

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Membership of the committee

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Senator the Hon Ron Boswell	Queensland, NAT
Senator Sam Dastyari	New South Wales, ALP
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# Contents

<b>Membership of the committee</b> .....	<i>iii</i>
<b>Introduction</b> .....	<i>vii</i>
<b>Chapter 1 – New and continuing matters</b>	
Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] ...	1
Home Care Subsidy Amendment (Transitional Workforce Supplement and Various Measures) Determination 2014 [F2014L00096] .....	2
Residential Care Subsidy Amendment (Transitional Workforce Supplement) Principle 2014 [F2014L00099] .....	2
Multiple instruments identified in Appendix 1 .....	3
<b>Chapter 2 – Concluded matters</b>	
Aged Care (Residential Care Subsidy - Homeless Supplement Amount) Determination 2013 [F2013L01984].....	5
Residential Care Subsidy Amendment (Homeless Supplement) Principle 2013 [F2013L01981].....	5
Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671].....	6
Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670].....	6
Social Security (Declared Overseas Terrorist Act) Declaration 2013 [F2013L01801].....	9
Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Jakarta [F2013L01830].....	9
Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Nairobi [F2013L01799].....	9
Social Security (Disaster Recovery Allowance) (Rate calculator) Determination 2013 [F2013L01971].....	10
<b>Appendix 1 – Index of instruments scrutinised</b> .....	13
<b>Appendix 2 – Guideline on consultation</b> .....	19
<b>Appendix 3 - Correspondence</b> .....	25



# 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.<sup>1</sup>

## 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

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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](http://www.comlaw.gov.au).

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*.<sup>2</sup>

## **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*.
- Appendix 3 contains correspondence relating to concluded matters.

## **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 Sean Edwards**

**Chair**

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2 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13<sup>th</sup> Edition (2012), Chapter 15.



# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **5 March 2014**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

### **Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]**

<b>Purpose</b>	This instrument provides for exceptions under the <i>Australian Jobs Act 2013</i> , information required for compliance and notification, and further functions for the Australian Industry Participation Authority
<b>Last day to disallow<sup>1</sup></b>	13 May 2014
<b>Authorising legislation</b>	<i>Australian Jobs Act 2013</i>
<b>Department</b>	Industry

#### **Issue:**

#### *Prescribing of matters by 'legislative rules'*

The committee notes that this instrument relies on section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules'. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General, by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the *Acts Interpretation Act 1901*, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the *Acts Interpretation Act 1901*.

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1 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate.

More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments. **The committee therefore requests further information from the Minister for Industry.**

### **Home Care Subsidy Amendment (Transitional Workforce Supplement and Various Measures) Determination 2014 [F2014L00096]**

### **Residential Care Subsidy Amendment (Transitional Workforce Supplement) Principle 2014 [F2014L00099]**

<b>Purpose</b>	This determination provides for the payment of a transitional workforce supplement to eligible approved providers from 12 December 2013 until 30 June 2014
<b>Last day to disallow</b>	13 May 2014
<b>Authorising legislation</b>	<i>Aged Care Act 1997</i>
<b>Department</b>	Social Services

#### **Issue:**

#### *Insufficient description 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:

Since the September 2013 Election, the Minister has consulted with a number of organisations in relation to the effect of this Principle. The changes in the determination in relation to the dementia and cognition supplement are to correct an error and to enable approved providers to back date their claims for payment for eligible care recipients. A communication strategy will be implemented to inform aged care providers of the amendment.

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While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it usually considers that an overly bare or general description, as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. **The committee therefore requests further information from the Assistant Minister for Social Services; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

### **Multiple instruments identified in Appendix 1**

The committee has identified a number of instruments, marked by an asterisk (\*) in Appendix 1, that appear to rely 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, the committee considers that it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the instruments identified in Appendix 1. The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.<sup>2</sup>

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2 For more extensive comment on this issue see *Delegated legislation monitor* No. 8 of 2013, p. 511.



## Chapter 2

### Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **5 March 2014**. 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.

#### **Aged Care (Residential Care Subsidy - Homeless Supplement Amount) Determination 2013 [F2013L01984]**

#### **Residential Care Subsidy Amendment (Homeless Supplement) Principle 2013 [F2013L01981]**

<b>Purpose</b>	Sets the level of funding provided through the homeless supplement; and creates a new homeless supplement as an additional other supplement
<b>Last day to disallow</b>	17 March 2014
<b>Authorising legislation</b>	<i>Aged Care Act 1997</i>
<b>Department</b>	Social Services

#### **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 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). With reference to these requirements, the committee notes that the ES accompanying each of the instruments contains no reference to consultation [**the committee requested further information from the Assistant Minister for Social Services; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***].

#### **ASSISTANT MINISTER'S RESPONSE:**

The Assistant Minister for Social Services advised that consultation was not undertaken, as the amendment was considered to be minor in nature.

The assistant minister further advised that the ESs had been amended to include the information provided.

**COMMITTEE RESPONSE:**

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

**Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671]**

**Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670]**

<b>Purpose</b>	The instruments set out the means by which a life expectancy income stream (superannuation) and a lifetime income stream (superannuation) can be determined to be asset-test exempt for the purposes of the <i>Veterans' Entitlements Act 1986</i>
<b>Last day to disallow</b>	2 December 2013
<b>Authorising legislation</b>	<i>Veterans' Entitlements Act 1986</i>
<b>Department</b>	Veterans' Affairs

**Issue:**

*Incorporation of extrinsic material*

The instruments set out the means by which a life expectancy income stream (superannuation) and a lifetime income stream (superannuation) can be determined to be asset-test exempt. Both of the instruments incorporate by reference the Institute of Actuaries of Australia Guidance Note 465 and require that actuarial certificates be prepared in accordance with that guidance note. The *Legislative Instruments Act 2003* provides that extrinsic material may be incorporated into instruments of delegated legislation; however, non-legislative material can generally only be incorporated as in force or existing at a particular date (as opposed to being incorporated as in force or existing 'from time to time').<sup>1</sup> However, neither the instruments nor their ESs provide sufficient detail to determine the basis on which the guidance note is incorporated into the instruments [**the committee sought further information from the former minister**].

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1 See Section 14, *Legislative Instruments Act 2003*.

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**MINISTER'S RESPONSE:**

The Minister for Veterans' Affairs acknowledged that the instruments incorporate by reference the Institute of Actuaries of Australia Guidance Note 465, and expressed the view that the *Legislative Instruments Act 2003* does not require an instrument or its ES to specify whether an incorporated document is the version existing at a particular date or a version as in force from time to time. While the minister noted the committee's comments, and provided an undertaking that future instruments would set out the basis on which a document is incorporated, no information was provided regarding the manner of incorporation in relation to the instruments in question.

**COMMITTEE RESPONSE:**

The committee thanks the minister for his response. However, in the committee's view, section 14 of the *Legislative Instruments Act 2003* provides two ways in which extrinsic material may be prescribed by reference: as at either paragraph 14(1)(a) or 14(1)(b). The committee therefore considers that, as made, the instruments do not comply with the requirements of that Act. Further, the committee regards the instruments as potentially uncertain in their operation, as a person subject to the determinations may find it difficult, or may not be able, to ascertain which version of the referenced material was intended to be prescribed by the instruments [**the committee requested that the minister take steps to amend the instruments in accordance with the requirements of the *Legislative Instruments Act 2003***].

In relation to ESs, the minister correctly states that ESs are not strictly required to specify the manner in which referenced material has been incorporated. However, the committee regards the inclusion of such information as a best-practice approach in fulfilling the requirement that an ES explain the purpose and operation of the instrument (paragraph 26(1A)(b)).

In addition, the committee notes that paragraph 26(1A)(c) requires an ES to provide information on how an instrument prescribed by reference may be obtained. As the ESs for the two instruments did not contain this information, the committee considers that the ESs do not comply with the requirements of the *Legislative Instruments Act 2003* [**the committee requested that the ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003***].

The committee gave notice of motion to disallow the two instruments on 2 December 2013, as the relevant disallowance period was due to expire on that day. The giving of a 'protective' notice in this way preserves the ability of the Senate to disallow an instrument while there remain issues under consideration.<sup>2</sup>

**MINISTER'S RESPONSE:**

In relation to the committee's concern that the ESs for the instruments did not contain information on how the incorporated material may be obtained, the committee acknowledges the minister's advice that this information was in fact contained in the

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2 For further information on the committee's use of notices see *Odgers' Australian Senate Practice*, 13<sup>th</sup> Edition (2012), p. 432.

**ESs. The committee apologises for overlooking this information and thanks the minister for his response.**

In relation to the committee's concern regarding the incorporation of extrinsic material, the minister provided a response, which included a copy of supporting legal advice from the Australian Government Solicitor. In summary, the advice noted that section 14 of the *Legislative Instruments Act 2003* constrains the way in which an instrument may incorporate the contents of another written document, such that a written document not subject to parliamentary scrutiny may be incorporated only as in force at the time the instrument is made. This applies to the instruments in question, meaning that the determinations could not validly incorporate the guidance note provisions as in force from time to time. While the text of the provisions does not make clear whether the determinations in fact purport to do this, section 13(1)(c) of the *Legislative Instruments Act 2003* requires that the determinations must be construed subject to the enabling legislation and so as not to exceed the power of the rule-maker. This provision, in combination with the fact that the determinations did not express the material in question to be incorporated as in force from time to time, supported the conclusion that the provisions must be read as incorporating the material as in force at the time of the making of the instruments, and are therefore consistent with section 14 of the *Legislative Instruments Act 2003*. This conclusion was further supported by the decision in *Comcare v Broadhurst* (2011) 192 FCR 497.

On the matter more generally of the committee's concerns regarding the potentially uncertain operation of the determinations, the advice noted that, as the version of the incorporated guidance note remains unchanged (and in light of the factors above), there is currently no room for confusion as to which version of the note is incorporated by the determinations. There was therefore no immediate need to amend the determinations; however, in the event that the guidance note was updated or superseded, it would be desirable to amend the determinations to clarify which document was being referred to.

The minister further advised that, in the event that the instruments are remade, the opportunity will be taken to specify the manner of incorporation of the guidance note.

#### **COMMITTEE RESPONSE:**

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

**Accordingly, the committee will seek to withdraw the notice of motion to disallow the two instruments, given on 2 December 2013.**

**However, the committee wishes to emphasise its continued expectation that, where an instrument incorporates extrinsic material by reference, the manner of incorporation is clearly specified. This approach enables persons affected by any such instrument to understand the operation of the instrument without the need to rely on specialist legal knowledge or advice. To this end, the committee acknowledges the minister's intention to specify the manner of incorporation in the event that the instruments are remade; and, more generally, the typically high standards of drafting and attention to the committee's scrutiny principles in**



instruments and ESs emanating from the Department of Veterans' Affairs portfolio.

Finally, the committee also wishes to thank the minister for the provision of the legal advice which was obtained in relation to this matter. In accordance with its usual practice, the committee intends to publish the legal advice once the minister has been given the opportunity to raise any objections against publication.

**Social Security (Declared Overseas Terrorist Act) Declaration 2013 [F2013L01801]**

**Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Jakarta [F2013L01830]**

**Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Nairobi [F2013L01799]**

<b>Purpose</b>	These instruments declare a number of terrorist acts for the purposes of allowing compensation payments to be made to victims of such acts
<b>Last day to disallow</b>	4 March 2014
<b>Authorising legislation</b>	<i>Social Security Act 1991</i>
<b>Department</b>	Social Services

**Issue:**

*No information provided regarding consultation*

These instruments are made by the Prime Minister, and declare a number of terrorist acts for the purposes of allowing compensation payments to be made to victims of such acts (under section 36B(1) of the *Social Security Act 1991*). 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 ESs for the instruments contain no reference to consultation [**the committee requested further information from the Minister for Social Services; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***].

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The Parliamentary Secretary to the Prime Minister responded, advising that consultation was undertaken with the Attorney-General's Department, the Department of Human Services and the Department of Foreign Affairs and Trade. Public consultation was not considered to be necessary as the departments consulted covered the range of expertise relevant to the making of the instruments.

The parliamentary secretary further advised that the ESs for the instruments had been amended to include the information provided.

**COMMITTEE RESPONSE:**

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

**Social Security (Disaster Recovery Allowance) (Rate calculator) Determination 2013 [F2013L01971]**

<b>Purpose</b>	Specifies the method in which the fortnightly rate of Disaster Recovery Allowance will be calculated
<b>Last day to disallow</b>	17 March 2014
<b>Authorising legislation</b>	<i>Social Security Act 1991</i>
<b>Department</b>	Social Services

**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). With reference to these requirements, the committee notes that the ES accompanying this instrument contains no reference to consultation [**the committee requested 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 for Justice advised that the purpose of the determination was to prescribe the method of calculating a person's Disaster Recovery Allowance (DRA), being a measure to provide short-term income support to individuals with a demonstrated loss of income following a disaster in Australia. Consultation was not considered necessary as DRA is payable to individuals and would indirectly support business; and because the setting of the method of calculating a person's DRA was considered to be minor or machinery in nature. The Attorney-General's Department consulted with the former Department of Education, Employment and Workplace Relations (DEEWR) to ensure the determination accurately reflected the correct rates of the Youth Allowance and Newstart Allowance (on which the DRA is based).

The minister further advised that the ES had been amended to include the information provided.

**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 **5 March 2014**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.<sup>1</sup> 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 marked with an asterisk (\*) are the subject of the comment on p. 3 of Chapter 1 relating to subsection 33(3) of the *Legislative Instruments Act 2003* (under the heading 'Multiple instruments identified in Appendix 1').

### Instruments received week ending 7 February 2014

<b><i>Aged Care (Living Longer Living Better) Act 2013</i></b>	
Fees and Payments Principles 2014 [F2014L00108]	
<b><i>Aged Care Act 1997</i></b>	
Aged Care Act 1997 - Determination under paragraph 44-19(1)(b) (ACA Ch. 3 No. 5/2007) Revocation Determination 2013 [F2014L00084]	
Home Care Subsidy Amendment (Transitional Workforce Supplement and Various Measures) Determination 2014 [F2014L00096]	*
Residential Care Subsidy Amendment (Transitional Workforce Supplement) Principle 2014 [F2014L00099]	
<b><i>Aged Care (Living Longer Living Better Act 2013 and Aged Care Act 1997</i></b>	
Aged Care (Maximum Accommodation Payment Amount) Determination 2014 [F2014L00109]	
<b><i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i></b>	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 1) [F2014L00086]	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 2) [F2014L00110]	
<b><i>Australian Prudential Regulation Authority Act 1998</i></b>	
Australian Prudential Regulation Authority (confidentiality) determination No. 1 of 2014 [F2014L00105]	
<b><i>Broadcasting Services Act 1992</i></b>	

1 FRLI is found online at <http://www.comlaw.gov.au/>.

Licence Area Plan - Lismore Radio - Variation No. 1 of 2014 [F2014L00083]	
Licence Area Plan - Darwin Radio - Variation No. 1 of 2014 [F2014L00087]	
Licence Area Plan - Gosford Radio - Variation No.1 of 2014 [F2014L00088]	
<b><i>Civil Aviation Safety Regulations 1998</i></b>	
CASA ADCX 002/14 - Revocation of Airworthiness Directives [F2014L00082]	
<b><i>Commonwealth Inscribed Stock Act 1911</i></b>	
Direction Relating to Commonwealth Borrowing [F2014L00074]	E <sup>2</sup>
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b>	
Amendment to the list of threatened species, threatened ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (149) (15/01/2014) [F2014L00081]	
Amendment to the list of threatened species, ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (152) (15/01/2014) [F2014L00085]	
Amendment of List of Exempt Native Specimens - New South Wales Estuary General Fishery (19/12/2013) (inclusion) [F2014L00090]	
Amendment of List of Exempt Native Specimens - New South Wales Estuary General Fishery (19/12/2013) (deletion) [F2014L00091]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Hauling Fishery (19/12/2013) (inclusion) [F2014L00092]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Hauling Fishery (19/12/2013) (deletion) [F2014L00093]	
Dent Island Lightstation Heritage Management Plan [F2014L00095]	
Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting and Revoking Recovery Plans (NSW, SA and WA) (17/01/2014) [F2014L00102]	
<b><i>Federal Financial Relations Act 2009</i></b>	
Federal Financial Relations (General Purpose Financial Assistance) Determination No. 53 (August 2013) [F2014L00067]	E
Federal Financial Relations (National Partnership payments) Determination No. 71 (December 2013) [F2014L00068]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 54 (September 2013) [F2014L00069]	E
Federal Financial Relations (National Partnership payments) Determination No. 72 (December 2013) [F2014L00070]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 57 (December 2013) [F2014L00071]	E

- 2 Instruments marked (E) are exempt from disallowance. As Senate Standing Order 23 directs the committee to consider instruments that are subject to 'disallowance or disapproval', exempt instruments are not scrutinised by the committee.

Federal Financial Relations (General purpose financial assistance) Determination No. 56 (November 2013) [F2014L00072]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 55 (October 2013) [F2014L00073]	E
Federal Financial Relations (National Partnership payments) Determination No. 73 (January 2014) [F2014L00075]	E
Federal Financial Relations (National Partnership payments) Determination No. 68 (September 2013) [F2014L00076]	E
Federal Financial Relations (National Partnership payments) Determination No. 69 (October 2013) [F2014L00077]	E
Federal Financial Relations (National Partnership payments) Determination No. 70 (November 2013) [F2014L00078]	E
<b><i>Food Standards Australia New Zealand Act 1991</i></b>	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 1, 2014 [F2014L00094]	E
<b><i>Higher Education Support Act 2003</i></b>	
Higher Education Support Act 2003 - VET Provider Approval (No. 3 of 2014) [F2014L00089]	
Higher Education Support Act 2003 - VET Provider Approval (No. 4 of 2014) [F2014L00100]	
Higher Education Support Act 2003 - VET Provider Approval (No. 5 of 2014) [F2014L00101]	
Higher Education Support Act 2003 - VET Provider Approval (No. 6 of 2014) [F2014L00103]	
<b><i>Legislative Instruments Act 2003</i></b>	
Legislative Instruments (Deferral of Sunsetting-Radiocommunications Instruments) Certificate 2013 [F2014L00080]	E
<b><i>Migration Regulations 1994</i></b>	
Migration Regulations 1994 - Specification of Specified Place - IMMI 13/143 [F2014L00104]	E
<b><i>National Gambling Reform Act 2012</i></b>	
National Gambling Reforms (Administration of ATM measure) Directions 2014 [F2014L00107]	
<b><i>National Health Act 1953</i></b>	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 1) (No. PB 5 of 2014) [F2014L00079]	
<b><i>National Health Act 1953</i></b>	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 1) (No. PB 4 of 2014) [F2014L00098]	
<b><i>Public Service Act 1999</i></b>	
Public Service Act 1999 - Determination under subsection 24(3) – Non-SES employees - amendment of determination of 18 September 2013 (No. 2) [F2014L00106]	E

<b><i>Veterans' Entitlements Act 1986</i></b>	
Amendment Statement of Principles concerning posttraumatic stress disorder No. 19 of 2014 [F2014L00066]	

**Instruments received week ending 14 February 2014**

<b><i>Agricultural and Veterinary Chemicals Code Act 1994</i></b>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 2) [F2014L00133]	E
<b><i>Australian Broadcasting Corporation Act 1983</i></b>	
Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014 [F2014L00122]	
<b><i>Australian Jobs Act 2013</i></b>	
Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]	
<b><i>Australian National University Academic Board Statute 2013</i></b>	
Academic Board (Election of Members) Order 2014 [F2014L00123]	E
<b><i>Civil Aviation Safety Regulations 1998</i></b>	
CASA EX06/14 - Exemption - carriage of cockpit voice recorders and flight data recorders [F2014L00112]	
CASA ADCX 003/14 - Repeal of Airworthiness Directives [F2014L00124]	
<b><i>Corporations Act 2001</i></b>	
Accounting Standard AASB 1031 Materiality [F2014L00126]	*
ASIC Market Integrity Rules (ASX Market) Amendment 2014 (No. 1) [F2014L00128]	*
ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2014 (No. 1) [F2014L00129]	*
ASIC Class Order [CO 14/23] [F2014L00134]	*
<b><i>Currency Act 1965</i></b>	
Currency (Royal Australian Mint) Determination 2014 (No. 1) [F2014L00132]	
<b><i>Defence Act 1903</i></b>	
Defence Determination 2013/61, aide-de-camp allowance - amendment	
Defence Determination 2013/62, Travel on extension of overseas posting - amendment	
Defence Determination 2013/63, Dental officer specialist officer career structure - amendment	
Defence Determination 2014/1, Post indexes - amendment	
Defence Determination 2014/2, Leave credits and travel - amendment	
Defence Determination 2014/3, Interdependent partner and overseas medical costs - amendment	
Defence Determination 2014/4, Posting location and rent contribution - amendment	
Defence Determination 2014/5, Review of housing contributions allowances	



Defence Determination 2014/6, Housing rent band adjustment	
Defence Determination 2014/7, Posting location and housing - amendment	
Defence Determination 2014/8, Post indexes - amendment	
Defence Determination 2014/9, ADF allowances - amendment	
<b><i>Eastern Tuna and Billfish Fishery Management Plan 2010 and Fisheries Management Act 1991</i></b>	
Eastern Tuna and Billfish Fishery Total Allowable Commercial Catch and Undercatch/Overcatch Determination 2014 [F2014L00115]	*
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b>	
Amendment - List of Specimens taken to be Suitable for Live Import (4/11/2013) [F2014L00097]	
Threat abatement plan for disease in natural ecosystems caused by <i>Phytophthora cinnamomi</i> , Commonwealth of Australia 2014 [F2014L00111]	
Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 - Proteaceae Dominated Kwongan Shrublands (EC 126) (15/01/2014) [F2014L00113]	
<b><i>Financial Management and Accountability Act 1997</i></b>	
FMA Act Determination 2014/01 – Section 32 (Transfer of Functions from Industry to Environment and Foreign Affairs) [F2014L00114]	E
FMA Act Determination 2014/02 — Section 32 (Transfer of Functions from Industry to Education) [F2014L00120]	E
FMA Act Determination 2014/03 – Section 32 (Transfer of Functions from DEEWR to Education and Employment) [F2014L00136]	E
<b><i>Higher Education Support Act 2003</i></b>	
Higher Education Support Act 2003 - VET Provider Approval (No. 7 of 2014) [F2014L00131]	
Higher Education Support Act 2003 - VET Provider Approval (No. 9 of 2014) [F2014L00138]	
Higher Education Support Act 2003 - VET Provider Approval (No. 10 of 2014) [F2014L00139]	
Higher Education Support Act 2003 - VET Provider Approval (No. 8 of 2014) [F2014L00140]	
<b><i>Migration Regulations 1994</i></b>	
Migration Regulations 1994 - Institutions and Disciplines for Subclass 476 (Skilled - Recognised Graduate) Visas - IMMI 14/010 [F2014L00130]	E
<b><i>Military Superannuation and Benefits Act 1991</i></b>	
Military Superannuation and Benefits (Eligible Member) Declaration 2014 [F2014L00119]	E
<b><i>National Consumer Credit Protection Act 2009</i></b>	
ASIC Class Order [CO 14/41] [F2014L00135]	
<b><i>National Health Act 1953</i></b>	
National Health (Weighted average disclosed price - main disclosure cycle) Amendment	

Determination 2014 (No. 1) [F2014L00137]	
<b><i>Private Health Insurance Act 2007</i></b>	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 1) [F2014L00116]	*
Private Health Insurance (Prostheses) Rules 2014 (No. 1) [F2014L00127]	
<b><i>Radiocommunications Act 1992</i></b>	
Radiocommunications (Spectrum Designation) Notice No. 1 of 2014 [F2014L00118]	
<b><i>Safety, Rehabilitation and Compensation Act 1988</i></b>	
Safety, Rehabilitation and Compensation (Licence Eligibility - DHL Supply Chain) Declaration 2014 (No. 1) [F2014L00117]	
Safety, Rehabilitation and Compensation Act 1988 - Section 97E - Premium Determination Guidelines 2013 [F2014L00121]	

**Instruments received week ending 21 February 2014**

No instruments were received.

The committee considered 64 legislative instruments.

## **Appendix 2**

### **Guideline on consultation**





AUSTRALIAN SENATE

## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### Addressing consultation in explanatory statements

#### *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](#) 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](#) (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](#).

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.

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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***

Further information is available through the committee's website at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_ctte/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm) or by contacting the committee secretariat at:

Committee Secretary  
Senate Regulations and Ordinances Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Phone: +61 2 6277 3066

Fax: +61 2 6277 5881

Email: [RegOrds.Sen@aph.gov.au](mailto:RegOrds.Sen@aph.gov.au)



# **Appendix 3**

## **Correspondence**





**SENATOR THE HON MITCH FIFIELD**

**ASSISTANT MINISTER FOR SOCIAL SERVICES**

MC14-001289

**RECEIVED**

Chair  
Senate Standing Committee on Regulations and Ordinances  
Room S1.111  
Parliament House  
CANBERRA ACT 2600

21 FEB 2014  
Senate Standing C'ttee  
on Regulations  
and Ordinances

Dear Chair

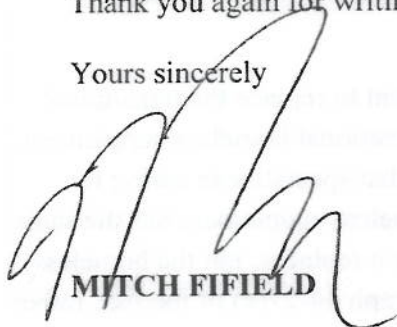
Thank you for your letter of 10 February 2014 about the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 9 of 2013 (11 December 2013), concerning the following instruments for which I have portfolio responsibility:

- Residential Care Subsidy Amendment (Homeless Supplement) Principle 2013 [F2013L01981]; and
- Aged Care (Residential Care Subsidy – Homeless Supplement Amount) Determination 2013 [F2013L01984].

I have reviewed and updated the Explanatory Statements for these instruments to include further information as requested by the Committee.

Thank you again for writing.

Yours sincerely



**MITCH FIFIELD**

Encl.

18/2/14





## Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs

Minister Assisting the Prime Minister for the Centenary of ANZAC

Special Minister of State

Ref: M13/3180

Senator Sean Edwards  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Room S1.111  
Parliament House  
CANBERRA ACT 2600

RECEIVED

13 FEB 2014

Senate Standing C'ttee  
on Regulations  
and Ordinances

  
Dear Senator Edwards,

I refer to the Committee's *Delegated Legislation Monitor* No. 8 of 2013 and in particular to the Committee's comments in respect of the *Veterans' Entitlements (Actuarial Certificate—Lifetime Income Stream Guidelines) Determination 2013* and the *Veterans' Entitlements (Actuarial Certificate—Life Expectancy Income Stream Guidelines) Determination 2013*.

The Committee had two concerns with the instruments. Firstly, that the instruments appeared to have infringed s.14 of the *Legislative Instruments Act 2003* in that the instruments incorporated a non-legislative document (Institute of Actuaries of Australia Guidance Note 465 (Guidance Note)) but "...neither the instruments nor their ESs provide sufficient detail to determine the basis on which the guidance note is incorporated into the instruments" (Committee). Secondly, the Explanatory Statements for the relevant instruments appeared to have infringed s.26(1A)(c) of the *Legislative Instruments Act 2003* because they did not provide information on how the Guidance Note 465 could be obtained.

Regarding the second concern, I understand that in discussions between officials of our respective organisations your officials agreed the Committee made an error on this point and that the Explanatory Statements do contain information as to how the Guidance Note could be obtained. Presumably the Committee will be publishing an erratum in this regard.

Turning to the main issue of whether the instruments infringe s.14 of the *Legislative Instruments Act 2003*, my legal advice from the Australian Government Solicitor (copy enclosed) is that they do not. Indeed it is settled law that a legislative instrument in the position of the instruments in question will be read so as not to exceed the power of the instrument-maker. In this case this means regarding the Guidance Note as being the version in force on the date the relevant instrument commenced: *see Comcare v Broadhurst* (2011) 192 FCR 497; s.13(1)(c) and s.13(2) of the *Legislative Instruments Act 2003*.

On a practical level the Institute of Actuaries of Australia has advised that the Guidance Note has not changed since its introduction and when it is changed, as planned, it will be called a Professional Standard. In other words, the Guidance Note is "frozen" in the form in which it is referred to in the Explanatory Statements for the relevant instruments and so there would appear to be very little scope for a person affected by the instruments to be misled as to the version of the Guidance Note that applied to the person's actions.

Finally, although the relevant instruments would not appear to infringe the *Legislative Instruments Act 2003* there is another potential legal issue with the instruments, unconnected to the issue raised by the Committee, and the Department of Veterans' Affairs is in the process of resolving it. It may be that ultimately the instruments are remade in which case the opportunity will be taken to refer to the Guidance Note as it exists at a specific date.

I hope this information is of assistance to you.

Yours sincerely,

**SENATOR THE HON. MICHAEL RONALDSON**

ENCL

- 4 FEB 2014



PARLIAMENTARY SECRETARY  
TO THE PRIME MINISTER

Reference: B14/325

24 FEB 2014

Senator Sean Edwards  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
CANBERRA ACT 2600

**RECEIVED**

26 FEB 2014  
Senate Standing C'ttee  
on Regulations  
and Ordinances

Dear Senator *Sean*

I refer to your letter dated 5 December 2013 to the Minister for Social Services, the Hon Kevin Andrews MP, about a number of legislative instruments. That letter was referred to the Department of the Prime Minister and Cabinet because three of the instruments were made by the Prime Minister. The Prime Minister has asked me to respond on his behalf.

Those instruments are:

- Social Security (Declared Overseas Terrorist Act) Declaration 2013;
- Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Jakarta; and
- Social Security (Declared Overseas Terrorist Act) Declaration 2013 – Nairobi.

The committee raised concerns that the explanatory statements for those instruments did not contain information about consultation. Due to an administrative oversight, this information was omitted. Consultation did take place between a number of departments. No public consultation was considered necessary as the Departments consulted covered the range of expertise relevant to the instruments.

I attach revised explanatory statements for your consideration.

Yours sincerely

JOSH FRYDENBERG







**THE HON MICHAEL KEENAN MP**  
**Minister for Justice**

MC13/31090

26 FEB 2014

Senator Sean Edwards  
Chair  
Senate Standing Committee on Regulations and Ordinances  
PO Box 6100  
PARLIAMENT HOUSE ACT 2600

**RECEIVED**  
27 FEB 2014  
Senate Standing C'ttee  
on Regulations  
and Ordinances

Dear Senator *Sean*

I am writing in response to comments contained in the report of the Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 9 of 2013 (11 December 2013), concerning the *Social Security (Disaster Recovery Allowance) (Rate Calculator) Determination 2013 [F2013L01971]* for which I have portfolio responsibility. I note the Committee's comments about providing further information on any consultation undertaken in preparing the Determination and that the Explanatory Statement (ES) be amended in accordance with the requirements under the *Legislative Instruments Act 2003* (the Act).

By way of background, the Disaster Recovery Allowance (DRA) provides short-term income support to individuals with a demonstrated loss of income following a disaster in Australia, whether natural or otherwise. It is a taxable, fortnightly payment based on the maximum applicable Newstart or Youth Allowance rate and is intended to provide support to those who reside in, or earn, derive or receive an income from working in a disaster affected area. The DRA is paid fortnightly until the individual regains their pre-disaster income or for up to 13 weeks. If after 13 weeks, an individual requires ongoing income support they are able to apply for Newstart Allowance or another income support payment applicable to their circumstances.

The *Social Security (Disaster Recovery Allowance) (Rate Calculator) Determination 2013* sets out the manner in which a person's rate of DRA is calculated. A person's rate of payment cannot exceed the maximum basic rate of Newstart or Youth Allowance that would be payable to a qualified person.

Section 17 of the Act requires appropriate consultation to be undertaken where a proposed instrument is likely to have an effect on business. The DRA is payable to the employees of a business that have lost income as a direct result of a disaster however the business itself is not eligible for this particular assistance measure. In the circumstances of sole traders or primary producers, the individual would apply for assistance rather than the business. Consultation with the broader business community was not necessary as the payment benefits businesses indirectly by supporting employees, sole traders and primary producers following a disaster.

As noted above, the *Social Security (Disaster Recovery Allowance)(Rate Calculator) Determination 2013* describes how an individual's rate of payment is to be calculated and is administrative in nature. Section 18(2)(a) of the Act provides that consultation may be unnecessary or inappropriate where an instrument is of a minor or machinery nature or does not substantially alter existing arrangements. The Attorney-General's Department (the Department) consulted with the former Department of Education, Employment and Workplace Relations (DEEWR) to ensure that the determination accurately reflected the correct calculations for the rates of Youth Allowance and Newstart Allowance. The Department did not consult with the public at large as the amendments do not substantially differ from existing arrangements for Newstart and Youth Allowance.

The explanatory statement has been amended in accordance with the Act as requested and is enclosed for your reference.

Thank you for bringing the Committee's comments to my attention.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Keenan', with a long horizontal line extending to the right.

**Michael Keenan**

Encl: Explanatory Statement *Social Security (Disaster Recovery Allowance) (Rate Calculator) Determination 2013*