

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*.

1 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, June 2017, pp. 37-38; *Scrutiny Digest 8 of 2017*, August 2017, pp. 146-147, in relation to the Regional Investment Corporation Bill 2017.

Thank you for your assistance with this matter.

Yours sincerely,

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