

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated Legislation Monitor

Monitor 2 of 2019

3 April 2019

© Commonwealth of Australia 2019

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Steve Martin	Tasmania, NAT
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Secretariat

Ms Anita Coles, Secretary
Ms Laura Sweeney, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Katie Helme, Legislative Research Officer

Committee legal adviser

Associate Professor Andrew Edgar

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

Contents

Membership of the committee	iii
--	------------

Introduction.....	ix
--------------------------	-----------

Chapter 1 – New and continuing matters

Response required

Amendment to List of Exempt Native Specimens - Commonwealth Southern and Eastern Scalefish and Shark Fishery, February 2019	1
Charter of the United Nations (Sanctions—South Sudan) Amendment (2019 Measures No. 1) Regulations 2019	4
Child Care Subsidy Minister’s Amendment Rules (No. 1) 2019	10
Defence (Payments to ADF Cadets) Determination 2019	13
Defence (State of Emergency – Townsville floods) Determination 2019 (No. 1).....	16
Financial Sector (Collection of Data) (reporting standard) determinations – various instruments	19
Great Barrier Reef Marine Park Regulations 2019	21
Marriage (Celebrant Professional Development Statement 2019).....	25
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019)	27
Renewable Energy (Electricity) Amendment (Small-scale Solar Eligibility and Other Measures) Regulations 2019	29
Road Vehicle Standards Rules 2018	32
Section 11 exemptions for voyages between the Cocos (Keeling) Islands and Australian states and territories	35
Shipping Registration Regulations 2019	37
Underwater Cultural Heritage Rules 2018	40

Further response required

AD/DHC-2/26 Amdt 1 Passenger Seats and Passenger Seat Attachment Fittings	45
Amendment of List of Exempt Native Specimens – Commonwealth Northern Prawn Fishery, December 2018	48
Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018.....	51
Immigration (Guardianship of Children) Regulations 2018.....	54

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10)	58
Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018	60
Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018	65

Advice only

Civil Aviation Safety Amendment (Part 139) Regulations 2019	71
Defence Determination, Conditions of Service (Salary non-reduction) Determination 2019 (No. 6).....	74
Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2019	76
Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2019	76
Health Insurance (Professional Services Review Scheme) Regulations 2019	79
Industry Research and Development – various instruments	81
Radiocommunications Licence Tax Amendment Determinations – various instruments	84
Social Security (Administration) (Declared child protection State or Territory – Western Australia) Determination 2019	86

Chapter 2 – Concluded matters

Air Navigation (Essendon Fields Airport) Regulations 2018	89
Air Navigation (Gold Coast Airport Curfew) Regulations 2018	89
Australian Radiation Protection and Nuclear Safety Regulations 2018	96
CASA EX159/18 — Authorised Flight Examiners Exemption 2018.....	98
Charter of the United Nations (Sanctions—Mali) Regulations 2018	100
Civil Aviation Safety Amendment (Part 91) Regulations 2018	106
Customs Amendment (Product Specific Rule Modernisation) Regulations 2018	111
Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018	115
Higher Education Support (Parapharm Pty Ltd) Higher Education Provider Approval Revocation 2018	118
Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2018	120

Lands Acquisition Amendment Regulations 2018	122
National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2018	124
Public Service Amendment (Miscellaneous Measures) Regulations 2018	127
Telecommunications Amendment (Access to Mobile Number Information for Authorised Research) Regulations 2018	129
Treasury Laws Amendment (Gift Cards) Regulations 2018.....	135

Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.¹

Publications

The committee's usual practice is to table a report, the *Delegated Legislation Monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated

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

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

Ministerial correspondence

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

Guidelines

Guidelines referred to by the committee are published on the committee's website.⁴

General information

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

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

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

2 Regulations and Ordinances Committee, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

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

4 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

5 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

6 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

7 Regulations and Ordinances Committee, *Disallowance Alert 2019*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

1.1 This chapter details concerns in relation to disallowable instruments of delegated legislation registered on the Federal Register of Legislation between 25 January 2019 and 28 February 2019 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

1.2 Guidelines referred to by the committee are published on the committee's website.¹

Response required

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

Amendment to List of Exempt Native Specimens - Commonwealth Southern and Eastern Scalefish and Shark Fishery, February 2019

FRL No.	F2019L00151 ²
Purpose	To amend the List of Exempt Native Specimens by deleting specimens taken from the Commonwealth Southern and Eastern Scalefish and Shark Fishery, and by including specimens taken from that fishery—subject to certain conditions.
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Compliance with authorising legislation³

1.4 Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation are made in

1 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

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

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

accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation, including any limitations or conditions on the power to make the instrument set out in the authorising legislation.

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

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

1.7 It appears to the committee that the requirements in subsection 303DC(1A) would not be satisfied by considering the outcomes of an assessment conducted under Part 10 of the EPBC Act only as one of a number of relevant factors. Rather, subsection 303DC(1A) appears to require the minister to give *primary consideration* to those outcomes. In this regard, the explanatory memorandum to the Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001 (2001 Bill) states that:

The purpose of...[sub-clauses 303DC(1A) – 303DC(1C) is] to ensure that the outcomes of the strategic assessment process will be relied upon for the purpose of deciding whether to add specimens derived from the fishery to the list of specimens which are exempt from export controls under Division 3 of Part 13A. *Only in exceptional circumstances would other matters need to be considered* [italics added].⁴

1.8 Schedule 2 to the instrument amends the exempt specimens list by including specimens derived from the Commonwealth Southern and Eastern Scalefish and Shark Fishery. It appears that the fishery is a commercial fishery, and that the fishery is managed by the Commonwealth.⁵ Consequently, it appears that the requirement in subsection 303DC(1A) of the EPBC Act would apply.

1.9 The explanatory statement provides that the Southern and Eastern Scalefish and Shark Fishery was assessed under Part 10 of the EPBC Act in September 2003.⁶ However, neither the instrument nor the explanatory statement indicates whether

4 Explanatory memorandum, 2001 Bill, p. 24. The 2001 Bill inserted the requirements relating to the exempt specimens list into the EPBC Act, including subsection 303DC(1A).

5 See <https://www.afma.gov.au/fisheries/southern-eastern-scalefish-shark-fishery>.

6 Explanatory statement, p. 1.

the minister 'relied primarily' on the outcomes of this (or another) assessment in making the instrument.

1.10 The committee requests the minister's specific advice as to whether, in making the instrument, the minister 'relied primarily' on the outcomes of an assessment in relation to the Commonwealth Southern and Eastern Scalefish and Shark Fishery, such as would satisfy subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*.

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

FRL No.	F2019L00112 ⁷
Purpose	To amend the Charter of the United Nations (Sanctions – South Sudan) Regulation 2015 to implement the decision of the United Nations Security Council in UNSC Resolution 2428 to impose an arms embargo in relation to South Sudan.
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Strict liability⁸

Significant penalties⁹

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

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

1.13 Item 7 of the instrument amends the Charter of the United Nations (Sanctions—South Sudan) Regulation 2015 (principal regulation)¹⁰ to insert new

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

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

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

10 [F2019C00135].

sections 4B to 4E. Those sections provide for a number of circumstances in which a person may contravene a UN sanction enforcement law:¹¹

- subsection 4B(1): making a sanctioned supply¹² which is not an authorised supply;¹³
- subsection 4B(4): using the services of an Australian ship or Australian aircraft to transport arms or related material in the course of, or for the purposes of, making a sanctioned supply which is not an authorised supply;
- subsection 4B(5): for a body corporate that has effective control over another body corporate or entity, the circumstance that the other body corporate or entity makes a sanctioned supply which is not an authorised supply;
- subsection 4D(1): using a sanctioned service¹⁴ which is not an authorised service;¹⁵
- subsection 4D(4): using the services of an Australian ship or Australian aircraft in the course of, or for the purposes of, providing a sanctioned service which is not an authorised service; and
- subsection 4D(6): for a body corporate that has effective control over another body corporate or entity, the circumstance that the other body corporate or entity provides a sanctioned service which is not an authorised service.

11 Each of the provisions is also specified as a UN sanction enforcement law in the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2019C00138].

12 New section 4A of the principal regulations (inserted by item 5 of the present instrument) provides that a person makes a 'sanctioned supply' if the person supplies, sells or transfers arms or related material to another person and, as a direct or indirect result of the supply, sale or transfer, the goods are transferred to South Sudan.

13 Subsection 4B(6) provides that an 'authorised supply' is a sanctioned supply that is authorised by a permit under section 4C or, for a supply, sale or transfer in or from a foreign country, a permit properly granted by the foreign country in a way that accords with that country's obligations under Resolution 2428 and any other relevant resolution.

14 'Sanctioned service' is defined in section 4 of the principal regulations as the provision to South Sudan of technical assistance, training, financial or other assistance relating to military activities or the provision, maintenance or use of any arms or related material. 'Sanctioned service' also includes the provision to South Sudan of armed mercenary personnel.

15 Subsection 4D(6) provides that an 'authorised service' is a sanctioned service that is authorised by a permit under section 4E or, for a service provided in a foreign country, a permit properly granted by the foreign country in a way that accords with that country's obligations under UN Resolution 2428 and any other relevant resolution.

1.14 Section 27 of the *Charter of the United Nations Act 1945* (UN Charter Act) makes it an offence to contravene a UN sanctions enforcement law. Such offences are punishable by up to 10 years' imprisonment, a significant fine,¹⁶ or both.

1.15 The committee acknowledges that the UN Charter Act permits regulations to prescribe conduct that would contravene a UN sanction enforcement law. Nevertheless, the committee is concerned about the use of the instrument to prescribe such conduct, given that contraventions of a UN sanction enforcement law may be punishable by a significant custodial sentence. The committee considers that the underlying conduct for offences carrying significant custodial penalties is more appropriately set out in primary legislation, rather than delegated legislation, noting that primary legislation is subject to a higher level of parliamentary oversight.

1.16 The committee also notes that subsection 4B(2) of the principal regulation (inserted by item 7 of the present instrument) provides that strict liability applies to the question of whether making a sanctioned supply was, or was not, authorised by a permit under section 4C. Subsection 4D(2) similarly provides that strict liability applies to the question of whether the provision of a sanctioned service was, or was not, not authorised by a permit under section 4E. The explanatory statement explains that the application of strict liability:

means that the prosecution will only need to prove that a permit does not exist. The defendant will not be able to argue that the conduct has been permitted in some other way, for example through a statement by the Minister which could be taken as *de facto* authorisation to engage in conduct that is prohibited under the Act.¹⁷

1.17 Under general principles of criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). The application of strict liability removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects a clear justification to be provided in the explanatory materials.

1.18 In this instance, the explanatory statement provides no such justification. However, the statement of compatibility provides that the application of strict liability is aimed at:

16 Subsections 27(3) and (4) of the Charter of the UN Act sets the maximum fine that may be imposed at the greater of 3 times the value of the prohibited transaction or transactions, or 2,500 penalty units.

17 Explanatory statement, p.2.

preventing a spurious defence that a statement of the Minister could be taken as *de facto* authorisation to engage in conduct that is prohibited under the *Charter of the United Nations Act 1945*, in addition to the overarching objectives of the UNSC arms embargo for South Sudan.¹⁸

1.19 The committee notes the justification provided in the statement of compatibility. However, the committee also notes that the *Guide to Framing Commonwealth Offences* states that applying strict liability to a particular element of an offence may be justified where:

- requiring proof of fault would undermine deterrence, and there are legitimate grounds for penalising persons lacking fault; or
- the relevant element of the offence is a jurisdictional element rather than one going to the essence of the offence.¹⁹

1.20 In this instance, it is not clear that requiring proof of fault in relation to whether a person has been granted a permit under section 4C or 4E would undermine deterrence, nor is it clear that there are legitimate grounds for penalising persons lacking fault in relation to these matters. Moreover, the question of whether a person holds a permit under section 4C or 4E appears to be central to the relevant offences, noting that the offences apply specifically to *unauthorised* conduct.

1.21 In addition, the committee notes that the *Guide* states that the application of strict liability to all elements of an offence is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.²⁰ The committee notes that in this instance strict liability is only applied to an element of each offence. Nevertheless, the committee's longstanding scrutiny view (shared with the Senate Standing Committee for the Scrutiny of Bills) is that it is inappropriate to apply strict liability in circumstances where a custodial penalty may be imposed—particularly such a substantial penalty as 10 years' imprisonment. This issue has not been addressed in the explanatory materials.

1.22 The committee requests the minister's more detailed advice as to the justification for applying strict liability to whether a person holds a permit granted under section 4C or 4E of the instrument to make a sanctioned supply or provide a sanctioned service. The committee's consideration of the appropriateness of a provision which imposes strict liability would be assisted if the minister's response

18 Statement of compatibility, p. 12.

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

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

would explicitly address relevant principles set out in the *Guide to Framing Commonwealth Offences*.²¹

1.23 The committee also requests the minister's advice as to the justification for setting out the underlying conduct for offences punishable by up to 10 years' imprisonment in delegated legislation, rather than in primary legislation.

Reversal of evidential burden of proof²²

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

1.25 As outlined above, new sections 4B and 4D of the principal regulations (inserted by item 7 of the present instrument) provide that a person contravenes a UN sanction enforcement law where they make a sanctioned supply or provide a sanctioned service which is not an authorised supply or service.

1.26 Sub-paragraphs 4B(6)(b)(i) and 4D(6)(b)(i) provide, respectively, that a supply or a service will be an 'authorised' supply or service where it is authorised by a permit granted by a foreign country. Subsections 4B(7) and 4D(7) provide that the defendant bears the evidential burden in relation to this matter.

1.27 The committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence, which reverses the burden of proof (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.²³

1.28 The explanatory statement briefly provides a justification for the reversal of the burden of proof:

The shifting of the evidentiary burden to the defendant in subsections 4B(7) and 4D(7) is justified on the basis that foreign permits

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

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

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

granted to the defendant would be peculiarly within the defendant's knowledge.²⁴

1.29 The committee notes this explanation, and acknowledges that it may in some cases be difficult for the prosecution to ascertain whether a permit has been granted by a foreign country. Nevertheless, it is not clear to the committee that whether a permit has been granted by a foreign country would be peculiarly within the defendant's knowledge in all circumstances, or that this matter would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. For example, whether a permit has been granted may also be within the knowledge of the foreign entity authorised to grant the permit.

1.30 The committee draws the attention of the minister and the Senate to the inclusion in the instruments of provisions (that is subsections 4B(7) and 4D(7)) which reverse the evidential burden of proof, in circumstances where relevant matters may not be peculiarly within the knowledge of the defendant.

24 Explanatory statement, p. 2.

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

FRL No.	F2019L00107 ²⁵
Purpose	To amend the Child Care Subsidy Minister's Rules 2017, to enable the secretary to make certain determinations relating to the care of children on his or her own initiative, and to refer to new guidelines relating to in-home care.
Authorising legislation	<i>A New Tax System (Family Assistance) Act 1999</i> <i>Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017</i>
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Consultation²⁶

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

1.32 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.²⁷

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

This amendment is in response to significant stakeholder feedback from approved providers and indirectly, from affected families.²⁸

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

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

27 Regulations and Ordinances Committee, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

28 Explanatory statement, p. 4.

1.34 No further information is provided as to any consultation that has been undertaken in relation to the instrument as presently drafted.

1.35 While the committee does not usually interpret paragraphs 15J(2)(d) and (e) of the Legislation Act as requiring a highly detailed description of consultation, it considers that an overly bare or general description may be insufficient to satisfy those requirements. In this instance, the statement that the amendment is 'in response to...stakeholder feedback' does not appear to satisfy the requirements in the Legislation Act that an explanatory statement either describe the nature of any consultation undertaken in relation to the instrument or explain why no consultation was undertaken.

1.36 The committee requests the minister's advice as to:

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

1.37 The committee also requests the explanatory statement be amended to include this information.

Significant matters in delegated legislation (Henry VIII clause)²⁹

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

1.39 Item 3 of Schedule 1 to the instrument amends the Child Care Subsidy Minister's Rules 2017 (principal rules)³⁰ to insert a new section 69A. That section modifies the operation of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) to enable the secretary to make a determination that a child was at risk of serious abuse or neglect, without an approved provider having to apply for such a determination.

1.40 Item 3 of Schedule 1 to the instrument was made under sub-item 12(1) of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Amendment Act), which allows the minister to make transitional rules. Sub-item 12(3) of the Amendment Act allows rules made under sub-item 12(1) on or before 2 July 2020 to modify the operation of the Amendment Act or any other Act. Sub-item 12(3) of the Amendment Act may therefore be characterised as a 'Henry VIII' clause, as it enables delegated legislation to modify the

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

30 [F2019C00168].

operation of legislation which has been passed by the Parliament. The explanatory statement to the present instrument recognises that item 12 of Schedule 4 to the Amendment Act operates as a Henry VIII clause.³¹

1.41 There are significant scrutiny concerns with enabling delegated legislation to modify the operation of primary legislation which has been passed by Parliament, because such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the executive.

1.42 In this respect, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered item 12 of Schedule 4 to the Amendment Act when the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 was before the Parliament. The Scrutiny of Bills committee noted that the item appeared to provide a 'broad modification power of principal legislation'. The Scrutiny of Bills committee also noted that while the explanatory materials stated that the provision was *intended* to operate beneficially, there was nothing on the face of the bill that would *require* it to be used in that manner.³²

1.43 Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the question of whether the scope of the delegation of legislative power in item 12 was appropriate, and drew the matter to the attention of this committee.³³

1.44 The committee draws the modification of primary legislation via delegated legislation via this instrument to the attention of the Senate.

31 Explanatory statement, p. 1.

32 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1 of 2016*, p. 20.

33 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, p. 368.

Defence (Payments to ADF Cadets) Determination 2019

FRL No.	F2019L00059 ³⁴
Purpose	To set out the authority and conditions for payments and other benefits to or for instructors or officers of Australian Defence Force cadets.
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Merits review³⁵

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

1.46 Subsection 6(1) of the instrument provides that an officer or instructor in the Australian Defence Force (ADF) cadets may apply, in writing, for the payment of a daily amount, or an expense that has been or will be incurred, for participating in activities of the ADF cadets. The explanatory statement indicates that the application must be made to an authorised person.³⁶

1.47 Subsections 6(2) and (3) of the instrument provide that an instructor or officer in the ADF cadets may not apply for an allowance for more than 48 days of participation in cadet activities during a financial year, unless approved in writing by an authorised person. Subsections 6(4) and (5) further provide that an application must be lodged on or before the end of the calendar month in which the officer or instructor participated in the cadet activities or incurred the relevant expenses, unless a late application is approved by an authorised person.

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

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

36 Explanatory statement, p. 2. 'Authorised person' is defined in section 10 of the instrument as a person authorised in writing by the Chief of Joint Capabilities to approve applications or an allowance of more than 48 days' participation, to approve late applications, and to make decisions about the amount of reimbursement payable.

1.48 Finally, section 9 of the instrument provides for the reimbursement of out-of-pocket expenses for cadet officers and instructors in certain circumstances. Subsection 9(2) provides that, in those circumstances, the Chief of Joint Capabilities (CJC) or an authorised person may decide the amount of reimbursement.

1.49 It appears that decisions by authorised persons and by the CJC under sections 6 and 9 of the instrument, relating to the payment of amounts and the extension of time for applications, involve at least an element of discretion. Such decisions also appear to have the potential to affect the rights and interests of individuals, particularly ADF cadet officers and instructors who participate in relevant activities. Consequently, it appears that the decisions may be suitable for independent merits review.

1.50 However, the instrument does not appear to provide for independent merits review of decisions made under sections 6 and 9. Further, the explanatory statement does not indicate whether those decisions are subject to merits review, or whether another mechanism, such as the ADF Redress of Grievance scheme, would apply.

1.51 Consequently, the committee requests the minister's advice as to:

- **whether decisions relating to payments to officers and instructors of the ADF cadets are subject to independent merits review (including whether the ADF Redress of Grievance scheme applies to those decisions); and**
- **if not, the characteristics of those decisions that would justify excluding independent merits review, by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

Retrospective effect³⁷

1.52 Subsection 11(1) of the instrument provides that applications for payment made under a previous version of the instrument are to be treated as having been made under the present instrument.³⁸

1.53 While the instrument commences prospectively, it appears to the committee that subsection 11(1) may result in the instrument having a retrospective effect. This may affect officers and instructors that have submitted applications for payment prior to the creation of the present instrument.

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

38 The previous version of the instrument is the Defence (Payments to ADF Cadets) Determination 2016 [F2016L01098], which is repealed by the present instrument.

1.54 The committee notes that the instrument does not appear to substantively alter relevant criteria for deciding applications that were set out in the previous version of the instrument. Nevertheless, the committee would expect the explanatory statement to address whether subsection 11(1) would have the effect of disadvantaging any person and, if so, what steps have been taken to mitigate that disadvantage.

1.55 The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the retrospective operation of subsection 11(1) of the instrument; and, if so, what steps have been taken or will be taken to mitigate such disadvantage.

Defence (State of Emergency – Townsville floods) Determination 2019 (No. 1)

FRL No.	F2019L00108 ³⁹
Purpose	To provide assistance to members of the Australian Defence Force and their dependents who have been affected by, and require relief from, flooding in Townsville.
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Merits review⁴⁰

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

1.57 The instrument sets up a scheme under which benefits may be provided to members of the Australian Defence Force (ADF) and their dependants who have been affected by, and require relief from, flooding in the Townsville area.

1.58 A number of provisions in the instrument allow a 'decision maker' to approve or extend the application of particular benefits:⁴¹

- section 11 provides for the circumstances in which an ADF member and their dependents may occupy temporary accommodation, for a maximum period of three months. Under subsection 11.3, the period of eligibility for accommodation may be extended by a decision maker in 'special circumstances';
- section 14 provides for the circumstances in which an ADF member and their dependents may be eligible for the cost of accommodation in Townsville, for

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

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

41 'Decision maker' is defined in section 5 of the instrument, and includes a number of listed senior officials of the Army, Navy and Air Force. For example, in relation to a member of the Air Force and their dependents, the decision maker is the Senior ADF Office, RAAF Base Townsville.

up to three nights. Under subsection 14.5, this time limit may be extended by a decision maker;

- section 17 provides that an ADF member may be required to occupy living-in accommodation in Townsville. Subsection 17.2 provides that a decision maker may permit a member's dependents to also occupy living-in accommodation; and
- section 19 provides that an ADF member is eligible for the reasonable cost of furniture hire to replace furniture lost, damaged or made inaccessible by flood water. Paragraph 19.3(c) allows a decision-maker to set a date on which this benefit ceases to apply.

1.59 Each of these decisions appears to involve at least an element of discretion by the decision maker. The decisions may also affect the rights and interests of individuals (in particular, ADF members and their dependents who have been affected by the Townsville floods). Consequently, it appears that the decisions may be suitable for independent merits review. However, neither the instrument nor the explanatory statement indicates whether the decisions are reviewable.

1.60 The committee notes that the Defence (State of Emergency – Townsville floods) Amendment Determination 2019 (Amendment Determination)⁴² amends the present instrument to (among other matters) amend the definition of 'decision maker' in section 5, and to insert a new section 24. Section 24 allows a commanding officer in an ADF member's chain of command or a decision maker to approve payment of certain expenses for a person who would not otherwise be eligible to receive benefits.

1.61 The explanatory statement to the Amendment Determination provides that:

Criteria are provided for the exercise of discretions under the Principal Determination, as amended by this determination. Adverse decisions may be subject to inquiry under the ADF redress of grievance system. A person may make a complaint to the Defence Force Ombudsman.⁴³

1.62 This appears to indicate that decisions made under the new sections inserted by the Amendment Determination would be subject to the ADF Redress of Grievance (RoG) scheme. However, it is unclear whether other decisions made under the instrument (that is, decisions made under sections 11, 14, 17 and 19) would similarly be subject to the RoG scheme.

42 [F2019L00128].

43 Explanatory statement, Defence (State of Emergency – Townsville floods) Amendment Determination 2019, p. 2.

1.63 The committee requests the minister's advice as to:

- **whether decisions by a 'decision maker', relating to the approval of benefits and the period during which benefits may be provided, are subject to independent merits review (including whether the decisions are subject to the ADF Redress of Grievance scheme); and**
- **if not, the characteristics of those decisions that would justify excluding merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

Financial Sector (Collection of Data) (reporting standard) determinations – various instruments⁴⁴

FRL No.	F2019L00086 , F2019L00088 , F2019L00089 , F2019L00090 , F2019L00091 , F2019L00092 , F2019L00093 , and F2019L00094 . ⁴⁵
Purpose	To set out how financial information is to be provided to the Australian Prudential Regulation Authority.
Authorising legislation	<i>Financial Sector (Collection of Data) Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Merits review⁴⁶

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

1.65 The instruments were each made under section 13 of the *Financial Sector (Collection of Data) Act 2001* (FSCD Act). They determine reporting standards applicable to authorised deposit-taking institutions (ADIs) and registered financial corporations (RFCs).

1.66 Section 4 of each instrument sets out the forms that ADIs and RFCs must use to provide information to the Australian Prudential Regulation Authority (APRA). The required form (that is, the 'standard' or 'reduced' form) is determined by whether the assets of the relevant entity exceed a particular financial threshold.

44 Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2019 [F2019L00086]; Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2019 [F2019L00088]; Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2019 [F2019L00089]; Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2019 [F2019L00090]; Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2019 [F2019L00091]; Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2019 [F2019L00092]; Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2019 [F2019L00093]; Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2019 [F2019L00094].

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

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

1.67 Section 5 of each instrument provides that APRA may from time to time determine that a threshold, or higher threshold than that specified in section 4, will apply to a particular ADI or RDC. If APRA makes such a determination, it must notify the affected ADI or RDC in writing.

1.68 Sections 9 and 10 of each instrument set out the periods required to be covered by a report provided to APRA (the reporting period) and the date by which information must be provided to APRA (the due date). Section 11 provides that APRA may, by notice in writing, change the reporting period, or specified reporting periods, for a particular ADI or RFC to require it to provide the information required by the reporting standard more or less frequently. Section 12 provides that APRA may grant an ADI or RFC an extension of the due date.

1.69 Decisions by APRA to determine thresholds, change reporting periods and grant extensions appear to involve at least an element of discretion. Moreover, such decisions may affect the interests of the ADIs and RFCs to which the instruments apply. Consequently, it appears to the committee that the decisions may be suitable for independent merits review. However, neither the instrument nor the explanatory statement indicates whether the decisions are reviewable.

1.70 The committee notes that Part 3A of the *Financial Sector (Collection of Data) Act 2001* (FSCD Act) provides that applications may be made to the Administrative Appeals Tribunal for the review of listed 'reviewable decisions'. Under section 31 of that Act, 'reviewable decisions' include decisions made under section 13 of the Act to determine or vary a reporting standard for a particular financial sector entity.⁴⁷ However, it is unclear whether this would extend to decisions made under sections 5, 11 and 12 of the present instruments.

1.71 The committee requests the minister's advice as to:

- **whether decisions to determine thresholds, change reporting periods and grant extensions would be subject to independent merits review; and**
- **if not, the characteristics of those decisions which would justify excluding independent merits review, by reference to the established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

47 See section 31, definition of 'reviewable decision', paragraphs (d) and (e).

Great Barrier Reef Marine Park Regulations 2019

FRL No.	F2019L00166 ⁴⁸
Purpose	To provide for a range of matters in relation to the Great Barrier Reef Marine Park, including: the grant of permissions to conduct particular activities; requirements relating to property; the accreditation of agreements with traditional owners; and the collection and remittance of certain fees.
Authorising legislation	<i>Great Barrier Reef Marine Park Act 1975</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Reversal of evidential burden of proof⁴⁹

1.72 Part 9 of the instrument sets out a series of offences designed to protect cetaceans in the Great Barrier Reef Marine Park (Marine Park). These include offences regulating the distance and speed of vessels and aircraft,⁵⁰ and offences regulating persons swimming or undertaking other activities.⁵¹

1.73 Subsection 188(1) of the instrument provides that the Great Barrier Reef Marine Park Authority (Authority) may give a written exemption from any or all of the provisions of Part 9 to a person who holds a permission to conduct a listed activity.⁵² This would appear to exempt a person from the offence provisions in Part 9. The explanatory statement indicates that the exemption would also apply to 'similar offence provisions under the EPBC Regulations'.⁵³

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

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

50 Sections 179, 180, 181 and 182. 'Cetacean' is defined in section 5 of the instrument as an animal of the Suborder Mysticeti or of the Order Cetacea. Broadly, this includes whales, dolphins and porpoises.

51 Sections 183, 184, 184, 185, 186 and 187.

52 The activities are listed in paragraphs 188(1)(a) to (d), and include: undertaking research relating to cetaceans; undertaking photography, filming or sound recording of cetaceans; conducting a tourist program consisting of a swimming-with-whales activity or a whale watching activity; and operating a vessel or aircraft in the Marine Park.

53 Explanatory statement, pp. 134-135. It appears that 'EPBC Regulations' refers to the Environment Protection and Biodiversity Conservation Regulations 2000 [F2018C00929].

1.74 A note to subsection 188(1) states that a defendant bears an evidential burden in relation to the matters in that provision, and directs readers to section 13.3 of the *Criminal Code*.⁵⁴ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.75 In relation to this matter, the explanatory statement explains that:

The holder of the permission would have easy access to evidence of that permission, and it would not be within the Authority's knowledge that they hold such a permission. While these permissions are granted by the Authority they are personal to the permission holder who has the obligation to carry that permission with them while conducting the permitted activity in the Marine Park. It would be more difficult for the prosecution to disprove.⁵⁵

1.76 Based on the information in the explanatory statement, it appears to the committee that the instrument intends to reverse the evidential burden of proof in relation to whether a particular *permission* is held, for the purposes of applying for an exemption. However, it is noted that the burden of proof, as a concept, generally applies only in proceedings before a court or tribunal. It is a key element of the common law right to be presumed innocent until proven guilty. Burdens of proof would not generally be applicable in relation to administrative matters such as applications for permits and exemptions.

1.77 Additionally, the committee would have concerns if it were intended to reverse the evidential burden of proof in relation to whether a person holds a permission or exemption, for the purposes of making out a defence to the offences in Part 9 of the instrument. In this respect, the committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the relevant offence, where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁵⁶

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

55 Explanatory memorandum, p. 135.

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

1.78 In this instance, it is not clear that the existence of a permission or exemption would be peculiarly within the knowledge of the defendant. Permissions and exemptions are granted by the Authority, and would be matters of which the Authority is also apprised. While the defendant may be able to point to evidence of a permission or exemption (for example, because the defendant is required to carry a permission while conducting permitted activities), this does not mean the existence of a permission or exemption is *peculiarly* within the defendant's knowledge.

1.79 The committee requests the minister's advice as to exactly how the evidential burden of proof is reversed in relation to whether a person holds a specified permission, for the purposes of applying for an exemption under section 188 of the instrument.

1.80 If the advice is that it is intended instead to reverse the burden of proof in relation to whether a person holds a permission or exemption, for the purposes of establishing a defence to the offences in Part 9 of the instrument, the committee requests the minister's advice as to the justification for reversing the evidential burden of proof. The committee's assessment would be assisted if the minister's response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences*.⁵⁷

Significant matters in delegated legislation⁵⁸

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

1.82 Section 38DC of the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) makes it an offence to engage in conduct that contravenes an order or direction given by the Authority under the regulations. For the offence to apply, the order or direction must be declared by the regulations to be an order or direction to which section 38DC applies. The offence is punishable by 500 penalty units.

1.83 Subsection 167(1) of the instrument provides that the Authority may order a person to remove property from the Marine Park in certain circumstances,⁵⁹ or to take action to remedy, mitigate or prevent damage to the Marine Park caused by the

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

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

59 The circumstances are set out in paragraphs 167(1)(a) to (d), and include: the property has been abandoned, sunk or wrecked; no permission is in force for an activity involving the property; or the property may cause damage to the Marine Park.

removal of abandoned, sunk or wrecked property. Subsection 167(5) provides that an order under subsection 167(1) is an order to which section 38DC of the GBRMP Act applies.⁶⁰

1.84 The committee acknowledges that the GBRMP Act permits regulations to prescribe orders and directions for the purposes of section 38DC of that Act (that is, to prescribe conduct that would constitute an offence under that section). Nevertheless, the committee is concerned about the use of an instrument to prescribe such orders and directions, given that contraventions may attract a significant pecuniary penalty. The committee considers that the underlying conduct for offences carrying significant pecuniary penalties is more appropriately set out in primary legislation rather than delegated legislation, given that primary legislation is subject to a higher level of parliamentary oversight.

1.85 In this respect, the committee also notes that the *Guide to Framing Commonwealth Offences* states that the content of an offence set out in an Act or regulation should be clear from the offence provision itself, and should not be delegated to another instrument unless there is a demonstrated need to do so.⁶¹ Consequently, where the content of an offence in an Act is delegated to another instrument (including a regulation), the committee would expect a justification for this approach to be included in the explanatory materials. In this instance, no such justification is included in the explanatory statement.

1.86 The committee requests the minister's advice as to why it is considered necessary and appropriate to leave the content of the offence in section 38DC of the *Great Barrier Reef Marine Park Act 1945* to delegated legislation.

60 Where an order cannot be served on a person, the Authority may publish the order as a notice on its website and in a daily newspaper circulated in Queensland. Subsection 167(5) provides that such a notice is an order to which section 38DC of the GBRMP Act applies.

61 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 26.

Marriage (Celebrant Professional Development Statement 2019

FRL No.	F2019L00138 ⁶²
Purpose	To set out professional development activities that registered marriage celebrants may complete in order to meet their ongoing professional development obligations for 2019.
Authorising legislation	Marriage Regulations 2017
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Consultation⁶³

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

1.88 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.⁶⁴

1.89 With reference to these requirements, the committee notes that, under the heading of consultation, the explanatory statement refers to the establishment of a panel to deliver professional development activities. It further explains that the Registrar of Marriage Celebrants corresponded with the panel and with celebrant associations to determine which activities would be approved as ongoing professional development (OPD) activities for marriage celebrants. Finally, it notes that marriage celebrants were not consulted on the activities developed and

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

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

64 Regulations and Ordinances Committee, Guideline on consultation, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

approved by training providers, as they would be able to choose from a wide range of approved activities in order to fulfil their OPD obligations.⁶⁵

1.90 The description of consultation in the explanatory statement appears to explain the background to making the instrument, rather than explaining whether any consultation was undertaken in relation to the instrument as presently drafted. This may not satisfy the requirements of the Legislation Act, which provides that the explanatory statement must either describe the nature of any consultation undertaken in relation to an instrument or explain why no such consultation was undertaken.

1.91 The committee requires the Attorney-General's advice as to:

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

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

65 Explanatory statement, p. 3.

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019)

FRL No.	F2019L00081 ⁶⁶
Purpose	To make changes to the drugs, forms, responsible person codes and circumstances for prescribing pharmaceutical benefits in relation to the Highly Specialised Drugs program.
Authorising legislation	<i>National Health Act 1953</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation⁶⁷

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

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

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

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

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

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

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

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

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

1.98 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments or other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁶⁸

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

- Asthma Control Questionnaire; and
- Psoriasis Area Severity Index (PASI) assessment.⁶⁹

1.100 However, neither the instrument nor its explanatory statement appears to indicate the manner in which those documents are incorporated, or how they may be accessed free of charge. In this regard, the committee notes that it is not only concerned with free access for key users of the instrument (for example, prescribers of particular medications), but also in the broader issue of free access to persons who may be affected by, or otherwise interested in, the law.

1.101 The committee requests the minister's advice as to the manner in which the Asthma Control Questionnaire and the Psoriasis Area Severity Index are incorporated by the instrument, and where those documents may be accessed free of charge. The committee also requests that the explanatory statement be amended to include this information.

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

69 The committee secretariat's research indicates that the PASI assessment relies on a series of questions designed to assess the severity of psoriasis by areas of the body (see e.g. <https://www.dermnetnz.org/topics/pasi-score/>). These questions may be an 'instrument' for the purposes of the Legislation Act.

Renewable Energy (Electricity) Amendment (Small-scale Solar Eligibility and Other Measures) Regulations 2019

FRL No.	F2019L00197 ⁷⁰
Purpose	To amend the Renewable Energy (Electricity) Regulations 2001 to clarify the eligibility of solar (photovoltaic) small generation units and the audit requirements for applications to amend exemption certificates.
Authorising legislation	<i>Renewable Energy (Electricity) Act 2000</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Merits review⁷¹

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

1.103 Section 46A of the *Renewable Energy (Electricity) Act 2000* (Renewable Energy Act) provides that certain persons may apply to the Clean Energy Regulator (Regulator) for the grant of an exemption certificate. Under paragraph 46A(2)(bb), an application for an exemption certificate (including an amendment to an exemption certificate) must be accompanied by any report required by the regulations.

1.104 Section 22UG of the Renewable Energy (Electricity) Regulations 2001 (principal regulations)⁷² prescribes, for the purposes of paragraph 46A(2)(bb) of the Renewable Energy Act, the circumstances in which an audit report must accompany an application for an exemption certificate.⁷³ The present instrument amends the principal regulations to prescribe additional circumstances in which an audit report may be required. It also inserts a new subsection 22UG(8), which provides that a

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

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

72 [F2019C00219].

73 Section 22UH of the principal regulations sets out the requirements for an audit report.

person may apply to the Regulator for a determination that an audit report is *not* required.

1.105 Decisions by the Regulator under subsection 22UG(8) to determine that an audit report is not required appear to involve at least an element of discretion, and may also affect the rights and interests of individuals. Consequently, it appears that such decisions may be suitable for independent merits review. In relation to the availability of review, the explanatory statement provides that:

The applicant [for an exemption certificate] may apply to the Regulator for a determination that an audit report is not required (i.e. an exemption). The exemption decision will be subject to judicial review but as a compliance tool is not subject to review in the Administrative Appeals Tribunal.⁷⁴

1.106 Where an instrument fails to provide for or excludes independent merits review, the committee expects the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. The fact that a decision under subsection 22UG(8) is a 'compliance tool' does not appear to reflect an established ground for excluding merits review. The committee also notes that no other established grounds for excluding merits review are identified in the explanatory statement.

1.107 Additionally, the committee notes that it does not generally consider the availability of judicial review, on its own, to be sufficient justification for excluding independent merits review. This is because (unlike merits review) judicial review does not allow the court to undertake a full review of the facts and to determine whether the correct or preferable decision has been made.

1.108 The committee requests the minister's more detailed advice as to the characteristics of decisions made under subsection 22UG(8) of the instrument, relating to whether an applicant for an exemption certificate is required to provide an audit report, that would justify excluding such decisions from independent merits review. The committee's assessment would be assisted if the minister's response expressly identified one or more grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

74 Explanatory statement, p. 8.

Retrospective effect⁷⁵

1.109 Item 32 of the instrument inserts a new section 52 into the principal regulations. That section provides that amendments made by Part 2 of Schedule 1 to the instrument, relating to amendments of exemption certificates, apply in relation to applications for amendments to exemption certificates for 2019 and later years.

1.110 While the instrument commences prospectively, the committee is concerned that the operation of section 52 could result in the instrument having a retrospective effect, to the potential detriment of a person who made an application to amend an exemption certificate prior to the commencement of the instrument which had not been determined at the time of that commencement. In this respect, the committee notes that the instrument appears to change certain requirements and criteria relating to applications for the amendment of exemption certificates. For example (as noted above), it appears to prescribe additional circumstances in which an audit report may be required. It also requires the Regulator to have regard, when making an amendment to an exemption certificate on request, to whether a compliant audit report has been provided to the Regulator.⁷⁶

1.111 The explanatory statement does not appear to provide any information as to whether a person, whose application to amend an exemption certificate was pending at the time the instrument commenced, may be disadvantaged by consideration of their application under any new criteria. It does not indicate, for example, how many (if any) pending applications or requests will be subject to new requirements, or whether a person would be able to address these requirements before their application is decided.

1.112 The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of section 52 of the principal regulations; and, if so, what steps have been or will be disadvantaged to avoid such disadvantage and to ensure procedural fairness.

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

76 Item 24, new paragraph 22ZN(2)(ba).

Road Vehicle Standards Rules 2018

FRL No.	F2019L00198 ⁷⁷
Purpose	To set out matters to support the regulatory framework in the <i>Road Vehicle Standards Act 2018</i> , including: the grant, variation, suspension and revocation of approvals to import road vehicles and components; the keeping of the Register of Approved Vehicles; and other miscellaneous matters.
Authorising legislation	<i>Road Vehicle Standards Act 2018</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Incorporation⁷⁸

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

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

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

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

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

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

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

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

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

1.118 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments or other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any incorporated document. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁷⁹

1.119 Subsections 22(1) and (3) of the *Road Vehicle Standards Act 2018* (Standards Act) make it an offence for a person to import a road vehicle into Australia where, at the time of importation, the person is not permitted to import the vehicle. Paragraph 22(2)(d) provides that a person is permitted to import a road vehicle if, at the time of importation, a circumstance set out in the rules applies. Section 171 of the instrument provides, for the purposes of paragraph 22(2)(d) of the Standards Act, that a person is permitted to import a road vehicle if it is a vehicle to which an intergovernmental agreement applies, and the vehicle is imported in accordance with the requirements of that agreement.

1.120 Further, subsections 24(1) and (5) of the Standards Act make it an offence for a person to provide a road vehicle to another person in Australia, in circumstances where the vehicle is provided for the first time in Australia and the vehicle is not on the Register of Approved Vehicles (RAV).⁸⁰ Paragraph 24(3)(f) provides that subsection 24(1) does not apply in circumstances set out in the rules. Section 50 of the instrument provides, for the purposes of paragraph 22(3)(f), that such a circumstance exists where an intergovernmental agreement applies to the vehicle, and the vehicle is provided in circumstances allowed by the agreement.

1.121 It appears to the committee that the 'intergovernmental agreement(s)' to which sections 50 and 171 of the instrument refer may be incorporated by the instrument, insofar as they may determine the content of the law.

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

80 Section 14 of the Standards Act requires the secretary to keep and maintain the RAV.

1.122 However, neither the instrument nor the explanatory statement appears to recognise that any intergovernmental agreements are incorporated. In this regard, neither the instrument nor the explanatory statement specifies which agreements are incorporated, the manner of their incorporation, or where the agreements may be accessed free of charge.

1.123 The committee requests the minister's advice as to whether the 'intergovernmental agreement(s)' to which sections 50 and 171 of the instrument refer are incorporated by the instrument.

1.124 If the advice is that the instruments are incorporated, the committee requests a description of the specific agreements that are incorporated, as well as the minister's advice as to the manner of their incorporation and where the agreements may be accessed free of charge. The committee also requests that the explanatory statement be amended to include this information.

Section 11 exemptions for voyages between the Cocos (Keeling) Islands and Australian states and territories

FRL No.	F2019L00142 ⁸¹
Purpose	To exempt vessels undertaking voyages between the Cocos (Keeling) Islands and Australian states and territories from the provisions of the <i>Coastal Trading (Revitalising Australian Shipping) Act 2012</i> .
Authorising legislation	<i>Coastal Trading (Revitalising Australian Shipping) Act 2012</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Continuing exemption⁸²

1.125 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

1.126 The instrument exempts vessels undertaking voyages for the carriage of passengers or cargo between the Cocos (Keeling Islands) and any port in Australia or in the external territories from the provisions of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT (RAS) Act). The exemption applies from 8 April 2019 to 7 April 2023.

1.127 The explanatory statement indicates that the instrument continues a longstanding exemption previously provided under section 7 of the *Navigation Act 2012* (Navigation Act). It also states that the exemption remains unchanged from that provided under the Navigation Act, which was put in place in 1956.⁸³ The statement of compatibility explains that the purpose of the exemption is to:

allow the Cocos (Keeling) Islands access to shipping services at competitive freight rates, recognising that shipping services for the Cocos (Keeling) Islands are limited.⁸⁴

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

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

83 Explanatory statement, p. 1.

84 Statement of compatibility, p. 3.

1.128 Given the duration and purpose of the exemption, it appears the instrument may be addressing certain unintended consequences of the CT (RAS) Act in relation to the Cocos (Keeling) Islands.

1.129 The committee's general preference is that exemptions are not used as, and do not continue for such a time as to operate as de facto amendments to, primary legislation (in this case the CT (RAS) Act). In this respect, the committee also notes that the explanatory statement does not explain why exemptions under the Navigation Act or the CT (RAS) Act have been used in favour of amendments to the primary legislation.

1.130 The committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to rely on exemptions to the *Coastal Trading (Revitalising Australian Shipping) Act 2012* to allow the Cocos (Keeling) Islands to access shipping services at competitive freight rates, instead of amending the primary legislation; and**
- **whether amendments to the primary legislation are being considered to address this issue.**

Shipping Registration Regulations 2019

FRL No.	F2019L00206 ⁸⁵
Purpose	To provide for the registration of ships on the Australian General Shipping Register and the Australian International Shipping Register.
Authorising legislation	<i>Shipping Registration Act 1981</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Strict liability⁸⁶

1.131 The instrument creates a number of strict liability offences relating to non-compliance with certain requirements associated with the registration of ships.⁸⁷ Each offence is punishable by five penalty units.

1.132 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of an offence (ensuring criminal liability is only imposed on persons who are aware of their actions and the associated consequences). The application of strict liability removes the requirement for the prosecution to prove fault on the part of the defendant in order to make out an offence.

1.133 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory materials to provide a sound justification for any imposition of strict liability, including clearly outlining whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.⁸⁸ The committee emphasises that the fact a provision remakes a pre-existing offence would not, on its own, be sufficient to justify the application of strict liability.

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

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

87 Subsections 19(3), 19(4), 20(5), 22(1), 25(1) and 38(6) of the instrument.

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

1.134 In this instance, while the explanatory statement outlines the operation and effect of the offences,⁸⁹ it does not appear to provide any justification for the application of strict liability.

1.135 The committee requests the minister's advice as to the justification for the imposition of strict liability to the offences identified at paragraph [1.131] above, by reference to relevant principles set out in the *Guide to Framing Commonwealth Offences*.⁹⁰

Reversal of evidential burden of proof⁹¹

1.136 As outlined above at paragraph [1.131], the instrument creates a number of offences relating to the registration of ships. The instrument also creates offence-specific defences to these offences, which reverse the evidential burden of proof.⁹²

1.137 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or to raise evidence to disprove, one or more elements of an offence, interfere with this important common law right.

1.138 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. The committee emphasises that the fact a provision remakes a pre-existing defence would not, on its own, be sufficient to justify the reversal of the evidential burden of proof.

1.139 The committee notes that the explanatory statement does not appear to provide any justification for the reversal of the burden of proof, but instead merely restates the operation and effect of the relevant provisions.⁹³

89 Explanatory statement, pp. 7-8, 10.

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

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

92 Subsections 19(5), 20(6), 22(2), 25(3) and 38(7) of the instrument. Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

93 Explanatory statement, pp. 7-8, 10.

1.140 The committee requests the minister's advice as to the justification for reversing the evidential burden of proof in the defences identified at paragraph [1.136] above, by reference to relevant principles set out in the *Guide to Framing Commonwealth Offences*.⁹⁴

Merits review⁹⁵

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

1.142 Subsections 23(4) and 23(5) of the instrument provide that the Australian Maritime Safety Authority (AMSA) may exempt certain ships and classes of ships from requirements set out in paragraphs 23(1)(a) and (b) (which relate to the inscription of names and home ports). AMSA may grant an exemption if AMSA 'considers it unreasonable' to require compliance with those requirements.

1.143 It appears that decisions made by AMSA under subsections 23(4) and 23(5) involve at least an element of discretion. Such decisions may also affect the rights and interests of individuals (in particular, persons who would be subject to the requirements in paragraphs 23(1)(a) and (b)). Consequently, it appears that the decisions may be suitable for independent merits review.

1.144 However, the instrument does not appear to provide for independent merits review of decisions made under subsections 23(4) and 23(5). Further, the explanatory statement does not appear to indicate whether the decisions are reviewable.

1.145 The committee requests the minister's advice as to:

- **whether decisions to exempt persons from requirements relating to the inscription on ships of names and home ports are subject to independent merits review; and**
- **If not, the characteristics of those decisions that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

94 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 50-52.

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

Underwater Cultural Heritage Rules 2018

FRL No.	F2019L00096 ⁹⁶
Purpose	To prescribe matters relating to the protection of underwater cultural heritage, including criteria relating to heritage significance and matters to which the minister must have regard in deciding whether to grant certain permits.
Authorising legislation	<i>Underwater Cultural Heritage Act 2018</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation⁹⁷

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

1.147 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁹⁸

1.148 With reference to these matters, the committee notes that the instrument appears to incorporate:

- 'relevant government guidelines' relating to the protection and management of underwater cultural heritage;⁹⁹ and
- 'relevant international conventions, agreements or treaties'.¹⁰⁰

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

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

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

99 Paragraphs 6(4)(b), (5)(b), (6)(b) and (7)(b), and 8(2)(b) of the instrument.

100 Subparagraphs 6(4)(d)(iii), (5)(d)(iii), (6)(d)(iii) and (7)(d)(iii), and 8(2)(c)(iii).

1.149 The instrument indicates that these documents are incorporated as in force from time to time.¹⁰¹ The explanatory statement also explains that:

It is practically necessary for there to be the option to incorporate material in the Rules as in force or existing from time to time. The types of documents that may be incorporated...would be authoritative conventions and international guidelines. Any changes to these documents would need to be incorporated from time to time to ensure regulated persons clearly understand their obligations under the Rules, and that the Rules are consistent with current international law or international best practice. It is intended that any external material incorporated into the Rules will be made freely available.

...

The protection of underwater cultural heritage is a matter of international concern. Consequently, there are international guidelines and conventions that will need to be incorporated into the Rules.¹⁰²

1.150 The committee acknowledges that it may be necessary for the instrument to incorporate material as in force from time to time, and notes that it is intended for the incorporated documents to be made available free of charge. However, the committee is concerned that neither the instrument nor the explanatory statement identifies the *specific* guidelines and conventions that are (or will be) incorporated.

1.151 In this regard, the committee reiterates that paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to an instrument which incorporates one or more documents to identify each document that is incorporated by reference, and to provide a meaningful description of the document. Where there is an identified need to incorporate documents that do not yet exist, consideration should be given to amending the instrument to specify each incorporated document as the relevant document is finalised and published. This helps to ensure clarity and certainty for persons interested in or affected by the law.

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

- **why it is considered necessary and appropriate for the instrument to incorporate 'relevant government guidelines' and 'relevant international conventions, agreements or treaties', noting that these document may not yet exist; and**

101 In this respect, subsection 61(4) of the UCH Act permits the incorporation of documents as in force from time to time.

102 Explanatory statement, p. 1.

- **whether this approach complies with paragraph 15J(2)(c) of the *Legislation Act 2003*, which requires the explanatory statement to an instrument to contain a description of each incorporated document and to indicate how it may be obtained.**

Significant matters in delegated legislation¹⁰³

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

1.154 Section 5 of the instrument was made under section 22 of the *Underwater Cultural Heritage Act 2018* (UCH Act). It sets out criteria to which the minister must have regard when assessing the heritage significance of underwater cultural heritage that may be declared as protected under sections 17, 18 and 19 of the UCH Act.

1.155 Section 6 of the instrument was made under subsection 23(4) of the UCH Act. It specifies the matters to which the minister must have regard when deciding whether to grant a permit (UCH permit) under section 23 of the UCH Act, authorising a person to engage in specified conduct relating to underwater cultural heritage, protected zones, and foreign underwater cultural heritage.

1.156 Section 8 of the instrument was made under subsection 25(3) of the UCH Act. It specifies matters to which the minister must have regard when deciding whether to vary a permit granted under section 23 of the UCH Act.

1.157 The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered section 22 and subsections 23(4) and 25(3) of the UCH Act when the Underwater Cultural Heritage Bill 2018 (UCH Bill) was before the Parliament. The Scrutiny of Bills committee expressed the view that significant matters, such as criteria relating to whether an item is of heritage significance, and matters to be considered when deciding whether to grant or vary a UCH permit, should generally be included in primary legislation rather than delegated legislation.¹⁰⁴

1.158 Following a response from the minister, the committee made no further comment on the appropriateness of including criteria for the assessment of heritage significance (that is, the matters specified in section 5 of the instrument) in delegated legislation. However, it left to the Senate as a whole the appropriateness of not including in the bill any criteria to guide the minister's decision to grant or vary a

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

104 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, pp. 73-74.

permit relating to protected underwater cultural heritage, and drew its concerns in relation to that matter to the attention of the Senate and this committee.¹⁰⁵

1.159 The committee's views regarding the inclusion of significant matters in delegated legislation accord with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that leave significant elements of a regulatory scheme, or significant changes to the law, to delegated legislation. In the committee's view, such significant matters are more appropriate for enactment in primary legislation.

1.160 In light of the matters raised by the Scrutiny of Bills committee, the committee draws the Senate's attention to the specification of significant matters relating to the protection of underwater cultural heritage in delegated legislation.

105 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 157-160.

Further response required

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

Correspondence relating to these matters is published on the committee's website.¹

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

FRL No.	F2019L00019 ²
Purpose	To provide an additional nine months to carry out certain repetitive inspection requirements.
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation³

1.162 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested:

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

1.163 The committee also requested that the explanatory statement be amended to include this information.⁴

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

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

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

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 1-3.

Minister's response⁵

1.164 The minister advised:

CASA has advised that the Directive required that there be removed from service any passenger seat assembly that cannot be identified as being manufactured in accordance with a drawing approved by De Havilland Canada or a drawing approved under the Air Navigation or Civil Aviation or the Civil Aviation Safety Regulations.

CASA does not hold any such approvals. The Directive places an onus on the aircraft owner to contact the aircraft manufacturer to obtain an approval, or to engage a person authorised under Part 21 of the Civil Aviation Safety Regulations 1998, to approve the design or modification of the seat specific to their aircraft. On this basis, the Directive does not incorporate documents already in existence.

Committee's comment

1.165 The committee thanks the minister for this response, and notes the minister's advice that the instrument does not incorporate any documents already in existence.

1.166 The committee notes that the instrument requires the removal from service of any seat assembly that 'cannot be identified as being manufactured in accordance with a drawing approved by De Havilland Canada or a drawing approved under the Air Navigation or Civil Aviation Regulations, or the Civil Aviation Safety Regulations'.⁶ This appears to be consistent with the minister's advice.

1.167 However, the drawings would appear to define certain obligations of persons and entities to which the instrument applies. In this respect, they would therefore appear to be incorporated by reference. The explanatory statement appears to support this conclusion, noting under the heading of 'documents incorporated by reference' that:

CASA [the Civil Aviation Safety Authority] will make the relevant sections of the incorporated documents available, in its Canberra or regional offices, by arrangement, and, in keeping with the proprietary nature of the documents, for viewing only, to any aircraft operator who is affected by the direction instrument, or to any interested person.⁷

1.168 It appears that the only 'technical documents' to which the explanatory statement could refer are the drawings approved by De Havilland Canada or under

5 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

6 'Requirement', paragraph 1.

7 Explanatory statement, p. 2.

the Australian civil aviation legislation. The committee finds it difficult to reconcile the assurance in the explanatory statement that CASA will make the incorporated documents available with the advice that no documents are incorporated.

1.169 In light of the preceding discussion, the committee requests the minister's further, more detailed advice as to why it is considered that the drawings approved by De Havilland Canada or under Australian civil aviation legislation are not incorporated by the instrument; and requests that the explanatory statement be amended to include this information.

1.170 Alternatively, if the advice is that the drawings *are* incorporated, the committee reiterates its request for a more detailed description of the documents (such as may satisfy the requirements of the *Legislation Act 2003*), as well as its request for advice as to the manner in which the documents are incorporated; and requests that the explanatory statement be amended to include this information.

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

FRL No.	F2019L00015 ⁸
Purpose	To amend the List of Exempt Native Specimens to allow the export of specimens taken in the Commonwealth Northern Prawn Fishery until 6 January 2024.
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Compliance with authorising legislation⁹

1.171 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to whether an assessment in relation to the Commonwealth Northern Prawn Fishery was 'primarily relied on' in making the instrument, such as would satisfy subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).¹⁰

Minister's response¹¹

1.172 The minister advised:

All relevant information is taken into consideration prior to a decision being made to approve a fishery under Parts 13 and 13A of the EPBC Act or amend the List of Exempt Native Specimens, including:

- the application for approval of the fishery and associated assessment of the fishery's operations submitted by the jurisdiction along with public comments received on the submission;
- the Department's assessment of the submission by the jurisdiction;

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

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

10 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 17-18.

11 The minister responded to the committee's comments in a letter dated 22 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

- the strategic assessment under Divisions 1 or 2 of the EPBC Act;
- overarching legislation and regulatory requirements; and
- any changes to the management arrangements since completing the strategic assessment.

In addition, the Department consults with the Australian Fisheries Management Authority in relation to current or potential issues concerning impacts to the target stocks, bycatch and protected species, and to the wider marine environment.

Committee's comment

1.173 The committee thanks the minister for this response. The committee notes the minister's advice that all relevant information is considered prior to a decision being made to amend the List of Exempt Native Specimens (exempt specimens list), and the examples provided of the matters that are taken into account.

1.174 The minister's response indicates that a strategic assessment in relation to the Commonwealth Northern Prawn Fishery was carried out under Division 1 or 2 of Part 10 of the EPBC Act, and that the assessment was *considered* in making the instrument. However, it is unclear whether the minister 'relied primarily' on the outcomes of this assessment, in accordance with subsection 303DC(1A).

1.175 As outlined in the committee's initial comments, subsection 303DC(1A) of the EPBC Act appears to establish a precondition to the making of an instrument under subsection 303DC(1) to amend the exempt specimens list by including a specimen derived from a commercial fishery. It does not appear that this precondition would be satisfied by simply 'considering' the outcomes of an assessment conducted under Part 10 of the EPBC Act as one of a number of relevant factors. Rather, subsection 303DC(1A) appears to require the minister to give *primary consideration* to those outcomes. In this regard, the explanatory memorandum to the Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001 (2001 Bill) states that:

The purpose of...[sub-clauses 303DC(1A) – 303DC(1C) is] to ensure that the outcomes of the strategic assessment process will be relied upon for the purpose of deciding whether to add specimens derived from the fishery to the list of specimens which are exempt from export controls under Division 3 of Part 13A. *Only in exceptional circumstances would other matters need to be considered* [italics added].¹²

1.176 On the basis of the information in the explanatory statement and the minister's response, it remains unclear whether the requirements in the enabling

12 Explanatory memorandum, 2001 Bill, p. 24. The 2001 Bill inserted the requirements relating to the exempt specimen list, including subsection 303DC(1A).

legislation (that is, those in subsection 303DC(1A) of the EPBC Act) were satisfied in relation to the present instrument.

1.177 In light of the preceding discussion, the committee requests the minister's further, specific advice as to whether the minister 'relied primarily' on the outcomes of an assessment carried out for the purposes of Division 1 or 2 of Part 10 of the *Environment Protection and Biodiversity Conservation Act 1999* in making the instrument, in accordance with subsection 303DC(1A) of that Act. The committee also requests that the explanatory statement be amended to include this information.

Australian Capital Territory National Land Amendment (Lakes) Ordinance 2018

FRL No.	F2018L01611 ¹³
Purpose	To modify the operation of the Lakes Ordinance 1976 as it applies to national land.
Authorising legislation	<i>Seat of Government (Administration) Act 1910</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 November 2018).

No invalidity clause¹⁴

1.178 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the assistant minister's advice as to why a failure to provide notice to an applicant of the availability of review of certain decisions should not affect the validity of those decisions.¹⁵

Assistant minister's response¹⁶

1.179 The assistant minister advised:

The provision in question was included in the 2018 instrument to continue the effect of, and maintain consistency with pre-existing law. It reproduces and continues the effect of the pre-existing section 51(4) of the *Lakes Ordinance 1976* (the Ordinance modified by the 2018 instrument). In addition, it replicates the effect of section 27A(3) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), which provides that the validity of a reviewable decision is not affected where the decision maker fails to provide the person whose interests are affected with a notice of decision and the right of that person to have the decision reviewed. It is, therefore a provision of a kind commonly used in the context of merits review and

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

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

15 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 17-18.

16 The assistant minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

included in other Commonwealth laws for the same reason, for example, the *Child Support (Registration and Collection) Act 1988*.

Section 51(4) of the *Lakes Ordinance 1976* has been included for the avoidance of doubt. This is because, even if the provision were not included, mere failure to provide notice to an applicant of their review rights would not, in the context of the statute, result in the invalidity of the reviewable decision. Therefore, section 51(4) does not in practice have the effect of validating decisions that would otherwise be invalid.

In response to the Committee's advice that these matters are being inadequately addressed in the Explanatory Statement for the Ordinance, I have instructed the Department of Infrastructure, Regional Development and Cities to update the Explanatory Statement to include further explanation in line with the reasoning outlined above. I have enclosed for the Committee an advance copy of the updated Explanatory Statement.

Committee's comment

1.180 The committee thanks the assistant minister for this response, and notes the assistant minister's advice that the no-invalidity clause was included in the instrument to continue the effect of, and maintain consistency with, existing law. In this respect, the committee notes the advice that the provision continues the effect of pre-existing section 51(4) of the *Lakes Ordinance 1976* (1976 Ordinance) and replicates section 27A(3) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

1.181 While noting this advice, the committee emphasises that it does not generally consider consistency with current or former laws (for example, the AAT Act or the 1976 Ordinance), on its own, to justify the inclusion of a no-invalidity clause. In this regard, the committee reiterates that the inclusion of a no-invalidity clause may mean that there are no consequences for a failure to notify a person of the availability of review or the right to request reasons for a decision. Where such notification is not provided, the applicant's right to a fair hearing may be compromised, as they may lose the opportunity to have an adverse decision considered by an independent court or tribunal.

1.182 No-invalidity clauses may also limit the practical efficacy of *judicial* review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (that is, jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is less likely to be available. In this respect, no-invalidity clauses may limit the availability of judicial review's standard remedies.

1.183 In light of these potentially significant limitations on a person's ability to seek review of adverse decisions, the committee would expect a sound justification for the inclusion of no-invalidity clauses in an instrument.

1.184 In light of the preceding discussion, the committee seeks the minister's further advice, beyond mere consistency with existing law, as to the appropriateness of providing that a failure to give notice to an applicant of the availability of review of certain decisions (including the right to request reasons) will not affect the validity of those decisions.

Immigration (Guardianship of Children) Regulations 2018

FRL No.	F2018L01708 ¹⁷
Purpose	To provide for a range of matters relating to the custodianship of non-citizen minors in Australia, including: duties and obligations applying to custodians, state governments, state authorities and other persons; placement and transfer of non-citizen minors; and the application of state child welfare laws.
Authorising legislation	<i>Immigration (Guardianship of Children) Act 1946</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Significant matters in delegated legislation¹⁸

1.185 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to why significant matters relating to the circumstances in which a non-citizen child may become the ward of the minister should be included in delegated legislation, rather than in primary legislation.¹⁹

Minister's response²⁰

1.186 The minister advised:

The Committee may be interested to know of the effect of section 4AA of the Act. Section 4AA was inserted in the Act by the *Statute Law (Miscellaneous Provisions) Act (No 1) 1985* (No. 65, 1985). The purpose of section 4AA is to enable the Minister to direct that a person under 18 years of age shall be a ward of the Minister notwithstanding that the person entered Australia as a non-citizen in the charge of, or for the purpose of living in Australia under the care of, a relative (other than a parent) who is not less than 21 years of age. The Minister may make a direction only if satisfied that it is necessary in the interests of the person

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

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

19 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 46-47.

20 The minister responded to the committee's comments in a letter dated 13 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

to do so. A direction may not be made unless the relative of the person consents to the Minister doing so.

Paragraph 12(aa) was inserted in the Act at the same time and provides that the Governor-General may make regulations prescribing the principles to be observed in considering whether or not to give a direction under section 4AA.

Following enactment of the amendments to the Act, regulation 3AA, which prescribed principles for the purposes of section 4AA, was inserted in the *Immigration (Guardianship of Children) Regulations 1946* by Statutory Rules 1986, No. 159, commencing on 1 July 1986. This provision subsequently became regulation 5 of the *Immigration (Guardianship of Children) Regulations 2001*, with no substantive amendments to the principles.

From 1 October 2019, the principles will be contained in section 6 of the Regulations in substantially the same form as regulation 5 of the *Immigration (Guardianship of Children) Regulations 2001*, with the addition of the principle at subparagraph 6(b)(iv). Under this provision, a direction must not be given unless it is necessary for any reason that the Minister, or a delegate of the Minister who is giving the direction, considers to be in the interests of the child. The addition of this subparagraph is consistent with section 4AA, which envisages that a direction may be given, with the consent of the child's relative, where this is in the interests of the child.

While the Regulations set out principles to be observed in deciding whether a non-citizen under the age of 18 is to become the Minister's ward, the actual grounds to be met for the exercise of the discretion to make a direction are set out within section 4AA itself. In particular, the relative of the child must consent to the direction being made, and the Minister must be satisfied that it is necessary in the interests of the child to do so. The prescribed principles ultimately must be consistent with section 4AA and cannot affect the rights and interests of non-citizen children in any way that is contrary to the protections set out in that section. Further protection is afforded by virtue of the fact that regulations prescribing principles are disallowable, and are therefore subject to Parliamentary scrutiny.

As the prescribed principles are subordinate to robust provisions in the Act, and as oversight of any amendments is available to the Parliament, I trust you will agree that use of delegated legislation is appropriate in these circumstances.

Committee's comment

1.187 The committee thanks the minister for this response, and notes the minister's advice that the key grounds to be met before the minister may make a guardianship order in relation to a non-citizen child are set out in section 4AA of the *Immigration (Guardianship of Children) Act 1946* (Guardianship of Children Act). The

committee also notes the advice that any principles prescribed for the purposes of section 4AA must be consistent with, and must not affect the rights and interests of children in a manner contrary to, that section.

1.188 The committee acknowledges that the basic ground for the issue of a guardianship order is set out in the Guardianship of Children Act: namely, that the minister may direct a child to be the minister's ward if satisfied 'that it is necessary in the interests of the person to do so'.²¹ The committee also notes that a relative of the relevant child must consent to a guardianship order being made.²²

1.189 However, the committee notes that the broad discretionary power to issue a guardianship order does not appear to be governed by any other specific criteria. Rather, it is left to the regulations to prescribe principles to be observed in considering whether or not an order should be made.²³ The instrument is therefore the mechanism by which broad criteria *must* be satisfied before a guardianship order (which may affect the rights and interests of non-citizen children in a significant manner) may be made. For example, the instrument specifies that an order must not be made unless it is necessary to protect the child from certain risks or from 'moral danger', or to enable the child to 'have the benefit of adequate direction and guidance'.²⁴ Additionally, the instrument appears to include a number of significant matters relating to non-citizen children subject to a guardianship order. For example, the instrument provides that the custodian of a child must 'provide for the care and welfare of the child', and must not, without the minister's consent, place the child in the care of another person.²⁵

1.190 The committee's longstanding view is that significant policy matters, and matters that may affect fundamental rights and liberties, should be set out in primary legislation.²⁶ In this regard, the committee notes that a legislative instrument, which is unamendable and made by the executive, is not subject to the

21 Subsection 4AA(1) of the Guardianship of Children Act.

22 Subsection 4AA(2) of the Guardianship of Children Act

23 See paragraph 12(aa) of the Guardianship of Children Act.

24 Section 6 of the instrument.

25 Sections 9 and 10 of the instrument.

26 See, for example, Senate Standing Committee on Regulation and Ordinances, *40th Parliament Report, 112th Parliament* (June 2005), p. 59.

full extent of parliamentary scrutiny inherent in bringing about proposed changes in the form of an amending bill.²⁷

1.191 In light of the preceding discussion, the committee seeks the minister's further advice as to whether consideration has been given to amending the *Immigration (Guardianship of Children) Act 1946* to ensure that specific criteria setting out the basis on which a non-citizen child may become the ward of the minister are included on the face of the Act, rather than left to delegated legislation.

27 In this regard, the committee also notes that the Department of the Prime Minister and Cabinet's Legislation Handbook states that rules which may have a significant impact on rights and personal liberties, and procedural matters that go to the essence of a statutory scheme, should generally be implemented only through Acts of Parliament: Department of Prime Minister and Cabinet, *Legislation Handbook* (February 2017), <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>, p. 2.

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

FRL No.	F2018L01646 ²⁸
Purpose	To make changes to pharmaceuticals and related conditions included in the special arrangements for pharmaceutical benefits for highly specialised drugs.
Authorising legislation	<i>National Health Act 1953</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled in the Senate on 4 December 2018).

Incorporation²⁹

1.192 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to the manner in which the Asthma Control Questionnaire (ACQ) is incorporated by the instrument, and how it may be accessed free of charge. The committee also requested that the explanatory statement be amended to include this information.³⁰

Minister's response³¹

1.193 The minister advised:

The Committee has requested advice specifically about whether the Asthma Control Questionnaire (ACQ) which is currently included as part of the Pharmaceutical Benefit Scheme restriction criteria for the drugs Benralizumab (Fasenra®), Mepolizumab (Nucala®) and Omalizumab (Xolair®) can be accessed free-of-charge

I can advise that the ACQ is available to prescribers at no cost through the suppliers of the medicines in question. Prescribers can contact the

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

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

30 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 52-53.

31 The minister responded to the committee's comments in a letter dated 28 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

suppliers of these asthma medications directly to obtain free copies of the ACQ/calculation sheet. Contact details for the suppliers are contained within each of those medicine's restriction text or accompanying notes that can be found online at www.pbs.gov.au.

Committee's comment

1.194 The committee thanks the minister for this response, and notes the minister's advice that the ACQ is available to prescribers at no cost through the suppliers of certain medications on the Pharmaceutical Benefits Scheme. The committee notes the advice that prescribers may contact those suppliers directly (via numbers listed online) to obtain free copies of the ACQ or associated calculation sheet.

1.195 The committee acknowledges that key users of the instrument (for example, prescribers) may access the ACQ free of charge. However, the committee is also interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law. The committee notes that the minister's response does not explain how persons other than prescribers may access the ACQ free of charge.

1.196 Additionally, the committee notes that it requested advice as to the manner in which the ACQ is incorporated by the instrument. The minister's response does not appear to provide any information in relation to this matter.

1.197 In light of the preceding discussion, the committee seeks the minister's further advice as to the manner in which the Asthma Control Questionnaire is incorporated by the instrument, and where persons *other* than prescribers (for example, members of the public) may access the questionnaire free of charge.

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

FRL No.	F2018L01730 ³²
Purpose	To make various changes to controls on the supply and use of certain scheduled substances, and amendments to streamline the operation of the refrigeration, air conditioning and fire protection industry end use permit schemes.
Authorising legislation	<i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation³³

1.198 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to where each of the standards incorporated by the instrument may be accessed free of charge. The committee also requested that the explanatory statement be amended to include this information.³⁴

Minister's response³⁵

1.199 The minister advised:

...I am advised that currently, online access to the standards has been suspended by SAI Global. The Australian Government envisages that the parties most likely to access the referenced documents are members of industry whose products and services are covered by the Determination. Those parties can readily purchase the standards from Standards Australia, through its exclusive licensee SAI Global.

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

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

34 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 54-58.

35 The minister responded to the committee's comments in a letter dated 22 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

The Australian refrigeration and air conditioning industry has been working with the standards referenced in the OPSGGM Regulations since they were adopted in Australia in 2016. The cost of becoming familiar with new or revised standards is a cost businesses absorb into their operating costs. Manufacturing, installing and maintaining equipment according to relevant Australian and international standards is a customer expectation. Operating according to relevant standards protects a business from legal claims for injury, death, property damage and sub-standard equipment operation.

The regulated community and the general public may access hard copies of the standards referenced in the OPSGGM Amendment Regulations without purchasing them, through National and State Libraries, with the National Library of Australia providing the facility to scan pages to a USB drive, also free of charge, provided it is for non-commercial purposes.

The COAG Industry and Skills Council Standards Accessibility Working Group continues to work to develop solutions to greater public access of standards beyond their availability in National and State libraries. In April 2018, the Working Group reported to relevant COAG Ministers its findings of a detailed investigation into access to Australian standards. Ministers agreed that recommendations on solutions to the longstanding issue of access to, and charges for, standards be progressed as a matter of priority.

In February 2019, Standards Australia announced that it will look to improve access to standards in the wake of a December 2018 ruling, that SAI Global will no longer have exclusive distribution rights. Standards Australia are exploring additional distribution channels (which currently are provided only in hard copy and in PDF) as the first stage of its transition.

.....

A replacement Explanatory Statement is being prepared for my approval, which will provide...information in relation to how the incorporated standards can be accessed.

Committee's comment

1.200 The committee thanks the minister for this response. The committee notes the minister's advice that while online access to the incorporated standards has been suspended by SAI Global, parties most likely to access the incorporated standards may readily purchase them through Standards Australia (from the response, it appears that the standards are available in hard copy or PDF).

1.201 The committee also notes the minister's advice that the regulated community (that is, the Australian refrigeration and air conditioning industry) and the general public may access hard copies of the incorporated standards, without purchasing them, through the National Library of Australia (NLA) and state libraries.

The committee also notes the advice that the NLA provides the facility to scan pages of the standards to a USB drive, provided that this is for non-commercial purposes.

1.202 The committee notes the minister's advice that a replacement explanatory statement is being prepared, including information as to how the incorporated standards may be accessed.

1.203 The committee further notes the minister's advice that the COAG Skills Council Standards and Accessibility Working Group is continuing to work to develop solutions to greater public access to standards beyond their availability through the NLA and state libraries. The committee also notes the advice that Standards Australia is exploring additional distribution channels for standards following a ruling that SAI Global will no longer have exclusive distribution rights. The committee welcomes the ongoing work to improve access to standards, and will continue to monitor the issue.

1.204 The committee has concluded its examination of this matter.

Reversal of evidential burden of proof³⁶

1.205 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to the justification for reversing the evidential burden of proof in subsection 304A(2).³⁷

Minister's response³⁸

1.206 The minister advised:

While the explanation provided in the statement of compatibility with human rights remains appropriate for the offence-specific defence in subsection 304A(2), the Department of the Environment and Energy (the Department) will prepare an amendment for the explanatory statement and statement of compatibility in due course to clarify that, consistent with the equivalent offence in regulation 113A:

- the offence-specific defence in sub-section 304A(2) applies only to the person (likely to be a business) that engaged the licence holder to perform services under an agreement, not the licence holder;
- the burden of proof in sub-section 304A(2) falls on that person, not the licence holder or the Commonwealth; and

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

37 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 54-58.

38 The minister responded to the committee's comments in a letter dated 22 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

- it is considered that the person who entered into an agreement with the licence holder for the purposes of performing services, and who obtains the benefits of the defence in subsection 304A(2) is the most appropriate person to provide evidence concerning such an agreement. While the existence and content of such an agreement would also be within the knowledge of the relevant third party, it is considered that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter, particularly given the commercial nature of these agreements and the likely reluctance of third parties to provide the Commonwealth with their commercial information.

A replacement Explanatory Statement is being prepared for my approval, which will...clarify the matter of the reversal of the evidential burden of proof in subsection 304A(2).

Committee's comment

1.207 The committee thanks the minister for this response. The committee notes the minister's advice that the defendant is the most appropriate person to provide evidence in relation to an agreement between the defendant and a third party (in order to make out the defence in subsection 304A(2)). In this regard, the committee notes the advice that while the content of such an agreement would also be within the knowledge of the relevant third party, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter given the commercial nature of the agreement and the likely reluctance of third parties to disclose commercial information.

1.208 However, the committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the relevant offence, where it is *peculiarly* within the knowledge of the defendant *and* significantly more difficult and costly for the prosecution to disprove.³⁹ In this respect, the committee emphasises that a matter is not peculiarly within a person's knowledge only because they are the 'most appropriate' person to provide relevant evidence. In this regard, it does not appear that the existence or content of an agreement between the defendant and a third party would be peculiarly within the defendant's knowledge. As noted in the minister's response, these matters would also be within the knowledge of that third party.

1.209 Further, and as outlined in the committee's initial comments, the content of an agreement appears to be a largely factual matter. Moreover, while the committee appreciates that aspects of such an agreement may be commercially sensitive, it appears that to make out the defence in subsection 304A(2) it would only be

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

necessary to disclose that part of the agreement that states that services must be provided by the holder of a relevant permit or exemption. It is not clear to the committee that such a provision would contain commercially sensitive information.

1.210 The committee considers that the matters in the offence specific defence at subsection 304A(2) of the instrument would be more appropriately included as elements of the offence in subsection 304A(1). The committee therefore requests the minister's further advice as to the appropriateness of amending the instrument in this manner.

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

FRL No.	F2018L01674 ⁴⁰
Purpose	To amend the <i>Water Act 2007</i> to formalise the commitments of contracting governments to the Murray-Darling Basin Agreement, alter powers of the Murray-Darling Basin Authority and add a new review process for the <i>Basin Salinity Management 2030</i> strategy.
Authorising legislation	<i>Water Act 2007</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation⁴¹

1.211 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to:

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

1.212 The committee also requested that the explanatory statement be amended to include this information.⁴²

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

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

42 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 68-70.

Minister's response⁴³

1.213 The minister advised:

I confirm that a replacement explanatory statement for the Amendment Regulations has been prepared to reflect my response enclosed with this letter.

Committee's comment

1.214 The committee thanks the minister for this response. The committee notes the minister's advice that a replacement explanatory statement has been prepared, reflecting the minister's response to the committee's request.

1.215 The replacement explanatory statement was provided with the minister's response. In relation to the advice requested by the committee, it provides that:

10. BSM procedures

A new provision allows for BSM procedures to be made. BSM procedures set out administrative and technical details as required to give effect to the parties' intentions for the implementation of the Schedule (clause 40A [Item 163]). All former references to protocols are replaced in the Amendment Regulations with references to BSM procedures.

BSM procedures are made by the Basin Officials Committee, and must be published by the Authority.

The BSM procedures, once made, will be publicly available, and free of charge, on the Authority's website. The Authority will also provide the BSM procedures to groups who are likely to regularly refer to the Basin Salinity Management 2030 strategy...

The references to the BSM procedures in Schedule B to the Agreement refer to those procedures as in force from time to time. Clause 40A of Schedule B to the Agreement relevantly provides for the Basin Officials Committee (the BOC) to make, amend or revoke BSM procedures from time to time.

...

References to the BSM procedures in the Agreement

Section 14(2) of the Legislation Act relevantly provides that, unless a contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, for the reasons set out below, this limitation

43 The minister responded to the committee's comments in a letter dated 12 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

does not apply in relation to the references to the BSM procedures in the Agreement.

Section 18C of the Act provides that the 'regulations may make amendments to Schedule 1 by incorporating into the Agreement amendments made to, and in accordance with, the Murray-Darling Basin Agreement'. The 'Agreement' means 'the Murray-Darling Basin Agreement, as amended from time to time in accordance with that agreement and as set out in Schedule 1 (see section 18A of the Act). Section 18C provides the source of power to make the Amendment Regulations.

The Amendment Regulations set out amendments to the text of the Agreement set out in Schedule 1 to the Act, which are agreed to in accordance with clause 5 of the Agreement. The Amendment Regulations do not, themselves, make provision in relation to a matter by applying, adopting or incorporating a matter contained in a document (such as the BSM procedures) as in force from time to time for the purposes of subsection 14(2) of the Legislation Act. Rather the Amendment Regulations make amendments to the text of the Agreement in Schedule 1 to the Water Act, which have been agreed to in accordance with clause 5 of the Agreement. It is the Agreement which makes provision for matters by reference to a document as in force from time to time (i.e. the BSM procedures), rather than the Amendment Regulations.⁴⁴

1.216 The replacement explanatory statement explains that the instrument makes amendments to the text of the Murray-Darling Basin Agreement (Agreement) in Schedule 1 to the *Water Act 2007* (Water Act). In this respect, it argues that it is the Agreement, rather than the instrument, which makes provision for matters by reference to the BSM procedures, and consequently the restrictions in subsection 14(2) of the *Legislation Act 2003* (Legislation Act) on incorporating documents as in force from time to time does not apply.

1.217 The committee acknowledges that the effect of the instrument is to amend the Water Act, and that it is ultimately the Water Act that requires particular functions to be carried out in accordance with the BSM procedures.

1.218 However, the committee notes that section 14 of the Legislation Act, which sets out how legislation may prescribe matters by reference to other instruments, applies in circumstances where 'enabling legislation authorises or requires provision to be made in relation to any matter by legislative instrument'. In this instance, sections 18C and 256 of the Water Act provide that regulations may make amendments to Schedule 1 of that Act by incorporating amendments made to, and in accordance with, the Agreement. Sections 18C and 256 of the Water Act would appear to authorise provision to be made in relation to a matter (that is, amending

44 Replacement explanatory statement, pp. 13-14.

Schedule 1 to that Act) by legislative instrument.⁴⁵ Section 14 of the Legislation Act would therefore appear to apply to instruments made under sections 18C and 256 of the Water Act (including the present instrument). This would include the restriction on incorporating documents from time to time in subsection 14(2).

1.219 Additionally, the committee notes that subclause 5(2) of Schedule 1 to the Water Act provides that:

5. Commencement of Agreement and Amendments to Agreement

...

(2) An amendment to this Agreement will take effect upon the registration of a legislative instrument, in accordance with the *Legislation Act 2003* (Commonwealth), that amends the schedule referred to in subclause (1) by incorporating the Agreement amendments that have been agreed by the Ministerial Council.⁴⁶

1.220 This provision indicates that the registration requirements in the Legislation Act would apply to a legislative instrument which amends the Agreement (such as the present instrument). In the committee's view, this may also support a conclusion that the Legislation Act (including the restrictions on incorporating documents by reference) applies more generally to such instruments.

1.221 The committee would therefore expect the present instrument or its explanatory statement to indicate where each incorporated document may be accessed free of charge, and to indicate the manner in which each document is incorporated. If the instrument purports to incorporate a document as in force from time to time, the committee would also expect the explanatory statement to specify the power relied on to incorporate the document in that manner.

1.222 The replacement explanatory statement indicates that the BSM procedures may be freely accessed on the website of the Murray-Darling Basin Authority, and that the procedures are incorporated from time to time. However, it does not specify the power relied on to incorporate the BSM procedures in this manner. The committee secretariat's research has not identified such a power in the Water Act or in another Act of Parliament.

1.223 In light of the preceding discussion, the committee requests the minister's further advice as to why it is considered that the Basin Salinity Management (BSM) procedures are not incorporated by the instrument (and why section 14 of the *Legislation Act 2003* would not apply), but rather only by Schedule 1 to the *Water Act 2007*.

45 Regulations made under an Act of Parliament are declared by section 10 of the Legislation Act to be a legislative instrument.

46 The schedule to which subclause 5(1) refers is Schedule 1 to the Water Act, which sets out the text of the Agreement.

1.224 If the advice is that the BSM procedures *are* incorporated by the instrument, the committee also requests the minister's advice as to the power relied on to incorporate the BSM procedures as in force from time to time.

Advice only

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

Civil Aviation Safety Amendment (Part 139) Regulations 2019

FRL No.	F2019L00176 ¹
Purpose	To amend Part 139 of the Civil Aviation Safety Regulations 1998, relating to the safety regulation of aerodromes and associated matters.
Authorising legislation	<i>Civil Aviation Act 1988</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Incorporation²

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

1.227 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.³

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

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

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

1.228 With regard to these matters, the committee notes that the instrument appears to incorporate the following documents:

- the aerodrome manual for an aerodrome;
- the safety management system (SMS) for an aerodrome; and
- 'other systems' for an aerodrome.

1.229 The explanatory statement provides that the documents are incorporated from time to time.⁴ However, it also states that the documents are not publicly or freely available. In this regard, the explanatory statement explains that the incorporated documents are proprietary documents prepared and used exclusively by aerodrome operators and their personnel, which may contain commercial in confidence information.⁵

1.230 In relation to whether the Civil Aviation Safety Authority (CASA) is able to make the documents available, the explanatory statement further explains that:

CASA considers it unlikely that the relevant owner of the document[s] would sell CASA the copyright at a price that would be an effective or efficient use of CASA funds, or otherwise permit CASA to make the document freely available.⁶

1.231 The committee acknowledges that it may be difficult or costly to provide free, public access to the documents identified at [1.228] above. Further, it appears that general requirements relating to the content of those documents would be set out in the Part 139 Manual of Standards (MoS),⁷ which would be a legislative instrument available on the Federal Register of Legislation.⁸

1.232 Nevertheless, the committee emphasises that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms

4 Explanatory statement, p. 5. Subsection 98(5D) of the *Civil Aviation Act 1988* provides authority to incorporate documents and other instruments as in force or existing from time to time.

5 Explanatory statement, pp. 4-5.

6 Explanatory statement, p.5. The explanatory statement further states that CASA has incorporated the documents in the instrument because: they are appropriate and necessary to give effect to the safety regulatory scheme; they provide flexibility to aerodrome operators in terms of compliance with the instrument; and no other freely available documents are available that serve those purposes.

7 For example, section 139.045 requires the operator of a certified aerodrome to have an aerodrome manual that complies with requirements prescribed by the Part 139 MoS. That section also provides that the Part 139 MoS may prescribe (among other matters) requirements relating to the information that must be included in an aerodrome manual.

8 The explanatory statement (p. 5) states that 'once made, [the Part 139 MoS] will be freely available on the Federal Register of Legislation'.

readily and freely. The committee also considers that persons otherwise interested in the law should have access to its terms.

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

Defence Determination, Conditions of Service (Salary non-reduction) Determination 2019 (No. 6)

FRL No.	F2019L00100 ⁹
Purpose	To amend the Defence Determination 2016/19 Conditions of Service to specify salary non-reduction periods for certain members of the Australian Defence Force, and to remove redundant or spent provisions.
Authorising legislation	<i>Defence Act 1903</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Retrospective effect¹⁰

1.234 Item 2 of Schedule 1 to the instrument substitutes a new Annex 3.2B in the Defence Determination 2016/19, Conditions of Service,¹¹ which specifies periods during which the salaries of certain members of the Australian Defence Force (ADF) may not be reduced. A number of the salary non-reduction periods specified in the new Annex appear to begin before the present instrument commences.¹²

1.235 While the instrument commences prospectively, the specification of salary non-reduction periods commencing before the instrument comes into force may result in the instrument having a retrospective effect. This may affect members of the ADF to whom the instrument applies.

1.236 The committee notes that the instrument appears to operate beneficially. In this respect, the explanatory statement explains that the instrument ensures that the salaries of members affected by the restructure of certain employment categories are not reduced for a period of five years.¹³

1.237 Nevertheless, the committee would expect the explanatory materials to address the retrospective operation of the salary non-reduction periods specified in

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

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

11 [F2019C00097].

12 For example, the period specified in item 1 of the Annex for an Operator Catering Manager Grade 1 begins on 1 July 2014. The instrument commences on 7 March 2019.

13 Explanatory statement, p. 1.

new Annex 3.2B. The committee would expect such an explanation to include whether any person was affected by the retrospective operation of the provisions and, if so, the steps that have been or will be taken to mitigate any possible disadvantage. The committee notes that no such explanation appears in the explanatory statement to the present instrument.

1.238 The committee draws the Senate's attention to the retrospective operation of a number of salary non-reduction periods specified in the instrument, in the absence of an explanation for the retrospective operation of the relevant provisions in the explanatory statement.

Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2019

Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2019

FRL No.	F2019L00163 and F2019L00165 . ¹⁴
Purpose	To establish legislative authority for spending activities administered by the Communications and the Arts and Jobs and Small Businesses portfolios.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Parliamentary scrutiny: ordinary annual services of government¹⁵

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

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

1.241 The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend

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

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

proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.¹⁶ In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in the Appropriation Acts as an 'ordinary annual service of the government', despite being spending on new policies.

1.242 The committee's considerations in this regard are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.¹⁷

1.243 The Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2019¹⁸ provides legislative authority for Commonwealth spending on the construction and operation of television retransmission infrastructure at Stroud (Stroud program). The explanatory statement indicates that the funding will be delivered through a direct grant of \$300,000 in 2018-19, and that the funding was allocated in the 2018-19 Mid-Year Economic and Fiscal Outlook (MYEFO).¹⁹

1.244 The Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measure No. 1) Regulations 2019²⁰ provides legislative authority for Commonwealth spending on the Career Revive Initiative for Regional Women (CR initiative).²¹ The explanatory statement indicates that the measure is part of the Women's Economic Security Package, announced on 20 November 2018, and that

16 In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 (June 2010), pp. 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017* (15 February 2017), pp. 1-5.

17 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

18 [F2019L00163].

19 Explanatory statement, p. 4.

20 [F2019L00165].

21 The explanatory statement (p. 1) explains that the CR initiative will fund the development of programs by up to 30 medium to large rural and regional employers to support, attract and retain women returning to work after caring-related breaks. Funding will also be provided for the development of publicly available online resources designed to guide regional employers generally in setting up similar initiatives within their organisations.

funding of \$1.5 million over three years from 2019-20 was included in the 2018-19 MYEFO.²²

1.245 It appears to the committee that the Stroud program and the CR initiative may be new policies or programs not previously authorised by special legislation; and that the initial appropriations for the relevant expenditure may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Act (No. 1) 2018-19 or Appropriation Bill (No. 3) 2018-19 (which are not subject to amendment by the Senate).

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

22 Explanatory statement, p. 1.

Health Insurance (Professional Services Review Scheme) Regulations 2019

FRL No.	F2019L00180 ²³
Purpose	To repeal and remake the Health Insurance (Professional Services Review) Regulations 1999 to make administrative changes to support the ongoing function of the professional Services Review Scheme.
Authorising legislation	<i>Health Insurance Act 1973</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled in the Senate on 2 April 2019).

Significant matters in delegated legislation²⁴

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

1.248 Section 82 of the *Health Insurance Act 1973* (Health Insurance Act) sets out the circumstances in which a practitioner will be said to engage in 'inappropriate practice'.²⁵ It appears that a finding of inappropriate practice may ultimately lead to the imposition of sanctions, including reprimands, counselling, disqualification from claiming Medicare benefits, orders for repayment of claimed Medicare benefits, and full disqualification from the Pharmaceutical Benefits Scheme (PBS).²⁶

1.249 Subsection 82(1B) of the Health Insurance Act provides that a practitioner does not engage in inappropriate practice in rendering or initiating services if a Professional Services Review Committee could reasonably conclude that, on the

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

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

25 'Inappropriate practice' is conduct by a practitioner in connection with rendering or initiating services that a practitioner's peers could reasonably conclude was unacceptable to the general body of their profession. Relevant conduct may include providing or initiating Medicare services and prescribing or dispensing PBS medicines. See also <https://www.psr.gov.au/about-the-psr-scheme/what-is-inappropriate-practice>.

26 The process for determining and addressing inappropriate conduct is set out in Part VAA of the Health Insurance Act. See also <https://www.psr.gov.au/about-the-psr-scheme/the-three-stages-of-review>.

relevant day, exceptional circumstances existed that affected the rendering or initiating of the services. Subsection 82(1D) provides that such exceptional circumstances include, but are not limited to, those prescribed by the regulations.

1.250 Section 7 of the instrument was made for the purposes of subsection 82(1D) of the Health Insurance Act. It provides, for the purposes of that provision, that exceptional circumstances for a particular day for a practitioner include:

- an unusual occurrence causing an unusual level of need for relevant services on the day; and
- an absence, on the day, of other medical services for the practitioner's patients, having regard to the location of the practitioner's practice and the characteristics of the practitioner's patients.

1.251 While the committee acknowledges that the Health Insurance Act authorises regulations to prescribe 'exceptional circumstances' for the purposes of determining whether a practitioner engaged in inappropriate conduct, the circumstances set out in section 7 are very broad. In particular, it appears that an 'unusual occurrence' may refer to virtually any situation that does not commonly arise during a practitioner's daily work routine. In this respect, the committee notes that there appears to be no definition of 'unusual occurrence' in the instrument or the Health Insurance Act.

1.252 In the committee's view, matters such as those prescribed by section 7 of the instrument are more appropriately enacted via primary rather than delegated legislation. Where such matters are left to delegated legislation, the committee would expect a sound justification to be included in the explanatory materials. In this instance, no such justification is provided in the explanatory statement.

1.253 The committee draws the Senate's attention to the specification in delegated legislation of broad circumstances in which a practitioner would not be said to have engaged in inappropriate conduct for the purposes of the *Health Insurance Act 1973*, noting that a finding of inappropriate conduct may expose a practitioner to a range of sanctions.

Industry Research and Development – various instruments²⁷

FRL No.	F2019L00114 , F2019L00115 , F2019L00130 , F2019L00141 and F2019L00154 . ²⁸
Purpose	To establish legislative authority for government expenditure on activities administered by the Industry, Innovation and Science portfolio.
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Portfolio	Industry, Innovation and Science
Disallowance	15 sitting days after tabling: <ul style="list-style-type: none"> • [F2019L00114] and [F2019L00115] tabled in the Senate on 13 February 2019). • [F2019L00130] tabled in the Senate on 14 February 2019. • [F2019L00141] and [F2019L00154] tabled in the Senate on 2 April 2019.

Parliamentary scrutiny: ordinary annual services of government²⁹

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

1.255 Under section 33 of the *Industry Research and Development Act 1986* (Industry Act), executive spending may be authorised by specifying schemes in instruments made under that Act. The money which funds these schemes is specified in an Appropriation Act, but the details of the scheme may depend on the content of the relevant instruments. Once the details of a scheme are outlined in an instrument,

27 Industry Research and Development (Small Business Digital Champions Project) Instrument 2019 [F2019L00114]; Industry Research and Development (Promote Mental Health for Small Business Operators Program) Instrument 2019 [F2019L00115]; Industry Research and Development (Small and Medium Enterprises Export Hubs Program) Instrument 2019 [F2019L00130]; Industry Research and Development (PSMA Australia Limited Concessional Loan Program) Instrument 2019 [F2019L00141]; Industry Research and Development (Antarctic Science Collaboration Initiative Program) Instrument 2019 [F2019L00154].

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

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

questions may arise as to whether the funds allocated in the relevant Appropriation Act were inappropriately classified as ordinary annual services of the government.

1.256 The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.³⁰ In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of instruments made under the Industry Act therefore includes an assessment of whether measures may have been included in an Appropriation Act as an 'ordinary annual service of the government', despite being spending on new policy.

1.257 The committee's considerations in this regard are consistent with those set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations*.³¹

1.258 With regard to the matters above, the committee notes that the instruments establish legislative authority for Commonwealth spending on the following programs and policies for which funding was secured through the 2018-19 Budget and the 2018-19 Mid-Year Economic and Fiscal Outlook:

- the Small Business Digital Champions Project;³²
- the Promote Mental Health for Small Business Operators Program;³³
- the Small and Medium Enterprises Export Hubs Program;³⁴

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

31 Regulations and Ordinances Committee, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

32 Spending on this program is authorised by the Industry Research and Development (Small Business Digital Champions Project) Instrument 2019 [F2019L00114]. The explanatory statement indicates that the program aims to support Australian small businesses to undertake online digital transformation, enable the government to create relevant case studies, and fund 'digital advisers' to give sector-specific advice on business digitisation.

33 Spending on this program is authorised by the Industry Research and Development (Promote Mental Health for Small Business Operators Program) Instrument 2019 [F2019L00115]. The explanatory statement indicates that the program aims to improve awareness of, and practical responses to, mental health issues within Australian small businesses.

- the PSMA Australia Limited Concessional Loan Program;³⁵ and
- the Antarctic Science Collaboration Initiative Program.³⁶

1.259 The explanatory statements indicate that, under the programs, grants and funding will be provided for between two and 10 years from 2018-19.

1.260 It appears to the committee that the programs in relation to which funding is authorised by the instruments may be new policies or programs not previously authorised by special legislation; and that the initial appropriations for the relevant expenditure may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in *Appropriation Act (No. 1) 2018-19* or *Appropriation Bill (No. 3) 2018-19* (which are not subject to amendment by the Senate).

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

34 Spending on this program is authorised by the Industry Research and Development (Small and Medium Enterprises Export Hubs Program) Instrument 2019 [F2019L00130]. The explanatory statement indicates that the program is designed to support the establishment and operation of export hubs in Australia's six Growth Centre sectors.

35 Spending on this program is authorised by the Industry Research and Development (PSMA Australia Limited Concessional Loan Program) Instrument 2019 [F2019L00141]. The explanatory statement indicates that the funding will be used to support PSMA Australia Limited to upgrade its information technology infrastructure and invest in organisational capability to assist in delivery of enhanced national spatial data infrastructure.

36 Spending on this program is authorised by the Industry Research and Development (Antarctic Science Collaboration Initiative Program) Instrument 2019 [F2019L00154]. The explanatory statement indicates that the funding will be used to support the operation and activities of the Australian Antarctic Program Partnership, particularly in relation to conducting science, research and innovation activities in alignment with the *Australian Antarctic Science Strategic Plan* and the *Australian Antarctic Strategy and 20 Year Action Plan*.

Radiocommunications Licence Tax Amendment Determinations – various instruments³⁷

FRL No.	F2019L00071 , F2019L00072 and F2019L00164 . ³⁸
Purpose	To amend the Radiocommunications (Transmitter Licence Tax) Determination 2015 and the Radiocommunications (Receiver Licence Tax) Determination 2015 to increase the amount of tax imposed in relation to certain licences.
Authorising legislation	<i>Radiocommunications (Transmitter Licence Tax) Act 1983</i> <i>Radiocommunications (Receiver Licence Tax) Act 1983</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling: <ul style="list-style-type: none"> • [F2019L00071] and [F2019L00072] tabled in the Senate on 12 February 2019. • [F2019L00164] tabled in the Senate on 2 April 2019.

Significant matters in delegated legislation³⁹

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

1.263 The *Radiocommunications (Transmitter Licence Tax) Act 1983* (RTLTL Act) and the *Radiocommunications (Receiver Licence Tax) Act 1983* (RRLT Act) provide, respectively, for the imposition of taxes in relation to transmitter licences and receiver licences. Section 7 of each of those Acts provides that the amount of tax imposed is determined by the Australian Communications and Media Authority by legislative instrument.

1.264 The instruments were made under section 7 of the RTLTL Act and RRLT Act. They increase the amount of tax payable by the licensees of particular apparatus licences for transmitters and receivers.⁴⁰

37 Radiocommunications (Transmitter Licence Tax) Amendment Determination 2019 (No. 1) [F2019L00071]; Radiocommunications (Receiver Licence Tax) Amendment Determination 2019 (No. 1) [F2019L00072]; Radiocommunications (Receiver Licence Tax) Amendment Determination 2019 (No. 2) [F2019L00064].

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

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

1.265 The committee's longstanding view is that one of the most fundamental functions of the Parliament is to levy taxation. Consequently, it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. While recognising that the instruments are lawfully made, the committee emphasises that rates of tax are more appropriate for enactment in primary legislation. In this respect, the committee also notes that the enabling legislation for the instruments does not appear to set a cap on the amount of tax that may be imposed.

1.266 The committee draws the Senate's attention to the imposition of taxes relating to transmitter licences and receiver licences in delegated legislation.

40 The Radicommunications (Receiver Licence Tax) Amendment Determination 2019 (No. 2) (No. 2 Determination) intends to correct errors made by the Radicommunications (Receiver Licence Tax) Amendment Determination 2019 (No. 1). It does this by remaking a table setting out the tax amounts for particular frequency ranges. In this regard, the No. 2 determination would appear to set a rate of tax.

Social Security (Administration) (Declared child protection State or Territory – Western Australia) Determination 2019

FRL No.	F2019L00068 ⁴¹
Purpose	To declare Western Australia to be a 'declared child protection State' for the purposes of the income management regime.
Authorising legislation	<i>Social Security (Administration) Act 1999</i>
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Significant matters in delegated legislation⁴²

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

1.268 The instrument declares Western Australia to be a 'declared child protection State for the purposes of section 123TF of the *Social Security (Administration) Act 1999*. The explanatory statement explains that the effect of this declaration is that:

a child protection officer within the Western Australian department responsible for child protection will be able to give the Secretary a notice, as mentioned in section 123UC of the Act, requiring a person to be subject to the income management regime. If the various criteria in section 123UC are satisfied...a portion of the person's relevant welfare payments will be redirected to the priority needs, such as food, clothing and shelter, of the person and his or her dependents.⁴³

1.269 The committee's longstanding view is that significant matters, such as the designation of states and territories as 'declared child protection States and Territories', are more appropriately enacted via primary than delegated legislation,

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

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

43 Explanatory statement, p. 1.

particularly noting the potentially significant implications for personal rights and liberties associated with the income management regime.

1.270 Where such significant matters are left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this instance, the committee notes that no such justification is provided in the explanatory statement.

1.271 The committee draws to the Senate's attention the use of delegated legislation to declare Western Australia to be a 'declared child protection State' for the purposes of the income management regime. The committee's view is that such significant matters should be enacted via primary, rather than delegated, legislation.

Chapter 2

Concluded matters

2.1 This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Air Navigation (Essendon Fields Airport) Regulations 2018

Air Navigation (Gold Coast Airport Curfew) Regulations 2018

FRL No.	F2018L01687 and F2018L01688 ²
Purpose	To establish a framework for the restriction of aircraft movements at Essendon Fields Airport and Gold Coast Airport.
Authorising legislation	<i>Air Navigation Act 1920</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Incorporation³

2.3 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to where Volume I of Annex 16 to the Chicago Convention may be accessed free of charge (including by the general public), and requested that the explanatory statements to the instruments be amended to include this information.⁴

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

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

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

4 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 12-16.

Minister's response⁵**2.4 The minister advised:**

I thank the Committee for consideration of the fundamental principle of the rule of law that every person subject to the law should be able to access its terms readily and freely. The parties subject to the law are aircraft operators and as indicated in the explanatory statement the Annex is available for purchase on the website of the International Civil Aviation Organization (CAO), and that aircraft operators may request a copy free of charge from the Department of Infrastructure, Regional Development and Cities.

Australia is not the copyright holder of the document, which is an international standard and therefore cannot distribute copies to members of the public. The National Library Trove online system <https://trove.nla.uov.au> allows users to identify libraries in Australia that are open to the public, where in most cases earlier editions may be viewed. The Royal Melbourne Institute of Technology holds a copy of the current edition of Annex 16, Volume I that can be made available on inter-library transfer. The explanatory statement will be amended to note the availability of the document through the National Library online system.

Committee's comment

2.5 The committee thanks the minister for this response. The committee notes the minister's advice that aircraft operators may request a copy of Annex 1 to the Chicago Convention (the Annex) free of charge from the Department of Infrastructure, Regional Development and Cities.

2.6 The committee also notes the minister's advice that as Australia is not the copyright holder of the Annex, it cannot distribute copies of that document to members of the public. However, the committee notes the minister's advice that the Annex can be made available for viewing through the National Library Trove online system. The committee also notes the advice that the Royal Melbourne University of Technology holds a copy of the current edition of the Annex that can be made available through inter-library transfer.

2.7 The committee notes the minister's undertaking to amend the explanatory statement to note the availability of the Annex through the National Library online system.

2.8 The committee has concluded its examination of this matter.

5 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

Reversal of evidential burden⁶

2.9 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's more detailed advice as to the justification for the reversal of the evidential burden of proof in relation to a number of offence-specific defences.⁷

Minister's response⁸

2.10 The minister advised:

As indicated within the explanatory statement, the reversal of the burden of proof contained in the Air Navigation (Gold Coast Airport Curfew) Regulations 2018 and the Air Navigation (Essendon Fields Airport) Regulations 2018 are matters likely to be within the knowledge of the defendant. This reversal of the burden of proof did have regard to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

I acknowledge the Committee's concerns that the weight of an aircraft and whether it is used for a police operation appear to be factual matters, however, these matters are highly dependent on the nature of the operation and this information will be contained either in the aircraft flight manual or the aircraft flight plan. Both of these matters are not ones for which the Secretary would be apprised unless this information was supplied to the Secretary by an aircraft operator in the course of conducting compliance activity.

The primary responsibility for adhering to the Regulations rests with the aircraft operator and it remains appropriate that operators bear the evidential burden of proof. It would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matters, due to the burden of proof required in a criminal prosecution under the Criminal Code.

The conduct prescribed is also conduct that should be prohibited to ensure appropriate protections for communities living in close proximity to both airports. These protections include minimising the adverse effects of aircraft noise which could cause public health issues in extreme cases.

Committee's comment

2.11 The committee thanks the minister for this response, and notes the minister's advice that the matters in the identified offence-specific defences are

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

7 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 12-16.

8 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

likely to be within the knowledge of the defendant. The committee also notes the minister's advice that certain matters which appear to be factual (for example, the weight of an aircraft and whether it is used for police purposes) are dependent on the nature of the relevant operation. The committee notes the advice that information relating to these matters would be contained in the aircraft's flight manual or flight plan, and would not generally be available to the secretary.

2.12 The committee further notes the minister's advice that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matters in the offence-specific defences, due to the burden of proof required in a criminal prosecution under the *Criminal Code*.

2.13 Finally, the committee notes the minister's advice that the offences are designed to ensure appropriate protections for persons living in close proximity to airports, including by minimising aircraft noise (which could cause public health issues in extreme cases). In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that offence-specific defences are more readily justified if conduct proscribed by the associated offences poses a grave danger to public health and safety.⁹

2.14 While noting this advice, the committee emphasises that the *Guide* states that a matter should only be included in an offence-specific defence where it is peculiarly within the knowledge of the defendant and would be significantly more difficult for the prosecution to disprove than the defendant.¹⁰ In this respect, while the matters identified in the minister's response (that is, the weight of an aircraft and the purposes for which it is used) may be within the knowledge of the defendant, and may not be matters of which the secretary would generally be apprised, this does not mean that the matters are *peculiarly* within the defendant's knowledge, or are matters in relation to which the prosecution could not obtain evidence.

2.15 Moreover, even if the matters identified in the minister's response would be peculiarly within the knowledge of the defendant, it is not clear that this is the case for all matters to which the offence-specific defences relate. For example, it appears that some of the defences could be made out by pointing to a dispensation granted by the secretary.¹¹ As set out in the committee's initial comments, it is not apparent that this matter would be peculiarly within the knowledge of the defendant, given

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

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

11 That is, the defences in subsections 8(2) and 10(3) of Air Navigation (Essendon Fields Airport) Regulations 2018 [F2018L01687] and subsection 8(2) of the Air Navigation (Gold Coast Airport Curfew) Regulations 2018 [F2018L01688]

that it is a matter of which the secretary (as the person responsible for granting the dispensation) would also be apprised.

2.16 The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate its concerns regarding the reversal of the evidential burden of proof in the offence-specific defences set out in the instrument, noting that the matters to which those defences relate may not be peculiarly within the knowledge of the defendant.

Merits review¹²

2.17 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to:

- whether decisions by the secretary to grant, or refuse to grant, a dispensation (curfew dispensation) allowing an aircraft to take off from, or land at, Essendon Fields Airport or Gold Coast Airport during a curfew period, are subject to independent merits review; and
- if not, the characteristics of those decisions that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*¹³

Minister's response¹⁴

2.18 The minister advised:

The Administrative Review Council's publication *What decisions should be subject to merit review?* indicates that decisions for which there is no appropriate remedy may be suitable to be excluded from merits review.

Curfew dispensation decisions are decisions for which there is no appropriate remedy. Once a decision is made to grant or refuse a curfew dispensation it is irrevocable and the decisions operate for a short period.

A curfew dispensation may be granted at the Essendon Fields Airport or the Gold Coast Airport during a curfew period in situations of 'exceptional circumstances'. The decision to grant or refuse a curfew dispensation is based upon administrative guidance documents authorised by the

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

13 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 12-16.

14 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

Secretary of the Department of Infrastructure, Regional Development and Cities.

The nature of curfew dispensations are based on circumstances that are often short notice, not foreseeable and require an immediate decision. In these circumstances, the urgency to make a decision to grant or refuse a dispensation request justifies the exclusion of merits review.

A merits review could cause uncertainty compromising the operations of an aircraft, which may include fragile time sensitive cargo, animals or cause undue hardship to passengers including unaccompanied minors, or those requiring mobility assistance. Delays in decision-making may also subject the community in close proximity to the airport to more noise caused by such delays. This would be contrary to the intent of the Regulations which is to protect the community from aircraft noise impacts at sensitive times.

As the Committee has indicated section 23A of the *Air Navigation Act 1920* provides for the review of decisions by the Administrative Appeals Tribunal for certain decisions. If curfew dispensations were to have been subject to review by the Administrative Appeals Tribunal this would have been specified by section 23A.

Committee's comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that decisions to grant a curfew dispensation are decisions for which there is no appropriate remedy. The committee notes that this may reflect an established ground for excluding independent merits review.¹⁵

2.20 In relation to this matter, the committee notes the minister's advice that the circumstances requiring a curfew dispensation are often identified at short notice, and the advice that such circumstances are often unforeseeable and require an immediate decision. The committee also notes the advice that curfew dispensations are irrevocable once granted, and operate only for a short period.

2.21 The committee further notes the minister's advice that providing for independent merits review could cause uncertainty, which could compromise the operations of an aircraft. The committee notes the advice that delays in decision-making associated with the merits review process could also subject the community around the airports to additional noise while the relevant decision is being reviewed.

15 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.49]-[4.51].

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

2.23 The committee has concluded its examination of the instrument.

Australian Radiation Protection and Nuclear Safety Regulations 2018

FRL No.	F2018L01694 ¹⁶
Purpose	To give effect to a number of matters under the <i>Australian Radiation Protection and Nuclear Safety Act 1998</i> , including the functions of the CEO of the Australian Radiation Protection and the Nuclear Safety Agency, the Radiation Health and Nuclear Safety Council and advisory committees, requirements for controlled facilities, persons and apparatuses, and various licensing and safety requirements.
Authorising legislation	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Unclear basis for determining fees¹⁷

2.24 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to the basis on which the fees set out in Division 4 of Part 5 of the instrument had been calculated.¹⁸

Minister's response¹⁹

2.25 The minister advised:

Section 34 of the *Australian Radiation Protection and Nuclear Safety Act 1998* (the Act), provides that applications for licences to engage in conduct otherwise prohibited by sections 30 or 31 of the Act must be in a form approved by the Chief Executive Officer of the Australian Radiation Protection and Nuclear Safety Authority. They must also be accompanied by such fee as is prescribed in the regulations.

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

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

18 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 19-20.

19 The minister responded to the committee's comments in a letter dated 28 February 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

The application fees prescribed by the [Australian Radiation Protection and Nuclear Safety Regulations 2018 (ARPANS Regulations)] have been set at a level estimated to only recover the actual average regulatory costs involved in assessing all facility and source licence applications for each licence type specified in the ARPANS Regulations.

The reference in the Explanatory Statement to risk was not meant to imply that source licence application fees were set according to the level of risk exhibited by the relevant material, merely that the categorisation of the material into Group 1, 2 or 3 is based on the level of radioactivity of the nuclide in question and the greater chance of serious harm being caused by an accident involving the material.

It is the amount of regulatory effort required to properly consider the more detailed licence applications received for materials in the higher order groups that attracts the application fee, not the inherent risk applicable to each group.

The application fees for facility and source licences set out in Division 4 of Part 5 of the ARPANS Regulations are cost recovery measures authorised by section 34 of the Act.

Committee's comment

2.26 The committee thanks the minister for this response, and notes the minister's advice that the fees imposed by Division 4 of Part 5 of the instrument have been set at a level that is estimated to recover only the actual average regulatory costs of assessing all facility and source licence applications.

2.27 In this regard, the committee notes the advice that that the fees are cost recovery measures authorised by section 34 of the *Australian Radiation Protection and Nuclear Safety Act 1998*.

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

2.29 The committee has concluded its examination of the instrument.

CASA EX159/18 — Authorised Flight Examiners Exemption 2018

FRL No.	F2018L01636 ²⁰
Purpose	To permit a flight examiner who certified a person under the Civil Aviation Safety Regulations 1998 to conduct a flight test for that person in certain circumstances.
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 4 December 2018).

Merits review²¹

2.30 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's more detailed advice as to:

- whether decisions to approve, or refuse to approve, a flight examiner to conduct a flight test are subject to independent merits review, in light of the minister's previous advice in relation to the CASA EX 111/18 – English Language Proficiency Assessments Exemption 2018;²² and
- if such decisions are not subject to independent merits review, the characteristics of the decisions that would justify excluding merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.²³

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

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

22 [F2018L01214].

23 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 23-25.

Minister's response²⁴

2.31 The minister advised:

The Civil Aviation Safety Authority (CASA) has advised that a decision of CASA under section 5 to refuse to grant an authorisation is subject to merits review by the Administrative Appeals Tribunal. This has been reflected in a revised explanatory statement lodged on 30 January 2019.

Committee's comment

2.32 The committee thanks the minister for this response, and notes the minister's advice that decisions under section 5 of the instrument to approve, or refuse to approve, a flight examiner to conduct a flight test are subject to independent merits review.

2.33 The committee notes that the explanatory statement has been amended to include this information.²⁵

2.34 The committee has concluded its examination of the instrument.

24 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

25 <https://www.legislation.gov.au/Details/F2018L01636/Replacement%20Explanatory%20Statement/Text>.

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

FRL No.	F2018L01614 ²⁶
Purpose	To implement the decision of the United Nations Security Council to impose targeted financial sanctions in relations to persons or entities designated by the Mali Sanctions Committee.
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Portfolio	Foreign Affairs and Trade
Disallowance	15 sitting days after tabling (tabled in the Senate on 29 November 2018).

Strict liability²⁷

Significant matters in delegated legislation²⁸

2.35 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to the justification for applying strict liability to each of the offences in the instrument.²⁹

2.36 The committee also requested the minister's advice as to the justification for including offences punishable by up to 10 years' imprisonment in delegated legislation rather than in primary legislation.³⁰

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

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

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

29 The offence itself is set out in section 27 of the *Charter of the United Nations Act 1945* (that is, contravening a UN enforcement law). However, the relevant conduct, as well as the application of strict liability, is provided for in the instrument.

30 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 26-28.

Minister's response³¹

2.37 The minister advised:

1. Inclusion of offence provisions in delegated legislation

The UN sanctions environment is dynamic, with the UN Security Council imposing sanctions to respond to threats to international peace and security. Australia's UN sanctions framework operates in a manner that ensures Australia is able to give legal effect to its international law obligations and respond to such threats in a timely way.

The *Charter of the United Nations Act 1945* (CoTUNA) enables Australia to apply sanctions giving effect to certain decisions of the United Nations Security Council (UNSC), through the making of country-specific regulations. There are currently 16 countries subject to UNSC sanctions. As Australia is obliged to give effect to UNSC resolutions as a matter of international law, and is not able to unilaterally determine how they will apply to Australia, it is both appropriate and practical that they be implemented through Regulations made by the Governor-General sitting in Council.

As the Guide set out, the content of an offence set out in an Act or Regulation should be clear from the offence provision itself, although the offence may rely on the Act or Regulation, or another instrument, to define terms used to give context to the offence. As noted in the Guide, while it is desirable for the content of an offence to be clear on the face of legislation, there are circumstances where it appropriate for the content of an offence to be set out by Regulation [see 2.3.4].

One of the examples given in the Guide as to when the content of an offence may be appropriately delegated to Regulations is where elements of the offence are to be determined by an international instrument in order to comply with Australia's obligations under international law. Here, the Regulations give effect to Australia's obligations to implement UNSC resolutions as they relate to sanctions.

The legal framework for the domestic implementation of UNSC resolutions was carefully designed to ensure that only provisions giving effect to UNSC sanction obligations can be a UN sanction enforcement law and subject to the offence provisions set out in section 27 of CoTUNA. Specifically, s 2B(3) provides:

The Minister may only specify a provision [to be a UN sanction enforcement law] to the extent that it gives effect to a decision that:

31 The minister responded to the committee's comments in a letter dated 4 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

(a) The Security Council has made under Chapter VII of the Charter of the United Nations; and

(b) Article 25 of the Charter required Australia to carry out in so far as that decision requires Australia to apply measures not involving the use of armed forces.

UNSC sanctions-related resolutions, even though they have different country focuses, address conduct of significant global seriousness. As such, it is appropriate for the penalty to be set out in primary legislation and for the offence content to be detailed in Regulations that reflect the terms of the relevant UNSC resolutions. Parliament, in passing CoTUNA, has determined that contravening a UN sanction enforcement law is a serious offence that ought to carry the significant penalties set out in CoTUNA.

Importantly, regulations made under the CoTUNA are registered on the Federal Register of Legislation and made available on the Department of Foreign Affairs and Trade sanctions website page.

2. Strict liability

...

The offence provisions relating to targeted financial sanctions in the Regulations operate in the same manner as Australia's other 15 UN sanction regimes enabled by CoTUNA. The Regulations contain two offence provisions: a prohibition on dealing with designated persons or entities; and a prohibition relating to controlled assets. Both provisions contain multiple physical elements to the offence. The application of strict liability does not apply to all elements of these offences. It only applies to one factual element; whether or not the relevant conduct was authorised by a permit. Significantly, to prove the offence, it is still necessary to show that a person intended to engage in the conduct constituting the offence. As a strict liability element, a defendant can still rely on the 'mistake of fact' defence available under section 9.2 of the Criminal Code. Accordingly, where a person can show they were under a mistaken but reasonable belief about certain facts, which if true would render the conduct non-criminal, they will not be convicted of the offence even if it can be proved that they intended to deal with a designated person or entity or with a controlled asset.

As set out in the Guide [2.2.6], applying strict liability to a particular physical element of an offence (as opposed to all physical elements) can be justified where:

- 1. requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element; or*
- 2. the element is a jurisdictional element rather than one going to the essence of the offence.*

In the case of these Regulations, we consider that the first exception applies. Specifically, the application of strict liability to a single physical element of the offences relating to the existence of a permit is necessary to ensure the integrity of Australia's Mali sanctions regime.

In the absence of the strict liability element of the offences in subsections 5(1)(b) and 6(1)(c) of the Mali Regulations, the corresponding fault element that would apply would be recklessness (the automatic default element set out in section 5.6 of the Criminal Code). This would require the prosecution to establish beyond reasonable doubt that a person who has breached UN sanctions was aware of the substantial risk that the dealing was not authorised by a permit, and that it was unjustifiable to take the risk. As the courts have interpreted substantial risk as requiring conscious awareness (as opposed to the risk being obvious or well known), this would require proof of the alleged offender's subjective appreciation of the circumstances. Given the difficulty in obtaining this form of evidence to satisfy the evidentiary threshold 'beyond reasonable doubt', and the consequent impact on achieving a successful prosecution, the sanctions regime would not have its intended deterrent effect.

Sanctions operate to prohibit particular activities, with very limited exceptions. Conduct which would be otherwise prohibited is only authorised where a permit has been issued. Permits can only be issued in a limited range of circumstances, as determined by the UNSC and as set out in relevant UNSC resolutions.

Applying strict liability to whether the conduct in question is authorised by a permit, rendering it a factual question, maintains the integrity of the permit system and its strict adherence to the narrow range of exceptions allowed by the UNSC in relation to a particular sanctions regime. It is also consistent with the Government's position that Australians and Australian companies should be encouraged to adopt the highest ethical standards in adhering to Australia's sanctions regimes.

Committee's comment

2.38 The committee thanks the minister for this detailed response. The committee notes the minister's advice that the *Guide to Framing Commonwealth Offences* provides that it may be appropriate for the content of an offence to be delegated to regulations where elements of the offence are to be determined by an international instrument.³² In this respect, the committee notes that the instrument gives effect to Australia's obligations to implement United Nations Security Council (UNSC) resolutions relating to sanctions.

32 See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), pp. 26-27.

2.39 The committee also notes the minister's advice that while UNSC sanctions-related resolutions may have different country focuses, they all address conduct of significant global seriousness. The committee notes the advice that it is therefore appropriate for the penalty for contravening a UN sanction enforcement law to be set out in primary legislation, with the content of the offence detailed in regulations that reflect the terms of the relevant UNSC resolution.

2.40 In relation to the application of strict liability, the committee notes the minister's advice that strict liability applies only to one element of each offence (that is, whether conduct was authorised by a permit). The committee also notes the minister's advice that the application of strict liability is necessary to ensure the integrity of the Mali sanctions regime as, in the absence of strict liability, the prosecution would be required to establish beyond reasonable doubt that a person alleged to have breached a UN sanction was aware of a substantial risk that their conduct was not authorised by a permit, and that it was unjustifiable to take that risk. The committee notes the advice that, given the substantial difficulties in establishing these matters, requiring proof of fault in relation to whether conduct was authorised by a permit would mean that the sanctions regime would not have its intended deterrent effect.

2.41 Finally, the committee notes the minister's advice that applying strict liability to whether the relevant conduct is authorised by a permit maintains the integrity of the permit system, and its strict adherence to the narrow range of exceptions allowed by the UNSC in relation to particular sanctions regimes.

2.42 While noting this advice, the committee remains concerned about the use of delegated legislation, rather than primary legislation, to prescribe conduct which constitutes an offence punishable by 10 years' imprisonment. While the committee is aware that the *Charter of the United Nations Act 1945* gives the regulations the power to prescribe offences which are punishable by up to ten years imprisonment, the committee considers that offences subject to significant custodial penalties (that is, all elements of such offences) are more appropriately included in primary, rather than delegated legislation. Such significant matters should be subject to a higher level of parliamentary oversight.

2.43 In addition, while the committee notes the minister's advice that the application of strict liability as to whether a person holds a valid permit is necessary for deterrence, it does not appear that the minister has also explained what are the legitimate grounds for penalising persons lacking 'fault', as required by the *Guide to Framing Commonwealth Offences*.³³ The committee also notes that the *Guide* states that the application of strict liability to all elements of an offence is only considered appropriate where the offence is not punishable by imprisonment and only

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

punishable by a fine of up to 60 penalty units for an individual. While noting that in this instance strict liability is only applied to an element of each offence, the committee considers it inappropriate to apply strict liability in circumstances where a custodial penalty may be imposed—particularly such a substantial penalty as up to 10 years' imprisonment.

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

2.45 The committee has concluded its examination of the instrument. However, the committee draws the Senate's attention to the application of strict liability to elements of an offence, and the prescription in delegated legislation of conduct that would constitute an offence, which is subject to up to 10 years' imprisonment.

Civil Aviation Safety Amendment (Part 91) Regulations 2018

FRL No.	F2018L01783 ³⁴
Purpose	To amend the Civil Aviation Safety Regulations 1998 to substitute a new Part 91 – General Operating and Flight Rules.
Authorising legislation	<i>Civil Aviation Act 1988</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Use of force and detention of persons³⁵

2.46 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's more detailed advice as to:

- the circumstances in which it is envisaged that force would be used in the exercise of powers under sections 91.220 and 91.225 of the instrument;
- the circumstances in which it is envisaged that a person would be detained or placed in custody under those sections, and the likely duration of the detention;
- the training, if any, in use of force and detention powers that pilots and crew undertake;
- the circumstances in which it is envisaged that persons would be called on to assist an operator or a pilot in the exercise of powers under section 91.220 of the instrument; and
- the types of persons it is envisaged may be called on to assist an operator or a pilot in the exercise of those powers, and what training, if any, such persons would have in the use of force.

2.47 The committee also requested the minister's advice as to why it is considered necessary and appropriate to include powers of arrest without warrant, and powers to remove persons from aircraft, restrain persons, and place persons in detention or custody, in delegated legislation.³⁶

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

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

36 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 29-34.

Minister's response³⁷

2.48 The minister advised:

The purpose of the provision is to ensure that the safety of an aircraft, its occupants and persons on the ground is assured in the face of a specific threat to the aircraft from a person on the aircraft, in circumstances where access to law enforcement officers is not possible due to the aircraft being in flight. Threats could arise from planned terrorist acts, unplanned malicious acts (for example exacerbated by alcohol consumption), and acts of persons of unsound mind. Force may need to be used in such circumstances to alleviate the threat to the aircraft, although that is not always the case.

The provision enables such persons to be restrained on the aircraft until the flight comes to an end and law enforcement officers arrive on the scene. Typically a flight would be diverted to the nearest suitable aerodrome in such situations. It is unlikely that any detention or custody on the aircraft would exceed 3 hours in duration, although longer periods are possible on trans-oceanic flights. The measures are expected to be necessary only in the context of commercial operations, airline operations in particular, although the relevant risks exist and must be managed in the interests of safety for all multi-occupant flights.

The Committee requested advice on the training, if any, in use of force and detention powers that pilots and crew undertake.

CASA understands that large commercial carriers train crew in a range of relevant matters including de-escalation techniques, physical subduing of persons, restraint techniques, and procedures for ensuring safe handover of restrained persons to law enforcement officers for purposes prescribed in the transport security laws administered by the Department of Home Affairs. CASA regulates crew member proficiency in the execution of emergency procedures, which includes theoretical knowledge of how to control passengers during emergencies, and covers methods of passenger control, use of restraint equipment and the handling of passengers of unsound mind.

CASA understands that crew for private operations and small scale commercial operations are unlikely to have any relevant formal training, which is not required under transport security laws. CASA considers that it is necessary that pilots of small aircraft have the power to authorise or direct other persons on board to assist with the arrest or restraint of a person, in appropriate circumstances. CASA will publish guidance material

37 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

in relation to the use of these powers with other guidance on the regulations.

The Committee requested advice as to the circumstances in which it is envisaged that persons would be called on to assist an operator or a pilot in the exercise of powers under section 91.220.

In practical terms persons other than the pilots would nearly always be called upon to assist. This is both to allow the pilots to continue to fly the aircraft, and to protect pilots from the risk of incapacitation. In some circumstances the pilots would also not leave the cockpit in order to ensure the integrity of cockpit security, in light of the modalities of the 11 September 2001 terrorist attacks.

CASA observes that the 'operator' will generally be a corporate entity. Accordingly, in practical terms, assistance of the operator is likely to be engaged by any employee of the operator on the aircraft, most likely cabin crew. Although the pilot in command can exercise authority through directions to cabin crew, new regulation 91.225 better reflects the reality of how relevant circumstances are dealt with by conferring specific powers on cabin crew.

The Committee requested advice as to the types of persons it is envisaged may be called on to assist an operator or a pilot in the exercise of those powers, and what training, if any, such persons would have in the use of force.

In the face of a threat to the safety of the aircraft, it is the intention that any passenger on board the aircraft might be called upon to assist. Given the nature of the assistance to be sought - the physical restraint of a person - generally persons of strong physical build and/or self-defence or combat skills are likely to be called upon. However, that may not always be possible depending on the make-up of the passengers. No specialised training will be provided for such emergency situations, nor is any such training possible in the context of an unforeseen and immediate threat to aviation safety.

CASA observes that the provisions will replace regulations 224 and 309 of the Civil Aviation Regulations 1988 (CAR). The relevant parts of the both provisions have been in force in substantially the same form since the regulations were originally made (although the latter provision was remade in 2013). They collectively confer on the pilot in command the powers in regulation 91.220. They are rarely used but legalise the use of coercive powers in emergency situations. Other coercive powers in CAR for the purpose of maintaining the safety of aviation include those in regulations 288, 293 and 294.

The addition of regulation 91.225 reflects the practical reality that crew other than the pilot are more likely to have to perform the physical acts of detention, for the reasons stated above in relation to the pilot remaining

in the cockpit, notwithstanding the pilot in command's overall responsibility for the aircraft.

The Committee also requested advice as to why it is considered necessary and appropriate to include powers of arrest without warrant, and powers to remove persons from aircraft, restrain persons, and place persons in detention or custody, in delegated legislation.

The powers of arrest without warrant, removal and restraint of persons, and the placement of persons in detention or custody have been part of the aviation safety regulatory scheme since at least 1988 and ensure that threats to aircraft can be controlled through physical measures if required. They are supported by the general powers to make regulations for the purpose of the *Civil Aviation Act 1988* (CA Act), and the power mentioned in paragraph 98(2)(k) of the CA Act in particular.

The purpose of regulations 91.220 and 91.225 of CASR is not to introduce new coercive powers, but only to move and update existing powers into the modern CASR suite to enable the repeal of the old-style CAR provisions. In the context of this purpose, CASA did not understand that it was either necessary or possible within its preferred timeframes to amend the CA Act to incorporate these matters. CASA expects that the new provisions reflect Office of Parliamentary Counsel best practice for such issues, unlike the older provisions to be repealed. CASA will liaise with the Department of Infrastructure, Regional Development and Cities and the Attorney-General's Department to explore whether the provisions should be moved to the CA Act, and the relevant regulations be repealed, as part of any further review of the CA Act.

The powers are distinct from powers under the transport security laws administered by the Department of Home Affairs and provide crew with powers specific to aviation safety in circumstances where security laws may not apply, and where CASA has no control over the circumstances in which they do apply. The powers ensure that the safety objectives of the CA Act, and the regulatory scheme administered by CASA, are able to be met.

Committee's comment

2.49 The committee thanks the minister for this detailed response. The committee notes the minister's advice that the purpose of the provisions authorising the use of force and the detention of persons is to ensure the safety of an aircraft in the face of specific threats, in circumstances where access to law enforcement officers is not available due to the aircraft being in flight.

2.50 In relation to the detention of persons, the committee notes the minister's advice that persons are unlikely to be detained for more than three hours (although longer periods are possible on trans-oceanic flights). The committee also notes the advice that, where a person is detained or taken into custody, the relevant flight

would typically be diverted to the nearest suitable aerodrome, to allow the person to be handed over to appropriate law enforcement officers.

2.51 In relation to whether pilots and crew members would be trained in the use of force, the committee notes the minister's advice that large commercial carriers train crew in a range of relevant matters, including de-escalation, subduing and restraint, and procedures for ensuring the safe handover of persons to law enforcement. The committee notes the advice that the Civil Aviation Safety Authority (CASA) regulates crew member proficiency in a number of these areas.

2.52 The committee notes the minister's advice that, for private and small-scale commercial operations, crew are unlikely to have any formal training. However, the committee notes the advice that CASA will publish guidance on using these powers along with guidance on other regulatory matters.

2.53 In relation to the persons who may be called on to assist operators and pilots under section 91.220, the committee further notes the minister's advice that it may be necessary to call on any person on board the aircraft to assist in responding to a potential threat (depending on the circumstances) and the advice that these persons are unlikely to have any formal training. The committee also notes the advice that it is not possible to provide specialised training to persons assisting in emergency circumstances, given that these circumstances may involve unforeseen, immediate threats to aviation safety.

2.54 Finally, the committee notes the minister's advice that sections 91.220 and 91.225 are not intended to introduce new coercive powers, but only to move and update existing ones. The committee notes the advice that, in this context, CASA did not understand that it was either necessary or possible within its preferred timeframes to amend the *Civil Aviation Act 1998* (Civil Aviation Act) to incorporate these matters. However, the committee notes the minister's advice that CASA will liaise with the Department of Infrastructure, Regional Development and Cities and the Attorney-General's Department to explore whether the provisions should be moved to the Civil Aviation Act when that Act is next reviewed. The committee welcomes this advice and reiterates its view that such provisions are more appropriate for enactment in primary legislation.

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

2.56 The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate the inclusion of coercive powers in delegated legislation (including the power to use force, arrest and detain persons). In this committee's view, such matters may be more appropriate for inclusion in primary legislation.

Customs Amendment (Product Specific Rule Modernisation) Regulations 2018

FRL No.	F2018L01755 ³⁸
Purpose	To repeal provisions relating to product specific rules for certain trade agreements, consequential on the enactment of the <i>Customs Amendment (Product Specific Rule Modernisation) Act 2018</i> .
Authorising legislation	<i>Customs Act 1901</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Consultation³⁹

2.57 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the assistant minister's advice as to:

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

2.58 The committee also requested that the explanatory statement be amended to include this information.⁴⁰

Assistant minister's response⁴¹

2.59 The assistant minister advised:

The Customs Amendment (Product Specific Rule Modernisation) Act 2018 (the PSR Modernisation Act) amended the *Customs Act 1901* to facilitate and streamline the way in which the product specific rules contained in four of Australia's free trade agreements (FTAs) are given effect

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

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

40 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 35-37.

41 The assistant minister responded to the committee's comments in a letter dated 6 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

domestically. The four FTAs are the ASEAN - Australia-New Zealand Free Trade Area (AANZFTA), the Japan-Australia Economic Partnership Agreement (JAEPA), the China-Australia Free Trade Agreement (ChAFTA) and the Singapore-Australia Free Trade Agreement (SAFTA).

As amended, instead of prescribing the product specific rules for each FTA in regulations made of the Customs Act, the relevant provisions for AANZFTA, JAEPA and ChAFTA in the Customs Act apply the product specific rules for each FTA by direct reference to the product specific rules Annex in the respective FTA. This amendment obviated the continued need for the product specific rules to be prescribed in regulations made under the Customs Act.

For SAFTA, the product specific rules were already applied by direct reference in the Customs Act rather than prescribed in regulations, except for the 'Chemical Chapter Origin Rules' contained in Section B of Annex 2 which had been implemented domestically in regulations made under the Customs Act. To ensure uniform domestic arrangements for FTAs, the amendments made by the PSR Modernisation Act also applied the 'Chemical Chapter Origin Rules' in the Customs Act by direct reference to the FTA treaty.

The *Customs Amendment (Product Specific Rule Modernisation) Regulations 2018* (the Amendment Regulations) are consequential to the amendments made to the Customs Act by the PSR Modernisation Act. The purpose of the Amendment Regulations is to repeal the relevant parts of each regulation that prescribed the product specific rules for AANZFTA, JAEPA and ChAFTA and to repeal the relevant part of the regulation that prescribed the 'Chemical Chapter Origin Rules' for SAFTA.

The amendments made by the Amendment Regulations are consequential to the PSR Modernisation Act and are technical in nature.

Government departments conducted extensive public and targeted stakeholder consultations during the negotiations of AANZFTA, JAEPA, ChAFTA and SAFTA including on matters that were encompassed in the rules of origin regulations for each of those FTAs. Details of those consultations were set out in the consultation attachment to the National Interest Analysis of each FTA. The Joint Standing Committee on Treaties also conducted an inquiry on each FTA based on written submission and a public hearing.

The PSR Modernisation Act merely changed the manner in which the product specific rules were implemented domestically, from prescription in regulations made under the Customs Act to direct reference to the relevant Annex of the FTA. The Amendment Regulations made consequential amendments to each of the rules of origin regulations to repeal the redundant product specific rules noted above.

Consultation was not appropriate as the amendments made by the Regulations did not change the operation of the Customs Act or the rules of origin regulations that were amended.

The Explanatory Statement has been amended to include this information.

Committee's comment

2.60 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the instrument only makes consequential amendments to certain rules of origin regulations, and repeals product specific rules that had become redundant following changes to the means by which Fair Trade Agreements (FTAs) to which Australia is a party are implemented domestically.

2.61 The committee also notes the assistant minister's advice that consultation in relation to the instrument was not considered appropriate as the instrument does not change the operation of the *Customs Act 1901* or make substantive amendments to the relevant rules of origin regulations.

2.62 The committee notes that the explanatory statement has been amended to include the information set out in the minister's response.⁴²

2.63 The committee has concluded its examination of this matter.

Incorporation⁴³

2.64 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the assistant minister's advice as to the manner in which the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (GATT) is incorporated; and requested that the explanatory statement be amended to include this information.⁴⁴

42 <https://www.legislation.gov.au/Details/F2018L01755/Replacement%20Explanatory%20Statement/Text>.

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

44 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 35-37.

Assistant minister's response⁴⁵

2.65 The assistant minister advised:

The Amendment Regulations incorporate the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the GATT) to enable certain calculations and definitions of value of goods to be made according to the relevant provisions in GATT, rather than be replicated in the rules of origin regulations.

The GATT is not a disallowable legislative instrument and as such, in accordance paragraph 14(1)(b) of the *Legislation Act 2003* it is applied, adopted or incorporated as in force or existing at the time when the Amendments Regulations commenced. This means that should the relevant provisions of the GATT be updated, amendment to the rules of origin regulations will be necessary to ensure that the updates are incorporated.

The GATT is available to be viewed free of charge on the World Trade Organization website <https://www.wto.org/index.htm>.

The Explanatory Statement has been amended to include this information.

Committee's comment

2.66 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the GATT is incorporated as in force or existing at the time the instrument commenced (that is, on 14 December 2018). The committee also notes the advice that the GATT may be viewed free of charge on the World Trade Organisation website.

2.67 The committee notes that the explanatory statement has been amended to include the information set out in the assistant minister's response.⁴⁶

2.68 The committee has concluded its examination of the instrument.

45 The assistant minister responded to the committee's comments in a letter dated 6 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

46 <https://www.legislation.gov.au/Details/F2018L01755/Replacement%20Explanatory%20Statement/Text>.

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

FRL No.	F2018L01572 ⁴⁷
Purpose	To prescribe the Greenhouse and Energy Minimum Standards (GEMS) requirements for certain three phase cage induction motors.
Authorising legislation	<i>Greenhouse and Energy Minimum Standards Act 2012</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 November 2018).

Access to justice⁴⁸

2.69 The committee initially scrutinised the instrument in [Delegated Legislation Monitor 15 of 2018](#) and requested the minister's advice.⁴⁹ The committee considered the minister's response in [Delegated Legislation Monitor 1 of 2019](#), and reiterated its concern about the impact on access to justice of imposing copyright restrictions on the content of a legislative instrument.

2.70 In this respect, the committee requested the minister's further advice as to whether any alternative approaches were considered that would not have required copyrighted material to be reproduced in the instrument.⁵⁰

Minister's response⁵¹

2.71 The minister advised:

The process for developing the Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018 included an assessment of the appropriateness of any relevant Australian/New Zealand Standards or international standards.

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

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

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

50 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 71-74.

51 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

Stakeholders clearly identified their preferred approach was the adoption of an international standard.

Incorporating standards by reference, particularly standards setting out detailed technical testing methods, can reduce the cost of delivering the Greenhouse and Energy Minimum Standards (GEMS) scheme as well as the regulatory burden for suppliers of GEMS products. As motors suppliers are already testing their products to the international standard, referencing the international standard limits future testing and compliance costs for industry.

Careful consideration is given to what material it is appropriate to make readily and freely available in the GEMS determination. At a minimum this generally includes enough information for interested parties to ascertain the scope of the instrument without having to purchase any standards. In cases where a standard already covers this information, it requires the inclusion of copyright material in the determination.

I understand that the inclusion of copyright material in GEMS determinations is a matter that the Department of the Environment and Energy is actively considering. The Department has advised me that it is seeking to engage with the relevant copyright holder in order to explore possible solutions to the kind of issues raised by the Committee.

Committee's comment

2.72 The committee thanks the minister for this response. The committee notes the minister's advice that the process for making the instrument included an assessment of the appropriateness of using Australian, New Zealand or international standards, and the advice that stakeholders clearly indicated a preference for adopting an international standard.

2.73 The committee also notes the minister's advice that careful consideration is given to what material it is appropriate to adopt in determinations made under the *Greenhouse and Energy Minimum Standards Act 2012* (GEMS Act). In this respect, the committee notes the advice that instruments made under the GEMS Act generally include sufficient information for interested parties to ascertain the scope of the relevant instrument without having to purchase any standards.

2.74 The committee further notes the minister's advice that the Department of the Environment and Energy is actively considering the issue of including copyrighted material in instruments made under the GEMS Act, and is seeking to engage with the copyright holder to explore possible solutions to this issue.

2.75 In light of this advice, the committee makes no further comment on the present instrument. However, the committee reiterates that, in general, copyright should not exist in legislative instruments as this may inhibit the capacity of people to access and use the law and potentially restrict access to justice.

2.76 The committee has concluded its examination of the instrument. However, the committee remains concerned about the impacts on access to justice associated with imposing copyright restrictions on the content of a legislative instrument, and will continue to monitor the issue.

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

FRL No.	F2018L01835 ⁵²
Purpose	To notify Parapharm Pty Ltd of the revocation of its approval as a higher education provider, and to repeal Higher Education Provider Approval No. 2 of 2014.
Authorising legislation	<i>Higher Education Support Act 2003</i>
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Consultation⁵³

2.77 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to:

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

2.78 The committee also requested that the explanatory statement be amended to include this information.⁵⁴

Minister's response⁵⁵

2.79 The minister advised:

The Department of Education and Training has accepted the Committee's feedback that the explanatory statements accompanying legislative instruments should clearly indicate whether or not any consultation was undertaken, or, where no consultation has occurred, the reason for this being the case. The Department will ensure that future explanatory

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

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

54 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 41-42.

55 The minister responded to the committee's comments in a letter dated 14 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at www.aph.gov.au/regords_monitor.

statements accompanying similar legislative instruments provide this information.

A replacement explanatory statement to the instrument will be prepared confirming that no consultation was necessary in order to satisfy the requirements of Section 17 of the Legislation Act. An explanation as to why no consultation was necessary will also be included in line with the requirements of paragraphs 15J(2)(d) and (e) of the Legislation Act. A preliminary draft of the proposed replacement explanatory statement is attached for the Committee's reference.

Officers of my department will be instructed to take action to implement this commitment by ensuring that the draft replacement explanatory statement is approved by the rule maker in accordance with paragraph 15J(2)(d) and (e) of the Legislation Act and registered on the Federal Register of Legislation as soon as is achievable following the rule maker's approval.

Committee's comment

2.80 The committee thanks the minister for this response, and notes the minister's advice that an explanation as to why no consultation was considered necessary will be included in a replacement explanatory statement. The committee notes that a replacement explanatory statement, including this information, has been registered on the Federal Register of Legislation.⁵⁶

2.81 The committee also welcomes the minister's advice that the Department of Education and Training will ensure that future explanatory statements provide information regarding consultation, in accordance with the requirements of the *Legislation Act 2003*. The committee will continue to monitor this issue.

2.82 The committee has concluded its examination of the instrument.

56 <https://www.legislation.gov.au/Details/F2018L01835/Replacement%20Explanatory%20Statement/Text>.

Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2018

FRL No.	F2018L01610 ⁵⁷
Purpose	To create and update certain country-specific guidelines and introduces a 'reasonableness' standard as part of importer or processor's due diligence.
Authorising legislation	<i>Illegal Logging Prohibition Act 2012</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 November 2018).

Incorporation⁵⁸

2.83 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the assistant minister's advice as to:

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

2.84 The committee also requested that the explanatory statement be amended to include this information.⁵⁹

Assistant minister's response⁶⁰

2.85 The assistant minister advised:

Manner of Incorporation

The Country specific guidelines provided in Schedule 1 to the Regulations are incorporated by reference to the versions of those documents as they

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

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

59 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 43-45.

60 The assistant minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 1 of 2019* available at www.aph.gov.au/regords_monitor.

applied on the particular dates they were co-endorsed by the relevant governments.

In relation to item 6 in Schedule 1 to the Regulations, the Country specific guideline for Indonesia, co-endorsed by the Government of Australia and the Government of Indonesia on 1 October 2018 is incorporated by reference to the version of that document as it applied on 1 October 2018.

In relation to item 7 in Schedule 1 to the Regulations, the Country specific guideline for Malaysia, co-endorsed by the Government of Australia and the Government of Malaysia on 10 March 2017, is incorporated by reference to the version of that document as it applied on 10 March 2017.

In relation to item 8 in Schedule 1 to the Regulations, the Country specific guideline for the Republic of Korea, co-endorsed by the Government of Australia and the Government of the Republic of Korea on 26 June 2018, is incorporated by reference to the version of that document as it applied on 26 June 2018.

Availability of documents

The Country specific guidelines for the Republic of Korea, Malaysia and Indonesia are all freely available on the website of the Department of Agriculture and Water Resources: <http://www.agriculture.gov.au/forestry/policies/illegal-logging/importers/resources#country-specific-guidelines>

Replacement explanatory statement

I have approved a replacement explanatory statement for the Regulations containing information about incorporation of the country specific guidelines and information on their availability.

Committee's comment

2.86 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that each country-specific guideline is incorporated as in force on the date the guideline was co-endorsed by the relevant governments. The committee also notes the assistant minister's advice that the country-specific guidelines are freely available on the department's website.

2.87 The committee further notes the assistant minister's advice that a replacement explanatory statement has been approved, containing information about the manner in which the country-specific guidelines are incorporated and where they may be accessed free of charge. The replacement explanatory statement was provided with the assistant minister's response.

2.88 The committee notes that the replacement explanatory statement has not yet been registered on the Federal Register of Legislation. The committee draws the minister's attention to paragraph 15G(4)(b) of the *Legislation Act 2003*, which requires the rule-maker for a legislative instrument to lodge any replacement explanatory statement for registration as soon as practicable after it is made.

2.89 The committee has concluded its examination of the instrument.

Lands Acquisition Amendment Regulations 2018

FRL No.	F2018L01647 ⁶¹
Purpose	To clarify interest rates for the purposes of calculating interest payable under the <i>Lands Acquisition Act 1989</i> .
Authorising legislation	<i>Lands Acquisition Act 1989</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled in the Senate on 4 December 2018).

Consultation⁶²

2.90 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the assistant minister's advice as to:

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

2.91 The committee also requested that the explanatory statement be amended to include this information.⁶³

Assistant minister's response⁶⁴

2.92 The assistant minister advised:

I note that in addition to the consultation undertaken with the Office of Best Practice Regulation, the Department of Finance consulted the Australian Government Solicitor in confirming the applicable Reserve Bank of Australia rate to apply in the Regulations.

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

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

63 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 48-49.

64 The assistant minister responded to the committee's comments in a letter dated 27 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

The Department of Finance is liaising with the Office of Parliamentary Counsel on updating the Explanatory Statement, as per the request of the Committee.

Committee's comment

2.93 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that, in addition to consultation with OBPR, the Department of Finance (the department) consulted with the Australian Government Solicitor to confirm the applicable Reserve Bank of Australia rate.

2.94 A replacement explanatory statement, which includes information about the consultation undertaken in relation to the instrument, was provided with the minister's response. The committee notes the assistant minister's advice that the department is liaising with the Office of Parliamentary Counsel on updating the explanatory statement in accordance with the committee's request.

2.95 The committee has concluded its examination of the instrument.

National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2018

FRL No.	F2018L01653 ⁶⁵
Purpose	To revoke the National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2017 (No. 2), and set out knowledge, qualifications and experience requirements for applicants for registration as a greenhouse and energy auditor.
Authorising legislation	National Greenhouse and Energy Reporting Regulations 2008
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled in the Senate on 4 December 2018).

Merits review⁶⁶

2.96 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to:

- whether decisions by the Clean Energy Regulator (the Regulator) under subsection 13(4) of the instrument, to determine whether an individual's training is sufficient to constitute 'knowledge of assurance', are subject to independent merits review; and
- if not, the characteristics of those decisions which would justify excluding independent merits review.⁶⁷

Minister's response⁶⁸

2.97 The minister advised:

The Committee requests my advice whether decisions by the Clean Energy Regulator, under subsection 13(4) of the instrument, to determine whether an individual's training is sufficient to constitute 'knowledge of assurance', are subject to independent merits review. I can confirm that

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

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

67 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 50-51.

68 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

the decisions in question are reviewable by the Administrative Appeals Tribunal.

In order to be registered as a greenhouse and energy auditor, under section 75A of the *National Greenhouse and Energy Reporting Act 2007* (the principal Act), an individual must meet prescribed requirements as to qualifications, knowledge, expertise, competence, independence and other matters. These include requirements relating to knowledge of audit team leadership and assurance as set out in subregulation 6.16(1) of the *National Greenhouse and Energy Reporting Regulations 2008*. Subsection 13(4) of the instrument sets out the ways in which the requirements of this subregulation may be met. Section 13(4) of the instrument provides for any other training or tertiary education an applicant may have successfully completed to be put to the Regulator in consideration in demonstrating their knowledge of assurance. Therefore, the decision under subsection 13(4) forms an intermediate step in the decision-making process for registering an auditor.

The Committee is correct that paragraph 56(j) of the principal Act provides the power for review by the Administrative Appeals Tribunal of any decision to refuse to register an individual in the register of greenhouse and energy auditors under section 75A of the principal Act, including a decision based on a refusal to accept that an individual's training or tertiary education is sufficient to demonstrate knowledge of assurance.

I have raised with the Clean Energy Regulator the Explanatory Statement's failure to indicate whether decisions made under subsection 13(4) are reviewable. The Clean Energy Regulator notes that the purpose of the instrument is to set out the knowledge, qualifications and experience requirement for registration as a greenhouse and energy auditor.

Therefore, all provisions under the instrument have the potential to affect a decision under section 75A of the principal Act. This is stated in the second paragraph under "Purpose and operation of the instrument" which provides that an application may be made to the Administrative Appeals Tribunal, under paragraph 56U) of the principal Act, for the review of a decision of the Regulator to refuse to register an individual in the register of greenhouse and energy auditors kept under section 75A of the principal Act.

However, the Clean Energy Regulator has indicated that it is willing to remake the Explanatory Statement to directly refer to the role of the Administrative Appeals Tribunal in reviewing decisions under subsection 13(4) of the instrument if the Committee wishes.

Committee's comment

2.98 The committee thanks the minister for this response. The committee notes the minister's advice that decisions under subsection 13(4) of the instrument, to determine whether a person's training or tertiary education is sufficient to demonstrate 'knowledge of assurance', form an intermediate step in the decision-

making process for registering a person as an auditor under the *National Greenhouse and Energy Reporting Act 2007* (principal Act). In this respect, the committee notes that preliminary or procedural decisions may reflect an established ground for excluding independent merits review.⁶⁹

2.99 The committee also notes the minister's advice that, under paragraph 56(j) of the principal Act, the Administrative Appeals Tribunal (AAT) may review any decision to refuse to register a person as an auditor. The committee notes the advice that this includes a decision based on a refusal to accept that the person's training or tertiary education is sufficient to demonstrate 'knowledge of assurance'. In this respect, it appears that the substantive decision to which the preliminary decision relates (that is, whether to register a person as an auditor) would be subject to independent merits review.

2.100 The committee notes the minister's advice that the Regulator has indicated that it is willing to remake the explanatory statement to refer to the AAT's role in reviewing decisions under section 13(4) of the instrument.

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

2.102 The committee has concluded its examination of the instrument.

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

Public Service Amendment (Miscellaneous Measures) Regulations 2018

FRL No.	F2018L01722 ⁷⁰
Purpose	To exempt members of the Fair Work Commission from the APS Code of Conduct, and to clarify certain operational matters related to the functions of the Merit Protection Commissioner.
Authorising legislation	<i>Public Service Act 1999</i>
Portfolio	Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Consultation⁷¹

2.103 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to:

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

2.104 The committee also requested that the explanatory statement be amended to include this information.⁷²

Minister's response⁷³

2.105 The minister advised:

I advise that the amendments to the Public Service Regulations 1999 were specifically at the request of the Merit Protection Commission and the Fair Work Commission.

The amendments in relation to Part 5 of the Regulations were of a technical nature to articulate more clearly the existing policy position of the Merit Protection Commission. The Fair Work Commission specifically

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

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

72 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 59-60.

73 The minister responded to the committee's comments in a letter dated 23 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

requested the amendment to Regulation 2.2(2)(c), which was only of concern to the Fair Work Commission. For these reasons, it was considered that the amendments did not require broader consultation.

Attached at A is the requested amended Explanatory Statement (ES) including the reasons for the limited consultation.

Committee's comment

2.106 The committee thanks the minister for this response. The committee notes the minister's advice that the amendments made by the instrument are technical in nature, and were specifically requested by the Merit Protection Commission and the Fair Work Commission. In this respect, the committee notes the advice that it was considered that the amendments did not require broader consultation.

2.107 The committee notes that a replacement explanatory statement, which sets out why consultation was not undertaken in relation to the instrument, was included with the minister's response.

2.108 The committee notes that the replacement explanatory statement has not yet been registered on the Federal Register of Legislation. In this regard, the committee draws the minister's attention to paragraph 15G(4)(b) of the *Legislation Act 2003*, which requires the rule-maker for a legislative instrument to lodge any replacement explanatory statement for registration as soon as practicable after it is made.

2.109 The committee has concluded its examination of the instrument.

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

FRL No.	F2018L01756 ⁷⁴
Purpose	To allow for the disclosure of unlisted mobile phone numbers and their associated postcodes, as recorded in the Integrated Public Number Database, for certain research purposes.
Authorising legislation	<i>Telecommunications Act 1997</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Privacy⁷⁵

2.110 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's more detailed advice as to why it was considered necessary and appropriate to permit the disclosure of unlisted mobile phone numbers, and associated postcodes recorded in the Integrated Public Number Database (IPND), to research entities for 'permitted research'.⁷⁶

Minister's response⁷⁷

2.111 The minister advised:

The Integrated Public Number Database (IPND) is an industry-wide database containing information relating to all public telephone numbers, making it a valuable tool for public health, electoral and public policy research. The regulations are necessary to ensure that the laws governing access to the IPND for research keep pace with technological and market changes and the IPND continues to serve the public interest in high quality research.

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

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

76 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 61-63.

77 The minister responded to the committee's comments in a letter dated 14 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

Reforms undertaken in 2007 allowed researchers to access information associated with listed numbers in the IPND; that is, numbers which appear in public number directories. However, in recent times the Australian telecommunications market has seen a significant shift in consumer behaviour, involving a movement from fixed line telephone services to mobile and mobile-only services.

There has been a consistent decline in the number of fixed line services, from 9.42 million in 2012-13 to 8.09 million in 2017-18 in addition, there has been a continued increase in the number of mobile users without a home fixed line phone. At June 2018, 41 per cent of Australian adults (7.70 million) only used mobile service for voice, owning or using a mobile phone but without a fixed line in their home.⁷⁸ This shift is most pronounced amongst younger Australians. At May 2018, 79 per cent of Australians aged 65 and over used a fixed-line phone, compared to only 18 per cent of those aged 25-34.⁷⁹ With the rise of mobile-only households, particularly amongst younger Australians, research using only listed numbers is likely to be increasingly unrepresentative and therefore unreliable.

To address this shift in technology and consumer behaviour, the regulations allow research entities access anonymised information about unlisted mobile phone numbers to establish a representative cross-section of the community.

In making these regulations, strong privacy protections, beyond those in the 2007 reforms, have been introduced. Most significantly, the only IPND information that can be accessed under these regulations is the mobile number and the associated postcode; no other identifying information in the IPND can be obtained by the researcher. A research entity (or group of entities) seeking to anonymised information about unlisted mobile phone numbers is required to first apply for and obtain an authorisation from the Australian Communications and Media Authority (ACMA). Before the ACMA can grant the authorisation it must be satisfied that each research entity listed in the application will comply with the conditions of the authorisation.

In determining whether a research entity will comply with the conditions in the authorisation, the ACMA must have regard to a range of matters, including the practices, procedures, processes and systems the entity has in place to comply with those conditions, past and current compliance with research authorisations, and the extent to which the *Privacy Act 1988*. The ACMA also has the discretion to consider other relevant matters when deciding whether to issue a research authorisation.

78 Statistics from the Australian Communications and Media Authority, Communications Report 2017-18.

79 Ibid.

Authorisations are subject to standard conditions, along with any additional conditions specified by the ACMA. In particular, the regulations contain constraints on the use and disclosure of unlisted mobile number information and require compliance with the *Privacy Act 1988* (however, registered political parties must comply with the Australian Privacy Principles given such entities are ordinarily exempted from that Act). Anonymised information about unlisted mobile phone numbers must be destroyed by a research entity if the entity is removed from a research authorisation or the authorisation comes to an end.

The regulations also include sanctions for non-compliance with authorisation conditions. The ACMA can remove an entity from research authorisation for contravention of any condition of a research authorisation. An entity that has been removed from an authorisation will be prohibited from using any research information that it has collected. An authorised research entity or former research entity also commits an offence of strict liability if the entity contravenes a condition of an authorisation.

Committee's comment

2.112 The committee thanks the minister for this response. The committee notes the minister's advice that while researchers were previously allowed to access information associated with listed numbers in the IPND (that is, numbers in public directories), changes in the usage of mobile services relative to fixed-line telephone services have increasingly made research using only listed numbers unrepresentative and therefore unreliable. The committee notes the minister's advice that the instrument intends to respond to shifts in technology and consumer behaviour, by allowing research entities to access anonymised information about unlisted mobile phone numbers to access a representative cross-section of the community.

2.113 The committee further notes the minister's advice regarding the safeguards in place to protect individuals' privacy. The identified safeguards are also set out in the statement of compatibility,⁸⁰ and were considered in the committee's initial assessment of the instrument.

2.114 The committee acknowledges that it may be necessary for research entities to access unlisted mobile numbers in order to effectively perform their research functions, and notes that there are a number of safeguards in place to protect individuals' privacy. Nevertheless, the committee remains concerned that the instrument would permit research entities to contact persons who have elected not to publicly list their telephone number, noting that this may result in an intrusion into those persons' private lives.

80 Statement of compatibility, pp. 25-27.

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

2.116 The committee has concluded its examination of this matter.

Strict liability⁸¹

2.117 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the minister's advice as to the justification for applying strict liability to a number of new offences.⁸²

Minister's response⁸³

2.118 The minister advised:

The regulations contain offences of strict liability for a research entity that breaches any condition of a research authorisation, and for former research entities that breach the prohibition on use and disclosure of IPND information or fail to destroy information within 10 business days after the authorisation has ended.

The *Guide to Framing Commonwealth Offences* was drawn on in framing the offence provisions within the regulations. The Guide indicates that the application of strict liability to all physical elements of an offence (as is the case with the provisions within the regulations) generally is only considered appropriate where all of the following apply:

- the offence is not punishable by imprisonment;
- the offence is punishable by fine of up to 60 penalty units for an individual in the case of strict liability;
- the punishment of offences not involving fault is likely to significantly to enhance the
- effectiveness of the enforcement regime in deterring certain conduct; and
- there are legitimate grounds for penalising persons lacking fault, for example because he or she will be placed on notice to guard against the possibility of any contravention.

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

82 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 61-63.

83 The minister responded to the committee's comments in a letter dated 14 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

The penalty for imposed by the regulations does not include imprisonment and is limited to 10 penalty units (which is also consistent with the maximum permitted under subsection 594(2) of the *Telecommunications Act 1997*).

It is important that information obtained from end users as a result of research is secured against unauthorised use or disclosure. The offence provisions in the regulations are triggered by a breach of any of the conditions of a research authorisation, or where former research entities breach the prohibition on use and disclosure of IPND information or fail to destroy information within 10 business days after the authorisation has ended. Strict liability offence provisions provide a strong incentive for compliance with these privacy protections, thereby enhancing the effectiveness of the enforcement regime.

It follows that the strict liability offence provisions are also designed to put research entities on notice that they should guard against the possibility of any contravention of an authorisation condition. A person who may contravene the offence provisions can guard against such a contravention by complying with all conditions of a research authorisation, complying with the use and disclosure requirements and destroying IPND information within 10 business days after the authorisation has ended.

Committee's comment

2.119 The committee thanks the minister for this response. The committee notes the minister's advice that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is generally only considered appropriate in certain circumstances (as outlined in the minister's response).⁸⁴

2.120 In this regard, the committee notes the minister's advice that the penalty imposed by the instrument does not include imprisonment, and is limited to 10 penalty units. The committee also notes the advice that the offence provisions provide a strong incentive for compliance with certain privacy protections (including conditions imposed on research authorisations and statutory prohibitions on the use and disclosure of IPND information), thereby enhancing the effectiveness of the enforcement regime.

2.121 The committee further notes the minister's advice that the offence provisions are designed to put research entities on notice to guard against the possibility of contravening an authorisation condition.

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

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

2.123 The committee has concluded its examination of the instrument.

Treasury Laws Amendment (Gift Cards) Regulations 2018

FRL No.	F2018L01754 ⁸⁵
Purpose	To amend certain parts of the Competition and Consumer Regulations 2010 to specify articles that are not gift cards, identify fees that are not post-supply fees, and exempt certain gift cards and supplies of gift cards from the application of specified provisions of the Australian Consumer Law.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 12 February 2019).

Significant matters in delegated legislation⁸⁶

2.124 In [Delegated Legislation Monitor 1 of 2019](#), the committee requested the Assistant Treasurer's advice as to why it is considered necessary and appropriate to alter the definition of 'gift card' and 'post-supply fee' in the Australian Consumer Law by delegated legislation, rather than primary legislation.⁸⁷

Assistant Treasurer's response⁸⁸

2.125 The Assistant Treasurer advised:

New section 89A supplements the definition of 'gift cards' by specifying that certain articles, i.e. reloadable pre-paid cards and pre-paid electricity, gas or telecommunications service cards, are not gift cards. The articles are specified largely to avoid doubt and provide certainty to industry and consumers. These articles are not commonly known as gift cards - they are not typically given as gifts but rather are used by single individuals to make payments. It was considered appropriate to use delegated legislation to clarify the definition of 'gift card' as the amendment does not substantially

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

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

87 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, pp. 64-65.

88 The Assistant Treasurer responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 2 of 2019* available at www.aph.gov.au/regords_monitor.

alter the existing meaning but rather clarifies that those articles are not subject to the reforms.

Allowing regulations to exempt certain gift cards or those supplied in certain circumstances from all or some of the requirements will provide the Government with the necessary flexibility to make timely changes to support industry to adopt innovative marketing techniques to encourage demand and manage stock levels.

It will also allow the law to adapt to changes in technology and address any attempts to avoid or undermine the reforms.

New section 89B contains an exhaustive list of permitted fees, i.e. fees or charges for making a booking, fees or charges for exchanging currencies, fees or charges relating to the reissue of a gift card which has been lost, stolen or damaged, and fees or charges that are payment surcharges. Including this level of specificity in the Regulations, as opposed to the primary law, provides the Government with the necessary flexibility to make timely changes based on changing business practices and developments in technology.

The Parliament has oversight of the use of delegated legislation to clarify the scope of the definitions as any regulations are disallowable. As such, on this occasion, it is considered that this approach is an appropriate trade-off for ensuring the reforms meet their objectives and remain fit for purpose.

Committee's comment

2.126 The committee thanks the Assistant Treasurer for this response. The committee notes the minister's advice that it was considered appropriate to use delegated legislation to clarify the definition of 'gift card', as the amendment does not substantially alter the meaning of the term but rather clarifies that certain articles are not subject to the relevant reforms to the Australian Consumer Law (that is, those enacted by the *Treasury Laws Amendment (Gift Cards) Act 2018*).

2.127 The committee also notes the Assistant Treasurer's advice that setting out the exemptions in delegated legislation will provide the flexibility necessary to encourage innovation in the industry, and will allow the law to adapt to changes in technology and to address any attempts to avoid or undermine the reforms. In relation to the definition of 'post-supply fee', the committee notes the advice that including the list of permitted fees in regulations (as opposed to primary legislation) will provide the flexibility necessary to make timely changes based on changing business practices and developments in technology.

2.128 The committee emphasises that it does not generally consider a desire for flexibility alone to be sufficient justification for including matters in delegated legislation rather than primary legislation. However, in the present context, it notes that such flexibility may be necessary to address changes in technology.

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

2.130 The committee has concluded its examination of the instrument.

Senator John Williams (Chair)