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Ordinances

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Introduction

Terms of reference

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

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

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

Nature of the committee's scrutiny

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

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.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 2018*, 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 30 August 2018 and 26 September 2018 (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.

Instrument	ASIC Corporations (Amendment) Instrument 2018/825 [F2018L01335]
Purpose	Amends the ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150 to continue the relief until 1 October 2021
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018) Notice of motion to disallow must be given by 6 December 2018 ²

Matters more appropriate for parliamentary enactment³

1.4 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more

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

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

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

appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments that grant or extend exemptions from compliance with principal or enabling legislation.

1.5 The ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150⁴ (2015 Instrument) exempts persons who promote or provide interests in employee redundancy schemes from certain requirements of the *Corporations Act 2001* (Corporations Act) relating to financial services licences and the registration of managed investment schemes. That instrument also exempts such persons from prohibitions on hawking financial products in certain circumstances. The exemptions provided by the 2015 Instrument were due to expire on 1 October 2018.

1.6 The present instrument extends the exemptions in the 2015 Instrument until 1 October 2021. The explanatory statement to the instrument states that this extension is to provide sufficient time for:

- a new regulatory regime for employee redundancy funds to be effectively implemented; and
- proper consideration to be given to changes to the Corporations Act and the *Australian Securities and Investments Act 2001* to permanently remove employee redundancy funds from the managed investment scheme and associated provisions.⁵

1.7 However, the explanatory statement also states that ASIC has provided interim class order relief in relation to employee redundancy funds since 25 May 2000, pending government consideration of how such funds should be regulated. In this regard, the explanatory statement explains that it is unclear whether Parliament intended employee redundancy funds to be subject to managed investment and associated provisions in the Corporations Act, noting that compliance with these provisions carries significant regulatory burdens.⁶

1.8 The explanatory statement further indicates that ASIC will consider whether the relief provided by the 2015 Instrument remains necessary if and when the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 passes the Parliament.⁷ The explanatory statement states that the passage of this bill will give

4 [F2018C00678].

5 Explanatory statement, p. 3.

6 Explanatory statement, p. 2.

7 The bill was introduced in the House of Representatives on 19 October 2017. As at the time of writing, the bill is before the Senate.

ASIC a stronger basis for recommending that employee redundancy funds be permanently removed from the managed investment scheme regime.⁸

1.9 While acknowledging this explanation, the committee is concerned that the relief in relation to employee redundancy funds, by way of an exemption from requirements in primary legislation, has now been in force for more than 18 years (since 25 May 2000).

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

- **the appropriateness of extending for a further three years, an exemption in relation to employee redundancy funds from requirements in the *Corporations Act 2001*, noting that the exemption has now been in force for more than 18 years;**
- **when is a new regulatory regime for employee redundancy funds likely to be implemented; and**
- **what steps are currently being taken to amend the *Corporations Act 2001* and *Australian Securities and Investments Act 2001* to permanently remove employee redundancy funds from the managed investment scheme and associated provisions.**

Instrument	ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 [F2018L01313]
Purpose	Continues relief provided by ASIC Class Order [CO 08/1] beyond that order's sunset date, and extends that relief to additional licensees
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 20 September 2018). Notice of motion to disallow must be given by 5 December 2018 ⁹

⁸ Explanatory statement, p. 3.

⁹ In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

Merits review¹⁰

1.11 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.

1.12 Section 7 of the instrument provides that a group purchasing body cannot rely on an exemption in section 5 of the instrument if the Australian Securities and Investments Commission (ASIC) has given the body a notice stating that it cannot rely on the instrument, and ASIC has not subsequently withdrawn the notice.

1.13 Decisions by ASIC to notify a group purchasing body that it cannot rely on the exemption instrument have the potential to affect the rights and interests of that body. Such decisions also appear to involve at least an element of discretion. Consequently, it appears that these decisions may be suitable for merits review.

1.14 The committee notes that Part 9.4A of the *Corporations Act 2001* provides for merits review of certain decisions made under that Act by ASIC. However, it is unclear to the committee whether this extends to decisions made by ASIC under the present instrument. In this regard, the committee notes that neither the instrument nor its explanatory statement indicates whether decisions by ASIC to notify a group purchasing body that it cannot rely on the exemption provided by section 5 of the instrument are subject to merits review.

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

- **whether decisions by the Australian Securities and Investments Commission to notify a group purchasing body that it cannot rely on the exemption provided by section 5 of the instrument are subject to merits review; and**
- **if not, what characteristics of those decisions would justify excluding merits review.**

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

Instrument	Australian National Maritime Museum Regulations 2018 [F2018L01294]
Purpose	Provides for a range of matters relation to the Australian National Maritime Museum, including financial limits for the disposal of material, security arrangements and offences to protect the museum, and rules for the service of liquor
Authorising legislation	<i>Australian National Maritime Museum Act 1990</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018 ¹¹

Merits review¹²

1.16 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.

1.17 Subsection 14(1) of the instrument provides that a security officer may prohibit a person or a group of persons from entering museum premises¹³ if they have reasonable grounds for believing that the person or group:

- has previously been directed to leave museum premises;
- has previously been removed from museum premises;
- will endanger, or is likely to endanger, public safety or the safety of staff members;
- will cause, or is likely to cause, offence to members of the public or staff; or
- is likely to commit an offence against the instrument.

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

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

13 'Museum premises' is defined in subsection 54(2) of the *Australian National Maritime Museum Act 1990* as an areas of land or water, or a building, structure or vessel, as the case may be, that is owned by, or under the control of, the museum.

1.18 The explanatory statement explains that these powers are necessary 'to ensure the safety and wellbeing of members of the public, staff members and Museum material'.¹⁴

1.19 Decisions by security officers to prohibit a person or group of persons from entering museum premises have the potential to affect the interests of the relevant person or group. Such decisions also appear to involve at least an element of discretion. Consequently, it appears that decisions by security officers to prohibit entry to the museum may be suitable for merits review.

1.20 In this regard, the committee notes that subsection 13(1) of the National Library Regulations 2018 (National Library Regulations) provides that applications may be made to the Administrative Appeals Tribunal for review of a decision to prohibit entry to library premises.¹⁵ In light of the apparent similarities between subsection 14(1) of this instrument and subsection 13(1) of the National Library Regulations, it is unclear why decisions made under subsection 14(1) of the present instrument would not also be subject to merits review.

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

- **whether decisions by security officers under section 14 of the instrument to prohibit entry to museum premises are subject to merits review; and**
- **if not, what characteristics of those decisions would justify excluding merits review.**

Reversal of evidential burden of proof¹⁶

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

1.23 Subsection 10(1) of the instrument makes it an offence for a person to sell or supply liquor on or in liquor controlled premises.¹⁷ Subsection 10(2) sets out two

14 Explanatory statement, p. 10.

15 National Library Regulations 2018, sections 13 and 34.

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

17 Section 5 of the instrument defines 'liquor controlled premises' as any land, building or vessel owned by, or under the control of, the museum.

offence-specific defences, which provide that subsection 10(1) does not apply to a person:

- selling or supplying liquor, if the person is authorised to do so by the Director¹⁸ under subsection 9(1) of the instrument; or
- supplying liquor (other than by selling it) if the liquor was sold or supplied to that person on or in museum premises by an authorised liquor supplier.

1.24 Subsection 25(1) makes it an offence for a person to allow an animal belonging to the person, or in the person's charge, to enter or remain in a library building. Subsection 25(2) sets out three defences to the offences in subsection 25(1). One of these defences provides that subsection 25(1) does not apply where the relevant animal is under the control of the museum.¹⁹

1.25 Subsection 26(1) makes it an offence for a person to bring food or liquid into, or to consume food or liquid in, controlled museum premises.²⁰ Subsection 26(2) sets out five defences, which provide that subsection 26(1) does not apply in certain circumstances, including where the food or liquid has been brought into, or consumed in, particular designated areas.²¹

1.26 Finally, section 32 sets out two general defences, which provide that it is a defence to a prosecution for any offence under Part 3 or 4 of the instrument that:

- when the relevant conduct was engaged in, the Director had consented in writing to the conduct; or
- the person accused of the offence is a member of the Council, the Director, a staff member, an officer or employee mentioned in section 41 of the *Australian National Maritime Museum Act 1990*, or a museum consultant, contractor, sub-contractor or volunteer. In each case, the person must be acting in accordance with their duties.

18 The *Australian National Maritime Museum Act 1990* defines 'Director' as the director of the museum. The Director is appointed by the Governor-General under section 30.

19 Paragraph 25(2)(c).

20 Section 5 of the instrument defines 'controlled museum premises' as any part of museum premises that is, or is part of, a building, structure or vessel used to exhibit, preserve, maintain or store museum material. 'Controlled museum premises' also includes any part of museum premises on or in which a notice is displayed that is clearly visible to the public, has been authorised by the Director, and states that that part of museum premises is controlled museum premises.

21 Paragraph 26(2)(e).

1.27 In relation to each of the offence-specific defences above, the defendant bears the evidential burden of proof.²²

1.28 While in these instances 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.

1.29 In relation to the defences in paragraph 10(2)(a) and section 32, the explanatory statement explains that it is appropriate that the evidential burden be reversed because the relevant matters would be disproportionately more difficult and costly for the prosecution to disprove than for the defendant to establish, and the defendant could readily and cheaply point to relevant evidence.²³

1.30 However, the committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences* states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of 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.²⁴

1.31 It is not apparent to the committee that the matters set out in the defences in paragraph 10(2)(a) and section 32 are matters that would be peculiarly within the defendant's knowledge. For example, whether a person had been authorised by the Director to sell liquor or to engage in any other conduct would be a matter about which the Director may be particularly apprised. Moreover, whether a person holds a particular position appears to be a largely factual matter.

1.32 In relation to the defences in subsections 25(2) and 26(2) of the instrument, the explanatory statement explains that the relevant matters would be peculiarly within the defendant's knowledge.²⁵ However, it is not clear to the committee that this is the case for all available defences. For example, it appears that whether an animal is under the control of the museum would be a matter of which the Director,

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

23 Explanatory statement, pp. 7 and 18.

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

25 Explanatory statement, pp. 15-16.

or the museum staff, may be particularly apprised. With respect to subsection 26(2), whether food or liquid is consumed in a designated area appears to be a largely factual matter.

1.33 The committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 10(2)(a), subsections 25(2) and 26(2) and section 32 of the instrument. The committee's assessment would be assisted if the minister's response expressly addresses the principles set out in the *Guide to Framing Commonwealth Offences*.²⁶

Personal rights and liberties: privacy²⁷

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

1.35 Subsection 15(1) of the instrument provides that a security officer may direct a person or group of persons to leave museum premises in particular circumstances. Paragraph 15(1)(c) relevantly provides that a security officer may direct a person or group of persons to leave museum premises where the officer has reasonable grounds for believing that the person or group intends to commit, is committing, or has committed an offence against the instrument.

1.36 Subsection 15(2) provides that, if a security officer directs a person to leave museum premises in accordance with paragraph 15(1)(c), the officer may take a photograph of the person and direct them to provide their name and residential address.

1.37 The explanatory statement to the instrument states that the powers in section 15 are necessary 'to ensure the safety and wellbeing of members of the public, staff members and Museum material'.²⁸ However, neither the explanatory statement nor the statement of compatibility addresses the privacy implications of subsection 15(2), or explains how information collected under that provision will be managed; what use can be made of it, including any permitted onward disclosure; and what safeguards are in place to protect the privacy of individuals whose personal information is provided to security officers in accordance with the instrument.

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

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

28 Explanatory statement, p. 10.

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

- **how personal information collected in accordance with subsection 15(2) of the instrument will be used and managed; and**
- **what safeguards are in place to protect the personal privacy of individuals in relation to that information.**

Instrument	CASA EX111/18 — English Language Proficiency Assessments Exemption 2018 [F2018L01214]
Purpose	Extends exemptions relating to certain English language proficiency requirements to 30 September 2021
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ²⁹

Parliamentary oversight: continuing exemption³⁰

1.39 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 that grant or extend exemptions from compliance with principal or enabling legislation.

1.40 The Civil Aviation Safety Regulations (CASR) establishes two English language proficiency standards: the aviation English language proficiency (AELP) standard and general English language proficiency (GELP) standard. The CASR requires student pilots and applicants for recreational pilot licences to satisfy the GELP standard, while applicants for flight crew licences, flight radio endorsements and aeronautical radio operator certificates (AROCs) must satisfy the AELP standard.

1.41 The instrument exempts persons from the requirement to meet the GELP standard if they have been assessed as meeting the AELP standard. It also exempts applicants for AROCs from the requirement to meet the AELP standard if they have been assessed as meeting the GELP standard.

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

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

1.42 The instrument continues existing exemptions from certain English language proficiency requirements in the CASR, first introduced in October 2015.³¹ The explanatory statement to the instrument explains that the exemptions were first made at the request of the aviation industry, to 'resolve difficulties conducting English language proficiency assessments that have arisen since the introduction of the flight crew licencing regulations in 2014'.³² The explanatory statement also states that CASA has been working with industry to resolve the difficulties associated with English language proficiency assessments.³³ However, the explanatory statement does not indicate whether the exemptions continued by the instrument are intended to be interim measures, pending substantive amendments to the CASR.

1.43 The committee generally prefers that exemptions are not used to, or do not continue for such time as to, operate as de facto amendments to primary legislation or principal regulations. In this regard, the committee notes that the instrument extends the exemptions originally enacted for an additional three years, to 30 September 2021. However, no information is provided as to whether further amendments to the principal regulations are being considered to remove the need for the continued exemptions.

1.44 The committee requests minister's advice as to:

- **whether amendments to the Civil Aviation Safety Regulations are being considered to resolve the difficulties associated with English language proficiency assessments; and**
- **if not, the justification for continuing the exemptions to the Civil Aviation Safety Regulations.**

Merits review³⁴

1.45 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.

1.46 Section 4 of the instrument provides that the Civil Aviation Safety Authority (CASA) may, in writing, approve a person to conduct an assessment of an individual's English language proficiency (with reference to the GELP and AELP standards).

31 CASA EX 146/15 [F2015L00717]. This instrument is due to expire on 30 September 2018.

32 Explanatory statement, p. 5.

33 Explanatory statement, p. 5.

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

Neither the instrument nor the explanatory statement sets out any matters that CASA must take into consideration when making this decision.

1.47 It appears to the committee that decisions by CASA to approve, or not approve, a person to conduct AELP and GELP assessments may involve at least an element of discretion. Such decisions also appear to have the potential to affect the interests of individuals, particularly prospective assessors. It therefore appears that decisions by CASA in relation to the approval of a person to conduct GELP and AELP assessments may be suitable for merits review.

1.48 The committee notes that section 297A of the Civil Aviation Regulations provides that an application may be made to the Administrative Appeals Tribunal (AAT) for review of certain decisions. Section 31 of the *Civil Aviation Act 1988* also provides that an application may be made to the AAT for review of a 'reviewable decision'.³⁵ However, it is not clear to the committee whether those provisions extend to merits review of decisions made under legislative instruments that are made under the CASR. In this regard, the committee notes that neither the instrument nor its explanatory statement indicates whether decisions by CASA to approve, or refuse to approve, a person to conduct GELP and AELP assessments would be subject to merits review.

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

- **whether decisions by the Civil Aviation Safety Authority to approve, or refuse to approve, a person to conduct English language proficiency assessments are subject to merits review; and**
- **if not, what characteristics of those decisions would justify excluding merits review.**

35 'Reviewable decision' is defined under that section to include refusals to grant or issue a certificate, permission, permit or licence granted or issued under that Act or the regulations (that is, the CASR or the Civil Aviation Regulations 1988).

Instrument	CASA EX122/18 — Flight in Class D Airspace near Sunshine Coast Aerodrome (Sunshine Coast Sports Aviators) Instrument 2018 [F2018L01278]
Purpose	Permits members of Sunshine Coast Sports Aviators Inc. to operate hang-gliders and paragliders from sites near Port Cartwright, Queensland
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 13 September 2018). Notice of motion to disallow must be given by 28 November 2018 ³⁶

Incorporation³⁷

1.50 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.

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

1.52 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.

1.53 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,

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

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

subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the 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.³⁸

1.54 The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference (that is, either as in force from time to time or as in force at a particular time). This enables persons interested in or affected by an instrument to understand its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.³⁹

1.55 With reference to the above, the committee notes that the instrument appears to incorporate a Letter of Agreement (LoA) between Airservices Australia and Sunshine Coast Aviators Inc. A note in section 3 of the instrument indicates that the LoA in effect at the commencement of the instrument is 'LoA_3318', version 2, dated 26 February 2015. This suggests that the instrument intends to incorporate that particular version of the LoA. However, the explanatory statement states that 'the instrument has the effect of applying, adopting or incorporating an LoA by reference, as the LoA exists from time to time'.⁴⁰

1.56 It is therefore unclear to the committee whether it is intended to incorporate the LoA as in force at the commencement of the instrument (that is, the LOA dated 26 February 2015), or the LoA as in force from time to time (that is, any future amended versions of the LoA).

1.57 The committee requests the minister's advice as to the manner in which the Letter of Agreement between Airservices Australia and Sunshine Coast Aviators is incorporated; and requests that the explanatory statement be amended to include this information.

38 In this regard, the committee notes that subsection 98(5D) of the *Civil Aviation Act 1988* allows instruments made under the Act or the regulations to incorporate documents as in force from time to time.

39 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.

40 Explanatory statement, p. 3.

Instrument	CASA 66/18 — Number of Cabin Attendants (Alliance Airlines) Direction 2018 [F2018L01244]
Purpose	Enables Alliance Airlines Pty Limited to continue operating designated aircraft with one cabin attendant for every 50 passenger seats or part of that number
Authorising legislation	<i>Civil Aviation Regulations 1988</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ⁴¹

Merits review⁴²

1.58 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.

1.59 Subsection 4(3) of the instrument directs that Alliance Airlines must not, without the prior written approval of Civil Aviation Safety Authority (CASA), revise any part of its operations manual affecting emergency procedures for the relevant aircraft, including procedures relating to able-bodied passengers.⁴³

1.60 Decisions by CASA as to whether to permit, or refuse to permit, Alliance to revise its operations manual have the potential to affect Alliance's interests. Such decisions also appear to involve at least an element of discretion. Consequently, it appears that decisions by CASA in relation to the revision of Alliance's operations manual may be suitable for merits review.

1.61 The committee notes that section 297A of the Civil Aviation Regulations (CAR) provides that an application may be made to the Administrative Appeals Tribunal (AAT) for review of decisions listed in subsection 297A(1). Further, section 31 of the *Civil Aviation Act 1988* provides that an application may be made to

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

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

43 Explanatory statement, p. 1.

the AAT for review of a reviewable decision.⁴⁴ However, it is not clear to the committee whether those provisions extend to merits review of decisions made under legislative instruments that are made under the CAR. In this regard, the committee notes that neither the instrument nor its explanatory statement indicates whether decisions by CASA to approve or refuse to approve revisions of Alliance's operations manual are subject to merits review.

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

- **whether decisions by the Civil Aviation Safety Authority to approve or refuse to approve revisions of Alliance Airlines' operations manual are subject to merits review; and**
- **if not, what characteristics of those decisions would justify excluding merits review.**

Instrument	Corporations (Passport) Rules 2018 [F2018L01272]
Purpose	Give effect to Passport Rules agreed by the participating economies to the Asia Region Funds Passport scheme
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ⁴⁵

Incorporation⁴⁶

1.63 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);

44 'Reviewable decision' is defined under that section to include refusals to grant or issue a certificate, permission, permit or licence granted or issued under that Act or the regulations (that is, the CAR or the Civil Aviation Safety Regulations 1998).

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

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

- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

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

1.65 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.

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

1.67 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.

1.68 The committee therefore expects instruments or their explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables people interested in or affected by an instrument to understand its terms, including those contained in any document incorporated by reference. Additionally, where a legislative instrument incorporates a document as in force from time to time, the committee expects the explanatory statement to set out the legislative authority (in the enabling legislation or another Commonwealth Act) for the incorporation of the document as in force from time to time.

1.69 With reference to these matters, the committee notes that the instrument appears to incorporate the following Acts of foreign jurisdictions and associated accounting standards:

- Act on Investment Trusts and Investment Corporations (Japan);⁴⁷
- Certified Public Accountants Act (Japan);⁴⁸
- Companies Act (Japan);⁴⁹
- Financial Instruments and Exchange Act (Japan), and accounting standards made under that Act;⁵⁰
- Financial Investment Services and Capital Markets Act (Korea), and general accounting principles made under that Act;⁵¹
- Financial Investment Business and Capital Markets Act (Korea);⁵²
- Act on External Audit of Stock Companies (Korea), and accounting standards made under that Act;⁵³
- Auditor Regulation Act 2011 (New Zealand);⁵⁴
- Financial Markets Conduct Act 2013 (New Zealand);⁵⁵
- Financial Reporting Act 2013 (New Zealand), and accounting standards made under that Act;⁵⁶
- Financial Markets Supervisors Act 2011 (New Zealand);⁵⁷
- Securities and Futures Act (Singapore);⁵⁸
- Accountants Act (Singapore);⁵⁹
- Accounting Standards Act (Cap. 2B) (Singapore), and accounting standards made under that Act;⁶⁰

47 See subsections 4(1), 13(1), 14(1), 15(3) and 56(b) of the instrument.

48 See subsection 15(3) of the instrument.

49 See subsections 14(1) and 15(3) of the instrument.

50 See subsection 7(4), 16(4) and 16(6) of the instrument.

51 See subsections 4(1), 7(4), 13(1), 15(3), 16(4) and 16(6) of the instrument.

52 See subsection 14(1) of the instrument.

53 See subsection 7(4), of the instrument.

54 See subsection 15(3) of the instrument.

55 See subsections 4(1), 16(4), 16(6) and 56(b) of the instrument.

56 See subsection 7(4) of the instrument.

57 See subsections 13(1), 14(1) and 15(3) of the instrument.

58 See subsections 4(1), 13(1), 14(1) and 15(3) of the instrument.

59 See subsection 15(3) of the instrument.

60 See subsections 7(4) and 16(4) of the instrument.

- Recommended Accounting Practices (Singapore);⁶¹
- Singapore Standards on Auditing;⁶²
- Accounting Guidelines for Investment Management business (Thailand);⁶³
- Thai Standards on Auditing;⁶⁴ and
- Securities and Exchange Act B.E. 2535 (1992) and the Trust for Transactions in Capital Market Act B.E. 2550 (2007) (Thailand).⁶⁵

1.70 The explanatory statement explains that certain provisions do not intend to incorporate any documents by reference.⁶⁶ However, it is unclear to the committee whether this extends to all circumstances, as it appears that some of the documents listed above are applied in determining the content of some of the instrument's provisions.⁶⁷ In this regard, the committee notes that some of these documents listed elsewhere in the explanatory statement under the heading 'documents incorporated by reference',⁶⁸ accompanied by web references to where English versions of the documents may be accessed.⁶⁹

1.71 In relation to other provisions of the instrument, the explanatory statement indicates that the provisions incorporate documents as in force from time to time.⁷⁰

61 See subsections 7(4) and 16(4) of the instrument.

62 See subsection 16(6) of the instrument.

63 See subsections 7(4) and 16(4) of the instrument.

64 See subsection 16(6) of the instrument.

65 See subsections 4(1), 13(1), 14(1), 15(3) and 56(b) of the instrument.

66 For example, the explanatory statement states on page 2 that section 4 of the instrument 'does not seek to incorporate the laws of participating economies by reference'.

67 For example, the explanatory statement states on page 3 that section 7 of the instrument 'is not designed to incorporate the laws of these economies by reference'. However, it appears that some of the documents to which that provision refers (e.g. certain accounting standards) are applied in determining the equity of a passport fund. It is therefore unclear that these documents are not incorporated by reference, as it appears that they are used to determine the content of the law.

68 Explanatory statement, p. 9.

69 For example, the Financial Investment Services and Capital Markets Act (Korea), and accounting standards made under that Act, are listed under the heading of 'documents incorporated by reference' at page 9 of the explanatory statement. Those documents are also referred to in sections 4 and 7 of the instrument. The explanatory statement indicates on pages 2 and 3 that those sections do not intend to incorporate documents by reference.

70 In this respect, the explanatory statement states on page 6 that section 16 of the instrument 'incorporates the financial reporting and auditing requirements in certain specified international instruments as in force from time to time'.

The explanatory statement explains that it is necessary to incorporate the documents in this manner, as otherwise the instrument and Annex 3 to the Memorandum of Cooperation (MOC) would become 'unworkable'.⁷¹ In this regard, the explanatory statement also explains that:

If the rules did not incorporate the specified international instruments as in force from time to time, the rules in Australia would not be the same as Annex 3 [to the Memorandum of Cooperation (MOC)] and the requirements of section 1211 could not be met. As a result, Australia could not give effect to its commitments under the MOC.⁷²

1.72 The explanatory statement further states that section 1211 of the *Corporations Act 2001* (Corporations Act) can be seen as 'manifesting, by necessary implication, an intention that the Rules may incorporate other instruments as in force from time to time'.⁷³ However, it is unclear to the committee that section 1211 of the Corporations Act manifests such an intention, and it does not appear to contain any other general or specific provision that would permit the incorporation of documents as in force from time to time in instruments made under section 1211 (the empowering provision for the instrument).

1.73 Noting the complexity of the instrument, the committee considers that it would be appropriate for the explanatory statement to indicate the manner in which each of the documents listed at paragraph [1.69] above is incorporated, and where these documents may be accessed free of charge. The committee considers that this would promote clarity and intelligibility for users, and ensure that persons interested in or affected by the law have full access to its terms.

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

- **the manner in which each of the documents identified at paragraph 1.69 above is incorporated by the instrument (that is, as in force from time to time or as in force at a particular time);**
- **where it is intended to incorporate a document as in force from time to time, the specific provision in the *Corporations Act 2001* or other Commonwealth legislation that permits incorporation in this manner; and**
- **where each of the documents identified above may be accessed free of charge.**

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

71 Explanatory statement, p. 6.

72 Explanatory statement, p. 6.

73 Explanatory statement, p. 6 (footnote).

Anticipated authority⁷⁴

1.76 Section 4 of the *Acts Interpretation Act 1901* (Interpretation Act) allows, in certain circumstances, the making of a legislative instrument in anticipation of the empowering provision that authorises the instrument to be made. The ability of such an instrument to confer powers or rights, or impose obligations, before its empowering provision commences is limited by subsection 4(4).

1.77 The instrument was made under section 1211 of the *Corporations Act 2001*. That section was inserted by item 1 of Schedule 1 to the *Corporations Amendment (Asia Region Funds Passport) Act 2018* (Amending Act). Schedule 1 to the Amending Act commenced on 18 September 2018.⁷⁵

1.78 The instrument was made on 5 September 2018 and registered on the Federal Register of Legislation on 7 September 2018. The committee notes that section 2 of the instrument provides that the instrument's substantive provisions commence on the later of the day after the instrument is registered,⁷⁶ and the day on which Schedule 1 to the Amending Act commences. Those provisions therefore also commenced on 18 September 2018.

1.79 Nevertheless, the committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, the explanatory statement to an instrument that is made in anticipation of its authorising provisions, and relies on section 4 of the Interpretation Act, should clearly identify that the instrument relies on that section.

1.80 The committee draws the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901* to the minister's attention.

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

75 Pursuant to the Corporations Amendment (Asia Region Funds Passport) Commencement Proclamation 2018 [F2018N00146].

76 That is, sections 3 to 57, Appendix A and Appendix B.

Instrument	Export Control (Plants and Plant Products) Amendment (Accredited Properties) Order 2018 [F2018L01337]
Purpose	Allows the Secretary of the Department of Agriculture and Water Resources to accredit properties for the purposes of the export control regime
Authorising legislation	<i>Export Control (Orders) Regulations 1982</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018) Notice of motion to disallow must be given by 6 December 2018 ⁷⁷

No invalidity clause⁷⁸

1.81 The instrument amends the Export Control (Plants and Plant Products) Order 2011 (Plants Order), to allow the Secretary of the Department of Agriculture and Water Resources (the secretary) to accredit and thereby regulate properties that produce or prepare plant products for export to certain countries.

1.82 Part 2A of the Plants Order, inserted by item 3 of the instrument, sets out the processes by which a person may apply to the secretary for accreditation of a property, and the renewal or variation of such an accreditation. That Part also sets out the process by which a person may apply to the secretary for approval to make alterations to an accredited property.

1.83 Subsections 9D.2, 9J.2 and 9L.3 provide that if the secretary decides not to accredit a property, renew an accreditation, vary an accreditation or approve an alteration to an accredited property, the secretary must give the applicant written notice of the adverse decision. The notice must include reasons for the decision and a statement that the applicant may apply for reconsideration and review of the decision under Part 16 of the Export Control (Prescribed Goods—General) Order 2005.⁷⁹ However, subsections 9D.3, 9J.3 and 9L.4 provide that a failure to give the applicant a notice of a decision in accordance with 9D.2, 9J.2 or 9L.3 does not affect the validity of the relevant decision.

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

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

79 [F2018C00072].

1.84 A legislative provision that indicates that an act done or a decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. In this instance, the inclusion of a no-invalidity clause may mean that there would be no consequences for a failure by the secretary to notify an applicant of the reasons for an adverse decision, or the availability of review. Where such a notice is not provided, the applicant may remain unaware of their review rights, and may consequently lose the opportunity to have the adverse decision reconsidered by a court or tribunal. The committee would therefore expect a sound justification for the use of no-invalidity clause to be provided in the explanatory statement.

1.85 In relation to the no-invalidity clause in subsection 9D.3, the explanatory statement states:

The written notice provided under subsection 9D.2 ensures that a person is able to understand the reasons for the decision and is aware of his or her right to review. However, as decisions made under the Act and the Plants Order are made to give effect to the intention of the Act and the Plants Order, it is not appropriate for such decisions to be found invalid because notice was not provided to the applicant whose interests are being affect by the decision.⁸⁰

1.86 Similar explanations are provided in relation to the no-invalidity clauses in subsections 9J.3 and 9L.4.⁸¹

1.87 However, the committee does not consider the broad statement that decisions made under the Act and the Plants Order are made 'to give effect to the intention of the Act and the Plants Order' to be sufficient justification for including no-invalidity clauses in relation to those decisions. In this regard, the committee also notes that the explanatory statement does not explain the intention of the Act or the Plants Order, or provide any further justification for the inclusion of no-invalidity clauses.

1.88 The committee requests the minister's more detailed advice as to why a failure by the secretary to provide notice to an applicant of a decision to refuse to grant, renew or vary a property accreditation, or to alter an accredited property, would not affect the validity of the relevant decision.

80 Explanatory statement, p. 11.

81 Explanatory statement, pp. 13-14, 16.

Retrospective effect⁸²

1.89 Item 11 of the instrument amends the Plants Order to insert a number of transitional provisions, which apply to applications and requests in relation to the listing of a property as an export listed property. The effect of these provisions is that an application or request which was made to the department prior to the commencement of the instrument, but was not yet decided, is taken to be an application or request made to the secretary in relation to an accredited property. The application or request would therefore be dealt with under the new provisions inserted by the instrument. The relevant applications and requests are as follows:

- an application for a property to be listed as an export listed property;⁸³
- an application to renew the listing of an export listed property;⁸⁴
- an application to vary the listing of an export listed property;⁸⁵
- a request to suspend the listing of an export listed property;⁸⁶ and
- a request to revoke the listing of an export listed property.⁸⁷

1.90 While the instrument commences prospectively, the committee is concerned that the operation of the transitional provisions may result in the instrument having a retrospective effect, to the potential detriment of persons who had made an application or request prior to the commencement of the instrument which had not been decided at the time the instrument commenced. In this respect, the committee notes that the instrument appears to make substantive changes to requirements for applications and requests relating to the accreditation of properties. These include changes to the criteria that must be satisfied before such applications and requests may be granted.

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

83 Section 53 provides that this application is taken to be made under subsection 9A.1 (accreditation of properties). Further, the application is subject to Division 7 of Part 2A (applications for accreditation), including requirements in subsection 9ZG.1 (requirements for applications).

84 Section 54 provides that this application is taken to be made under subsection 9F.1 (application to renew accreditation of property). Further, the application is subject to Division 7 of Part 2A, including requirements in subsection 9ZG.1.

85 Section 55 provides that this application is taken to be made under subsection 9K.1 (variation of accreditation or approval of alteration of property). Further, the application is subject to Division 7 of Part 2A, including requirements in subsection 9ZG.1.

86 Section 56 provides that this application is taken to be made under subsection 9R.1 (requests for suspension of accreditation).

87 Section 57 provides that this application is taken to be made under subsection 9X.1 (requests for revocation of accreditation).

1.91 The explanatory statement explains that the purpose of the transitional provision in proposed section 53 is:

to prevent any delay in the accreditation of properties, by permitting the secretary to consider and make decisions on an application made by the manager of a property for export listing immediately before commencement day. The export seasons for Australia's plant industries, particularly the horticulture industry, are often time sensitive. Without this provision a manager is required to resubmit an application for accreditation to the secretary after commencement...which would otherwise lead to delayed decision making and ultimately impede the export of goods from Australia.⁸⁸

1.92 Similar explanations are provided in relation to the other transitional provisions identified above.⁸⁹

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

1.94 The committee requests the minister's advice as to whether any persons were, or could be, disadvantaged by the operation of the transitional provisions in sections 53 to 57 of the instrument; and, if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness.

88 Explanatory statement, p. 37.

89 Explanatory statement, pp. 37-39.

Instrument	Historic Shipwrecks Regulations 2018 [F2018L01322]
Purpose	Continue protections for historic shipwrecks until the commencement of the <i>Underwater Cultural Heritage Act 2018</i>
Authorising legislation	<i>Historic Shipwrecks Act 1976</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018) Notice of motion to disallow must be given by 6 December 2018 ⁹⁰

Consultation⁹¹

1.95 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.

1.96 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.⁹²

1.97 With reference to these requirements, the committee notes that the explanatory statement to the instrument states that 'a review of the Act and the Regulations, including public consultation, was conducted in 2009'.⁹³ The explanatory statement does not provide any information about more recent consultation undertaken in relation to the instrument, nor does it explain why further consultation was considered inappropriate or unnecessary.

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

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

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

93 Explanatory statement, p. 3.

1.98 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 the requirements of the Legislation Act. In this instance, the statement that 'public consultation was undertaken' does not appear to satisfy the requirement in paragraph 15J(2)(d) that the explanatory statement describe the nature of any consultation that has been undertaken in relation to the instrument. As set out in the committee's guideline on consultation:

An explanatory statement should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An explanatory statement should avoid bare statements such as 'Consultation was undertaken'.

1.99 Further, it is unclear to the committee whether more recent consultation was undertaken before the instrument was made. In this regard, the committee notes that consultation undertaken nine years ago may no longer be relevant.

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

- **the nature of the consultation undertaken in relation to the instrument; and**
- **whether more recent consultation was undertaken and if so, the nature of that consultation; or if more recent consultation was not undertaken, why not.**

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

Reversal of evidential burden of proof⁹⁴

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

1.103 Subsection 8(1) of the instrument makes it an offence to for a person to engage in a number of acts related to protected zones.⁹⁵

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

1.104 Subsection 8(3) sets out two defences, which provide that it is a defence to a prosecution under subsection (1) if the person:

- is acting in accordance with a permit granted under subsection 15(1) of the Act; or
- has a reasonable excuse.

1.105 The defendant bears the evidential burden of raising the relevant defence.⁹⁶ While 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.

1.106 In this instance, the explanatory statement contains no justification as to why the evidential burden has been imposed on the defendant for the defences in subsection 8(3).

1.107 The committee requests the minister's advice in relation to the justification for reversing the evidential burden of proof in the defences set out in subsection 8(3) of the instrument. The committee's assessment would be assisted if the minister's response would expressly address the principles set out in the *Guide to Framing Commonwealth Offences*.⁹⁷

Matters more appropriate for parliamentary enactment⁹⁸

1.108 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).

95 These include: bringing into a protected zone certain items that would be likely to damage, or interfere with, a historic shipwreck or relic within the protected zone; using such items within a protected zone; causing a ship carrying such items to enter, or remain within, a protected zone; engaging in underwater activities within a protected zone; or mooring or using ships within a protected zone.

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

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

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

1.109 The instrument was made under section 32 of the *Historic Shipwrecks Act 1976* (Historic Shipwrecks Act). That section provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters which are required or permitted by the Act, or necessary or convenient to carry out or give effect to the Act or a relevant agreement.

1.110 Subsection 14(b) of the Historic Shipwrecks Act provides that the regulations may prescribe penalties, not exceeding a fine of \$1000 or imprisonment for one year, for any contravention of regulations made for the purposes of subsection 14(1) (which relates to activities in protected zones). Subsection 8(1) of the instrument (summarised in footnote [95] above) imposes a maximum penalty of one year imprisonment, four penalty units, or both, for offences relating to activities in protected zones.

1.111 The Attorney-General's Department's *Guide to Framing Commonwealth Offences* states that regulations should not be authorised to create offences that are punishable by imprisonment. The Guide further states that:

The Attorney-General's Department should be consulted at an early stage on any proposal to enable offences in subordinate legislation to be punishable by imprisonment.

1.112 In this regard, the committee notes that the explanatory statement does not explain whether the Attorney-General's Department was consulted, and why the regulations do not appear to comply with the *Guide to Framing Commonwealth Offences* regarding the imposition of penalties punishable by imprisonment in subordinate legislation. Moreover, the explanatory statement notes that similar offences carrying a term of imprisonment are included in primary legislation (that is, the *Underwater Cultural Heritage Act 2018*).⁹⁹

1.113 The committee notes that the explanatory statement states that the instrument remakes the Historic Shipwreck Regulations 1978 (previous regulations), and replicates the penalty prescribed by the previous regulations for offences relating to activities in protected zones. However, the fact that a provision replicates a provision in a previous instrument does not, of itself, address the committee's scrutiny concerns. Where the provisions of an instrument impose a penalty of imprisonment, the committee expects the explanatory statement to justify the imposition of such a penalty by reference to the *Guide to Framing Commonwealth Offences*, regardless of whether the provision retains a penalty from a previous instrument.

99 Explanatory statement, p. 4.

1.114 The committee requests the minister's advice as to the appropriateness of imposing a penalty of imprisonment in regulations, and whether the Attorney-General's Department was consulted in relation to the imposition of this penalty, by reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.¹⁰⁰

Unclear basis for determining fees¹⁰¹

1.115 Section 7 of the instrument sets the fee payable for obtaining copies of the register of historic shipwrecks. The fee is set at 50 cents per page of the copy.

1.116 The committee's usual expectation, in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment, is that the explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular, to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

1.117 The explanatory statement states that the imposition of these fees is authorised by subsection 12(3) of the Historic Shipwrecks Act. It also explains that the subsection is now redundant as the register is publicly available online through the Australian National Shipwrecks Database. The committee notes, however, that the explanatory statement does not provide any information about the basis on which the fee amounts set out in section 7 of the instrument have been determined.

1.118 The committee draws to the attention of the minister and the Senate the absence of information in the explanatory statement about how the fee in section 7 of the instrument is determined.

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

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

Instrument	<p>Marine Navigation Levy Regulations 2018 [F2018L01298]</p> <p>Marine Navigation Levy Collection Regulations 2018 [F2018L01300]</p> <p>Marine Navigation (Regulatory Functions) Levy Regulations 2018 [F2018L01301]</p> <p>Marine Navigation (Regulatory Functions) Levy Collection Regulations 2018 [F2018L01302]</p>
Purpose	Set amounts of maritime industry levies, and prescribe how those levies are to be collected
Authorising legislation	<p>[F2018L01298]: <i>Marine Navigation Levy Act 1989</i></p> <p>[F2018L01300]: <i>Marine Navigation Levy Collection Act 1989</i></p> <p>[F2018L01301]: <i>Marine Navigation (Regulatory Functions) Levy Act 1991</i></p> <p>[F2018L01302]: <i>Marine Navigation (Regulatory Functions) Levy Collection Act 1991</i></p>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 20 September 2018). Notice of motion to disallow must be given by 5 December 2018 ¹⁰²

No explanatory statement¹⁰³

1.119 Paragraph 15G(4)(a) of the *Legislation Act 2003* (Legislation Act) requires the maker of a disallowable instrument to lodge an explanatory statement for the instrument as soon as practicable after the instrument is lodged for registration on the Federal Register of Legislation (FRL).

1.120 With reference to these requirements, the committee notes that explanatory statements to these instruments do not appear to have been lodged for registration on the FRL.

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

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

1.121 The committee requests the minister's advice as to why the explanatory statements to these instruments have not been registered on the Federal Register of Legislation; and requests that the explanatory statements are registered in accordance with paragraph 15G(4)(a) of the *Legislation Act 2003*.

Instrument	National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 9) (PB 74 of 2018) [F2018L01223]
Purpose	Amends the list of Benefits on the Pharmaceutical Benefits Scheme (PBS)
Authorising legislation	<i>National Health Act 1953</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ¹⁰⁴

Incorporation¹⁰⁵

1.122 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.

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

1.124 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.

¹⁰⁴ In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

¹⁰⁵ Scrutiny principle: Senate Standing Order 23(3)(a).

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

1.126 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. The committee therefore expects instruments or their explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time.

1.127 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 understand its terms, including those contained in any document incorporated by reference. Additionally, where a legislative instrument incorporates a document as in force from time to time, the committee expects the explanatory statement to set out the legislative authority (in the enabling legislation or another Commonwealth Act) for the incorporation of the document as in force from time to time. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁰⁶

1.128 With reference to the above, the committee notes that the instrument appears to incorporate the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-5).¹⁰⁷ However, neither the instrument nor the explanatory statement indicates the manner in which the document has been incorporated. In this regard, the committee also notes that the *National Health Act 1953* does not appear to contain any general or specific provision that would permit the incorporation of documents as in force from time to time in instruments made under sections 84AAA, 84AK, 85, 85A, 88 or 101 of that Act (the authorising provisions for the present instrument).

106 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.

107 See Schedule 1, items 98 and 101 of the instrument.

1.129 The committee further notes that neither the instrument nor the explanatory statement indicates where the DSM-5 may be accessed. The committee secretariat's research indicates that the DSM-5 may only be accessed on payment of a fee. 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.

1.130 The committee requests the minister's advice as to whether the DSM-5 is incorporated, and, if so:

- **the manner in which the DSM-5 is incorporated;**
- **if it is intended to incorporate the document from time to time, the provision in the enabling legislation or other Commonwealth law relied on to incorporate the DSM-5; and**
- **how the DSM-5 is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.**

Instrument	National Health Security Regulations 2018 [F2018L01247]
Purpose	Provides for the operational details of the Security Sensitive Biological Agent Regulatory Scheme
Authorising legislation	<i>National Health Security Act 2007</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ¹⁰⁸

Personal rights and liberties: privacy¹⁰⁹

Matters more appropriate for parliamentary enactment¹¹⁰

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

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

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

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

1.132 Section 21 of the *National Health Security Act 2007* (NHS Act) provides that a person commits an offence if the person obtains protected information, and makes a record of, discloses or otherwise uses that information in circumstances where the record, disclosure or use is not authorised by section 19 or 20 of the NHS Act. The offence is punishable by a custodial penalty of two years' imprisonment. Section 18 of the NHS Act defines 'protected information' as personal information (within the meaning of the *Privacy Act 1988*) obtained under or in accordance with Part 2 of the NHS Act (which relates to public health surveillance).

1.133 Section 23 of the NHS Act creates a series of defences to the offence in section 21. In particular, subsection 23(2) provides that section 21 does not apply if a person discloses protected information to an officer or employee of an intelligence agency 'prescribed by the regulations'.

1.134 Section 6 of the instrument prescribes the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) for the purposes of paragraph 23(2)(b) of the NHS Act. This allows a person to disclose protected information (which may include a significant amount of personal information) to the AFP or ASIO without committing the offence in section 21 of the NHS Act.

1.135 The explanatory statement does not address the privacy implications of this provision: it does not provide any examples of the kind of protected information that may be disclosed to the AFP or to ASIO; why it is necessary to disclose protected information to those agencies; the purposes for which the information may be disclosed or used; or what safeguards are in place to protect individuals' privacy.

1.136 Additionally, the committee's view is that significant matters, such as the intelligence agencies to which protected information may be disclosed (thereby avoiding commission of a criminal offence), are more appropriately enacted via primary rather than delegated legislation. Where significant matters are left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be included in the explanatory materials. In this case, no such justification is provided in the explanatory statement.

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

- **why it is considered necessary and appropriate to allow persons to disclose protected information (which could include significant personal information) to the Australian Federal Police and the Australian Security Intelligence Organisation;**
- **the type of protected information that it is envisaged would be disclosed to the those agencies, and how that information would be used and managed; and**
- **what safeguards are in place to protect individuals' privacy.**

1.138 The committee also draws the attention of the minister and the Senate to the prescription of intelligence agencies to which protected information may be disclosed (that is, without committing an offence) in delegated legislation.

Instrument	National Library Regulations 2018 [F2018L01295]
Purpose	Make provision for a range of matters relation to the National Library including financial limits for the purchase and disposal of assets, security arrangements and offences to protect the library, and rules for the service of liquor
Authorising legislation	<i>National Library Act 1960</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018 ¹¹¹

Reversal of evidential burden¹¹²

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

1.140 Subsection 9(1) of the instrument makes it an offence for a person to sell or supply liquor on or in a library premises.¹¹³ Subsection 9(2) sets out two defences, which provide that subsection 9(1) does not apply to a person:

- selling or supplying liquor, if the person is authorised to do so by the Director-General under subsection 8(1) of the instrument;¹¹⁴ or
- supplying liquor (other than by selling it) if the liquor was sold or supplied to that person on or in Library premises by an authorised liquor supplier.

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

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

113 Section 5 of the instrument defines 'Library premises' in the Australian Capital Territory owned by or under the control of the Library.

114 The *National Library Act 1960* defines 'Director-General' as the Director-General of the library. The Director-General is appointed by the Governor-General under section 17.

1.141 Section 24 of the instrument creates a series of offences and corresponding offence-specific defences relating to library property and library collection material:

- Subsection 24(1) makes it an offence for a person to remove library collection material from a storage area or reading room, or to place anything on an item of library collection material to copy or trace that material. Subsection 24(2) provides that subsection 24(1) does not apply if the person has permission from an authorised officer for the relevant conduct.
- Subsection 24(3) makes it an offence for a person to remove an item of library collection material from library property. Subsection 24(4) provides that subsection 24(3) does not apply if the person has permission from an authorised officer for the relevant conduct, or has a loan record for the item approved by an authorised officer.
- Subsection 24(5) makes it an offence to handle library collection material in such a way as is likely to damage that material. Subsection 24(6) provides that subsection 24(5) does not apply if the person has approval in writing from the Director-General to undertake work for the purposes of maintaining and developing library collection material.

1.142 Subsection 26(1) makes it an offence for a person to bring, or to have in the person's possession, a projectile or an inflammable or explosive article or substance, on library property. Subsection 26(2) sets out a defence, which provides that subsection 26(1) does not apply if the person has permission from an authorised officer for the relevant conduct.

1.143 Subsection 29(1) makes it an offence for a person to bring food or liquid into, or to consume food or liquid in, a library building. Subsection 29(2) sets out three defences, which provide that subsection 29(1) does not apply in certain circumstances, including where the food or liquid has been brought into, or consumed in, designated areas.¹¹⁵

1.144 Finally, section 32 sets out two general defences, which provide that it is a defence to a prosecution for any offence under Part 3 or 4 that:

- when the relevant conduct was engaged in, the Director-General had consented in writing to the conduct; or
- the person accused of the offence is a member of the Council, the Director-General, a staff member, a consultant, a library contractor, a person engaged or employed by a library contractor, or a volunteer engaged by the library.

115 Paragraph 29(1)(c).

1.145 In relation to each of the offence-specific defences above, the defendant bears the evidential burden of proof.¹¹⁶ While 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.

1.146 In relation to the defences in paragraph 9(2)(a), section 24 and section 32, the explanatory statement states that it is appropriate that the evidential burden be reversed because the relevant matters would be disproportionately more difficult and costly for the prosecution to disprove than for the defendant to establish, and the defendant could readily and cheaply point to relevant evidence.¹¹⁷

1.147 However, the committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of 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.¹¹⁸

1.148 It is not apparent to the committee that the matters set out in the defences in paragraph 9(2)(a), section 24 and section 32 are matters that would be peculiarly within the defendant's knowledge. For example, whether a person had been authorised to sell liquor by the Director-General would appear to be a matter about which the Director-General would be particularly apprised, as would whether an authorised officer had given approval for particular conduct.

1.149 In relation to the defences in subsections 28(2) and 29(2), the explanatory statement states that the relevant matters would be peculiarly within the defendant's knowledge.¹¹⁹ However, it is not clear to the committee that this is the case. For example, with respect to subsection 29(2), the question of whether food or liquid is consumed in a designated area, appears to be a largely factual matter.

1.150 The committee requests the minister's more detailed advice as to the justification for reversing the evidential burden of proof in paragraph 9(2)(a),

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

117 Explanatory statement, pp. 8, 16-17 and 22.

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

119 Explanatory statement, pp. 19-20.

subsections 24(2), (4) and (6), subsections 28(2) and 29(2), and section 32 of the instrument. 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*.¹²⁰

Instrument	Radiocommunications (Invictus Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018 [F2018L01343]
Purpose	This instrument provides an exemption to members of the Australian Federal Police from particular provisions of the <i>Radiocommunications Act 1992</i> , to facilitate security measures associated with the Invictus Games
Authorising legislation	<i>Radiocommunications Act 1992</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018). Notice of motion to disallow must be given by 6 December 2018 ¹²¹

Incorporation¹²²

1.151 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.

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

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

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

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

1.153 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.

1.154 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument commences, or at a time before its commencement. However, subsection 14(2) provides that such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, unless a specific provision in the 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.¹²³

1.155 The committee therefore expects instruments or their explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. This enables persons interested in or affected by an instrument to understand its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹²⁴

1.156 With reference to the above, the committee notes that the instrument appears to incorporate the following legislative instruments:

- Radiocommunications (Radionavigation-Satellite Service) Class Licence 2015 (2015 Licence); and
- Australian Radiofrequency Spectrum Plan 2017 (Spectrum Plan).¹²⁵

1.157 Paragraph 6(a) of the instrument provides that, unless the contrary intention appears, a reference in the instrument to any other legislative instrument is a reference to that other legislative instrument 'as in force at the time it was made'. This suggests that the 2015 Licence and the Spectrum plan are incorporated as in force at the time those instruments were made. However, the explanatory statement

123 In this regard, the committee notes that subsection 98(5D) of the *Civil Aviation Act 1988* allows instruments made under the Act or the regulations to incorporate documents as in force from time to time.

124 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.

125 See section 5 of the instrument—definitions of **RNSS radiocommunication** and **spectrum plan**.

states that both the 2015 Licence and the Spectrum Plan are incorporated as in force from time to time.¹²⁶

1.158 It is therefore unclear to the committee whether it is intended that the instrument incorporates the 2015 Licence and the Spectrum Plan as in force at the time those instruments were made, or whether it is intended to incorporate those instruments as in force from time to time.

1.159 The committee requests the minister's advice as to the manner in which the Radiocommunications (Radionavigation-Satellite Service) Class Licence 2015 and the Australian Radiofrequency Spectrum Plan 2017 are incorporated.

1.160 If it is intended for the instrument to incorporate those instruments as in force from time to time, the committee requests the minister's advice as to the appropriateness of amending the instrument to remove paragraph 6(a), which provides that a reference in the instrument to any other legislative instrument is a reference to that other instrument as in force at the time it was made.

Instrument	Taxation (Interest on Overpayments and Early Payments) Regulations 2018 [F2018L01288]
Purpose	These regulations repeal and replace the Taxation (Interest on Overpayments and Early Payments) Regulations 1992
Authorising legislation	<i>Taxation (Interest on Overpayments and Early Payments) Act 1983</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018 ¹²⁷

Consultation¹²⁸

1.161 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

126 Explanatory statement, pp. 2-3.

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

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

been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.

1.162 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.¹²⁹

1.163 With reference to these requirements, the committee notes that the explanatory statement to the instrument states that 'targeted consultation on the Regulations was undertaken, however, pursuant to section 17 of the Legislation Act 2003, no public consultation was undertaken as the Regulations are machinery in nature'.¹³⁰

1.164 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 undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this instance, the statements that 'targeted consultation was undertaken' and 'no public consultation was undertaken' do not appear to satisfy the requirement in paragraph 15J(2)(d), that the explanatory statement describe the nature of any consultation that has been undertaken in relation to the instrument. As set out in the committee's guideline on consultation:

An explanatory statement should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An explanatory statement should avoid bare statements such as 'Consultation was undertaken'.

1.165 The committee requests the Treasurer's more detailed advice as to the nature of the consultation undertaken in relation to the instrument; and requests that the explanatory statement be amended to include this information.

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

130 Explanatory statement, p. 1.

Incorporation¹³¹

1.166 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.

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

1.168 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.

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

1.170 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.

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

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

contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹³²

1.172 With reference to these requirements, the committee notes that the instrument appears to incorporate a number of international double tax agreements.¹³³ However, neither the instrument nor the explanatory statement indicates the manner in which any of those documents is incorporated (that is, as in force from time to time or as in force at a particular time), or how the documents may be accessed free of charge.

1.173 The committee notes that subsection 5(2) of the instrument provides that a reference to a double tax agreement by name is a reference to the agreement so described in section 3AAA or 3AAB of the *International Tax Agreements Act 1953*. Those sections refer respectively to current and former international tax agreements. In relation to each of those agreements, the Act refers to the date and place on which the agreement was completed, and provides a reference to the Australian Treaty Series (which is freely accessible online).¹³⁴

1.174 Nevertheless, in the interests of promoting clarity and intelligibility for users of the instrument, and to ensure that persons interested in or affected by the law have full access to its terms, the committee considers that the instrument or its explanatory statement should set out the manner in which the relevant tax agreements are incorporated, and how those agreements may be accessed free of charge.

1.175 The committee draws the Treasurer's attention to the absence in the instrument and the explanatory statement of information regarding the manner in which the international double taxation agreements are incorporated by the instrument, and how those agreements may be accessed free of charge.

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

133 Subsections (3) and (5) of the instrument.

134 See <http://www.austlii.edu.au/au/other/dfat/treaties/>.

Instrument	Therapeutic Goods Order No. 98 – Microbiological Standards for Medicines 2018 [F2018L01287]
Purpose	Specifies testing requirements for certain medicines
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 19 September 2018). Notice of motion to disallow must be given by 4 December 2018 ¹³⁵

Consultation¹³⁶

1.176 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.

1.177 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.¹³⁷

1.178 With reference to these requirements, the committee notes that, under the heading 'consultation', the explanatory statement to the instrument states:

Consistent with Government best practice regulation requirements for sunseting legislative instruments, the Department, after consultation, has assessed TGO 77 as having operated effectively and efficiently since it came into force in January 2010, and it continues to do so. As such, a regulation impact statement is not required for its successor instrument, TGO 98.¹³⁸

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

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

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

138 Explanatory statement, p. 2.

1.179 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 undertaken, it considers that an overly bare or general description may be insufficient to satisfy the requirements of the Legislation Act. In this instance, the statement that the department has assessed TGO 7, 'after consultation', as having operated effectively and efficiently, does not appear to satisfy the requirement in paragraph 15J(2)(d) that the explanatory statement describe the nature of any consultation that has been undertaken in relation to the instrument.

1.180 In this regard, the committee also notes that the requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Legislation Act relating to consultation. As set out in the committee's guideline on consultation:

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

1.181 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.**

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

Incorporation¹³⁹

1.183 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.

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

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

1.185 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.

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

1.187 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.

1.188 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁴⁰

1.189 With reference to these requirements, the committee notes that the instrument appears to incorporate the following documents:

- a 'default standard';¹⁴¹
- the British Pharmacopoeia;
- the European Pharmacopoeia; and
- the United States Pharmacopoeia-National Formulary.

140 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.

141 For example, section 7 of the instrument provides that, in certain circumstances, medicines must comply with the Test for Sterility and, if applicable, the Bacterial Endotoxin Test, of a default standard.

1.190 However, neither the instrument nor the explanatory statement indicates the manner in which any of those documents is incorporated (that is, as in force from time to time or as in force at a particular time), or how the documents may be accessed free of charge.

1.191 The committee notes that section 3(1) of the TG Act provides that each pharmacopoeia refers to the publication by that name in effect immediately before the commencement of the relevant definition, and to any subsequent amendments or editions of the publication. The committee secretariat's research also indicates that each of the pharmacopoeias is freely available online.¹⁴²

1.192 Nevertheless, in the interests of promoting clarity and intelligibility for users of the instrument, and to ensure that persons interested in or affected by the law have full access to its terms, the committee considers that the instrument or its explanatory statement should set out the manner in which the documents identified at paragraph [1.189] above are incorporated, and indicate where they may be accessed free of charge.

1.193 The committee draws the minister's attention to the absence in the instrument and the explanatory statement of information regarding the manner in which the documents identified at paragraph [1.189] above are incorporated, and how those documents may be accessed free of charge.

142 For the British Pharmacopoeia, see <https://www.pharmacopoeia.com>; for the European Pharmacopoeia, see <http://online.pheur.org/EN/entry.htm>; for the United States Pharmacopoeia – National Formulary, see <https://www.uspnf.com/>.

Further response required

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

1.195 Correspondence relating to these matters is published on the committee's website.¹⁴³

Instrument	Census and Statistics (Information Release and Access) Determination 2018 [F2018L01114]
Purpose	Sets out a framework for the Australian Bureau of Statistics to disclose statistical information
Authorising legislation	<i>Census and Statistics Act 1905</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 16 August 2018). Notice of motion to disallow must be given by 17 October 2018 ¹⁴⁴
Previously reported in	<i>Delegated legislation monitor 10 of 2018</i>

Merits review¹⁴⁵

1.196 In [Delegated legislation monitor 10 of 2018](#),¹⁴⁶ the committee requested the minister's advice as to whether decisions by the Statistician to authorise the disclosure of information, and decisions relating to disclosure under Parts 2 and 3 of the instrument, are subject to merits review; and if not, the characteristics of those decisions that would justify their exclusion from merits review.

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

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

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

146 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 16-17.

Assistant Treasurer's response

1.197 The Assistant Treasurer advised:

The Determination is made under section 13 of the *Census and Statistics Act 1905*, and provides the framework under which information may be disclosed under that Act. The Determination remakes and improves upon the framework that was previously contained in the *Statistics Determination 1983*, which was due to 'sunset' on 1 October 2018.

As noted by the Committee in its *Delegated legislation monitor*, the release of information in accordance with the determination requires the written approval of the Australian Statistician. As a general principle, decisions involving the exercise of administrative discretion that may materially affect an individual's interest should be subject to merits review.

However, consistent with decisions that were made under *the Statistics Determination 1983*, decisions under the Determination are not subject to a general merits review on the basis that the Determination carefully specifies the only circumstances in which information may be disclosed. These conditions are factual and there is no determination or opinion that the Australian Statistician must form to disclose information.

The strict conditions for disclosure contained in the Determination provide appropriate safeguards to protect those individuals and organisations whose information should not be disclosed. Importantly, the Determination does not permit, and is incapable of permitting, the disclosure of information of a personal or domestic nature that is likely to enable the identification of an individual.

The Australian Statistician may also impose certain conditions on the recipients of information that is disclosed under the Determination in respect of the information, where it is appropriate to do so. Such conditions may be imposed to provide additional safeguards for the handling of information, including restrictions about who can access the information and the circumstances under which it can be accessed. While the decision to impose such conditions are not subject to merits review, they can only be applied in respect of those disclosures that require specific undertakings to be given by an individual or the responsible officers of an organisation seeking to obtain information. Individuals or organisations seeking to obtain information under the determination have complete discretion about whether or not to accept the conditions.

The decisions of the Australian Statistician are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* on the basis that they are administrative decisions to which that Act applies and are not covered by any of the applicable exclusions to the Act. This ensures that any concerns about whether the Australian Statistician has validly made a decision under the Determination can be reviewed by the Courts.

Committee's response

1.198 The committee thanks the Assistant Treasurer for his response, and notes his advice that the decisions of the Australian Statistician (Statistician) to approve the disclosure of information under section 8 are exclusively based on whether factual conditions prescribed by the instrument are satisfied, and do not require the Statistician to make a determination or form an opinion. In this regard, the committee notes that, to the extent that decisions are mandatory or procedural in nature (that is, based on an obligation to act on the existence of specified circumstances), this is generally considered an established ground as to when a matter may not be considered suitable for merits review.¹⁴⁷

1.199 However, it remains unclear to the committee whether all of the circumstances in which the Statistician may disclose information under the Determination are sufficiently clear and limited, such that the Statistician would not need to form an opinion or make a determination about them. For example, in the absence of further clarification, it appears to the committee that, under section 11 of the instrument, the Statistician would need to form an opinion as to whether the relevant information falls within the scope of the matters prescribed by paragraphs 11(1)(a) to 11(1)(e).¹⁴⁸

1.200 The committee also notes the Assistant Treasurer's advice that the Statistician may impose certain conditions on the recipients of information where it is appropriate to do so, and such decisions are also not subject to merits review. In such cases, individuals or the responsible officers of an organisation seeking to obtain the information would be required to give specific undertakings in order to access the information, and the committee notes the Assistant Treasurer's advice that such individuals or organisations 'have complete discretion about whether or not to accept the conditions'. However, the committee notes that while individuals or organisations can decide whether to accept the specified conditions of disclosure, this does not address the committee's concerns as to the appropriateness of excluding independent merits review. The committee notes that should a person not

147 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [3.8]-[3.12].

148 Subsection 11(1) provides that statistical information may be disclosed if it relates to an official body (paragraph 11(1)(a)); foreign trade, being statistics derived wholly or in part from customs or import documents (paragraph 11(1)(b)); interstate trade, being statistics which are the result of compilation and analysis of information provided by Tasmania (paragraph 11(1)(c)); building and construction, not being the costs or net returns of individual builders or contractors (paragraph 11(1)(d)); or agricultural, apicultural, poultry, dairying and pastoral activities not being the costs or net returns of individual operators (paragraph 11(1)(e)).

agree to the conditions of disclosure they would have no basis on which to seek review of the decision to impose such conditions.

1.201 The committee requests the Assistant Treasurer's further advice as to:

- the nature of each of the decisions that may be made by the Australian Statistician under paragraphs 11(1)(a) to (e) of the Determination and how, in each instance, such decisions are purely factual and do not require the Australian Statistician to form an opinion or make a determination; and
- the grounds on which it is considered appropriate to exclude merits review of the Australian Statistician's decision to impose conditions on the disclosure of statistical information.

Instrument	Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2018 [F2018L01128]
Purpose	Establishes legislative authority for a spending activity administered by the Department of Defence
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018). Notice of motion to disallow must be given by 12 November 2018 ¹⁴⁹
Previously reported in	<i>Delegated legislation monitor 10 of 2018</i>

Merits review¹⁵⁰

1.202 In [Delegated legislation monitor 10 of 2018](#),¹⁵¹ the committee requested the minister's advice as to the characteristics of decisions regarding the provision of assistance under the Supporting Sustainable Access to Drinking Water program that would justify excluding merits review.

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

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

151 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 26-27.

Minister's Response

1.203 The Minister for Defence advised:

As outlined in the Explanatory Statement (ES) to the Regulations, the purpose of the *Supporting Sustainable Access to Drinking Water* program is to provide sustainable access to drinking water and necessary water infrastructure to property owners in communities surrounding four Defence sites - the Army Aviation Centre Oakey, and RAAF Bases Williamtown, Tindal and Pearce - where environmental site assessments have identified them as using bores containing per- and poly-fluoroalkyl substances (PFAS) above the Australian Drinking Water Guideline values, as their primary source of drinking water.

Taking into consideration the purpose and scope of the program, assistance is available in relatively strict and limited circumstances under this program:

(a) properties affected by PF AS contamination resulting from activities at the above four sites; and

(b) the contamination is above the Australian Drinking Water Guideline values, which is publicly accessible at <https://www.nhmrc.gov.au/guidelines/publications/eh52>.

Criterion (a) is based on the location of the property. Criterion (b) is based on an Australian standard, which is an objective criterion. As outlined in the ES, there is no formal application process for the program or direct funding. The Department of Defence (Defence) works with its environmental consultants to identify and approach affected properties that are eligible for assistance under the program, with bores being sampled to determine the level of PFAS contamination present. The circumstances of each property owner are considered against the program's eligibility criteria.

Under the program, Defence has identified and worked collaboratively with property owners in affected communities to achieve desired outcomes, as directed by the Government. The majority of property owners eligible for the program have already been contacted and Defence continues to work with them to implement support measures to suit each individual's circumstances.

As set out above, the eligibility criteria for the program indicate that the determination of eligibility for assistance is largely, if not wholly, based on matters of fact and scientific evidence obtained during environmental investigations. There is little to no scope for subjective or discretionary decision-making. In this regard, to the extent that decisions under the program are mandatory or procedural in nature (that is, based on an obligation to act on the existence of specified circumstances), they are not considered suitable for external merits review.

Further, in relation to the reconsideration of decisions, it is noted that Defence's internal review process applies principles of administrative law to ensure decisions are reconsidered in a fair, independent and robust manner. If in the unlikely circumstances that a request is refused and the resident seeks reconsideration, a Senior Executive Service officer will review the decision against the program criteria and the individual's circumstances. To enhance confidence in the independence of the reviewing officer and the internal review process, steps are taken to ensure that the initial decision-maker is not involved in the reconsideration process. The reviewing senior officer reconsiders the merits of the request in regards to:

- the individual's initial request;
- the reasoning of the individual in asking for a reconsideration of the decision and any new material provided by the individual as part of the reconsideration process.

Given that independent internal reviews would be carried out by a Senior Executive Service officer, and the clear criteria that the resident must meet for the delegate of the Secretary to provide support under the program, the current review mechanism is consistent with the purpose of the program.

In conclusion, Defence is of the view that the characteristics of the program and the decisions justify their exclusion from merits review.

Committee's response

1.204 The committee thanks the minister for his response, and notes the minister's advice that determinations of eligibility for assistance under the Supporting Sustainable Access to Drinking Water program are largely, if not wholly, based on matters of fact and scientific evidence obtained during environmental investigations. The committee also notes the minister's advice that there is therefore little or no scope for subjective or discretionary decision-making and, to the extent that decisions are mandatory or procedural in nature, they are not considered suitable for external merits review.

1.205 The committee acknowledges that mandatory or automatic decisions are generally considered unsuitable for merits review.¹⁵² However, the committee also notes that, where there is scope for disagreement about whether particular facts have occurred, the automatic or mandatory nature of a decision flowing from those facts will not mean that the decision is inappropriate for review (although the review

152 See Administrative Review Council, *What decisions should be subject to merits review?*, [3.8]-[3.12].

will be confined to ascertaining whether relevant facts have occurred).¹⁵³ In this respect, it appears there may be scope for disagreement regarding facts and evidence obtained during environmental investigations into whether properties have been affected by contamination. Consequently, the committee considers decisions based on such facts and evidence may be suitable for merits review—even if only to determine whether the facts and evidence support a particular finding.

1.206 Additionally, the minister's advice regarding internal reconsideration of decisions made under the program suggests that such decisions may be suitable for merits review. In this regard, the committee notes the minister's advice that, where an individual seeks reconsideration of a decision, a Senior Executive Service (SES) officer will review the decision against the program criteria and the individual's circumstances. The SES officer will reconsider the merits of the individual's request, having regard to the initial request, the individual's reasoning in asking for reconsideration, and any new material provided during the reconsideration process.

1.207 The process for reconsideration of decisions outlined in the minister's response appears to be broadly analogous to the review process undertaken by the Administrative Appeals Tribunal (AAT). It therefore remains unclear to the committee why review by the AAT should not be available in relation to decisions under the program, in addition to the reconsideration of decisions by departmental officers. In this regard, the committee reiterates that it does not consider internal review by departmental officers to constitute sufficiently independent merits review.

1.208 In light of the discussion above, the committee requests the minister's further advice as to why decisions in relation to the provision of support under the Sustainable Access to Drinking Water program would not be subject to independent merits review.

153 See Administrative Review Council, *What decisions should be subject to merits review?*, [3.12].

Advice only

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

Instrument	ASIC Corporations (Amendment) Instrument 2018/697 [F2018L01281]
Purpose	Amends 13 ASIC instruments to facilitate the implementation and operation of the Asia Region Funds Passport in Australia
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled Senate 17 September 2018). Notice of motion to disallow must be given by 29 November 2018 ¹⁵⁴

Matters more appropriate for parliamentary enactment¹⁵⁵

1.210 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).

1.211 Sections 1, 3, 6, 9, 25 and 30 of the instrument amend various Australian Securities and Investments Commission (ASIC) Class Orders. These class orders modify the operation of the *Corporations Act 2001* (Corporations Act) in relation to particular persons, entities and schemes, and exempt persons and entities from the operation of the Corporations Act in certain circumstances.

1.212 The instrument is made under subsections 341A(1), 665A(1), 601QA(1), 926A(2), 1020F(1) and 1217(1) of the Corporations Act. Those provisions authorise ASIC to exempt persons from specific Chapters and Parts of the Corporations Act, and to declare that the specific Chapters and Parts of the Act apply as if specified

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

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

provisions were omitted, modified or varied.¹⁵⁶ A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such provisions limit parliamentary oversight and may subvert the appropriate relationship between the Parliament and the executive.

1.213 The provisions in the Corporations Act under which this instrument is made appear to be akin to Henry VIII clauses, as they authorise delegated legislation to modify the operation of primary legislation. In this regard, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 1217 of the Corporations Act when the Corporations Amendment (Asia Region Funds Passport) Bill 2018 was introduced into Parliament. The Scrutiny of Bills committee noted that it has significant concerns where a provision authorises delegated legislation to modify the operation of, or exempt persons or entities from, primary legislation.¹⁵⁷

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

156 For example, section 665A allows ASIC to exempt a person from the operation of Chapter 6A, and to declare that the Chapter applies to a person as if specified provisions were omitted, modified or varies as specified in the declaration.

157 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, pp. 18-22; *Scrutiny Digest 6 of 2018*, pp. 79-88.

Instrument	Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2018 (No. 1) [F2018L01331]
Purpose	Determines the amount of the instalment of levy for 2018-19
Authorising legislation	<i>Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018) Notice of motion to disallow must be given by 6 December 2018 ¹⁵⁸

Matters more appropriate for parliamentary enactment¹⁵⁹

1.215 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).

1.216 Section 8 of the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Industry Contribution Act) imposes a levy on certain entities ('leviable entities') that are regulated and supervised by the Australian Transaction Reports and Analysis Centre (AUSTRAC). The explanatory statement to the instrument states that the purpose of this levy is to recover the costs of AUSTRAC's regulatory and intelligence functions.¹⁶⁰

1.217 Section 7 of the Industry Contribution Act provides that the levy is payable in instalments. Subsection 9(1) of the Industry Contribution Act allows the minister, by legislative instrument, to determine the amount of an instalment of levy payable by leviable entities for a particular financial year. Paragraph 9(2)(b) of that Act places a cap on the total amount of levy payable in a financial year. The cap is set at two times the sum of all amounts appropriated by Parliament for the purposes of AUSTRAC for the relevant financial year.

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

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

160 Explanatory statement, p. 1.

1.218 The present instrument was made under subsection 9(1) of the Industry Contribution Act. It determines the amount of the first instalment of levy payable by each leviable entity for the 2018-19 financial year.

1.219 The levy imposed under the Industry Contribution Act, and set by the instrument, appears to be a tax. In the committee's view, one of the most fundamental functions of the Parliament is to levy taxation. Consequently, the committee considers it is for the Parliament, rather than makers of delegated legislation, to set rates of tax. While recognising that the instrument is lawfully made, and noting that the Industry Contribution Act places a cap on the total amount of levy that may be imposed, the committee emphasises that the imposition of tax is more appropriate for enactment in primary legislation.

1.220 The committee draws the Senate's attention to the setting of the amount of an instalment of a levy (which appears to be a tax) in delegated legislation.

Instrument	CASA EX100/18 — Flight Examiner Rating for CAO 82.0 Check Pilots Exemption 2018 [F2018L01228]
Purpose	Exempts holders of a check pilot approval from the requirement to hold a flight examination rating when conducting certain operator proficiency checks
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Portfolio	Infrastructure, Regional Development and Cities
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ¹⁶¹

Incorporation¹⁶²

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

1.222 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁶³

1.223 With reference to the above, the committee notes that the instrument appears to incorporate 'the operator's approved training and checking system' (training and checking system), as in force from time to time. The explanatory

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

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

163 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.

statement confirms that the training and checking system is incorporated by reference.¹⁶⁴ The explanatory statement further states that:

Each affected aircraft operator will have an approved training and checking system that was prepared by the operator and approved by CASA.¹⁶⁵

1.224 No further information is provided as to the nature of the training and checking system. It is therefore unclear to the committee whether the description of the training and checking system in the explanatory statement is sufficiently precise to enable people other than operators to identify the relevant training and checking system, such as would satisfy the requirement in paragraph 15J(2)(c) of the Legislation Act.

1.225 With regard to access to the training and checking system, the explanatory statement explains that the approved training and checking system is available to the operator and the pilots who are affected by the instrument, but is subject to copyright and may not otherwise be publicly available.¹⁶⁶ In this regard, the explanatory statement also states that:

Usually, where practicable, by prior arrangement with CASA, copies of...documents can usually be made available for viewing free of charge at any office of CASA. However, given the large number and variety of approved training and checking systems, it is not practicable for these documents to be made available by CASA. CASA considers it extremely unlikely that the owners of the documents would sell CASA the copyright, such that CASA could make the document freely available, at a price that would be an effective and efficient use of CASA funds.¹⁶⁷

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

164 CASA EX100/18 – Flight Examiner Rating for CAO 82.0 Check Pilots Exemption 2018, subsection 6(2); Explanatory statement, p. 2.

165 Explanatory statement, p. 3.

166 Explanatory statement, p. 3.

167 Explanatory statement, p. 3.

1.227 The committee draws to the minister's attention to the broad description in the explanatory statement of the documents incorporated by the instrument, and to the apparent lack of access to those documents for parties who might be affected by, or otherwise interested in, the law.

Instrument	Fisheries Management (Logbooks for Fisheries) Determination 2018 [F2018L01310]
Purpose	Determines what logbooks need to be kept and maintained by fishing concession holders in respect of their activities in Commonwealth fisheries
Authorising legislation	<i>Fisheries Management Act 1991</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 September 2018). Notice of motion to disallow must be given by 5 December 2018 ¹⁶⁸

Incorporation¹⁶⁹

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

1.229 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁷⁰

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

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

170 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.

1.230 With reference to the matters above, the committee notes that the instrument incorporates the following Commonwealth Gazettes:

- Gazette No. GN 23, Wednesday 15 June 2011;
- C2017G00101;
- C2013G01762;
- C2014G01056;
- C2016G00444;
- C2016G00442;
- C2016G00443;
- C2016G00445;
- C2017G01174; and
- G2018CG00407.

1.231 The explanatory statement explains that 'publishing the specific form and content of logbooks in the Commonwealth Gazette significantly reduces the complexity and length of the Determination'.¹⁷¹ However, neither the instrument nor the explanatory statement indicates where the Gazettes can be freely accessed.

1.232 In this case, the committee has observed that the documents appear to be available for free online on the Federal Register of Legislation; however, it notes that Gazette No GN 23 is only available under 'Historical Gazettes'.¹⁷² Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the explanatory statement to provide details of the website where the document can be accessed.

1.233 The committee draws to the minister's attention the absence of information in the explanatory statement regarding access to the documents incorporated by reference in the instrument.

171 Explanatory statement, p. 3.

172 Gazette No. GN 23 is available under 'Historical Gazettes' on the Federal Register of Legislation, at <https://www.legislation.gov.au/content/HistoricGazettes2011>. By contrast, the other Gazettes referred to appear to be available by searching 'Individual Notices' by 'Gazette Number' on the Federal Register of Legislation, at <https://www.legislation.gov.au/Browse/ByYearNumber/Gazettes/InForce/0/0/>.

Instrument	Medical Device Standards Order (Endotoxin Requirements for Medical Devices) 2018 [F2018L01280]
Purpose	Specifies endotoxin limits and endotoxin testing requirements for certain medical devices
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 17 September 2018). Notice of motion to disallow must be given by 29 November 2018 ¹⁷³

Incorporation¹⁷⁴

1.234 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.

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

1.236 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.

1.237 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

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

174 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 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.

1.238 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.

1.239 The committee therefore expects an instrument or its explanatory statement to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁷⁵

1.240 With reference to these requirements, the committee notes that the instrument appears to incorporate a 'default standard'.¹⁷⁶ The explanatory statement states that the term 'default standard' is defined in subsection 3(1) of the *Therapeutic Goods Act 1989* (TG Act) 'as, in effect, any of the British Pharmacopoeia, European Pharmacopoeia or United States Pharmacopoeia-National Formulary'.¹⁷⁷ However, neither the instrument nor the explanatory statement indicates the manner in which the default standard, or any of the pharmacopoeias, are incorporated, or how those documents may be accessed free of charge.

1.241 The committee notes that section 3(1) of the TG Act provides that each pharmacopoeia refers to the publication by that name in effect immediately before the commencement of the relevant definition, and to any subsequent amendments

175 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.

176 In this regard, section 7 of the instrument provides that certain medical devices to which the instrument applies must be tested using a bacterial endotoxin test methodology set out in a default standard or, if applicable, an alternative method that is validated.

177 ES, pp. 4-5.

or editions of the publication. The committee secretariat's research also indicates that each of the pharmacopoeias is freely available online.¹⁷⁸

1.242 Nevertheless, in the interests of promoting clarity and intelligibility for users of the instrument, and to ensure that persons interested in or affected by the law have full access to its terms, the committee considers that the instrument or its explanatory statement should set out the manner in which the default standard and associated pharmacopoeias are incorporated, and to indicate where those documents may be accessed free of charge.

1.243 The committee draws the minister's attention to the absence in the instrument and the explanatory statement of information regarding the manner in which the 'default standard' and associated pharmacopoeias are incorporated, and how those documents may be accessed free of charge.

Instrument	Therapeutic Goods (Permissible Ingredients) Determination No. 3 of 2018 [F2018L01342]
Purpose	Replaces the Therapeutic Goods (Permissible Ingredients) Determination No. 2 of 2018 and makes a number of changes to that determination
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 15 October 2018) Notice of motion to disallow must be given by 6 December 2018 ¹⁷⁹

Incorporation¹⁸⁰

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

178 For the British Pharmacopoeia, see <https://www.pharmacopoeia.com>; for the European Pharmacopoeia, see <http://online.pheur.org/EN/entry.htm>; for the United States Pharmacopoeia – National Formulary, see <https://www.uspnf.com/>.

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

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

document to contain a description of that document and indicate how it may be obtained.

1.245 The committee is concerned to ensure that every person interested in or affected by the law should be able to readily access its terms, without cost. The committee therefore expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be readily and freely accessed. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.¹⁸¹

1.246 With reference to the above, the committee notes that the instrument incorporates the following legislation and documents, as in force from time to time:

- *Animal Products Act 1999* (New Zealand);
- *Animal Welfare Act 1999* (New Zealand);
- *British Pharmacopoeia*;
- *European Pharmacopoeia*;
- *United States Pharmacopeia – National Formulary*; and
- Food Chemicals Codex (FCC).¹⁸²

1.247 The explanatory statement explains that versions of these documents are available through 'a number of public libraries allowing public access'.¹⁸³ However, the explanatory statement does not provide any indication of the specific libraries where the document may be accessed. As set out in the committee's *Guideline on incorporation of documents*, the committee's expectation is that, where access to incorporated documents is provided through public libraries, the explanatory statement would either specify the public libraries through which access is provided, or indicate that access may be provided through any public library in Australia.

1.248 Additionally, the instrument also appears to incorporate the document titled 'Expert consultation on oral rehydration salts formulation'.¹⁸⁴ The instrument indicates that the document is incorporated as in force on 18 July 2001. However, neither the instrument nor its explanatory statement indicates where that document may be accessed free of charge. In this instance, the committee secretariat's

181 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.

182 <http://online.foodchemicalscodex.org>.

183 Explanatory statement, p. 2.

184 See Volume 5, table items 4044 (Potassium Chloride) and 4517 (Sodium Bicarbonate).

research indicates that the document may be accessed for free online.¹⁸⁵ However, in the interests of promoting the clarity and intelligibility of legislative instruments for interested or affected persons, the committee considers that a best-practice approach would be for the explanatory statement to provide details of where the document can be accessed.

1.249 The committee draws to the attention of the minister and the Senate the lack of information in the explanatory statement as to:

- **the specific public libraries through which the documents identified at paragraph [1.246] above may be accessed; and**
- **free access to the 'Expert consultation on oral rehydration salts formulation', which appears to be incorporated by the instrument.**

185 <http://rehydrate.org/ors/expert-consultation.html>.

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

Instrument	Adult Disability Assessment Determination 2018 [F2018L01106]
Purpose	Sets out a method for assessing the care requirements for adult persons with disability
Authorising legislation	<i>Social Security Act 1991</i>
Portfolio	Social Services
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow given on 20 September 2018 ²

Personal rights and liberties: privacy³

2.3 In [Delegated legislation monitor 10 of 2018](#),⁴ the committee requested the minister's advice as to how personal information collected in accordance with the instrument about people with disabilities would be used and managed; and what safeguards are in place to protect the privacy of people with disabilities in relation to that information.

Minister's response

2.4 The Minister for Families and Social Services advised:

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

2 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

4 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 1-4.

Under the Determination, personal information is collected by the Department of Human Services (DHS) and used to determine qualification for, and payability of, Carer Payment (Adult) and/or Carer Allowance (Adult) in accordance with...requirements in the *Social Security Act 1991*.

In remaking the Determination there has been no change to current practice for collecting, managing and protecting the personal information of people with disabilities or their carers.

Division 3 of Part 5 of the *Social Security (Administration) Act 1999* outlines confidentiality arrangements, specifically for the protection of personal information collected for the purposes of administering social security law. Sections 203 and 204 outline the circumstances that constitute unauthorised access to, or use of, information including protected information. An offence under these sections is punishable on conviction by imprisonment for up to two years.

The *Privacy Act 1988* also requires DHS to have a privacy policy, which outlines what kinds of personal and sensitive information is collected, why this information is collected, and how it is handled.

Details of the policy are provided at www.humanservices.gov.au/organisations/aboutus/publications-and-resources/privacy-policy.

DHS takes reasonable steps to protect people's personal information against misuse, interference and loss, and from unauthorised access, modification or disclosure. These steps include:

- storing paper records securely as per Australian Government security guidelines;
- only accessing personal information on a need-to-know basis and by authorised personnel;
- monitoring system access which can only be accessed by authenticated credentials;
- ensuring buildings are secure; and
- regularly updating and auditing storage and data security systems.

Division 3 of Part 5 of the *Social Security (Administration) Act 1999* binds any person dealing with protected information, including personal information. In the exercise of the Secretary's Delegation to the Chief Executive Centrelink, to administer Carer Payment and Carer Allowance, DHS officers are bound by all provisions in the *Social Security (Administration) Act 1999*, including Division 3 of Part 5.

Committee's response

2.5 The committee thanks the minister for his response, and notes the minister's advice that personal information collected under the instrument would be used to determine eligibility for certain carer payments and allowances under the

Social Security Act 1991 (Social Security Act), and to determine the amounts of those payments.

2.6 The committee also notes the minister's advice that Division 3, Part 5 of *Social Security (Administration) Act 1999* (Administration Act) outlines confidentiality arrangements for the protection of personal information. These include the imposition of significant penalties for unauthorised access to, and use of, protected information. The committee further notes the advice that this applies to officers who administer carer payments and allowances.

2.7 The committee also notes the minister's advice that the department has a comprehensive privacy policy in place (as required under the *Privacy Act 1988*), and takes reasonable steps to protect personal information against misuse, interference and loss, and from unauthorised access, modification or disclosure.

2.8 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.

2.9 The committee has concluded its examination of this matter.

Merits review⁵

2.10 In [Delegated legislation monitor 10 of 2018](#),⁶ the committee requested the minister's advice as to whether decisions by the secretary to approve persons as treating health professionals, and to request the completion of replacement questionnaires, are subject to merits review, and, if so, the specific provisions that would provide for merits review; or, if not, the characteristics of those decisions that would justify their exclusion from merits review.

Minister's response

2.11 The Minister for Families and Social Services advised:

In relation to the omission of the previous Part 3 review provisions from the Determination, decisions made under instruments under the *Social Security Act 1991* are part of social security law. Decisions made under the social security law are reviewable internally under Part 4 of the *Social Security (Administration) Act 1999* and by the Administrative Appeals Tribunal under Part 4A of that Act.

As outlined in the Explanatory Statement, this Act was not in force when the 1999 Determination was made. Therefore, the specific provisions for

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

6 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 1-4.

review are not included in the Determination but are available under the *Social Security (Administration) Act 1999*. There is no change in practice.

Committee's response

2.12 The committee thanks the minister for his response, and notes the minister's advice that decisions made under the instrument are reviewable internally under Part 4 of the Administration Act, and externally by the Administrative Appeals Tribunal (AAT) under Part 4A of that Act.

2.13 In the interests of promoting clarity and intelligibility, 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.

2.14 The committee also considers that it would be appropriate for the explanatory statement to specify which particular provision or provisions in the Administration Act make instruments made under the Social Security Act part of the social security law, such that Part 4A of the Administration Act applies to decisions made under the instrument.

2.15 The committee has concluded its examination of the instrument.

Instrument	Australian Federal Police Regulations 2018 [F2018L01121]
Purpose	Provide for matters related to the operation and administration of the Australian Federal Police
Authorising legislation	<i>Australian Federal Police Act 1979</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 20 August 2018). Notice of motion to disallow must be given by 18 October 2018 ⁷

Access to incorporated documents⁸

2.16 In [Delegated legislation monitor 10 of 2018](#),⁹ the committee requested the minister's advice as to where *AS/NZS 4308:2008 Procedures for specimen collection*

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

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

9 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 5-14.

and the detection and quantification of drugs of abuse in urine can be accessed free of charge; and requested that the explanatory statement be updated to include this information.

Minister's response

2.17 The Minister for Home Affairs advised:

AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (the Standard) is an Australian Standard of Standards Australia. The Copyright Act 1968 (Cth) has the effect of making the Standard publicly available only in specific circumstances.

The Standard is freely and readily available to all persons directly affected by the law, being Australian Federal Police (AFP) appointees. All such persons have full access to the Standard via an online portal accessible on the AFP intranet. The Standard is also available to prospective or past AFP appointees, as well as persons generally interested in these laws, at the National Library of Australia. However, the Standard cannot be made public by the AFP in light of copyright restrictions.

As noted by the Committee, concerns arise when external materials incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law. However, any detriment caused by incorporated material not being freely and readily available to the public at large must be balanced against the benefit gained from utilising that incorporated material. The proposed amendment strikes an appropriate balance.

Copyright restrictions

The Standard is copyright protected by Standards Australia, which has provided SAI Global with exclusive distributor rights. The AFP's subscription agreement with SAI Global allows it to use and access the relevant standard for internal business purposes only. The AFP is not permitted to copy, distribute or allow access to any third party. As a result of the proprietary rights of Standards Australia, Standards Australia/Standards New Zealand and SAI Global, the AFP is not permitted to make the Standard freely and readily available to the general public.

The benefit of incorporating the relevant standard

The ability for the Australian Federal Police Regulations 2018 (the Regulations) to incorporate relevant aspects of standards published by Standards Australia or Standards Australia/Standards New Zealand is vital to ensuring the AFP applies best practice in its approach to alcohol and drug testing.

There is an expectation from employees that drug tests will be carried out pursuant to current industry standards. Standards Australia and Standards Australia/Standards New Zealand produce standards that are based on

sound industrial, scientific and consumer experience and are regularly reviewed to ensure they keep pace with new technologies.

The Standard includes highly technical scientific procedures, particularly relating to testing methods, apparatus and calculations. These procedures are carried out by trained technicians from an independent company, on behalf of the AFP, in accordance with the Regulations.

Incorporating the Standard into the Regulations supports the integrity of test results and ensures there is no discrepancy between the procedures and testing methods used by the company contracted to conduct drug tests and the Standard referenced in the Regulations.

This information will be included in a supplementary explanatory statement to the Regulations.

Committee's response

2.18 The committee thanks the minister for his response. The committee notes the minister's advice that *AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* (the Standard) is freely and readily available to Australia Federal Police (AFP) appointees through the AFP intranet, and is available to other persons generally interested in the law through the National Library of Australia.

2.19 The committee further notes the minister's advice that copyright restrictions prevent the AFP from making the Standard freely and readily available to the general public. The committee also notes the advice that, despite these restrictions, it is necessary to incorporate the Standard to preserve the integrity of drug testing processes carried on in accordance with the instrument.

2.20 The committee notes that a supplementary explanatory statement, containing the information included in the minister's response, has now been registered on the Federal Register of Legislation (FRL).

2.21 The committee has concluded its examination of this matter.

Review of employment decisions¹⁰

2.22 In [Delegated legislation monitor 10 of 2018](#),¹¹ the committee requested the minister's advice as to the processes in place for reviewing employment decisions made under the instrument.

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

11 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 5-14.

Minister's response

2.23 The Minister for Home Affairs advised:

The AFP has review processes in place for a number of different types of employment decisions. These processes are outlined below.

Processes for the suspension of AFP employees

When considering a decision to suspend an employee from duty for suspected misconduct as per Section 8 of the Regulations, it often for reasons that require an immediate response. In such circumstances, however, the AFP employee is provided with an opportunity to make a submission immediately after the suspension decision is made to the suspension decision-maker. This process is regularly practiced. Suspension decisions under the Regulations are subject to administrative law requirements, including a requirement that employees be afforded procedural fairness in decision-making.

Review of suspension decisions are also conducted at regular intervals and may also be conducted at the request of the employee if, for example, the employee raises matters relevant to hardship or other changes of circumstances.

Additionally, as a suspension decision is a 'decision made under an enactment', an employee can seek judicial review under the Administrative Decisions (Judicial Review) Act 1977 or under the general law (prerogative writs).

Processes for the filling of vacant positions

The AFP's National Guideline of Recruitment provides that any internal applicant at the Executive Level and below has a period of seven calendar days to request a review of the recruitment process by directly contacting the delegate. The delegate must not sign off on the outcome of the recruitment process until the conclusion of the seven day review period.

Decisions under the AFP Enterprise Agreement 2017-2020

Employment decisions arise from application of the AFP Enterprise Agreement 2017-2020 (the EA). Section 71 of the EA provides a process for dispute resolution for the purposes of preventing and settling disputes that may arise from the EA.

Underperformance rating in a Performance Development Agreement (PDA)

Section 17 of the 'PDA Procedures' document provides the mechanism for a performance review audit in these circumstances, where the employee and the business area engage in a tiered approach to review. This is a similar approach to the review process that is applicable to disputes arising from the application of the EA.

Other review processes

Outside of these avenues, an employee may seek legal review of an employment decision through the Federal Court system. The Fair Work Commission has no jurisdiction to review matters that arise outside of the industrial framework, unless they involve an unfair dismissal or general protections claim.

Committee's response

2.24 The committee thanks the minister for his response. In relation to the review of suspension decisions made under section 8 of the instrument, the committee notes the minister's advice that such decisions are subject to regular internal review (including at the request of the relevant employee), and that employees may seek judicial review of suspension decisions under the *Administrative Decisions (Judicial Review) Act 1977* and under the general law.

2.25 While noting this advice, the committee emphasises that it does not generally consider the availability of internal review or judicial review to be sufficient justification for excluding external merits review (for example, by the Administrative Appeals Tribunal or another independent body).

2.26 In relation to employment decisions more generally, the committee notes the minister's advice that employment decisions arise from the application of the AFP Enterprise Agreement 2017-202 (EA), and that section 71 of the EA provides for a dispute resolution process in relation to disputes arising under that agreement. The committee notes that it appears that this dispute resolution process provides for disputes to be escalated to the Fair Work Commission (FWC), which may ultimately make a binding determination on the relevant parties.¹²

2.27 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. In particular, the committee considers that it would be useful for the explanatory statement to include information as to the availability of external review and dispute resolution processes (such as review and arbitration by the FWC).

2.28 The committee has concluded its examination of this matter.

Search and entry powers¹³

2.29 In [Delegated legislation monitor 10 of 2018](#),¹⁴ the committee requested the minister's more detailed advice as to:

12 See subsection 71(12) of the Australian Federal Police, *Enterprise Agreement 2017-2020*.

13 Scrutiny principle: Senate Standing Orders 23(3)(b) and (d).

- the circumstances in which it is envisaged that force would be used in the execution of a search warrant, and any safeguards in place;
- the circumstances in which it is envisaged that persons would be called on to assist authorised officers in the execution of warrants; and
- the types of persons it is envisaged may be called on to assist authorised officers in the execution of warrants, and their qualifications and expertise.

2.30 The committee also sought the minister's advice as to the appropriateness of amending the instrument to provide that, where an authorised officer obtains the assistance of another person in executing a warrant, the authorised officer must be satisfied that the person assisting has appropriate expertise, skills and training to assist in the execution of the warrant.

2.31 The committee otherwise drew its concerns regarding the appropriateness of including in delegated legislation the power to grant and execute warrants to search for and seize returnable property to the attention of the Senate.

Minister's response

2.32 The Minister for Home Affairs advised:

Use of force

Paragraph 63(3)(b) of the Regulations places appropriate limitations on the use of force during execution of warrants by adding a safeguard to require reasonable use of force. This ensures the scope of the power is not inappropriately broad and limits the power further than the previous Australian Federal Police Regulations 1979 (the previous Regulations).

Paragraph 63(3)(b) of the Regulations only permits officers to use force against persons or property that is both 'reasonable' and 'necessary' in the circumstances. For example, it might be reasonable and necessary to cut a padlock on a safe, drawer or door to gain access to a particular area where no key can be procured. Similarly, it may be reasonable and necessary to move furniture to search the area behind or below this furniture.

The use of force is subject to strict safeguards. Force may only be used against a person or property where it is necessary to ascertain whether returnable property is to be found on the premises or place specified in the warrant, and the degree of force used must be reasonable in the circumstances. Any use of force against a person or property that does not comply with these requirements would be outside the scope of the warrant and may attract criminal and civil liability. Any unauthorised use of force by officers may also be subject to internal review and review by the Commonwealth Ombudsman as appropriate.

Use of force and professional standards training is also compulsory for all AFP members. Members are required to refresh this training annually and pass a minimum level of proficiency and understanding. This training requires members to exercise restraint and act in proportion to the legitimate objective to be achieved.

Assisting authorised officers in the execution of warrants

In executing a warrant, an officer may draw on the assistance of a person in a variety of ways, including by requesting that they provide information as to the location of particular returnable property or how to access this property.

Persons who may be called on to provide assistance could include the occupier of the property (who may have knowledge as to the layout of the property) or technical experts (who may have knowledge on how to extract information from a particular device).

Paragraph 63(3)(b) of the Regulations is substantially similar to the iteration in the previous Regulations. The key difference in the Regulations is that a member of the AFP who is authorised to execute warrants can use any assistance they think is appropriate during the execution of the warrant, whereas previously the power to search premises, and seek assistance, was only directly granted to the AFP Commissioner.

The Committee's proposed amendments would not be appropriate, as it would prevent an executing officer from seeking assistance from persons who, while not trained in executing warrants, must cooperate with an officer to ensure the successful execution of a warrant.

For example, an officer may request that a person present on the property provide them with a key to open a safe containing returnable property. This person may not have the appropriate expertise, skills and training to execute a warrant more generally, but their assistance will be vital in locating and seizing the property in question.

I acknowledge, however, that the policy aim underpinning this proposed amendment could be achieved by only allowing an officer to obtain such assistance as is 'reasonable and necessary' in the circumstances. This accords with existing search warrant provisions under section 3G of the Crimes Act 1914 (Cth) and will ensure that an officer can request assistance on basic tasks from those present, while seeking assistance on more advanced tasks only from appropriately qualified persons.

If the Committee agrees with this approach, I will seek to have these amendments progressed in a separate legislative instrument at a later date.

Committee's response

2.33 The committee thanks the minister for his response, and notes the minister's advice that the instrument places appropriate limitations on the use of force during the execution of warrants. In this regard, the committee notes the advice that the

instrument only permits the use of force that is both reasonable and necessary in the circumstances, and that the excessive or unauthorised use of force may attract criminal and civil liability, and may also be subject to internal review and review by the Commonwealth Ombudsman.

2.34 The committee further notes the minister's advice that use of force and professional standards training is compulsory for all AFP members, and the advice that members are required to refresh this training annually, including by demonstrating minimum levels of proficiency and understanding.

2.35 In relation to persons who may be called on to assist authorised officers, the committee notes the minister's advice that officers obtain assistance in a variety of ways, including by requesting that persons provide information as to the location of, and access to particular returnable property. The committee also notes the advice that the persons who may be called upon to provide assistance include the occupier of the relevant property and technical experts (who may, for example, have knowledge about how to extract information from a particular device).

2.36 The committee further notes the minister's advice that it would not be appropriate to amend the instrument to provide that authorised officers be satisfied that persons assisting have appropriate expertise, skills and training, because such a requirement may prevent authorised officers from seeking assistance from persons who lack appropriate training but whose assistance is vital to the successful execution of a warrant.

2.37 However, the committee welcomes the minister's undertaking to progress amendments to the instrument to provide that an authorised officer may only obtain such assistance as is 'reasonable and necessary' in the circumstances. The committee notes the minister's advice that such a provision would ensure that officers could request assistance on basic tasks from those present, while seeking assistance on more advanced tasks only from appropriately qualified persons.

2.38 The committee considers that it would be appropriate for the information provided by the minister regarding the limitations on the use of force and the training provided to authorised officers 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.

2.39 The committee has concluded its examination of this matter.

Disposal of property¹⁵

2.40 In [Delegated legislation monitor 10 of 2018](#),¹⁶ the committee requested the minister's detailed advice as to:

- why it is considered appropriate to provide the Commissioner with a broad discretion to order the disposal of property that he or she considers to be offensive;
- the appropriateness of amending the instrument to insert (at least high-level) guidance concerning what constitutes 'offensive' property for the purposes of section 76 of the instrument;
- why it is considered necessary and appropriate to confer a broad immunity from suit on the Commonwealth in relation to the disposal of property under sections 75 and 76 of the instrument; and
- why it is considered appropriate not to permit a property owner to claim the market value of property under section 77 that has been lawfully disposed of under sections 74 and 76.

Minister's response

2.41 The Minister for Home Affairs advised:

Disposal of 'offensive' property

The power to dispose of 'offensive' property under section 76 of the Regulations is appropriate, as it ensures that the AFP is not compelled to preserve property that is objectively contrary to the standards of morality, decency and propriety generally accepted by a reasonable person.

If this power was not provided, the AFP would be compelled to hold on to material that may be unacceptably racist, violent or sexual in nature. This can include, for example, child pornography and child abuse material.

Before property can be disposed of under paragraph 76(1)(b), the AFP Commissioner must be 'reasonably satisfied' (emphasis added) that the property is 'offensive in nature'. The term 'reasonably' imports an objective assessment of the offensive nature of the property, and property will not be 'offensive' merely because the Commissioner takes offence.

The fact that the term 'offensive' is not defined allows community standards and common sense to be imported into a decision about whether property is in fact 'offensive' in nature. The term 'offensive' has also been used, without clarification, across the Commonwealth statute book. The term is used in legislation prohibiting offensive names on

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

16 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 5-14.

passports, offensive business names and offensive victim impact statements.

I have also approved a supplementary explanatory statement, which provides that, in assessing whether property is 'offensive in nature' under paragraph 76(1)(b) of the Regulations, the Commissioner may have regard to the following (non-exhaustive) factors:

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) of the property, and
- the general character of the property (including whether it is of a medical, legal or scientific character).

This guidance makes it clear that whether property is 'offensive in nature' is an assessment which must be made on reasonable grounds, taking into account the nature of the material and standards accepted by reasonable adults.

Immunity from suit and market value compensation

The immunity from suit provisions under sections 75 and 76 of the Regulations, and narrow eligibility criteria for claiming the market value of property under section 77, ensure that the AFP is not punished for disposing of property, or retaining it for law enforcement purposes, in an appropriate manner.

The limited circumstances where it is appropriate for the AFP to be immune from suit could include situations where:

- the AFP disposes of claimable property after taking reasonable action to contact the owner of the property and four months have elapsed since the property came into AFP's custody (section 72)
- the AFP disposes of claimable property that has been held for evidential use as the Commissioner is reasonably satisfied that a person with a valid claim to the property cannot be located or does not want the property (section 73)
- the AFP disposes of property that would have perished after a short period of time (such as dairy products or fruits) (section 74), or
- the AFP disposes of property where reasonably satisfied that it represents a danger to public health and safety (section 76).

If a person was entitled to bring a suit to claim the market value of the property in these circumstances, the AFP would be financially penalised for dealing with the property in an appropriate manner.

However, the Commonwealth's general immunity from suit provided by subsections 75(2) and 76(5) of the Regulations is balanced with other

provisions allowing for a person to claim value or proceeds in the property. Section 77 allows the owner of the property to make a claim for the market value of the property at the time it was disposed of where the circumstances required to lawfully dispose of the property under sections 72, 73, 74 or 76 did not exist. Also, section 78 allows a person to obtain the proceeds of sale where the property has been sold under sections 72, 73 or 74.

For example, the AFP may decide to destroy a large quantity of goat's milk (valued at \$500) under paragraph 74(1)(b) of the Regulations as it was perishable and due to expire the day after it came into the AFP's possession. If the owner of this milk was entitled to claim its market value before disposal, the AFP would effectively incur a \$500 financial penalty for not finding a buyer for this milk at short notice.

If, on the other hand, the AFP managed to sell the milk at short notice at \$400, the AFP would incur at least a \$100 penalty (the difference between the \$400 sale price and the \$500 market price). Section 78 of the Regulations instead provides that the owner of the milk would be entitled to the \$400 sale price, less the AFP's reasonable costs for storing the milk, ensuring that the AFP is not financially rewarded or punished for dealing with the property appropriately.

Section 77 of the Regulations, however, would appropriately entitle a person to the market value of the property where the basis for disposal did not exist. If the AFP mischaracterised the substance as perishable goat's milk and destroyed it on this basis, but the substance was in fact non-perishable white paint, the claimant would be entitled to the full market price of this paint under section 77.

The provisions in question are therefore appropriate, as they strike a vital balance between providing compensation to those with an interest in property, while ensuring that the AFP is not financially penalised for dealing with property in an appropriate manner.

Committee's response

2.42 The committee thanks the minister for his response, and notes the minister's advice that the purpose of the Commissioner's powers under section 76 of the instrument regarding 'offensive' property is to ensure that the AFP is not compelled to preserve property that is objectively contrary to the standards of decency and propriety.

2.43 The committee also notes the minister's advice that the lack of a definition of the term 'offensive' enables the Commissioner to rely on community standards and common sense when determining whether property is offensive. The committee also notes the advice that the Commissioner must be 'reasonably' satisfied that property is offensive before exercising his or her powers to dispose of it, and that this requirement imports an objective assessment of the offensive nature of the property

(that is, the property will not be 'offensive' merely because the Commissioner takes offence).

2.44 Regarding sections 75, 76 and 77 of the instrument, the committee notes the minister's advice that the provisions strike an appropriate balance between providing compensation to people with an interest in the property and ensuring that the AFP is not financially penalised for dealing with the property in an appropriate manner. In this regard, the committee notes the advice that the immunity conferred by sections 75 and 76 of the instrument would only apply in limited circumstances.

2.45 The committee further notes the minister's advice that the immunity from suit provided by sections 75 and 76 is balanced by other provisions which allow property owners to claim the market value of property in certain circumstances.

2.46 The committee notes that a supplementary explanatory statement, containing the information included in the minister's response, has now been registered on the FRL. The committee considers it would be useful if the explanatory statement were also amended to include the information in the minister's response regarding immunity from suit and market value compensation.

2.47 The committee has concluded its examination of this matter.

Subdelegation¹⁷

2.48 In [*Delegated legislation monitor 10 of 2018*](#),¹⁸ the committee sought the minister's more detailed advice as to why it is considered necessary and appropriate to allow the Commissioner to delegate any of their powers, functions and duties under the instrument to any employee of the Australian Federal Police, and to any special member.

2.49 The committee also sought the minister's advice as to the appropriateness of amending the instrument to require that the Commissioner be satisfied that persons to whom powers, functions and duties are delegated have the expertise appropriate to the powers delegated.

Minister's response

2.50 The Minister for Home Affairs advised:

The delegation provision under section 79 of the Regulations is intended to give the AFP sufficient flexibility to ensure that it can fulfil its statutory functions efficiently and effectively. Allowing for the delegation of the AFP Commissioner's powers to AFP employees, special members and the Deputy Commissioner is also consistent with the delegation provisions

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

18 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 5-14.

under subsection 69C(1) of the *Australian Federal Police Act 1979* (Cth) (the AFP Act), as well as equivalent delegation powers under other law enforcement legislation.

Many of these powers, duties and functions are administrative and transactional in nature.

For example, the return of found property by the AFP to lawful owners occurs on a daily basis. A typical scenario is a person finding a wallet and handing it to a police officer. If the owner attends the same police station to report the loss a few hours later, the police officer can immediately return it to the owner. To ensure the AFP operates effectively to meet public expectations, all police officers have been delegated power to return property under section 71 of the Regulations. All police officers receive training in relation to return of property and the AFP has comprehensive governance and rules in place to ensure officers have the appropriate expertise to exercise this delegation.

It is considered unnecessary to amend section 79 of the Regulations as current AFP practices have adequate accountability safeguards to ensure the AFP Commissioner's powers are delegated appropriately.

Consistent with section 34AA of the *Acts Interpretation Act 1901* (Cth), the AFP Commissioner has delegated powers, functions and duties with reference to specified positions (a class of persons) or offices (e.g. AFP members) within the AFP, rather than individually named persons. The use of positions and offices allows for organisational effectiveness and flexibility when appointees are acting in roles.

All AFP positions have detailed role descriptions stating the required skills, knowledge and expertise requirements of the position. This ensures that all persons or classes of persons occupying a role to which a power, function or duty has been delegated will have the requisite skills, knowledge and expertise relevant to the proper and appropriate exercise of that delegation. AFP appointees are also required to receive induction and training when they are appointed to, or are acting in, a role.

Additionally, the AFP has strict chain of command, professional standards and governance requirements, which guide decision making practices to ensure appropriate risk management for the individual exercise of delegated powers.

Further to this, current practices require all requests for delegation of the Commissioner's powers to be initially assessed by the AFP's in-house legal team (AFP Legal), which centrally manages all delegation and authorisation instruments and processes for the AFP. AFP Legal then consults with AFP managers, risk and internal business areas to assess whether it is appropriate for the Commissioner to delegate the power. If delegation is appropriate, only positions with the operational or administrative need are granted the power. For example, delegation of powers in relation to drug

and alcohol testing is confined to a very limited number of SES Band 1, 2 and 3 positions which have responsibility for drug and alcohol testing.

Committee's response

2.51 The committee thanks the minister for his response, and notes the minister's advice that the power of delegation in section 79 of the instrument is intended to give the AFP sufficient flexibility to ensure that it can fulfil its statutory functions efficiently and effectively, and that many of the powers, duties and functions delegated are administrative and transactional.

2.52 The committee further notes the minister's advice that it is considered unnecessary to amend section 79, on the basis that adequate accountability safeguards exist to ensure the AFP Commissioner's powers are delegated appropriately. In this regard, the committee notes the advice that the Commissioner has delegated powers, functions and duties to specified positions or offices, rather than to individually named persons, and that all AFP positions have detailed role descriptions outlining required skills, knowledge and expertise.

2.53 However, it remains unclear to the committee why the instrument could not be amended to require the Commissioner be satisfied, prior to exercising the power of delegation under section 79, that delegates possess the expertise appropriate to the powers, functions and duties delegated. The committee considers it would be appropriate for the instrument to be amended to include a requirement of this kind.

2.54 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.

2.55 The committee has concluded its examination of this matter. However, the committee draws to the attention of the Senate the absence of any statutory requirement for the Commissioner to be satisfied, prior to exercising the power of delegation in section 79 of the instrument, that delegates possess expertise appropriate to the powers delegated.

Unclear basis for determining fees¹⁹

2.56 In [Delegated legislation monitor 10 of 2018](#),²⁰ the committee requested the minister's advice as to the basis on which the fees in Schedule 3 of the instrument have been calculated.

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

20 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 5-14.

Minister's response

2.57 The Minister for Home Affairs advised:

The fees in Schedule 3 are no higher than those required for cost recovery.

Where the Australian Government has made a decision to charge for a regulatory activity on a full or partial cost recovery basis, these activities are subject to the Australian Government Cost Recovery Guidelines (the CRGs). The CRGs set out the overarching framework under which government entities design, implement and review regulatory charging activities.

While the six overarching charging principles apply to regulatory charging activities, they must also meet the requirements in the CRGs, including:

- policy approval from the Australian Government to charge
- statutory authority to charge
- alignment between expenses and revenue, and
- up-to-date, publicly available documentation and reporting.

Entities, including the AFP, are required to set fees consistent with the CRGs (outlined above) in order to recover the cost of certain activities. Fees take into account all relevant direct and indirect costs associated with delivering the service. The AFP reviews the fees in Schedule 3 as appropriate to ensure they remain consistent with the CRGs.

Committee's response

2.58 The committee thanks the minister for his response, and notes the minister's advice that the fees in Schedule 3 to the instrument are no higher than those required for cost recovery.

2.59 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.

2.60 The committee has concluded its examination of the instrument.

Instrument	Australian Radiation Protection and Nuclear Safety Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00850] Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00851]
Purpose	Amend the Australian Radiation Protection and Nuclear Safety Regulations 1999 to amend license conditions, increase licence application fees, update incorporated standards and codes, and address other minor issues
Authorising legislation	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i> <i>Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998</i>
Portfolio	Health
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018). Notice of motion to disallow given on 17 September 2018 ²¹
Previously reported in	<i>Delegated Legislation Monitor 11 of 2018</i>

Access to incorporated documents²²

2.61 The committee initially scrutinised these instruments in [Delegated legislation monitor 8 of 2018](#),²³ and sought the minister's advice. The committee considered the response proved by the Minister for Regional Services in [Delegated Legislation Monitor 11 of 2018](#),²⁴ and requested further advice as to whether the standard incorporated by reference in the instruments:

- could be made available for viewing without charge at the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) offices; and
- are, or could be made, available through public libraries (and if so, which public libraries).

21 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

22 Scrutiny principle, Senate Standing Order 23(3)(a).

23 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 3-5.

24 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2018*, pp. 15-17.

Minister's response

2.62 The Minister for Regional Services advised:

The standards incorporated into the above instruments can be made available for viewing without charge at the offices of the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA). Alternatively, public libraries holding copies of the Standard can be identified by contacting ARPANSA.

The revised Explanatory Statements for both instruments, enclosed to this letter, will be promptly lodged with the Office of Parliamentary Counsel so they can be registered on the Federal Register of Legislation. The revisions against each reference to standards are:

"This Standard can be made available for viewing without charge at the offices of the Australian Radiation Protection and Nuclear Safety Agency. Alternatively, public libraries holding copies of the Standard can be identified by contacting ARP ANSA.

"This Standard may also be purchased from SAI Global (www.saiglobal.com)."

Committee's response

2.63 The committee thanks the minister for her further response, and notes the minister's advice that the standards incorporated by the instruments can be made available for viewing, without charge, at ARPANSA offices. The committee also notes the minister's advice that public libraries holding copies of the standards can be identified by contacting ARPANSA.

2.64 The committee notes that revised explanatory statements for the instruments, including the information set out in the minister's response, have been received by the committee. The committee also notes the minister's undertaking to register the revised explanatory statements on the Federal Register of Legislation'.

2.65 The committee has concluded its examination of the instrument.

Instrument	Carbon Credits (Carbon Farming Initiative—Industrial Equipment Upgrades) Methodology Determination 2018 [F2018L01206]
Purpose	Sets out rules for implementing and monitoring offsets projects that reduce emissions associated with the electricity and fuel consumption of industrial and similar equipment
Authorising legislation	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ²⁵

Incorporation of documents²⁶

2.66 In [Delegated Legislation Monitor 11 of 2018](#),²⁷ the committee requested the minister's advice as to where the standards incorporated by the instrument may be accessed free of charge, and requested that the explanatory statement be updated to include this information. The committee also requested the minister's advice as to whether, prior to making the instrument, the minister complied with the conditions set out in section 106 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*; and if so, the web address where the advice sought and obtained from the Emissions Reduction Assurance Committee may be accessed.

Minister's response

2.67 The Minister for the Environment advised:

The Committee requested advice on how standards incorporated in the Determination may be accessed free of charge and whether 'AS 4777' was the full title of the incorporated standard. On the first matter, the National Library of Australia provides free access to the standards incorporated in the Determination to the general public for non-commercial purposes. On the second matter, I am advised there are three parts to the AS 4777 currently in force (AS 4777.1, AS 4777.2 and AS 4777.3). As such, a reference to the AS 4777 is a reference to all three parts of the

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

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

27 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2018*, pp. 3-7.

incorporated standard as in force from time to time (indicated by the status of 'current').

The Committee also requested advice about whether the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP, complied with the conditions set out in section 106 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act), and if so, where the advice provided by the Emissions Reduction Assurance Committee on the method may be accessed. Before making the Determination, the Minister obtained advice from the Emissions Reduction Assurance Committee and considered this advice, in accordance with section 106 of the Act.

The above information has been included in the enclosed approved supplementary explanatory statement, which will be registered on the Federal Register of Legislation in due course.

Committee's response

2.68 The committee thanks the minister for her response, and notes the minister's advice that the National Library of Australia provides free access to the standards incorporated by the instrument. The committee also notes the advice that the reference in the instrument to 'AS 4777' is a reference to the three parts of that standard currently in force (AS 4777.1, AS 4777.2 and AS 4777.3).

2.69 The committee further notes the minister's advice that, before making the instrument, the (then) Minister for the Environment and Energy obtained and considered advice from the Emissions Reduction Assurance Committee, and this advice is available on the department's website.

2.70 The committee notes that a supplementary explanatory statement, including the information provided by the minister, has been received by the committee and will be registered on the Federal Register of Legislation in due course.

2.71 The committee has concluded its examination of the instrument.

Instrument	Carbon Credits (Carbon Farming Initiative—Sequestering Carbon in Soils in Grazing Systems—Revocation) Instrument 2018 [F2018L01113]
Purpose	Revokes the Carbon Credits (Carbon Farming Initiative) (Sequestering Carbon in Soils in Grazing Systems) Methodology Determination 2014
Authorising legislation	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Portfolio	Environment and Energy
Disallowance	15 sitting days after tabling (tabled Senate 16 August 2018). Notice of motion to disallow must be given by 17 October 2018 ²⁸

Compliance with authorising legislation²⁹

2.72 In [Delegated legislation monitor 10 of 2018](#),³⁰ the committee requested the minister's advice as to whether the advice given by the Emissions Reduction Assurance Committee regarding the revocation of a methodology determination has been published on the department's website (that is, whether the condition in section 123(5) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* has been satisfied).

Minister's response:

2.73 The Minister for the Environment advised:

The committee have requested my advice on whether the condition in s 123(5) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* has been satisfied in regards to the revocation of the Sequestering Carbon in Soils in Grazing Systems methodology determination.

Section 123(5) requires the Minister to cause advice received from the Emissions Reduction Assurance Committee to be published on the Department's website as soon as practicable after any decision to revoke a methodology determination. The Hon Josh Frydenberg made the decision to revoke the methodology on 30 July 2018 by signing the revocation

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

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

30 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 15-16.

instrument. The instrument was then registered by the Department on 15 August 2018.

I can confirm that the Department published the ERAC's letter of advice on 27 August 2018 on behalf of the Hon Josh Frydenberg MP who was the responsible Minister at the time. The letter of advice from the ERAC is available at the following web address:

<https://www.environment.gov.au/climate-change/government/emissions-reductionfund/methods/sequestering-carbon-in-soils>

Committee's response

2.74 The committee thanks the minister for her response and notes the minister's advice that the advice provided by the Emissions Reduction Assurance Commission was published on the department's website on 27 August 2018, and therefore satisfies section 123(5) of the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

2.75 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.

2.76 The committee has concluded its examination of the instrument.

Instrument	Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018 [F2018L01082]
Purpose	Specifies Al-Shabaab for the purposes of the definition of 'terrorist organisation' in the <i>Criminal Code Act 1995</i>
Authorising legislation	<i>Criminal Code Act 1995</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow given on 20 September 2018 ³¹

Drafting³²

2.77 In [Delegated legislation monitor 10 of 2018](#),³³ the committee requested the minister's advice as to whether it was intended to list the 'Young Mujahideen

31 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

33 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 18-19.

Movement in Somalia' and the 'Youth Wing' as separate entries in paragraphs 5(2)(u) and 5(2)(v) of the instrument.

Minister's response

2.78 The Minister for Home Affairs advised:

In the Monitor, the Committee sought my advice as to whether I intended to list the 'Young Mujahideen Movement in Somalia' and the 'Youth Wing' as separate entries in paragraphs 5(2)(u) and 5(2)(v) of the Regulations. I note the Committee's concern that the previous version of the instrument, the Criminal Code (Terrorist Organisation-Al-Shabaab) Regulations 2015, listed the 'Young Mujahideen Movement in Somalia, Youth Wing' (combining the references in paragraphs 5(2)(u) and 5(2)(v)).

I confirm that it was my intention to list the 'Young Mujahideen Movement in Somalia' and the 'Youth Wing' as separate aliases of al-Shabaab in the Regulations. This decision was based on advice from the Australian Security and Intelligence Organisation that these separate names were more accurate aliases for al-Shabaab. I further advise that the inconsistency between the list of aliases in the Statement of Reasons in the explanatory statement and the Regulations was due to a minor typographical error in the Statement of Reasons.

Committee's response

2.79 The committee thanks the minister for his response, and notes the minister's advice that it was the minister's intention to list 'Young Mujahideen Movement in Somalia' and 'Youth Wing' as separate aliases of Al-Shabaab in paragraphs 5(2)(u) and 5(2)(v) of the instrument.

2.80 The committee further notes the minister's advice that the inconsistency between the list of aliases in the Statement of Reasons in the explanatory statement and the instrument was due to a minor typographical error in the Statement of Reasons. In the interests of promoting the clarity and intelligibility of instruments, the committee considers that it would be appropriate for the Statement of Reasons to be amended to correct this error.

2.81 The committee has concluded its examination of the instrument.

Instrument	Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2018 [F2018L01135]
Purpose	Revises export and import controls to account for the enactment of the Charter of the United Nations (Sanctions—Democratic People’s Republic of Korea) Regulations 2008
Authorising legislation	<i>Customs Act 1901</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 21 August 2018). Notice of motion to disallow must be given by 12 November 2018 ³⁴

Merits review³⁵

2.82 In [Delegated legislation monitor 10 of 2018](#),³⁶ the committee requested the minister's advice as to whether decisions by the Foreign Minister and by authorised persons in relation to the grant of permission for the export of goods to, and the import of goods from, the Democratic People's Republic of Korea, would be subject to merits review; and if not, the characteristics of those decisions that would justify their exclusion from merits review.

Minister's response

2.83 The Assistant Minister for Home Affairs advised:

The *Charter of the United Nations Act 1945* (the Act) does not provide for merits review. Accordingly, decisions by the Minister for Foreign Affairs to grant a permit under the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008 (2008 Regulations) authorising the export of goods to, and the import of goods from, the Democratic People's Republic of Korea that would otherwise breach the Act are not subject to merits review.

The requirement for permission from the Minister for Foreign Affairs to import or export under the 2008 Regulations is reflected in the requirements for permission to export under regulation 13CO of the Customs (Prohibited Exports) Regulations 1958 (the Prohibited Exports

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

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

36 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 20-21.

Regulations) and to import under regulation 4Y of the Customs (Prohibited Imports) Regulations 1956 (the Prohibited Imports Regulations), which are also not subject to merits review.

It is the Government's position that any limitation on access to merits review for such decisions should be justified in line with the principles developed by the Administrative Review Council (ARC). The ARC's publication '*What decisions should be subject to merits review?*' provides examples of situations where exclusion of merits review may be justified. Included in this category are policy decisions of a high political content (from 4.22).

The decisions of the Minister for Foreign Affairs in relation to permission for the export of goods to, and the import of goods from, the Democratic People's Republic of Korea, fall unambiguously within the scope of this exception. The ARC cites illustrative examples of decisions that may fall within this exception, including decisions:

- affecting the Australian economy;
- affecting Australia's relations with other countries;
- concerning national security; and
- concerning major political controversies.

Ministerial permit decisions under the 2008 Regulations, the Prohibited Exports Regulations and the Prohibited Imports Regulations can engage these examples.

The Charter of the United Nations Act has the legitimate objective of giving domestic effect to United Nations Security Council Resolutions and providing a foreign policy mechanism for the Australian Government to address situations of international concern. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security considerations involved, as well as the potentially sensitive nature of the evidence relied on in reaching those decisions.

Where the United Nations Security Council has resolved that there will be limitations on engagement with a sanctioned regime, Australia, as a member of the United Nations, must comply with these international legal obligations.

While merits review is unavailable for a decision by the Minister regarding the issuing of a permit, an applicant can still seek judicial review of a decision.

Committee's response

2.84 The committee thanks the Assistant Minister for her response. The committee notes the Assistant Minister's advice that decisions by the Minister for Foreign Affairs to grant a permit authorising the export of goods to, and the import of goods from, the Democratic People's Republic of Korea (DPRK) are decisions of a

high political content, and consequently are not subject to merits review. In this regard, the committee notes that 'high political content' it is an accepted ground for excluding merits review.³⁷

2.85 The committee further notes the Assistant Minister's advice that the exclusion of merits review regarding to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security considerations involved, as well as the potentially sensitive nature of relevant evidence.

2.86 The committee considers that it would be appropriate for the information provided by the Assistant 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.

2.87 The committee has concluded its examination of the instrument.

Instrument	Export Control (Animals) Amendment (Notices of Intention to Export) Order 2018 [F2018L01118]
Purpose	Amends the Export Control (Animals) Order 2004 to enable the Secretary of the Department of Agriculture and Water Resources to grant notices of intention to export
Authorising legislation	<i>Export Control (Orders) Regulations 1982</i>
Portfolio	Agriculture and Water Resources
Disallowance	15 sitting days after tabling (tabled Senate 20 August 2018). Notice of motion to disallow must be given by 18 October 2018 ³⁸

Consultation³⁹

2.88 In [Delegated legislation monitor 10 of 2018](#),⁴⁰ the committee requested the minister's advice as to whether any stakeholders were consulted in relation to the instrument (as opposed to being merely informed); or if no consultation was

37 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.22]-[4.30].

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

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

40 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 22-23.

undertaken, why not. The committee also requested that the explanatory statement be amended to include this information.

Minister's response

The Minister for Agriculture and Water Resources advised:

The Export Control (Animals) Amendment (Notices of Intention to Export) Order 2018 (Order) introduces provisions for the Secretary of the Department of Agriculture and Water Resources to approve or refuse a Notice of Intention to export. It applies to all types of livestock to ensure consistency across the industry and to assist exporters who manage mixed consignments. The additional decision point will provide added assurance that the export of live-stock will be compliant with the regulatory requirements throughout the export supply chain. This will support improved animal welfare outcomes and reduce the impacts on the export sector in relation to an export that may not occur.

Through this Order, the Australian Government is continuing to implement measures to improve the regulation of the export of livestock and promote improved animal welfare outcomes while supporting the live sheep export trade. This Order further strengthens this approach.

No public consultation was undertaken during the preparation of the Order, but members of the key stakeholder group, Australian Livestock Exporters' Council, indicated their support for the amendment prior to it being made. The preparation of the Order followed several months of discussions between Commonwealth, state and territory governments, industry stakeholders and animal welfare groups. This has been on-going since footage of sheep in severe heat stress was released in April 2018. It was not reasonably practicable to undertake consultation as the instrument was required as a matter of urgency, in order to implement the government's response to provide better assurance of animal welfare for livestock exports to the Middle East. Significant public concern and community expectations of a swift government response prevented ordinary consultation processes being undertaken on this occasion.

Committee's response

2.89 The committee thanks the minister for his response and notes the minister's advice that no public consultation was undertaken during the preparation of the instrument. In this regard, the committee notes the advice that it was not considered reasonably practicable to undertake ordinary consultation processes as public concern and community expectations necessitated a prompt government response.

2.90 The committee further notes the minister's advice that members of the Australian Livestock Exporters' Council indicated support for the amendments in the instrument before they were made, and that the making of the instrument followed several months of discussion between Commonwealth, State and Territory governments, industry stakeholders and animal welfare groups.

2.91 The committee considers that the information provided by the minister should be included in the explanatory statement. In this regard, the committee emphasises that paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* require explanatory statements either to describe the nature of any consultation undertaken in relation to the relevant instrument, or, if no consultation was undertaken, explain why no consultation was undertaken.

2.92 The committee has concluded its examination of the instrument

Instrument	Federal Circuit Court Amendment (Costs and Other Measures) Rules 2018 [F2018L01088]
Purpose	Increases costs associated with certain court services, and makes other miscellaneous amendments
Authorising legislation	<i>Federal Circuit Court of Australia Act 1999</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow given on 20 September 2018 ⁴¹

Drafting⁴²

2.93 In [Delegated legislation monitor 10 of 2018](#),⁴³ the committee requested the Attorney-General's advice as to the omission of information relating to Schedule 1, Part 2 from the explanatory statement, and the inclusion of information relating to a Schedule 2 (which does not appear in the instrument).

Attorney-General's response

2.94 The Attorney-General advised:

The Rules make a series of amendments to the Federal Circuit Court Rules 2001. In the Monitor, the Committee sought my advice on the omission of information relating to Schedule 1, Part 2 from the Explanatory Statement, and the inclusion of information relating to Schedule 2 (which does not appear in the instrument).

The Committee's concerns were brought to attention of the Court as the Rules were made by Judges of the Court. I am advised that the matters

41 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

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

43 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 23-25.

referred to by the Committee were due to an oversight. The Court registered a revised Explanatory Statement on 20 September 2018 to address this issue.

Committee's response

2.95 The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the omission of information relating to Schedule 1, Part 2 from the explanatory statement to the instrument, and the inclusion of information relating to Schedule 2 (which does not appear in the instrument), was due to an oversight.

2.96 The committee further notes Attorney-General's advice that, to address this issue, the Court registered a revised explanatory statement on the Federal Register of Legislation on 20 September 2018.

2.97 The committee has concluded its examination of the instrument.

Instrument	Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 2) Regulations 2018 [F2018L00839]
Purpose	Establishes legislative authority for spending activities administered by the Department of Education and Training and the Department of Jobs and Small Business
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018). Notice of motion to disallow given on 17 September 2018 ⁴⁴

Merits review⁴⁵

2.98 In [Delegated legislation monitor 8 of 2018](#),⁴⁶ the committee requested the minister's advice regarding the characteristics of decisions by service providers in relation to the Skills Checkpoint for Older Workers Program and related Incentive that would justify their exclusion from merits review by an external body independent of the department.

44 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

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

46 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, pp. 10-13.

2.99 The committee also requested the minister's advice as to whether decisions by service providers in relation to the High Achieving Teachers' Program that affect the interests of participants or potential participants in the program would be subject to independent merits review; and if not, the characteristics of such decisions that would justify their exclusion from merits review.

Minister's response

The Minister for Small and Family Business, Skills and Vocational Education, and the Minister for Jobs, Industrial Relations and Women (joint response) advised:⁴⁷

Table item 277 – Skills Checkpoint for Older Workers Program

...

Eligibility Criteria

Before a person is able to receive services through the Program, the service provider will determine whether they meet the eligibility criteria, as approved by the Government and published in the request for tender, namely:

In order to be eligible to receive Program services, participants must be an Australian citizen or Permanent Resident, aged 45 to 70 years old and either:

- (a) employed and at risk of entering the income support system (e.g. those in industries undergoing structural adjustment); or
- (b) unemployed for no more than three consecutive months and not registered for assistance through an Australian Government employment services program, such as *jobactive*.

The Service provider makes the decision about whether an applicant meets the criteria to participate in the Program and receive Program services. Once the Program funds allocated for each financial year have been expended, the service provider will not be able to provide Program services to any new applicants in that financial year.

Funding

Funding of \$17.4 million for the Program was included in the 2018-19 Budget. The Program will be delivered over four years and there will be a finite number of participants that will receive the Program services in each of those years. Participants will be accepted into the program on a first come, first served basis, until allocated program places for each financial

47 This is an extract of the ministers' response, which does not include certain details relating to the programs captured by the instrument (for example, background information and details of funding arrangements). The full text of the ministers' response is available on the committee's website: see correspondence relating to *Delegated Legislation Monitor 12 of 2018* available at https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

year are filled. No new participants will be able to join the program if there are no places remaining for the given financial year.

Merits Review

Noting the above, decisions by service providers as to whether a potential participant meets the criteria to receive Program services will not be subject to independent merits review. In the context of the Administrative Review Council's document 'What decisions should be subject to merit review?' the characteristics of such decisions that support this conclusion are that:

- the eligibility criteria which are set out above are factually based and there is very limited scope for disagreement about whether or not the particular facts have occurred and therefore the decision is automatic or mandatory; and
- the service provider's decision allocates a finite resource between competing applicants. The funding for the Program is capped and the number of applicants who will be able to receive the Program services will also be capped and so any reversal of a decision on whether an applicant has been successful may displace another successful applicant.

Skills and Training Incentive

...

A participant can access the Incentive from 1 January 2019 - 31 December 2020 subject to:

- there being remaining allocations;
- the relevant training being identified in the participant's career plan; and
- either the participant or the participant's employer co-funding the training.

In administering the Incentive, service providers will:

- provide a participant with information about the Incentive if the provider determines (based on whether the Incentive is still in operation and whether there are remaining allocations) that the Incentive will be available at the time that the participant will receive their career plan; and
- organise referrals and assist with the participant's enrolment in training opportunities where relevant training is recommended in the participant's career plan and the participant would like to use the Incentive to undertake the training.

Merits Review

Noting the above, decisions by service providers as to whether a potential participant meets the criteria to receive an Incentive will not be subject to

independent merits review. In the context of the Administrative Review Council's document 'What decisions should be subject to merit review?', the characteristics of such decisions that support this conclusion are that the decisions are automatic or mandatory decisions and they are decisions allocating a finite resource between competing applicants.

Automatic or Mandatory decisions

A determination about whether a Program participant is able to access the Incentive is largely based on objective matters of fact and does not involve significant discretionary elements.

The only circumstance in which discretion is exercised is where training is not provided by a registered training organisation or a higher education provider. In these instances, the provider must have prior approval from the department before making a claim against the Incentive for the training course.

Also, there is a relatively low threshold required in order for training to be relevant for the purposes of the Incentive. This reflects that rather than trying to minimise access to the Incentive, the Department of Jobs and Small Business and providers will be promoting it to encourage eligible people and employers to participate. Such participation helps achieve the Australian Government's objectives of creating jobs, reducing unemployment and reducing dependence on the social security system.

Decisions allocating a finite resource between competing applicants

Decisions about access to the Incentive involve allocating a finite resource between competing applicants. This further indicates the decisions are inappropriate for merits review. Up to 3,600 participants a year assessed as part of the Program may have access to the Incentive. This is a capped allocation. The Incentive will also only be in operation for two of the four years the Program will run. This means that not all participants in the Program will be able to access the Incentive. An allocation that has already been made to another participant, or decisions relating to other participants, could be affected by overturning a decision not to allow a participant to access the Incentive in relation to particular training.

Other relevant factors for the Program and the Incentive

There is sufficient administrative accountability, without merits review by an external body independent of the department, as the process of allowing access to the Program services and the Incentive is fair, noting that:

- service providers will be required to establish a complaints resolution process to deal fairly with complaints about delivery of the Program and the Incentive and prominently display on its website the existence of the complaints handling process;
- participants or affected persons who are unsatisfied with a provider's services, including a provider's decision about whether a potential

participant meets the criteria to receive Program services or specific training will attract the Incentive, can complain to the provider or the relevant department;

- departmental officers must comply with their Australian Public Service Code of Conduct obligations at all times, including in relation to impartiality and conflicts of interest. If a department is asked to review a participant's complaint about the provider's decision making, departmental officers who have a conflict of interest will declare that conflict. Each department will ensure it manages any conflicts of interest in accordance with the whole-of-government and respective departmental policies;
- providers will also have conflict of interest obligations under their contractual arrangements; and
- the criteria around the availability of the Program and the Incentive to potential participants are clear and will be publicly available.

Table item 278 - High Achieving Teachers Program

...

Characteristics of decisions and related matters

...

[D]ecisions of the service provider(s) that affect the interests of participants or potential participants will not be subject to independent merits review. The characteristics of such decisions are as follows:

(a) the service provider(s) will be required to select a limited number of participants from potentially a large and high-quality pool of applicants. As an example, in an alternative pathways to teaching program administered by the Department in 2017, more than 1,500 individuals applied for the program for only 150 places. As such, from a resourcing and timing perspective, including taking into account the finite number of places for competing high-quality applicants and the effective use of Commonwealth resources, it would not be feasible for the service provider(s) or the Department to make such decisions subject to independent merits review;

(b) given that the number of places are finite, any reversal of a decision on whether an applicant is successful or not may then cause the displacement of, and disadvantage, another successful applicant;

(c) the relevant application process is not directly related to the provision of Commonwealth funding or other entitlement. Rather, the service provider(s) will be engaged under contract with the Department to make decisions about whether the personal qualities, skills, knowledge and experience of applicants would target the specific needs of secondary schools, and address specific teacher

workforce challenges. These decisions are based on the expertise of service provider(s);

(d) any decision to offer a place to an applicant must necessarily be done with reference to the identified vacancies in schools. There are scenarios where individuals who may have the characteristics to become high-quality teachers, may nevertheless not be offered a place because their subject-specific skills and experience do not match specific identified vacancies in schools.

Further to the above, the Department will be imposing additional requirements on the service provider(s) to provide for enhanced administrative accountability.

The service provider(s) will be required to establish a feedback and complaints process to deal with any feedback and complaints from applicants or participants.

As part of this process, the service provider(s) will be required to ensure that the feedback complaints process:

- (a) clearly indicates that applicants and participants may also provide feedback or complaints directly to the Department;
- (b) is underpinned by principles of fairness, accessibility, responsiveness and efficiency; and
- (c) is developed and implemented, as far as possible, based on the Commonwealth Ombudsman 's Better Practice Guide to Complaint Handling.

The service provider(s) will also be required to ensure that their feedback and complaints process is publicised to applicants and participants. The service provider(s) must keep a register that includes, but is not limited to:

- (a) all feedback and complaints received by the service provider;
- (b) all feedback and complaints referred to the service provider by, or through, the Department; and
- (c) any personnel and subcontractors (if any) which are the subject of the feedback or complaint, circumstances giving rise to the feedback or complaint, the investigation undertaken (where relevant), and any follow-up action.

The service provider(s) will also be required to support, assist and fully cooperate with a Department appointed independent evaluator for the purposes of evaluating all aspects of the Program.

The Department considers that the above requirements will provide for appropriate administrative accountability by its service provider(s) and will assist to ensure that any decisions made are fair, objective and transparent.

Committee's response

2.100 The committee thanks the ministers for their detailed response. In relation to the Skills Checkpoint for Older Workers Program (table item 277), and the associated Skills and Training Incentive, the committee notes the ministers' advice that decisions by service providers will not be subject to merits review, because the decisions are largely automatic and mandatory, and would allocate finite resources between competing applicants. It appears to the committee that decisions by service providers may involve at least an element of discretion, and consequently it is not clear that those decisions could be characterised as automatic or mandatory. However, the committee notes that the allocation of finite resources between competing applicants reflects an established ground for excluding merits review.⁴⁸

2.101 In relation to the High Achieving Teachers Program (table item 278), the committee notes the ministers' advice that decisions of service providers that affect the interests of participants or potential participants will not be subject to independent merits review. The committee notes the advice that, as places in the program are finite, any reversal of a decision to include a person in the program could cause the displacement of, and disadvantage to, another successful applicant. In this regard, it appears to the committee that decisions under the program will allocate finite resources between competing applicants. This reflects an established ground for excluding merits review.⁴⁹

2.102 The committee considers that it would be appropriate for the information provided by the ministers regarding merits review 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.

2.103 The committee has concluded its examination of the instrument.

48 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.11]-[4.19].

49 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.11]-[4.19].

Instrument	Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2018 [F2018L00841]
Purpose	Establishes legislative authority for spending activities administered by the Department of Foreign Affairs and Trade
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled Senate 26 June 2018). Notice of motion to disallow given on 17 September 2018 ⁵⁰

Merits review⁵¹

2.104 In [Delegated legislation monitor 8 of 2018](#),⁵² the committee requested the minister's advice regarding whether decisions made in relation to assistance under the 'MH17 Dutch national prosecution—travel assistance' activity are of a nature suitable for independent merits review; and if so, whether such review will be provided; or if not, the characteristics of such decisions that would justify their exclusion from independent merits review.

Minister's response

2.105 The Minister for Foreign Affairs and Trade advised:

As the Minister with portfolio responsibility for this spending activity, I can confirm that decisions made relating to travel assistance under this activity are of a nature suitable for independent review. As detailed in the explanatory statement, a multi-layered internal review process will apply. The Department of Human Services (DHS) will administer payments and make decisions applying the eligibility criteria based on factual considerations. If claimants are not satisfied after following the review processes outlined in the explanatory statement, they may then seek a review from the Commonwealth Ombudsman. I believe this process is sufficient to meet the Committee's expectations set out in the *Guideline on regulations that amend Schedule 1 JAB to the Financial Framework (Supplementary Powers) Regulations 1997*.

50 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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

52 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2018*, pp. 13-14.

The policy guidelines for this activity will be drafted to minimise the use of subjective tests and discretion, where appropriate, and ensures the decision-maker has clear guidance as to how a claim should be assessed. The victims of the downing of Malaysia Airlines Flight MH17 are known to Government. Family members claiming assistance under this activity will be required to meet proof of identity testing, consistent with Level of Assurance 3 under the National Identity Proofing Guidelines. Assistance will be limited to a certain number of family members per victim. Family members claiming assistance will be assessed against a next-of-kin hierarchy, which will be published as part of the policy guidelines.

The policy guidelines for the travel assistance have not yet been published and spending under this activity has not commenced. Finalisation of the policy guidelines is dependent on the Dutch confirming arrangements for next-of-kin participation in the Dutch National Prosecution. This will determine the eligibility period and frequency of assistance.

Preparations for the Dutch National Prosecution are still ongoing. Dates for the prosecution have not been announced and arrangements for next-of-kin participation are not confirmed. Due to the sensitive nature of the prosecution, we are unlikely to be given significant notice. We continue to work closely with the Dutch authorities on their preparations for the prosecution. I will finalise the policy guidelines once the Dutch have confirmed the timing and arrangements for the prosecution. The final policy guidelines will be made available on the DHS website. I will also provide a copy of the final version to the Chair of the Committee.

Committee's response

2.106 The committee thanks the minister for her response, and notes the minister's advice that decisions relating to assistance made under the 'MH17 Dutch national prosecution–travel assistance' activity are of a nature suitable for merits review. The committee notes the advice that, where a claimant is not satisfied after following the review processes outlined in the explanatory statement,⁵³ he or she may seek review by the Commonwealth Ombudsman.

2.107 While noting this advice, the committee emphasises that complaints to the Commonwealth Ombudsman are not a form of merits review. In this regard, the committee notes that the Ombudsman only has jurisdiction to consider and investigate complaints, and to make formal recommendations to government. The Ombudsman cannot override decisions of agencies, nor issue directions to their staff.

53 As outlined in the committee's initial comments, the explanatory statement provides that claimants who are not satisfied with a decision in relation to assistance may request review by an officer of the Department of Human Services (DHS) who was not involved in the initial decision. The explanatory statement further states that, if the matter cannot be resolved by DHS, policy guidelines will set out a process for referral to the Department of Foreign Affairs and Trade for further review.

This is distinct from merits review (for example, by the Administrative Appeals Tribunal), which involves an independent tribunal standing in the position of the original decision-maker and either quashing, remaking or confirming the relevant decision. The committee also emphasises that it does not generally consider review by a departmental official to constitute sufficiently independent merits review.

2.108 The committee also notes the minister's advice that policy guidelines for the activity will be drafted so as to minimise subjective or discretionary decision-making where appropriate, and will provide clear guidance as to how claims should be assessed. The committee notes the advice that the victims of the downing of Malaysia Airlines Flight MH17 are known to government, and that assistance under the activity will be limited to a certain number of family members per victim. The committee also notes the minister's advice that family members claiming assistance under the program will be assessed against a next-of-kin hierarchy, which will be published as part of the policy guidelines.

2.109 The committee further notes the minister's advice that the policy guidelines have not been published (as their finalisation is dependent on confirmation of next-of-kin participation arrangements in the Dutch National Prosecution), and that spending for the activity has yet to commence. The committee notes the minister's undertaking to make the final policy guidelines available on the Department of Human Services' website, and to provide a copy to the Chair of the committee.

2.110 The minister's advice suggests that decisions made under the activity will be based on largely factual matters, such as where a claimant sits in the next-of-kin hierarchy of a known victim of Flight MH17. To the extent that decisions are based on mandatory or factual considerations, it may be appropriate to exclude merits review. Consequently, the committee will generally be less concerned about the availability of independent merits review in relation to decisions of this nature. However, whether decisions made under the activity are in fact based on mandatory considerations will depend on the content of the relevant policy guidelines.

2.111 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.

2.112 The committee has concluded its examination of the instrument.

Instrument	Migration Amendment (Skilling Australians Fund) Regulations 2018 [F2018L01093]
Purpose	Implement changes to the <i>Migration Act 1958</i> made by the <i>Migration Amendment (Skilling Australians Fund) Act 2018</i> , and make other minor amendments
Authorising legislation	<i>Migration Act 1958</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled Senate 13 August 2018). Notice of motion to disallow given on 20 September 2018 ⁵⁴

Merits review

2.113 In [Delegated legislation monitor 10 of 2018](#),⁵⁵ the committee requested the minister's more detailed advice as to why it is considered appropriate to exclude decisions relating to the refund of certain charges and fees, made under sections 2.73AA and 5.37A, from merits review. In particular, the committee requested the minister's advice as to why it would not be appropriate to provide for merits review in relation to such decisions, and allow affected businesses to determine whether it is in their interests to seek review.

Minister's response

2.114 The Minister for Immigration, Citizenship and Multicultural Affairs advised:

Regulations 2.73AA and 5.37A provide that, in specified situations, employers may be able to obtain a refund of the nomination fee and nomination training contribution charge (NTCC) payable in relation to the nomination of skilled overseas workers for the temporary and permanent employer-sponsored visa programs.

The nomination fee is \$330 (for the Temporary Skill Shortage (TSS) visa), \$540 (for the permanent employer-sponsored Employer Nomination Scheme (ENS) (subclass 186) and Regional Sponsored Migration Scheme (RSMS) (subclass 187) visas) or nil for permanent visa nominations for positions in regional Australia. The NTCC, which is a tax, ranges from \$1200 to \$7200, depending on a range of factors.

54 Notice given by the Chair of the committee. See Disallowance Alert 2018: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

55 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2018*, pp. 32-35.

The availability of refunds reflects the possibility that, for various reasons, employers may not receive any benefit from the nominated overseas worker and this may be through no fault of the employer. The nomination application fee, which is a fee for service rather than a tax, will not be refunded in cases where the service has been provided; that is, the nomination application has been processed.

As the Committee has noted, some of the grounds for refund turn on objective criteria that will not be in question, for example where the nominated person is refused a visa on health or character grounds. It is intended that the Department of Home Affairs will always provide a refund of the NTCC in those situations, and merits review by the Administrative Appeals Tribunal (AAT) would therefore be redundant. In relation to refund grounds that may give rise to dispute, I consider that genuine disputes are likely to be rare and, in view of the costs of AAT review to the employer and to the Department as respondent, it is not appropriate to provide for AAT review rights.

This is consistent with the position in relation to refunds of fees and charges under the Migration Regulations, including visa application charges. Those decisions are not, and have never been, subject to review by the AAT. I also note that any alleged maladministration of the refund provisions could be referred to the Commonwealth Ombudsman.

In light of the considerations outlined above, I am of the view that the position reflected in the Amending Regulations is appropriate.

Committee's response

2.115 The committee thanks the minister for his response, and notes the minister's view that the position reflected in the instrument (that is, that merits review is not available in relation to refund decisions) is appropriate.

2.116 In this regard, the committee notes the minister's advice that some of the grounds for refund turn on objective criteria that will not be in question (for example, where a nominated person is refused a visa on health and character grounds). The committee also notes the advice that it is intended that the department will always provide a refund in those situations, and that merits review by the Administrative Appeals Tribunal (AAT) would therefore be redundant.

2.117 The committee further notes the minister's advice that, in relation to refund grounds that may give rise to dispute, genuine disputes are likely to be rare. The committee notes the advice that, in view of the costs of AAT review to the employer and to the department as respondent, it is not appropriate to provide for AAT review. The committee further notes the advice that any alleged maladministration of the refund provisions could be referred to the Commonwealth Ombudsman.

2.118 The committee acknowledges that it may be appropriate to exclude merits review in relation to mandatory or automatic decisions.⁵⁶ However, as noted in the committee's initial comments and the minister's response, at least some refund decisions will be discretionary. This is confirmed by the explanatory statement, which states that 'the minister has a discretion, rather than a duty, to provide a refund'.⁵⁷

2.119 In relation to decisions that may give rise to a dispute, the committee reiterates that, in some circumstances, decisions not to provide a refund may have significant financial impacts on smaller businesses. It is not apparent that, in those circumstances, the costs of seeking review would be vastly disproportionate to the significance of the relevant decision, such as might justify excluding merits review.⁵⁸ In this regard, the committee notes that the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*, provides as an example of a decision that may be unsuitable for merits review a decision not to waive a filing fee of \$150.⁵⁹ On this basis, while excluding decisions in relation to the refund of a nomination fee of \$330 from merits review may be justified, this may not be a valid ground for decisions in relation to the refund of NTCC (which may be up to \$7,200). As outlined in its initial comments, the committee considers that it would be appropriate to provide for merits review for decisions relating to the refund of fees and charges, and to allow affected businesses to determine whether it is in their interests to seek review.

2.120 The committee also emphasises that complaints to the Commonwealth Ombudsman are not a form of merits review. In this regard, the committee notes that the Ombudsman only has jurisdiction to consider and investigate complaints, and to make formal recommendations to government. The Ombudsman cannot override decisions of agencies, nor issue directions to their staff. This is distinct from merits review, which generally involves an independent tribunal standing in the position of the original decision-maker and either quashing, remaking or confirming the relevant decision.

2.121 The committee has concluded its examination of the instrument. However, the committee draws to the attention of the Senate the exclusion of merits review in relation to decisions relating to the refund of charges and fees, including in circumstances where the amount under consideration may be significant.

56 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [3.8]-[3.12].

57 Explanatory statement, pp. 15 and 21.

58 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.56]-[4.57].

59 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.57].

Instrument	Other Grants Guidelines (Education) Amendment (No. 1) 2018 [F2018L01172]
Purpose	Specifies the Regional Study Hubs Program as a program under which grants are paid to support open access to higher education across Australia
Authorising legislation	<i>Higher Education Support Act 2003</i>
Portfolio	Education and Training
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ⁶⁰

Merits review⁶¹

2.122 In [Delegated Legislation Monitor 11 of 2018](#),⁶² the committee requested the minister's advice as to whether decisions by the minister in relation to the provision of grants under the Regional Study Hubs Program (RSHP) are subject to merits review; and if not, the characteristics of those decisions that would justify excluding merits review.

Minister's response

2.123 The Minister for Education advised:

Merits review was not considered appropriate for the RSHP for the following reasons.

Funding for the RSHP will be provided under Part 2-3 of the *Higher Education Support Act 2003* (HESA). Under Part 2-3 of HESA, the Minister has the discretion to:

- approve grants made under part 2-3 (section 41-20)
- determine the amount of those grants (where the Other Grants Guidelines do not specify an amount (section 41-30), and
- determine the conditions that attach to the grant (also where the conditions are not determined by the Other Grants Guidelines) (section 41-25).

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

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

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

Section 206-1 of HESA specifies the decisions made under the Act that are reviewable decisions. As the Committee has noted, funding decisions made under part 2-3 of HESA are not specified. Furthermore, \$16.7 million was allocated to the RSHP in the 2018-19 Budget. That is, there is a finite amount of funding available for the RSHP, and funding will not be able to be provided to all applicants. Providing for merits review in this case would be beyond the scope of HESA and delay delivery of funding to successful applicants, as a decision in relation to one application affects all applications where a finite amount of funding is available.

While merits review is not available to applicants under the RSHP, I will decide the applications following an open application round. A panel of departmental officials has assessed all eligible applications against criteria set out in the Application Guide for the program. I will decide the outcome of the application round taking into account their evaluation and recommendations.

Committee's response

2.124 The committee thanks the minister for his response, and notes the minister's advice that merits review was not considered appropriate for the RSHP.

2.125 In this regard, the committee notes the minister's advice that there is a finite amount of funding (\$16.7 million) available for the RSHP, and that funding will not be able to be provided to all applicants. The committee further notes the advice that providing for merits review would delay delivery of funding to successful applicants, as a decision in relation to one application affects all other applications where a finite amount of funding is available. The committee notes that the allocation of finite resources between competing applicants reflects an established ground for excluding merits review.⁶³

2.126 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.

2.127 The committee has concluded its examination of the instrument.

63 See Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), [4.11]-[4.19].

Instrument	Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018 [F2018L01185]
Purpose	Exempts Corrective Services NSW from certain requirements in the <i>Radiocommunications Act 1992</i> relating to mobile telecommunications service jamming devices
Authorising legislation	<i>Radiocommunications Act 1992</i>
Portfolio	Communications and the Arts
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ⁶⁴

Access to incorporated documents⁶⁵

2.128 In [Delegated Legislation Monitor 11 of 2018](#),⁶⁶ the committee requested the minister's advice as to how the documents incorporated by the instrument may be accessed free of charge; and requested that the explanatory statement be amended to include this information.

2.129 The committee also indicated that, with regard to the map of the Lithgow Correctional Centre, it would assist the committee if the minister's response would provide a reference to the specific web address where the document may be accessed.

Minister's response

2.130 The Minister for Communications and the Arts advised:

I am pleased to inform you that a map of the Lithgow Correctional Centre is available free of charge from the Australian Communication and Media Authority (the Authority) website at <https://www.acma.gov.au/Home/Industry/Spectrum/Radiocommslicensing/Spectrumlicences/mobile-phone-jammers-in-prisons>.

I am also advised that publication of the device agreement would defeat its key purpose of preventing criminal activity by inmates, and so would not be in the public interest.

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

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

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

The Authority will soon produce an updated explanatory statement which will include the precise web address for the map and outline the reasons why it is not in the public interest for the agreement to be made public.

Committee's response

2.131 The committee thanks the minister for his response and notes the minister's advice that a map of the Lithgow Correctional Centre (LCC) is available free of charge from the Australian Communications and Media Authority website, and the specific web address provided.

2.132 The committee further notes the minister's advice that publication of the relevant device agreement would defeat the key purpose of preventing criminal activity by inmates, and so would not be in the public interest.

2.133 The committee notes the minister's undertaking to register an updated explanatory statement, including the precise web address for the LCC map and the precise reasons why publication of the device agreement is not in the public interest, on the Federal Register of Legislation.

2.134 The committee has concluded its examination of the instrument

Instrument	Safety, Rehabilitation and Compensation (Catastrophic Injury) Rules 2018 [F2018L01160] Seafarers Rehabilitation and Compensation (Catastrophic Injury) Rules 2018 [F2018L01161]
Purpose	Sets the conditions for when an injury will be a 'catastrophic injury' for workers' compensation purposes
Authorising legislation	<i>Safety, Rehabilitation and Compensation Act 1988</i> <i>Seafarers Rehabilitation and Compensation Act 1992</i>
Portfolio	Jobs and Small Business
Disallowance	15 sitting days after tabling (tabled Senate 10 September 2018). Notice of motion to disallow must be given by 15 November 2018 ⁶⁷

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

Personal rights and liberties: privacy⁶⁸

2.135 In [Delegated Legislation Monitor 11 of 2018](#),⁶⁹ the committee requested the minister's advice as to:

- how the Functional Independence Measure will be carried out for the purposes of the instrument;
- how personal information collected in the course of conducting the assessment will be used and managed; and
- what safeguards are in place to protect individuals' privacy in relation to that information.

Minister's response

2.136 The Minister for Jobs and Industrial Relations advised:

Employees who meet the definition will not be subject to a monetary cap on the amount of compensation they can receive each fortnight for attendant care services and household services under the Comcare and Seacare workers' compensation schemes, consistent with the benchmarks set by the National Injury Insurance Scheme.

The Committee has noted that two classes of injury classified as 'catastrophic injuries' require the impairment of the person to be assessed by reference to the Functional Independence Measures (FIM). As with many (if not all) claims for injury compensation, completion of the FIM may involve the collection of a personal information relating to injured persons.

The FIM assessment can only be carried out by a person who has been trained in the use of the FIM and is credentialed in the use of the FIM at the time of the assessment. These medical and health professionals (that is, nurses, doctors and allied health staff such as occupational therapists and physiotherapists) are regulated by Australian Health Practitioner Regulation Agency.

Personal information collected in the course of a FIM assessment will be used and managed by:

- medical and health professionals in accordance with their professional obligations, subject to applicable Commonwealth, state or territory privacy laws
- relevant authorities in the Comcare scheme (that is, Comcare and licensees) in accordance with the functions and powers conferred on such authorities by the *Safety, Rehabilitation and Compensation Act*

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

69 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2018*, pp. 13-14.

1988 ('the SRC Act'), subject to applicable Commonwealth, state or Territory privacy laws

- employers in the Seacare scheme in accordance with the functions and powers conferred on such employers by the Seafarers Rehabilitation and Compensation Act 1992 ('the Seafarers Act'), subject to applicable Commonwealth, state or territory privacy laws.

For the avoidance of doubt, the instruments do not in any way alter:

- the existing framework around the use and management of personal information by medical and health professionals, by relevant authorities under the SRC Act or by employers under the Seafarers Act; or
- the existing safeguards that are in place to protect individuals' privacy in relation to that information.

Committee's response

2.137 The committee thanks the minister for her response, and notes the minister's advice that the Functional Independence Measure (FIM) assessment can only be carried out by a person who has been trained in the use of the FIM, and is credentialed in the use of the FIM at the time of the assessment. The committee notes the advice that these persons would be medical and health professionals (nurses, doctors and allied health staff such as occupational therapists and physiotherapists), regulated by the Australian Health Practitioner Regulation Agency.

2.138 The committee also notes the minister's advice that personal information collected during a FIM assessment will be used and managed by medical and health professionals in accordance with their professional obligations, and by specific bodies in accordance with functions conferred by Commonwealth workers' compensation law. The committee further notes the advice that the use and management of personal information would be subject to applicable Commonwealth, State and Territory privacy laws.

2.139 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.

2.140 The committee has concluded its examination of the instrument.

Senator John Williams (Chair)