

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].