The Senate

Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# 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 Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information. Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown after the name of each instrument).

### The committee's terms of reference

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

* 1. (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
	2. (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.
	3. The committee shall scrutinise each instrument to ensure:
	4. (a) that it is in accordance with the statute;
	5. (b) that it does not trespass unduly on personal rights and liberties;
	6. (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
	7. (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;

Appendix 1 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Appendix 2 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 John Williams**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **3 September 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.

## New matters

### CASA 170/14 - Direction — number of cabin attendants (National Jet Systems) [F2014L01044]

|  |  |
| --- | --- |
| **Purpose** | Directs National Jet Systems Pty Ltd to operate an Australian registered Boeing 717 series aircraft with not less than 3 cabin attendants |
| **Last day to disallow[[3]](#footnote-3)** | 28 November 2014 |
| **Authorising legislation** | *Civil Aviation Regulations 1988* |
| **Department** | Infrastructure and Regional Development |

**Issue:**

*Timetable for making of substantive amendments to Civil Aviation Orders*

In Monitor No. 1 of 2013 (7 February 2013), the committee raised concerns about the timetable for substantive amendments to Civil Aviation Order (CAO) 20.16.3 in light of the exemption granted by CASA 364/12 - Direction - number of cabin attendants (National Jet Systems) [F2012L02169]. The committee noted it generally prefers that exemptions are not used or do not operate as de facto amendments to primary legislation. The committee further noted it had previously written to the then minister about the continued need for exemptions with a similar purpose to the 2012 instrument. To that end, the committee sought further information on the timetable for substantive amendments to CAO 20.16.3. The then minister advised that progress on the issue depended on the progress in developing the proposed Civil Aviation Safety Regulations Part 121 'Air Transport Operations – Large Aeroplanes', and that this would occur in 2013.

The current instrument specifies the minimum number of cabin attendants required on specified aircraft operated by a particular operator. In doing so, the instrument grants an exemption from CAO 20.16.3 until 31 July 2015 (to the same operator operating the same aircraft as the 2012 instrument). The explanatory statement (ES) for the current instrument under the heading, 'Senate committee concerns', states:

* 1. The development and preparation of suitable amendments of the Regulations to avoid the need for individual directions and set a suitable standard for cabin crew numbers is continuing.

**Noting that CASA still relies on instruments that exempt compliance with CAO 20.16.3, and that development of the amendments are continuing, the committee seeks further information from the minister on the timetable for completing the amendments.**

## Continuing matters

### Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

The committee has identified a number of instruments 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 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 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:**

* 1. 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.[[4]](#footnote-4)

**The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the following instruments:**

|  |
| --- |
| ASIC Market Integrity Rules (ASX Market) Amendment 2014 (No. 3) [F2014L01023] (subsection 798G(1), Corporations Act 2001) |
| ASIC Market Integrity Rules (APX Market) Amendment 2014 (No. 1) [F2014L01024] (subsection 798G(1), Corporations Act 2001) |
| ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2014 (No. 3) [F2014L01025] (subsection 798G(1), Corporations Act 2001) |
| Export Control (Meat and Meat Products) Amendment (2014 Measures No. 1) Order 2014 [F2014L01038] (regulation 3, Export Control (Orders) Regulations 1982) |

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **3 September 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 2.

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

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

|  |  |
| --- | --- |
| **Purpose** | Sets 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 *Veterans' Entitlements Act 1986*  |
| **Last day to disallow** | 2 December 2013 |
| **Authorising legislation** | *Veterans' Entitlements Act 1986* |
| **Department** | Veterans' Affairs |

**[The committee first reported on this instrument in *Delegated legislation monitor* (Monitor) No. 5 of 2013, and subsequently in Monitor No.2 of 2014].**

**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').[[5]](#footnote-5) 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]**.

**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 thanked the minister for his response (Monitor No. 8 of 2013)].**

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 minster 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.[[6]](#footnote-6)

**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 ESs **[the committee apologised for overlooking this information and thanked 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 determninations 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 thanked the minster for his response and** **concluded its interest in the matter (Monitor No.2 of 2014)].**

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.

**[The committee thanked the minister for the provision of the legal advice which was obtained in relation to this matter and noted that it would publish the legal advice once the minister had been given the opportunity to raise any objections against publication].**

**No objection from the minister having been received, the legal advice from the Australian Government Solicitor in relation to this matter is included in Appendix 2 to this report.**

# Appendix 1

## Guideline on consultation

**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](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 as 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> or by contacting the committee secretariat at:

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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. [↑](#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. For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-4)
5. See Section 14, *Legislative Instruments Act 2003*. [↑](#footnote-ref-5)
6. For further information on the committee's use of notices see *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432. [↑](#footnote-ref-6)