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Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Delegated legislation monitor

## Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.[[1]](#footnote-1)

### The committee's terms of reference

Senate Standing Order 23 contains a general statement of the committee's terms of reference:

(1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.

(2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.

The committee shall scrutinise each instrument 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.

### Work of the committee

The committee scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating 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 or instrument-maker 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, which are established by the *Legislative Instruments Act 2003*.[[2]](#footnote-2)

### Structure of the report

The report is comprised of the following parts:

Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;

Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;

Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;

Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

### Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

**Senator Mark Furner**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **21 March 2013**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers seeking further information or an appropriate undertaking within the disallowance period.

### CASA ADCX 004/13 - Revocation of Airworthiness Directives [F2013L00427]

|  |  |
| --- | --- |
| **Purpose** | Revokes two airworthiness directives |
| **Last day to disallow[[3]](#footnote-3)** | 25 June 2013 |
| **Authorising legislation** | Civil Aviation Safety Regulations 1998 |
| **Department** | Infrastructure and Transport |

**ISSUE:**

#### Drafting

The explanatory statement (ES) to the instrument states that it is made under subregulation 39.001(1) of the Civil Aviation Safety Regulations 1998. As subregulation 39.001(1) contains no express power to amend, vary or revoke an airworthiness directive, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of the minister**.

### Migration Regulations 1994 – Specification under regulation 3.10A – Access to Movement Records – September 2012 [F2013L00444]

|  |  |
| --- | --- |
| **Purpose** | Revokes the Migration Regulations 1994 - Specification under regulation 3.10A - Access to Movement Records - September 2012 and permits the use of movement records information by external agencies to administer a variety of legislation |
| **Last day to disallow** | 25 June 2013 |
| **Authorising legislation** | Migration Regulations 1994 |
| **Department** | Immigration and Citizenship |

**ISSUE:**

#### Drafting

The ES to the instrument states that it is made under regulation 3.10A of the Migration Regulations 1994. As regulation 3.10A contains no express power to amend, vary or revoke an instrument, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of the minister**.

### Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 1 of 2013 [F2013L00438]

|  |  |
| --- | --- |
| **Purpose** | Specifies the fees that TEQSA may charge for things done in the performance of its functions. |
| **Last day to disallow** | 25 June 2013 |
| **Authorising legislation** | *Tertiary Education Quality and Standards Agency Act 2011* |
| **Department** | Industry, Innovation, Science, Research and Tertiary Education |

**ISSUE:**

#### Drafting

Subparagraph (i) of the instrument, which revokes the previous instrument, states that it is made under subsection 158(1) of the *Tertiary Education Quality and Standards Agency Act 2011*. As subsection 158(1) contains no express power to amend, vary or revoke an instrument, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of the minister**.

### Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278] and two related instruments[[4]](#footnote-4)

|  |  |
| --- | --- |
| **Purpose** | Substitutes a new Part 4 in the principal regulations dealing with the reporting of immediately reportable and routinely reportable matters; amends the principal regulations as a consequence of the Transport Safety Investigation (Confidential Reporting Scheme) Regulation 2012; and establishes a scheme for confidential reporting that applies to aviation, marine and rail transport |
| **Last day to disallow** | 14 May 2013 |
| **Authorising legislation** | *Air Navigation Act 1920*; *Navigation Act 1912*; and *Transport Safety Investigation Act 2003* |
| **Department** | Infrastructure and Transport |

**ISSUE:**

#### No information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).[[5]](#footnote-5) With reference to these requirements, the committee notes that the ES accompanying the instrument contains no reference to consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that consultation was undertaken in relation to two of the instruments. In relation to F201202278, this had comprised the release of a discussion paper on enhanced mandatory reporting requirements for rail accidents and occurrences, with an invitation for public submissions. Submissions had been generally supportive of the proposals in the discussion paper. An exposure draft of the proposed amendments was subsequently also the subject of public consultation, with comments being received from such bodies as the Australian Rail Association and the Rail, Tram and Bus Union. In relation to F2012L02281, the Australian Transport Safety Bureau (ATSB) undertook extensive consultation, based on release of a public consultation paper and subsequent drafts of the instrument and ES for public comment. In relation to F2012L02280, this instrument made amendments to the principal regulation to correct an out-dated reference and make minor clarifications and corrections. Consultation was therefore considered unnecessary as the instrument was considered to be 'minor or machinery' in nature.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response. However, the committee notes that the minister did not provide an undertaking to update the relevant ES in accordance with the requirements of the *Legislative Instruments Act 2003*. The committee will therefore seek such an undertaking from the minister.**

### Health Insurance (Diagnostic Imaging Capital Sensitivity) Amendment Determination 2012 (No. 3) [F2012L02510]

|  |  |
| --- | --- |
| **Purpose** | Amends the Health Insurance (Diagnostic Imaging Capital Sensitivity) Determination 2011 to correct a drafting error in the description of item 63514 to clarify that the use of anaesthetic and contrast is permissible where a General Practitioner requests an MRI knee scan for a child under the age of 16 years |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Department** | Health and Ageing |

**ISSUE:**

#### Whether any person disadvantaged by previous error

The instrument corrects an omission in the description of an item in the principal determination, which meant that the item did not, as intended, authorise the claiming of Medicare benefits for anaesthetic and contrast compounds used in diagnostic imaging. In such cases, the committee usually expects an assurance that no person has been disadvantaged or, if they have, an explanation of what steps have been taken to address that disadvantage (for example, a person may have been out of pocket by not being able to claim the benefit for the anaesthetic and contrast compounds) **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the consequence of the omission in the description of MBS item 63491 (used when a contrast agent is administered to perform MBS item 63512 – MRI knee for under 16 years) was that a patient would not have access to MBS item 63491 when billed in conjunction with MBS item 63512. The minister's department had reviewed the relevant period and identified nine services undertaken against MBS item 63512. However, the department was not able to determine how many of these were performed with contrast.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response. However, while the committee recognises that it is not possible in every case to identify if a person or persons have been disadvantaged by administrative error, it is not clear from the minister's response why the department is unable to ascertain whether any person was disadvantaged in this case. The committee will therefore seek further information from the minister.**

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **21 March 2013**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 3.

### National Environment Protection (Movement of Controlled Waste between States and Territories) Measure Minor Variation 2012 (No. 1) [F2012L02300]

|  |  |
| --- | --- |
| **Purpose** | Makes minor editorial changes and corrects typographical errors in the principal instrument |
| **Last day to disallow[[6]](#footnote-6)** | 15 May 2013 |
| **Authorising legislation** | *National Environment Protection Council Act 1994* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUES:**

#### (a) No information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).[[7]](#footnote-7) With reference to these requirements, the committee notes that the ES accompanying the instrument contains no reference to consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

#### (b) No statement of compatibility with human rights

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility with specified human rights for each disallowable legislative instrument. Subsection 9(2) requires the statement of compatibility to include an assessment of whether the legislative instrument is compatible with human rights. No statement of compatibility accompanies this instrument **[the committee noted that the Parliamentary Joint Committee on Human Rights had identified this issue (First Report of 2013),[[8]](#footnote-8) and deferred to that committee's carriage of the matter].**

**PARLIAMENTARY SECRETARY'S RESPONSE:**

On behalf of the minister, the parliamentary secretary advised that public consultation in relation to the making of the instrument had been undertaken in accordance with section 22B of the *National Environment Protection Council Act 1994*. The consultation comprised publication of the draft proposed variation and ES, along with an invitation for public submissions (with none being received). The parliamentary secretary provided an updated ES for the instrument, which included the additional information on consultation.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter**.

### Defence Determination 2012/68, Reserve employer support payments

|  |  |
| --- | --- |
| **Purpose** | Repeals and replaces the Defence (Employer Support) Determination 2005, which provides for payments to be made to the employers of certain members of the Australian Defence Force who serve as reservists |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Defence Act 1903* |
| **Department** | Defence |

**ISSUES:**

#### (a) Trespass on personal rights

Subsections 3.5(a) and (b) of the determination provide that nothing in section 3 (relating to repeal, saving and transition matters) is taken to preserve the monetary amount or value of a person's entitlements under the former determination. While the committee appreciates that the section facilitates the transition between the two determinations by, for example, ensuring that a person who has qualified for an entitlement under the previous determination will be taken to have qualified for the corresponding requirement under the new determination, the committee notes that the ES provides only a general description of the purpose and operation of the section and, particularly, subsections 3.5(a) and (b) **[the committee sought further information from the parliamentary secretary on the intended purpose of subsections 3.5(a) and (b) of the determination, and particularly as to whether there was potential for a person to be disadvantaged due to their operation]**.

#### (b) Review of decisions on their merits

Part 5 of the instrument deals with the question of review of decisions. It is apparent from the transitional provisions that the new instrument removes the right of review by the Administrative Appeals Tribunal (AAT) for certain decisions relating to employer support payments; however, the ES notes that a review of a decision may be conducted by the Commonwealth Ombudsman. In the committee's view, it is unclear as to why AAT review has been excluded, and what will be the nature and potential outcomes of a review by the Ombudsman **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

In relation to issue (a), the parliamentary secretary advised that the purpose of the provision was to provide transitional arrangements to avoid any detriment to claimants by ensuring continuity of applications, claims and decisions across the two determinations, without matters needing to be recommenced or delayed. The provision was in substantially the same form as that used whenever a determination repealed and replaced an earlier determination. Sufficient discretion also existed for a requirement to be waived, in cases where a member providing a required capability failed to meet a test that they had met under the previous determination.

In relation to issue (b), the parliamentary secretary advised that the removal of AAT review of decisions for all claimants was intended not to prevent review but to ensure that review took place 'at the lowest possible level'. While the Ombudsman would not be able to substitute an original decision as could the AAT, he or she could inquire into and assist self-employed members to resolve claim-related complaints through the giving of advice to claimants and the making of recommendations to decision makers (a function said to be analogous to the referral of a matter by the AAT back to a decision maker for fresh consideration, although 'less formal'). The less formal and technical nature of the Ombudsman's processes were thought to be advantageous to claimants by providing more timely and less costly review of decisions, and to be appropriate to the number and outcomes of previous reviews conducted by the AAT over the life of the scheme.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter**.

**However, in relation to merits review of decisions by the AAT the committee notes that, while the parliamentary secretary has advanced a substantial justification the removal of AAT review, this step nevertheless represents a diminution of the principle that administrative decisions should be subject to review on their merits by a judicial or other independent tribunal.** **The committee therefore draws this matter to the attention of senators**.

### Fair Work Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 321] [F2012L02417]

|  |  |
| --- | --- |
| **Purpose** | Amends the Fair Work Regulations 2009, the Fair Work (Registered Organisations) Regulations 2009, the Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 and the Occupational Health and Safety (Maritime Industry) Regulations 1995 |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Fair Work (Registered Organisations) Act 2009*; *Occupational Health and Safety (Maritime Industry) Act 1993*; *Fair Work Act 2009*; and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* |
| **Department** | Education, Employment and Workplace Relations |

**ISSUE:**

#### Drafting

Regulation 3.16A requires, inter alia, that a protected ballot agent must ensure that in the conduct of an electronic ballot 'there is no way of identifying how any employee has voted'. The committee notes, however, that the ability to identify ballot papers is necessary to ensure that ballots are conducted fairly. Given also that the regulation later provides that an agent must remove any identifiers from an electronic (and postal) ballot before the scrutineer can examine them (see, for example, new paragraph 3.20(6)(a)), it would appear that the intent of regulation 3.16A is rather that electronic (and other identifiable) ballots are able to have identifiers removed (that is, are capable of being rendered unidentifiable) **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the intention of the regulation was not to restrict the ability of protected action ballot agents to identify ballot papers but to ensure the integrity of the ballot process was able to be maintained. In the minister's view, other requirements in the regulation clearly required a protected ballot agent to be able to identify the identity of a voter, such that the requirement at regulation 3.16A was to operate in addition to the requirement that identifiers are to be removed from a ballot paper before the scrutineer is present (regulations 3.19(8) and 3.20(6)).

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter.**

### Fair Work Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 322] [F2012L02409]

|  |  |
| --- | --- |
| **Purpose** | Amends the Fair Work Regulations 2009 and the Fair Work (Registered Organisations) Regulations 2009 |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Fair Work (Registered Organisations) Act 2009*; and *Fair Work Act 2009* |
| **Department** | Education, Employment and Workplace Relations |

**ISSUE:**

#### Drafting

Clause (6)(b)(iii) of Schedule 6.1A to the regulation states, inter alia, that an employee must comply with a direction unless it is 'not appropriate for the employee to perform'. In the committee's view this criterion, depending as it does on the notion of appropriateness, appears to involve a subjective judgement that could give rise to uncertainty about its application in a given case **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister noted that the instrument (and specifically regulation 6.1A) prescribed a model dispute settlement term for a copied state instrument, as provided for under section 768BK of the *Fair Work Act 2009*. This term was modelled on and effectively the same as the existing model term for enterprise agreements in Schedule 6.1 of the regulations. The minister advised that the Australian Industrial Relations Commission (AIRC) had developed a model clause for inclusion in modern awards that, while not identical to the wording of regulation 6.1A, contained a similar requirement that work be 'safe and appropriate for the employee to perform'. Dispute resolution provisions with similar wording had been a feature of workplace relations for a significant time, although the meaning of the term 'appropriate work' was yet to be judicially considered in the dispute settlement context. In view of the above, the minister considered that the dispute settlement provisions were working satisfactorily and did not require any further clarification.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter.**

### Levy Amount Formula Modification Determination 2013 [F2013L00158]

|  |  |
| --- | --- |
| **Purpose** | Modifies the formula by which a levy amount is calculated for a participating persons, in the first or second eligible revenue period, to provide for the calculations to be adjusted in the event that a participating person goes into receivership, liquidation, general administration or ceases to exist |
| **Last day to disallow** | 17 June 2013 |
| **Authorising legislation** | *Telecommunications Universal Service Management Agency Act 2012* |
| **Department** | Broadband, Communications and the Digital Economy |

**ISSUE:**

#### Whether instrument is validly made

Section 99 of the *Telecommunications Universal Service Management Agency Act 2012* sets out a number of formulas for the setting of a levy amount applicable to a participating person for an eligible revenue period. The instrument is made under subsection 99(8), which provides that the minister may, by legislative instrument, 'modify' the formula in subsection 99(3). However, noting that the effect of this instrument is to wholly replace subsection 99(3) with four new subsections, the committee is unsure as to whether, on a strict interpretation, the power to 'modify the formula in subsection 99(3)' provides sufficient authority to wholly replace subsection 99(3), as the instrument does or purports to do **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that section 2B of the *Acts Interpretation Act 1901* provides that 'modifications' in relation to a law includes additions, omissions and substitutions, meaning that it was within the minister's power to omit and substitute the formula as effected by the determination.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Therapeutic Goods Information (Stakeholder Consultation on the System for Australian Recall Actions) Specification 2013 [F2013L00117]

|  |  |
| --- | --- |
| **Purpose** | Permits the secretary to release certain therapeutic goods information to the persons and bodies mentioned in the specification, for specified purposes |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Therapeutic Goods Act 1989* |
| **Department** | Health and Ageing |

**ISSUE:**

#### Insufficient explanation provided regarding consultation

Regarding consultation, the ES for the instrument states:

The release of therapeutic goods information in relation to recall actions for the purpose of testing a prototype of the SARA database is the proposed mechanism for consulting stakeholders on the database. It is considered to be minor and machinery in nature.

Section 26 of the *Legislative Instruments Act* 2003, requires that an ES provide an explanation of why consultation was not undertaken in a given case. The issue of consultation is addressed only indirectly in the ES, and it is not clear to the committee whether consultation was considered unnecessary or inappropriate due to the nature of the instrument or because of plans for future consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

On behalf of the minister, the parliamentary secretary advised that a number of bodies had been targeted and invited to participate in the testing of the prototype System for Recall Actions (SARA) database, which is currently being created. These bodies were listed in Schedule 1 of the instrument, and included consumer and practitioner bodies such as Medicines Australia, the Generic Medicines Industry Association of Australia and the Australian Medical Association. The specification allowed those bodies to participate in the testing of the prototype database by allowing them to access the information it contained, and the comments and feedback from the testing process had been taken into account in determining the final form of the database. The parliamentary secretary advised that the ES would be amended to include the information on consultation provided.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary and has concluded its interest in the matter**.

### Water Efficiency Labelling and Standards Determination 2013 [F2013L00067]

|  |  |
| --- | --- |
| **Purpose** | Repeals the Water Efficiency Labelling and Standards Determination 2011 and sets the registration requirements and rules for products that are covered by the WELS Scheme and also sets the fee amount for those registrations. |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Water Efficiency Labelling and Standards Act 2005* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUE:**

#### Unclear basis for calculation of fees

The determination repeals the previous determination, sets the registration requirements and rules for products that are covered by the Water Efficiency Labelling and Standards (WELS) Scheme and sets the fee amount for those registrations. Contrary to the committee's usual expectation, the ES does not indicate whether the registration fees have decreased or increased or describe the basis for the calculation of the registration fees **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that the registration fees had been set with the intention of raising $923,000, being the proportion of the WELS budget relating to registration (the scheme being restricted to cost recovery only for registration related costs). The fee calculation took into account the cost recovery target, the number of registrations in each tier, the number of products in each tier and an estimate of the number of new products expected to be registered during the year.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter**.

### Native Title (Assistance from Attorney-General) Guideline 2012 [F2012L02564]

|  |  |
| --- | --- |
| **Purpose** | To be applied in authorising the provision of financial assistance under section 213A of the *Native Title Act 1993* |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Native Title Act 1993* |
| **Department** | Attorney-General's |

**ISSUE:**

#### Unclear term

The guideline sets out how the Attorney-General is to make decisions about providing financial assistance to native title claimants. Section 4.2 of the guideline provides that a decision maker must not authorise the provision of financial assistance for costs incurred before a complete application for assistance has been received unless there are 'exceptional circumstances'. However, there is no guidance or examples as to what might constitute exceptional circumstances, and the committee considers that this could be a potentially uncertain criteria **[the committee sought further information from the Attorney-General]**.

**MINISTER'S RESPONSE:**

The Minister for Emergency Management responded, advising that there would be limited circumstances where an applicant would be unable to complete an application before incurring costs. The term 'exceptional circumstances' had therefore been intentionally left undefined to avoid creating expectations that costs would be covered in certain circumstances, and to allow the decision maker to exercise his or her discretion in cases where a strict application of the policy would produce an unfair result. The minister further advised that section 4.2 of the guideline was consistent with the *Commonwealth guidelines for legal financial assistance*, which were applied in a number of comparable financial assistance schemes. In general, the minister expected that requests for assistance based on a claim of 'exceptional circumstances' would be assessed with reference to whether it would be unreasonable to refuse assistance due to severe time constraints, where an applicant experiences difficulty in being able to submit an application, or where procedural issues mean it would be unfair to refuse assistance with the payment of retrospective costs.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Amendment - List of Specimens Taken to be suitable for Live Import (03/01/2013) [F2013L00105]

|  |  |
| --- | --- |
| **Purpose** | Amends the List of Specimens Taken to be Suitable for Live Import (29/11/2001) to update the scientific name for the sucker catfish |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Environment Protection and Biodiversity Conservation Act 1999* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUE:**

#### No information provided regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES accompanying the instrument contains no reference to consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that, as the amendment was a simple taxonomic update to a species name, the instrument was considered to be 'minor or machinery' in nature and consultation was therefore considered unnecessary. The minister further advised that the ES would be updated as requested by the committee.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Amendment of List of Exempt Native Specimens - Pandanus spiralis (18/12/2012) [F2013L00107]

|  |  |
| --- | --- |
| **Purpose** | Amends the List of Exempt Native Specimens (29/11/2001) by adding *Pandanus spiralis* to the list |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Environment Protection and Biodiversity Conservation Act 1999* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUE:**

#### Insufficient explanation provided in relation to consultation

Regarding consultation, the ES for the instrument provides a substantial description of the nature of consultation undertaken in relation to the making of the instrument. However, a reference to the 'relevant state department' is unclear, as the committee is not able to determine which department is referred to on the face of the instrument and more generally **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the department referred to was the Western Australian Department for Environment and Water. On the basis of the consultation undertaken, that department had supported the inclusion of *Pandanus spiralis* on the List of Exempt Native Species.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Carbon Credits (Carbon Farming Initiative) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571]

|  |  |
| --- | --- |
| **Purpose** | Sets out the rules for implementing an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to reduce the methane generated from manure in dairy production systems |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Climate Change and Energy Efficiency |

**ISSUE:**

#### Insufficient explanation provided in relation to consultation

Regarding consultation, the explanatory statement (ES) for this instrument states:

The methodology proposal was developed by the Department of Climate Change and Energy Efficiency (the Department) in collaboration with a technical working group made up of representatives from the dairy industry, the Australian Government and State and Territory governments.

The methodology proposal was published on the Department's website for public consultation from 13 June 2012 to 21 July 2012. Stakeholders and members of the public who asked to be listed on the mailing list maintained by the Department were notified of the public consultation period.'

Unlike the ES for a similar instrument, the Carbon Credits (Carbon Farming Initiative) (Capture and Combustion of Methane in Landfill Gas for Legacy Waste: Upgrade projects) Methodology Determination 2012 [F2012L02583], no information is provided as to the outcome of the consultation, such as the number, if any, of submissions received and the extent to which any comments may have been or were required to be taken into account **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that public consultation was undertaken in relation to the instrument. The methodology proposal was developed by the Department of Climate Change and Energy Efficiency in collaboration with a technical working group made up of representatives from the dairy industry and the Commonwealth, state and territory governments. The proposal was published with an invitation for public comments, with five submissions being received and considered. The parliamentary secretary provided a revised ES in accordance with the committee's request.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for her response and has concluded its interest in the matter**.

### Coastal Trading (Revitalising Australian Shipping) Act 2012 – Section 11 exemption for cruise vessels [F2012L02585]

|  |  |
| --- | --- |
| **Purpose** | Provides an exemption from the Coastal Trading (Revitalising Australian Shipping) Act 2012 for certain cruise vessels |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Coastal Trading (Revitalising Australian Shipping) Act 2012* |
| **Department** | Infrastructure and Transport |

**ISSUE:**

#### (a) No explanation provided regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES accompanying the instrument contains no reference to consultation **[The committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

#### (b) Whether exemption more appropriate for parliamentary enactment

The instrument allows a certain class of vessel to engage in carriage of passengers between Australian ports (except Victoria and Tasmania) without a licence, continuing for a further four years an exemption in effect since 1998. The committee considers that the exemption could be characterised as a de facto amendment to the Act, and as such it may be that the exemption would be more appropriately effected through an amendment to the principal Act. **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

Regarding issue (a), the minister advised that consultation in relation to the instrument was undertaken as part of the development of the Stronger Shipping for a Stronger Economy reform. In addition, the Minister for Tourism was consulted and advised of the proposed continuance of the exemption. The minister further advised that the ES had been reissued in accordance with the committee's request.

Regarding issue (b), the minister advised that the extension to the exemption until 31 December 2017 was intended to align with the review of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* that was to occur five years after its commencement, and that this approach had been accepted by industry stakeholders. The department continued to consult with industry regarding the administration and operation of the *Coastal Trading (Revitalising Australian Shipping) Act 2012*, and would give consideration, if necessary, to the question of whether the current exemption could be more properly effected through an amendment to that Act.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 309] [F2012L02410]

|  |  |
| --- | --- |
| **Purpose** | Amends the Foreign Acquisitions and Takeovers Regulations 1989 to give effect to Australia's commitments under the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Foreign Acquisitions and Takeovers Act 1975* |
| **Department** | Treasury |

**ISSUE:**

#### (a) Drafting

The committee notes that section 2 of the instrument provides:

(1) This regulation commences on the day notified by the Minister in an instrument.

(2) An instrument made under subsection (1) is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the Legislative Instruments Act 2003 applies to the instrument.

In the committee's experience, declarations as to whether or not a particular instrument is a legislative instrument, and as to the application of section 4 (disallowance) and Part 6 of the *Legislative Instruments Act 2003* (the Act), are commonly situated in primary rather than subordinate legislation. The basis for this approach is not apparent or otherwise addressed in the ES for the instrument **[the committee sought further information from the Assistant Treasurer]**.

#### (b) Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states only that 'the National Interest Analysis provided to the Joint Standing Committee outlines the extensive consultation process undertaken as part of the negotiations'. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken (or explanation as to why consultation was not undertaken), it considers that an overly bare or general description or explanation is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee sought further information from the Assistant Treasurer and requested that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**ASSISTANT TREASURER'S RESPONSE:**

Regarding issue (a), the Assistant Treasurer advised that the purpose of subsection 2(2) of the instrument was to provide for public notification of when the regulation will commence, and that the approach taken ensured such notification through both the instrument and the regulation it commenced being registered on the Federal Register of Legislative Instruments (FRLI). More generally, subsection 4(1) of the *Legislative Instruments Act 2003* clearly contemplated that a legislative instrument may be made under another legislative instrument as the 'enabling legislation'. However, in light of the committee's inquiry, the Office of Parliamentary Counsel (OPC) had advised that in future such notifications would instead be made by Gazette notices, which would be published electronically and linked to the legislation to which they relate.

Regarding issue (b), the Assistant Treasurer advised that, as the changes made by the regulation replicated existing provisions (extended in their operation to New Zealand by the instrument), they were considered to be minor and consultation was therefore considered unnecessary. More broadly, the Assistant Treasurer noted that extensive consultation was undertaken in relation to the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, including a process of public consultation and direct consultation with the states and territories.

**COMMITTEE RESPONSE:**

**The committee thanks the Assistant Treasurer for his response and has concluded its interest in the matter**.

### Carbon Credits (Carbon Farming Initiative) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571]; and

### Carbon Credits (Carbon Farming Initiative) (Destruction of Methane from Piggeries using Engineered Biodigesters) Methodology Determination 2013 [F2013L00124]

|  |  |
| --- | --- |
| **Purpose** | Sets out the detailed rules for implementing and monitoring an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to capture biogas generated from dairy farms and to reduce the methane generated from manure in conventional piggeries |
| **Last day to disallow** | 16 May 2013 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Climate Change and Energy Efficiency |

**ISSUE:**

#### Vague or uncertain terminology

These instruments set out the rules for implementing and monitoring an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to capture biogas generated from dairy farms; and to reduce the methane generated from manure in conventional piggeries. Subsection 3.5(4) of the first determination (F2012L02571), setting out one of the methods for measuring solids removal efficiency of the dairy production system, and the table in section 5.2 of the second determination (F2013L00124), setting out matters which must be measured for the purposes of calculating baseline emissions, require that certain parameters must be 'sampled on enough occasions to produce an unbiased, representative sample'. While the committee recognises that there may be a legitimate reason for drafting the requirement in such broad terms, it considers that this could be a potentially uncertain requirement **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that, in general, methodology determinations related to the Carbon Farming Initiative are drafted so as to strike an appropriate balance between prescription and flexibility, while satisfying the offsets integrity standards outlined in the *Carbon Credits (Carbon Farming Initiative) Act 2011*. The methodology determinations were only made once endorsed by the independent Domestic Offsets Integrity Committee, comprised of experts in agricultural and land emissions abatement and sequestration. In the case of the two methodology determinations in question, there was currently no measurement standard directly applicable to determining the solids removal efficiency of manure solids or for sampling volatile solids. Given this, the methodology determinations instead provided overarching guidance as to the objective of achieving an unbiased, representative sample to allow proponents to achieve this outcome in the most efficient manner. The parliamentary secretary further advised that the Clean Energy Regulator would determine on a case-by-case basis which practices would satisfy the requirements of the methodology determinations, and provide guidance to assist proponents to understand the scope of the requirement.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for her response and has concluded its interest in the matter**.

### Nuclear Non-Proliferation (Safeguards) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 292] [F2012L02423]

|  |  |
| --- | --- |
| **Purpose** | Amends the Nuclear Non-Proliferation (Safeguards) Regulations 1987 to update the list of prescribed international agreements in accordance with which powers under *the Nuclear Non-Proliferation (Safeguards) Act 1987* are to be exercised |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Nuclear Non-Proliferation (Safeguards) Act 1987* |
| **Department** | Foreign Affairs and Trade |

**ISSUE:**

#### No explanation provided regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES accompanying the instrument contains no reference to consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that the regulation updated the list of prescribed international agreements according to which powers under the *Nuclear Non-Proliferation (Safeguards) Act 1987* are to be exercised. Those agreements had been tabled in both Houses of Parliament prior to ratification to facilitate public consultations and scrutiny by the Joint Standing Committee on Treaties. The minister considered that consultation in relation to the regulation was unnecessary as it effected only minor changes.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### SSAT Child Support Review General Directions 2012 [F2012L02459]

|  |  |
| --- | --- |
| **Purpose** | Provides for the procedures to be followed in relation to child support review hearings before the Social Security Appeals Tribunal (SSAT) |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Child Support (Registration and Collection) Act 1988* |
| **Department** | Families, Housing, Community Services and Indigenous Affairs |

**ISSUE:**

#### Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states that consultation was not required in this case due to both its urgency and the fact that its effect is 'largely machinery in nature' and 'will not substantially affect or alter reviews by the SSAT'. First, the committee considers that the ES does not adequately explain the circumstances leading to the urgency of the instrument, particularly as to whether there was a reasonable opportunity to anticipate the need for the changes effected by the instrument (arising from the development and passage of the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012*, Second, the committee considers that the statement that the instrument is 'largely machinery' implies that it may also have more substantial effects that could have a bearing on the conclusion that consultation was unnecessary or inappropriate in this case **[the committee sought further information from the minister and requested that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that there was a period of approximately one month to prepare the directions, which commenced the day after the changes made by the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012*. The minister further advised that there were two areas in which the directions altered existing arrangements. First, section 18 of the directions permits an SSAT member to communicate protected information to a person if that information concerns a threat to the life, health or welfare of a person (reflecting a new subsection 16(3A) of the *Child Support (Registration and Collection) Act 1988*). Second, section 31, whichestablishes procedures for dealing with requests for reinstatement of a child support application previously dismissed by the SSAT, reflects changes to section 100 of the *Child Support (Registration and Collection) Act 1988*. This change gives the Principal Member powers to reinstate a child support application that had been dismissed in certain circumstances, as previously there had been no capacity to reinstate a child support application that had been dismissed by the SSAT.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response and has concluded its interest in the matter.**

### Customs Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 276] [F2012L02382]

|  |  |
| --- | --- |
| **Purpose** | Amends the Customs Regulations 1926 to prescribe the methods by which a notice prohibiting the exportation of goods under new section 112BA of the *Customs Act 1901* is to be given, and the time at which such a notice is taken to have been received |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Customs Act 1901* |
| **Department** | Attorney-General's  |

**ISSUE:**

#### Protection of rights

This instrument prescribes the methods by which a notice prohibiting the exportation of goods from Australia may be given, and the time at which such a notice is taken to have been received. It is an offence to export a good in contravention of any such notice. Paragraph 2(c)(iii) provides for a form of 'constructive notice', whereby a notice given to a 'person who appears to work in a management or executive position' (at a previously notified address for service) will be taken to have been served at the time it was given to that person. In the committee's view, it is not clear why there is not a more stringent requirement to ascertain whether a person to whom a notice is given in such cases is in fact in a management or executive position, particularly given that it is an offence to export a good in contravention of any such notice **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that he considers the construction of the provision to be appropriate, given that there are 'obvious complexities' in serving notices on companies. The requirement that such a notice be given to a person who reasonably appears to be in a management or executive position (as opposed to any person on the company premises) was therefore a sufficient safeguard and meant, for example, that the notice provision would not have been complied with if the notice was given to administrative staff at a given company. The minister further advised that the Department of Defence would instruct all persons authorised to give notices to make appropriate inquiries when serving a notice on a company to ensure that the person being given the notice was in a management or executive position. More generally, the minister noted that the regulation was reasonable when compared with other methods by which a notice can be served, such as notices served by mail, which are taken to have been received seven business days after the date of response.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter.**

### Customs (Malaysian Rules of Origin) Regulation 2012 [Select Legislative Instrument 2012 No. 318] [F2012L02435]

|  |  |
| --- | --- |
| **Purpose** | Prescribes matters relating to the rules of origin that are required to be prescribed under Division 1H of the *Customs Act 1901* and which are required to fulfil, in part, Australia's obligations under Chapter 3 of the Malaysia-Australia Free Trade Agreement |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Customs Act 1901* |
| **Department** | Attorney-General's |

**ISSUE:**

#### Insufficient explanation regarding consultation

Regarding consultation, the ES for the instrument states:

No particular consultation was undertaken with regard to this regulation; however, consultation regarding the Malaysia-Australia Free Trade Agreement was undertaken as part of the Joint Standing Committee on Treaty's [sic] consideration of the Agreement.

Section 26 of the *Legislative Instruments Act 2003* requires that an ES provide an explanation of why consultation was not undertaken in a given case. It is not clear to the committee how, of itself, the stated reason for not consulting in relation to the making of the instrument necessarily relates to a conclusion by the rule maker that consultation was 'unnecessary' or 'inappropriate' (as provided for by section 18) **[the committee sought further information from the minister]**

**MINISTER'S RESPONSE:**

The minister advised that extensive public and targeted stakeholder consultation were undertaken during the Malaysia-Australia Free Trade Agreement (MAFTA) negotiations. In addition, the Joint Standing Committee on Treaties conducted an inquiry on the MAFTA, which included the acceptance of written submissions and a public hearing resulting in a report recommending that binding treaty action be taken. The minister further advised that the ES would be updated to include the information provided on consultation.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter.**

### Customs Act 1901 - Amendment of Approved Statement Instrument No. 6 of 2013 - Amendment of "Self-Assessed Clearance Declaration (Sea) (To Be Communicated With a Cargo Report)" [F2013L00142]

|  |  |
| --- | --- |
| **Purpose** | Amends the Customs Act 1901 - CEO Instrument of Approval No. 4 of 2006 to update references and the specified low value goods threshold |
| **Last day to disallow** | 16 May 2013 |
| **Authorising legislation** | *Customs Act 1901* |
| **Department** | Attorney-General's |

**ISSUE:**

#### Insufficient explanation provided in relation to consultation

Regarding consultation, the ES for the instrument states:

No consultation was undertaken under section 17 of the Legislative Instruments Act 2003 before this instrument was made as it is of a minor or machinery nature and does not substantially alter existing arrangements.

However, the instrument appears to make very similar changes to those made by Customs Act 1901 - Amendment of Approved Statement Instrument No. 2 of 2013 - Amendment of "Self-Assessed Clearance Declaration (Air) (To be Communicated with a Cargo Report)" [F2013L00134], for which the ES identified consultation as having taken place with the Conference of Asia Pacific Air Carriers. Given the similarity between the instruments, the committee considers that is unclear as to why consultation was not considered necessary or appropriate in the case of the current instrument **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the instrument was part of a package of six instruments that amended approved statements administered by Australian Customs and Border Protection. Instruments one to five included, at the request of the Conference of Asia Pacific Air Carriers, an additional field to be completed in certain circumstances. Consultation undertaken on these five instruments related only to the inclusion of the additional field, as the other changes were considered to be minor or machinery in nature. As the instrument which was the subject of the committee's inquiry did not include the additional field, no consultation was undertaken in respect of that instrument.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter.**

# Appendix 1

## Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **21 March 2013**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[[9]](#footnote-9) Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

### Instruments received week ending 15 March 2013

***Australian Passports Act 2005***

Australian Passports Amendment Determination 2013 (No. 1) [F2013L00440]

***Australian Prudential Regulation Authority Act 1998***

Australian Prudential Regulation Authority (confidentiality) determination No.4 of 2013 [F2013L00429]

***Civil Aviation Act 1988***

CASA ADCX 004/13 - Revocation of Airworthiness Directives [F2013L00427]

***Coastal Trading (Revitalising Australian Shipping) Act 2012***

Coastal Trading (Revitalising Australian Shipping) Act 2012 – Section 11 exemption for voyages between Christmas Island and Australian States and Territories [F2013L00450]

***Defence Act 1903***

Defence Determination 2013/13, Post indexes – amendment

Defence Determination 2013/14, Excess commuting costs - amendment

***Environment Protection and Biodiversity Conservation Act 1999***

Amendment – List of Specimens Taken to be Suitable for Live Import (19/2/2013) [F2013L0443]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (136) (05/03/2013) [F2013L00432]

Coral Sea Commonwealth Marine Reserve Management Plan 2014-24 [F2013L00425]

Environment Protection and Biodiversity Conservation Act 1999 – section 280 – Instrument of Approval of Variation to Adopted Recovery Plan (21/02/2013) [F2013l00447]

North Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00426]

North-West Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00428]

South-east Commonwealth Marine Reserves Network Management Plan 2013-23 [F2013L00423]

South-west Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00422]

Temperate East Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00421]

***Fair Entitlements Guarantee Act 2012***

Fair Entitlements Guarantee (Extended operation of the Act in relation to Rosella Foods Pty Ltd and Rosella Food Holdco Pty Ltd in Administration) Declaration 01/2013 [F2013L0446]

***Family Law Act 1975***

Family Law (Superannuation – Provision of Information: Governors-General Pension Scheme) Determination 2013 [F2013L00453]

Family Law (Superannuation – Provision of Information: Judges' Pensions Act Scheme) Determination 2013 [F2013L00452]

***Financial Management and Accountability Act 1997***

Financial Management and Accountability (Local Hospital Networks Special Account) Determination 2013/1 [F2013L00451]

***Fisheries Management Act 1991***

Northern Prawn Fishery (Closures) Direction No. 161 [F2013L00431]

Northern Prawn Fishery (Closures) Direction No. 162 [F2013L00430]

Northern Prawn Fishery (Closures) Direction No. 163 [F2013L00442]

Western Tuna and Billfish Fishery Overcatch and Undercatch Determination 2013 [F2013L00424]

***Higher Education Support Act 2003***

Higher Education Support Act 2003 - Revocation of Approval as a Higher Education Provider (Gordon Institute of TAFE) [F2013L00439]

Higher Education Support Act 2003 - VET Provider Approval (No. 9 of 2013) [F2013L00437]

***Migration Act 1958***

Migration Regulations 1994 – Specification under regulation 3.10A – Access to Movement Records – September 2012 [F2013L00444]

***National Health Act 1953***

National Health (Weighted average disclosure price – main disclosure cycle) Amendment Determination 2013 (No. 1) (No. PB 18 of 2013) [F2013L00445]

***Public Service Act 1999***

Australian Public Service Commissioner's Directions 2013 [F2013L0448]

Public Service Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 35, 2013] [F2013L00460]

***Tertiary Education Quality and Standards Agency Act 2011***

Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 1 of 2013 [F2013L00438]

***Therapeutic Goods Act 1989***

Therapeutic Goods Information (System for Australian Recall Actions) Specification 2013 [F2013L0449]

***Veterans' Entitlements Act 1986***

Veterans' Entitlements (Special Assistance) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 20, 2013] [F2013L00441]

***Workplace Gender Equality Act 2012***

Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) [F2013L00434]

### Total number of instruments scrutinised: 33

# Appendix 2

## Guideline on explanatory statements: consultation



AUSTRALIAN SENATE

**STANDING COMMITTEE ON REGULATIONS AND ORDINANCES**

**Guideline for preparation of explanatory statements: consultation**

***Role of the committee***

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm) of personal rights and parliamentary propriety.

***Purpose of guideline***

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the [*Legislative Instruments Act 2003*](http://www.comlaw.gov.au/Details/C2012C00041) (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to [disallowance](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm).

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the rule-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

***Requirements of the* Legislative Instruments Act 2003**

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although 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. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

***Describing the nature of consultation***

To meet the requirements of section 26 of the Act, an ES must *describe the nature of any consultation that has been undertaken*. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

*Method and purpose of consultation*

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

*Bodies/groups/individuals consulted*

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

*Issues raised in consultations and outcomes*

An ES should identify the nature of any issues raised in consultations, as well the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

***Explaining why consultation has not been undertaken***

To meet the requirements of section 26 of the Act, an ES must *explain why no consultation was undertaken*. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

*Specific examples listed in the Act*

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

*Timing of consultation*

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

***Seeking further advice or information***

For further advice regarding the requirements of the Act in relation to consultation or any other matters, please consult the *Legislative Instruments Handbook: a practical guide for compliance with the Legislative Instruments Act 2003 and related matters (December 2004)*, published by the Office of Legislative Drafting and Publishing.

Further information is also available through the committee's website at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm> or by contacting the committee secretariat at:

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# Appendix 3

## Correspondence relating to committee's scrutiny

1. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at www.comlaw.gov.au. [↑](#footnote-ref-1)
2. For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15. [↑](#footnote-ref-2)
3. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-3)
4. Transport Safety Investigation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 264] [F2012L02280]; and Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012 [Select Legislative Instrument 2012 No. 265] [F2012L02281]. [↑](#footnote-ref-4)
5. The committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003* is included at Appendix 2. [↑](#footnote-ref-5)
6. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-6)
7. The committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003* is included at Appendix 2. [↑](#footnote-ref-7)
8. Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 19-29 November 2012 [and] Legislative Instruments registered with the Federal Register of Legislative Instruments 17 November 2012 – 4 January 2013', (First Report of 2013), February 2013, Appendix 1. [↑](#footnote-ref-8)
9. FRLI is found online at http://www.comlaw.gov.au/. [↑](#footnote-ref-9)