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 correspondence relating to concluded matters.

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 John Williams**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **19 November 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.

This report considers all disallowable instruments tabled between 10 October 2014 and 23 October 2014. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[[3]](#footnote-3)

## New matters

### National Land Transport (Exemption from Public Tenders for State Projects) Determination 2014 [F2014L01342]

|  |  |
| --- | --- |
| **Purpose** | Allows for States and Territories to be exempt from calling for public tenders if the work is below $100,000 |
| **Last day to disallow[[4]](#footnote-4)** | 10 February 2015 |
| **Authorising legislation** | *National Land Transport Act 2014* |
| **Department** | Infrastructure and Regional Development |

**Issue:**

*No 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 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 for the instrument provides no description of the nature of the consultation undertaken. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***.

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

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

|  |
| --- |
| ASIC Class Order [CO 14/829] [F2014L01347] |
| Part 145 Manual of Standards Amendment Instrument 2014 (No. 1) [F2014L01316] |
| PCEHR (Participation Agreements) Amendment (specified kind of agreement) Rule 2014 [F2014L01334] |
| Remuneration Tribunal Determination 2014/19 - Remuneration and Allowances for Holders of Public Office [F2014L01339] |

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **19 November 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 1.

### Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841]

|  |  |
| --- | --- |
| **Purpose** | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on certain activities across eleven portfolios |
| **Last day to disallow** | 19 November 2014 |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997*[[6]](#footnote-6) |
| **Department** | Finance |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 10 of 2014. The committee drew the Senate's attention to various items added to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations); and** **sought further information regarding the authority for the expenditure specified in the regulation]**

**Issue:**

*Addition of matters to Schedule 1AB of the FFSP Regulations—authority for expenditure*

Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

This instrument was made after the High Court's decision in *Williams (No. 2)* ([2014] HCA 23 (19 June 2014)) (*Williams No. 2*). The committee notes that, as a result of that decision, a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under section 51 of the Constitution. The committee considers that, in light of *Williams No.2*, the explanatory statement (ES) for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* should explicitly state, for each new program, the constitutional head of power that supports the expenditure **[the committee therefore requested further information from the minister in relation to the constitutional head of power for each program, grant, and arrangement specified in the instrument].**

**MINISTER'S RESPONSE:**

The Minister for Finance and Acting Assistant Treasurer advised:

* 1. The Government acknowledges that, following the High Court's decisions in *Williams v Commonwealth* (2012) 288 ALR 410 (*Williams No. 1*) and *Williams No. 2*, it will often be the case that spending activities require legislative authority in addition to an appropriation. The Regulation represents one kind of legislative authority that can be provided. The Government does not agree, however, that this means explanatory statements must in effect set out the constitutional and other legal reasoning taken into account in formulating legislation and expenditure programmes. The validity of any legislation generally turns on judicial consideration of its text rather than on what is said in explanatory material.
  2. It is of course true that the formulation of legislation and programmes often involves many complex issues; and the drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective or scope of legislation. In others they will not be so obvious. Such variation in approach—in primary and subordinate legislation—is commonplace.
  3. The Regulation here is a case in point. In some instances, the constitutional basis for a particular item will be clear from the text in the 'Purpose' or 'Objective(s)' column for that item in the table in the Regulation. For example, item 37 prescribes programmes for the advancement of Indigenous people and, as such, is clearly supported by the races power in section 51(xxvi). In other cases, the constitutional reach for a particular item is delineated by text in the 'Purpose' or 'Objective(s)' column which refers to the principal heads of power relied on to support the item. Item 15 is an example of this approach to drafting.
  4. In order to meet the Committee's request in this case, and without being exhaustive, the attached table lists constitutional heads of power referenced by each of the items in the Regulation. In doing so, however, the Government is not purporting to provide any comprehensive statement of relevant constitutional considerations. Further, for the reasons outlined above, it is not the intention of the Government generally to provide information such as that set out in the attached table. That said, the Government will continue to draft legislation in the clearest possible terms, including in relation to constitutional application where appropriate.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response.**

The committee would like to acknowledge the minister and the department for the substantial effort in providing a comprehensive and informative response to the committee's inquiry in relation to this regulation.

However, while recognising that its inquiries impact on the resources of ministers' offices and departments, the committee notes that in *Williams No. 1* the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. The parliament's response to that finding was to provide the current mechanism for authorising expenditure via the making of regulations that add programs to certain schedules of the FFSP Regulations.[[7]](#footnote-7)

An inescapable consequence of basing this response around the making of (disallowable) delegated legislation is that such instruments are subject to scrutiny by the committee in accordance with Senate Standing Order 23, which requires the committee to ensure that instruments do not breach a number of scrutiny principles.[[8]](#footnote-8) The committee does this through seeking information or undertakings from rule-makers, and this approach is underpinned by the disallowance process.

In this respect, the committee is concerned at the minister's advice that 'it is not the intention of the government generally to provide information such as that set out in the attached table [indicating the constitutional basis for spending]', on the basis that:

* 1. …the government does not agree…that...explanatory statements must in effect set out the constitutional and other legal reasoning taken into account in formulating legislation and expenditure programmes.

The committee emphasises its expectation that ESs identify a constitutional head of power for expenditure on programs added by regulation to schedules in the FFSP Regulations, derives not from any legislative prescription but from the Senate Standing Orders. As noted above, scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.[[9]](#footnote-9)

In light of these remarks, the committee notes that, in *Williams No. 2*, the High Court stated:

* 1. …[section] 32B should be read as providing power to the Commonwealth to make, vary or administer arrangements or grants *only where it is within the power of the Parliament* to authorise the making, variation or administration of those arrangements or grants [emphasis added].[[10]](#footnote-10)

**The committee therefore restates its expectation that, in light of *Williams No. 2*, the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers)* *Act 1997* explicitly state, for each new program, the constitutional head of power that supports the authorisation of expenditure.**

In relation to the information provided by the minister setting out the constitutional authority for the 54 programs added to Schedule 1AB by the regulation, the committee notes that a case has been made that each of the programs is supported by a relevant constitutional head or heads of power. **The committee has therefore concluded its examination of the instrument.**

# Appendix 1

## Correspondence

# Appendix 2

## 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](http://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. Senate Disallowable Instruments List, available at <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List> [↑](#footnote-ref-3)
4. '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-4)
5. For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-5)
6. With effect from 1 July 2014, the *Financial Management and Accountability Act 1997* was amended and renamed the *Financial Framework (Supplementary Powers) Act 1997*. The Financial Management and Accountability Regulations 1997 were renamed the Financial Framework (Supplementary Powers) Regulations 1997. [↑](#footnote-ref-6)
7. The committee notes that the regulations in this case are the means by which programs are added to certain schedules of the principal regulations; and that the provision authorising the spending of monies is section 32B of the *Financial Framework (Supplementary Powers) Act 1997*. The regulations do not of themselves provide the authority for spending in relation to programs. [↑](#footnote-ref-7)
8. The committee notes that it has previously raised other matters in relation to similar regulations. For example, in relation to scrutiny principle (c) (which effectively requires the committee to consider whether instruments of delegated legislation accord with principles of natural justice), the committee has on a number of occasions requested information regarding the exclusion of merits review under programs added to the relevant FFSP schedules. Such information is now generally provided as a matter of course in ESs. [↑](#footnote-ref-8)
9. As noted in *Odgers' Australian Senate Practice*, the committee interprets its scrutiny principles 'broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights' (*Odgers' Australian Senate Practice*, 13th ed. (2012) 438). [↑](#footnote-ref-9)
10. *Williams v Commonwealth* [2014] HCA 23 (19 June 2014) [36]. [↑](#footnote-ref-10)