

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

## Current members

|                                       |                                  |
|---------------------------------------|----------------------------------|
| Senator John Williams (Chair)         | New South Wales, NAT             |
| Senator Gavin Marshall (Deputy Chair) | Victoria, ALP                    |
| Senator Sam Dastyari                  | New South Wales, ALP             |
| Senator Nova Peris OAM                | Northern Territory, ALP          |
| Senator Linda Reynolds                | Western Australia, LP            |
| Senator Zed Seselja                   | Australian Capital Territory, LP |

## Secretariat

Mr Ivan Powell, Secretary  
Dr Patrick Hodder, Senior Research Officer

## Committee legal adviser

Mr Stephen Argument

## Committee contacts

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3066  
Email: [regords.sen@aph.gov.au](mailto:regords.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_regord\\_ctte](http://www.aph.gov.au/senate_regord_ctte)



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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.<sup>1</sup>

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) 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.

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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)

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*.<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;
- 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**

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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 11 February 2015, 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 7 November 2014 and 29 January 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.<sup>1</sup>

### New matters

#### Defence Determination 2014/58, Benchmark schools, location allowance and hardship posts - amendment

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Introduces Sri Lanka as a new hardship location, and sets up Daejeon and Seoul as separate hardship locations in South Korea; introduces a new benchmark school for Colombo, Sri Lanka; reduces the recommended interval between assisted leave travel from Indonesia; revises the purpose of location allowances; and expands special Kabul allowance to also be available to the Defence Attaché, Baghdad |
| <b>Last day to disallow</b>    | 3 March 2015  |
| <b>Authorising legislation</b> | <i>Defence Act 1903</i>   |
| <b>Department</b>              | Defence   |

#### Issue:

##### *Retrospectivity*

This instrument was made on 13 November 2014. Section 15 of the instrument provides that the amendments made by the instrument are back-dated to 26 August

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1 Senate Disallowable Instruments List, available at [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/leginstruments/Senate\\_Disallowable\\_Instruments\\_List](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List)

2014. This means the instrument has a retrospective operation. While the explanatory statement (ES) indicates the instrument provides for an 'expansion' of existing entitlements and for a 'higher rate of hardship allowance', the ES does not expressly address the prohibition in subsection 12(2) of the *Legislative Instruments Act 2003* against retrospectivity that is disadvantageous to the rights of persons other than the Commonwealth. The committee's usual expectation is that this matter would be specifically addressed in the ES. **Noting both the apparently beneficial effect of the retrospective provisions and the generally high drafting standard of Defence instruments, the committee therefore draws this matter to the minister's attention.**

### **Clean Energy Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01606]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Clean Energy Regulations 2011 and the Renewable Energy (Electricity) Regulations 2001 to add 'the production of ferrovandium' and 'the rendering of animal by-products' as new emissions-intensive trade-exposed activities in the context of the Jobs and Competitiveness Program and the Renewable Energy Target |
| <b>Last day to disallow</b>    | 23 March 2015   |
| <b>Authorising legislation</b> | <i>Clean Energy Act 2011; Renewable Energy (Electricity) Act 2000</i>   |
| <b>Department</b>              | Environment   |

#### **Issue:**

##### *Retrospectivity*

This instrument was made on 27 November 2014. Items 19 and 20 of Schedule 1 to this instrument are transitional provisions that apply the amendments to applications 'made but not determined' before the commencement of this instrument. The ES does not expressly address the prohibition in subsection 12(2) of the *Legislative Instruments Act 2003* against retrospectivity that is disadvantageous to the rights of persons other than the Commonwealth. The committee's usual expectation is that this matter would be specifically addressed in the ES. **Noting, however, that the ES indicates that the amendments will be of benefit to applicants, the committee therefore draws this matter to the minister's attention.**

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**Customs (Drug and Alcohol Testing) Amendment Regulation 2014 (No. 1)  
[F2014L01616]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Customs (Drug and Alcohol Testing) Regulation 2013 to enable a sufficient amount of hair to be taken for the conduct of a prohibited drug test, provide more certainty as to where on the body a sample of hair can be taken from for the conduct of a prohibited drug test, and subject to existing subsections 8(4) and 8(5) of the Drug and Alcohol Testing Regulation, require the destruction of records, other than body samples, relevant to a breath test, blood test or prohibited drug test conducted under the Act, as soon as practicable after the Customs worker to whom the record relates ceases, for any reason, to be a Customs worker |
| <b>Last day to disallow</b>    | 25 March 2015   |
| <b>Authorising legislation</b> | <i>Customs Administration Act 1985</i>  |
| <b>Department</b>              | Immigration and Border Protection   |

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**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 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 this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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*.**

## CASA EX168/14 - Exemption from paragraph 5.1 of Civil Aviation Order 20.16.3 for Airbus 330 aircraft operated by Qantas Airways Limited [F2014L01644]

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Enables certain passenger seats not to be in the upright position when taking off or landing |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | Civil Aviation Safety Regulations 1998   |
| <b>Department</b>              | 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 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 this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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*.**

## Banking (prudential standard) determination No. 3 of 2014 - Prudential Standard APS 001 – Definitions [F2014L01649]

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Determines Prudential Standard APS 001 definitions |
| <b>Last day to disallow</b>    | 26 March 2015                                      |
| <b>Authorising legislation</b> | <i>Banking Act 1959</i>                            |
| <b>Department</b>              | Treasury   |

### Issue:

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES states that 'APRA undertook a seven week consultation on the proposed consequential changes from August 2014'. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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*.**

**Amendment to the list of threatened species under section 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (158) (03/12/2014) [F2014L01681]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the list referred to in section 178, 181 and 183 of the <i>Environment Protection and Biodiversity Conservation Act 1999</i> by deleting species from the endangered category and amending the name of 1 species in the critically endangered category |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Environment Protection and Biodiversity Conservation Act 1999</i>  |
| <b>Department</b>              | Environment   |

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried

out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes the ES for the instrument states that, in accordance with paragraph 184(1)(d) of the Environment Protection and Biodiversity Conservation Act 1999, under which the instrument is made, 'consultation was not required to be undertaken before the instrument was made'. However, there is no reference to the consultation requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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.**

### **Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Makes amendments to the Migration Regulations 1994 to, in particular, remove the lengthy prescribed periods that an applicant outside Australia must be given to respond to a request for information or to an invitation to comment, broaden the definition of 'managed fund' to include both statutory funds and benefit funds operated by friendly societies registered under the <i>Life Insurance Act 1995</i> , provide that it is a criterion for the grant of a visa that, if requested, a statement from an appropriate authority about a person's criminal history and a completed Form 80 (Personal particulars for assessment including character assessment) must be provided, provide that where a person has had a visa cancelled under section 501 of the Migration Act (character grounds), they cannot be granted a further visa (except in certain circumstances), provide that where a person has had a visa cancelled under new subsections 116(1AA) (identity) or 116(1AB) (providing incorrect information) or the minister's new 'set-aside and cancel' powers in sections 133A or 133C of the Migration Act, they cannot be granted a further visa for three years (except in certain circumstances), and harmonise the manner and time periods in which a person can make representations in relation to visa cancellation decisions |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | <i>Migration Act 1958</i>  |
| <b>Department</b>              | Immigration and Border Protection  |

**Issue:***Retrospective effect of instrument*

Schedule 2 to this instrument amends the Migration Regulations 1994 (Migration Regulations) to broaden the definition of 'managed fund' to include funds operated by friendly societies registered under the *Life Insurance Act 1995*. The effect of the amendment is to enlarge the category of 'eligible investments' that can be made by applicants for certain subclasses of business visas.

Schedule 3 to the instrument amends the migration regulations to increase the powers (including around the character test and visa cancellation) in relation to the identification of non-citizens who have engaged in criminal or fraudulent behaviour.

Schedule 4 to this instrument (and, specifically, new clauses 3802 and 3803) provide that the amendments made by Schedules 2 and 3 apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (12 December 2014), as well as applications made on or after that day.

Although the instrument is not strictly retrospective, the new criteria prescribe rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 12 December 2014 may now be subject to one or more new criteria at the time of the visa decision. The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). **The committee therefore requests further information from the minister (as to the justification for this approach).**

**Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 3) Regulation 2014 [F2014L01697]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for Government spending on the Global Infrastructure Hub (Schedule 1AB), and for the Government to form the Global Infrastructure Hub, a company limited by guarantee (Schedule 1B) |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Financial Framework (Supplementary Powers) Act 1997</i>  |
| <b>Department</b>              | Finance   |

**Background:**

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.<sup>2</sup>

**Issue:***Addition of matters to Schedule 1AB of the FF(SP) Regulations*

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument adds one new item to Part 4 (Programs) of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations) to establish legislative authority for expenditure on the Global Infrastructure Hub (Hub). On 16 November 2014, G20 Leaders agreed to establish a Hub in Sydney to help implement the G20 multi-year infrastructure initiative. The Commonwealth will contribute \$30 million to the establishment and operation of the Hub to be administered by Treasury. The instrument also amends Schedule 1B of the FF(SP) regulations to establish legislative authority for the Commonwealth to form the Global Infrastructure Hub, a company limited by guarantee.

Funding for the Hub will be provided from unallocated funding within the Infrastructure Investment Programme (\$11.3 million) (Department of Infrastructure and Regional Development) and the Moorebank Units Relocation contingency (\$18.7 million) (Department of Finance).<sup>3</sup> **The committee therefore notes that the instrument appears to authorise the redirection of existing expenditure and makes no further comment on this matter.**

**Issue:***Addition of matters to Schedule 1AB of the FMA 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.

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2 For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16-17.

3 *Mid-Year Economic and Fiscal Outlook 2014-15*, Appendix A: Policy decisions taken since the 2014-15 Budget, Global Infrastructure Hub (December 2014) 199.

The committee has previously stated its expectation that, in light of the High Court decision in *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 program added to Schedule 1AB by the regulation, the committee notes that the ES identifies certain constitutional heads of power that purportedly support the scheme listed in the instrument. **The committee notes that, consistent with the committee's expectations, this information has been included in the ES for the instrument, and thanks the minister and the department for their assistance on this matter.**

### **Customs (Japanese Rules of Origin) Regulation 2014 [F2014L01713]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Prescribes matters relating to the rules of origin that are required to be prescribed under new Division 1K of Part VIII of the <i>Customs Act 1901</i> |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Customs Act 1901</i>   |
| <b>Department</b>              | Immigration and Border Protection   |

#### **Issue:**

##### *Insufficient information regarding consultation*

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

No particular consultation was undertaken with regard to this Regulation; however, consultation regarding the Japan-Australia Economic Partnership Agreement was undertaken as part of the Joint Standing Committee on Treaty's consideration of the Agreement.

The committee does not usually interpret section 26 as requiring a highly detailed description of the reasons why consultation was not undertaken. However, the committee's usual expectation, in cases where the instrument-maker relies on prior consultation that is said to support the making of an instrument, is that the ES for the instrument set out the relevance of that consultation to the matters dealt with in the instrument. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **The committee therefore draws this matter to the minister's attention.**

### **Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01721]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on certain activities administered by Agriculture, Education, Immigration and Border Protection, Industry and Infrastructure |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Financial Framework (Supplementary Powers) Act 1997</i>  |
| <b>Department</b>              | Finance   |

#### **Background:**

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.<sup>4</sup>

#### **Issue:**

*Addition of matters to Schedule 1AB of the FF(SP) Regulations—previously unauthorised expenditure*

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument adds two new items to Part 2 (Grants of financial assistance to a State or Territory) and seven new items to Part 4 (Programs) of Schedule 1AB to the

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<sup>4</sup> For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16-17.

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FF(SP) regulations, to establish legislative authority for various activities within five portfolios.

The committee has examined all nine items in the regulation. Five of the items appear to authorise additional or continuing funding of existing measures, and or the redirection of existing funding (the Drought Recovery Concessional Loans Scheme, the National Assessment Reform, the Australian Small Business Advisory Services Program, the Community Assistance Support—Transitional Support, and the Tasmanian Jobs and Growth Package). However, the following items appear to be expenditure not previously authorised by legislation:

- New table item 4 of Part 2 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide grants of financial assistance to States and Territories to implement the Stronger Biosecurity and Quarantine program. The Commonwealth allocated funding of \$20 million over four years to the Agriculture portfolio in the 2014-15 Budget.
- New table item 64 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to support, and establish, Industry Growth Centres. The Commonwealth announced funding of \$188.5 million over four years from 2014-15. The program will be administered by the Department of Industry.
- New table item 65 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funds to non-government external parties to support State and Territory governments in the early stages of a response to pest and/or disease incursions, and for activities to strengthen Australia's biosecurity preparedness. This item supports the implementation of the Stronger Biosecurity and Quarantine program (see above). The program will be administered by the Department of Agriculture. No funding details are provided.
- New table item 66 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund a program to assist, support and encourage access by farmers to a greater range of safe and effective uses of agricultural chemicals and veterinary medicines. The Commonwealth allocated funding of \$8.0 million over four years to the Agriculture portfolio in the 2014-15 Budget.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the schemes outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

**The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the schemes listed below:**

- **Stronger Biosecurity and Quarantine program—grants to States and Territories to conduct biosecurity response and preparedness activities;**
- **Industry Growth Centres Initiative;**
- **Stronger Biosecurity and Quarantine program—grants to external parties to conduct biosecurity response and preparedness activities; and**
- **Improved Access to Agricultural and Veterinary Chemicals Program.**

**Issue:**

*Addition of matters to Schedule 1AB of the FMA 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.

The committee has previously stated its expectation that, in light of the High Court decision in *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 programs added to Schedule 1AB by the regulation, the committee notes that the ES identifies certain constitutional heads of power that purportedly support the schemes listed in the instrument. **The committee notes that, consistent with the committee's expectations, this information has been included in the ES for the instrument, and thanks the minister and the department for their assistance on this matter.**

## Legislative Instruments Amendment (Exemptions) Regulation 2014 [F2014L01730]

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Legislative Instruments Regulations 2004 to exempt certain legislative instruments from the sunset provisions of the <i>Legislative Instruments Act 2003</i> and other matters |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Legislative Instruments Act 2003</i>   |
| <b>Department</b>              | Attorney-General's  |

### Issue:

*Classes of instruments to be exempt from sunset not identified by reference to established criteria*

The instrument adds seven new items to Schedule 3 of the principal regulations. The classes of instruments added to Schedule 3 will be exempt from sunset. The ES states that the instruments to be exempt from sunset have each been assessed as not suitable for regular review under Part 6 of the Act. The ES sets out the five established criteria used to determine whether an instrument is suitable to be exempt from sunset. To be considered suitable, an instrument must satisfy at least one of the criteria. However, the ES does not identify one or more of the established criteria in relation to each class of instrument that is to be exempt from sunset. The committee considers that it would be of benefit to anticipated users of the ES to identify which of the established criteria was determined to apply in each case. **The committee therefore requests further information from the minister.**

## Fair Work (Building Industry—Accreditation Scheme) Amendment Regulation 2014 [F2014L01736]

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Amends the Fair Work (Building Industry—Accreditation Scheme) Regulations 2005 to implement the Australian Government's decision to accept all recommendations of a recent review of the Scheme, with two minor adjustments and makes a number of amendments that have been identified by the Federal Safety Commissioner to improve the clarity and effectiveness of the Scheme |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | <i>Fair Work (Building Industry) Act 2012</i>  |
| <b>Department</b>              | Employment   |

**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 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 this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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*.**

**Antarctic Treaty (Environment Protection) Amendment (2012 to 2014 Measures—Protected Areas and Managed Areas) Proclamation 2014 [F2014L01737]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Amends the Antarctic Treaty (Environment Protection) Proclamation 2007 by declaring three new ASPAs, varying the boundaries of 18 ASPAs, varying the boundaries of one ASMA, revoking the declarations of three ASPAs and revoking the declaration of one ASMA. It also makes consequential amendments to remove four additional ASPAs that ceased operation on 31 December 2010, and to repeal spent sections |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | <i>Antarctic Treaty (Environment Protection) Act 1980</i>  |
| <b>Department</b>              | Environment  |

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried

out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES states:

Australia is an Antarctic Treaty Consultative Party under the Antarctic Treaty and the Proclamation seeks to give effect to measures agreed to by Antarctic Treaty Consultative Parties under the Protocol on Environmental Protection to the Antarctic Treaty...

All relevant Treaty Parties, including Australia, unanimously agreed to the all the measures listed above at the 35th, 36th and 37th Antarctic Treaty Consultative Meetings.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **Noting, however, that the instrument resulted from a treaty process with unanimous agreement, the committee therefore draws the matter to the minister's attention in this instance.**

### **Antarctic Treaty (Environment Protection) Amendment (2012 and 2013 Measures—Historic Sites and Monuments) Proclamation 2014 [F2014L01740]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Amends the Antarctic Treaty (Environment Protection – Historic Sites and Monuments) Proclamation 2007 to declare four additional Antarctic Historic Sites and Monuments (HSMs) following their adoption at the 36th Antarctic Treaty Consultative Meeting (ATCM) in 2013, and to vary the description of seven existing HSMs declared under the Principal Proclamation |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | <i>Antarctic Treaty (Environment Protection) Act 1980</i>  |
| <b>Department</b>              | Environment  |

#### **Issue:**

##### *Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such

consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES states:

Australia is an Antarctic Treaty Consultative Party under the Antarctic Treaty and the Proclamation seeks to give effect to measures agreed to by Antarctic Treaty Consultative Parties under the Antarctic Treaty...

All relevant Treaty Parties, including Australia, unanimously approved the variation of the descriptions of the HSMs [Historic Sites and Monuments] under Measure 11 at the 35th Antarctic Treaty Consultative Meeting in 2012.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **Noting, however, that the instrument resulted from a treaty process, the committee therefore draws the matter to the minister's attention in this instance.**

### **Competition and Consumer (Monitoring of Prices, Costs and Profits) Repeal Direction 2014 [F2014L01749]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Revokes the direction given to the Australian Competition and Consumer Commission under section 95ZE of the <i>Competition and Consumer Act 2010</i> to monitor the prices, costs and profits relating to the supply of regulated goods by corporations and the supply of goods by liable entities to assess the general effect of the carbon tax scheme in Australia |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Competition and Consumer Act 2010</i>  |
| <b>Department</b>              | Treasury  |

#### **Issue:**

##### *Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have

an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for each of this instrument states:

For the purposes of section 17 of the *Legislative Instruments Act 2003*, consultation on the revocation of the price monitoring Direction has been undertaken.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **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*.**

### **Student Identifiers (Exemptions) Instrument 2014 [F2014L01754]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Specifies the matters which are exempt from the requirement for an individual to have been assigned a student identifier before a VET qualification or VET statement of attainment can be issued |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | <i>Student Identifiers Act 2014</i>  |
| <b>Department</b>              | Industry   |

#### **Issue:**

##### *Drafting*

Paragraph 6(1)(b) of this instrument provides:

...the registered training organisation can a VET qualification or VET statement of attainment to an individual without a student identifier where the individual has undertaken VET for which AVETMISS data is not collected and reported in terms of 6(1)(a) above.

There appears to be a verb missing from the first line of paragraph 6(1)(b) above. A reading of the ES for the instrument suggests the word 'issue' is missing between 'can'

and 'a VET qualification'. **The committee therefore draws the matter to the minister's attention.**

### **Fair Work (Registered Organisations) Act 2009 - Reporting guidelines for the purposes of section 253 [F2014L01755]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Provides for reporting guidelines for the purposes of section 253 of the <i>Fair Work (Registered Organisations) Act 2009</i> |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Fair Work (Registered Organisations) Act 2009</i>  |
| <b>Department</b>              | Fair Work Commission  |

#### **Issue:**

##### *Retrospective effect of instrument*

The instrument determines reporting obligations for 'reporting units' to which the *Fair Work (Registered Organisations) Act 2009* applies. Section 4 of the instrument provides that the 'operative date' for the instrument is 'each financial year of a reporting unit that ends on or after 30 June 2014'. The instrument therefore applies in relation to the 2013-14 financial year and has the effect of altering the reporting obligations that existed at the start of that financial year. Although the instrument is not strictly retrospective, the altering of the prior reporting obligations for 2013-14 may be regarded as being retrospective in effect. The committee's usual approach is to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee notes that the General Manager of the Fair Work Commission consulted prior to 30 June 2014 with persons (or their representatives) likely to be affected by the instrument. However, the committee's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the ES. **The committee therefore requests further information from the General Manager (as to the justification for this approach).**

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**CASA 295/14 - Permission and direction — helicopter operations by Wellspring Rural Services Pty Ltd, trading as Northern Helicopter Charter [F2014L01777]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Allows a passenger in a helicopter to be carried on the undercarriage for the purpose of leaving or boarding the helicopter while it is in the hover. It also allows a passenger not to wear a seat belt, or occupy a seat, at a height less than 1000 feet above the terrain, when the helicopter is in the hover for the purpose of permitting him or her to leave or board the helicopter |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | Civil Aviation Regulations 1988  |
| <b>Department</b>              | Infrastructure and Regional Development  |

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**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 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 this 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*.**

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## Migration Act 1958 - Determination of Protection (Class XA) and Refugee Humanitarian (Class XB) Visas 2014 - IMMI 14/117 [F2014L01819]

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Operates to specify the Minister's determination of at least the minimum total combined number of Protection (Class XA) visas and Refugee and Humanitarian (Class XB) visas that the Minister must take all reasonable practicable measures to ensure are granted for, the financial years commencing 2015, 2016, 2017 and 2018 |
| <b>Last day to disallow</b>    | 26 March 2015   |
| <b>Authorising legislation</b> | <i>Migration Act 1958</i>   |
| <b>Department</b>              | Immigration and Border Protection   |

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### Issue:

#### *Insufficient information regarding consultation*

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

Under section 18(2)(b) of the *Legislative Instruments Act 2003*, consultation was considered inappropriate due to the Instrument being required as a matter of urgency.

The committee also notes the instrument will have a beneficial impact by:

...[raising] the minimum combined total number of Protection (Class XA) and Refugee and Humanitarian (Class XB) visas that the Minister must take all reasonably practicable measures to ensure are granted.

However, the increase commences in the financial year starting 1 July 2017. There is no change from the existing visa numbers for the financial years starting 1 July 2015 and 1 July 2016. It is not immediately apparent, therefore, why the instrument was required as a matter of urgency. The committee's expectations regarding why consultation has not been undertaken are set out in the 'Guideline on consultation' in Appendix 2 of this report. In particular, the committee would generally expect the ES to explain the reasoning as to why the instrument was considered urgent (as opposed to, for example, it being convenient or preferable not to undertake consultation). **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*.

**CASA 293/14 - Permission and direction — helicopter operations by Northshore Holdings (NT) Pty Limited, trading as Remote Helicopters Australia [F2015L00024]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Applies to helicopters operated by Northshore Holdings (NT) Pty Limited, trading as Remote Helicopters Australia allowing a passenger in a helicopter to be carried on the undercarriage for the purpose of leaving or boarding the helicopter while it is in the hover. It also allows a passenger not to wear a seat belt, or occupy a seat, at a height less than 1000 feet above the terrain, when the helicopter is in the hover for the purpose of permitting him or her to leave or board the helicopter. |
| <b>Last day to disallow</b>    | 26 March 2015  |
| <b>Authorising legislation</b> | Civil Aviation Regulations 1988  |
| <b>Department</b>              | 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 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 this 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

### Staffing and Delegations Rule 2014 [F2014L01296]

|   |  |
|---|--|
| <b>Purpose</b>                          | Provides for the National Capital Authority (NCA) Chief Executive to delegate functions and powers under the Ordinance to officers and employees of the NCA and any person whose services have been made available for the purposes of the Ordinance |
| <b>Last day to disallow<sup>5</sup></b> | 4 December 2014  |
| <b>Authorising legislation</b>          | National Land (Road Transport) Ordinance 2014  |
| <b>Department</b>                       | Infrastructure and Regional Development  |

[The committee first reported on this instrument in *Delegated legislation monitor No. 14 of 2014*].

#### Issue:

*Delegation of power to a 'person'*

Section 3 of the rule provides:

The National Capital Authority (NCA) Chief Executive may arrange with a person for the services of officers or employees of the person to be made available for the purposes of the Ordinance.

Section 4 of the rule provides:

The NCA Chief Executive may delegate all or any functions and powers under the Ordinance to:

- (a) an officer or employee of the NCA established under the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth); or
- (b) a person whose services have been made available under section 3 of this rule.

The explanatory statement (ES) notes:

The Staffing and Delegations Rule 2014 makes provision for the NCA Chief Executive to make arrangements with a person to be made available for the purposes of the Ordinance. The Rule also provides for the NCA Chief Executive to delegate functions and powers under the Ordinance to

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<sup>5</sup> 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate.

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officers and employees of the NCA and any person whose services have been made available for the purposes of the Ordinance.

The committee notes that neither the rule nor the ES specify limitations on either the powers that can be delegated or the persons to whom the powers can be delegated. In this regard, the committee also notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the scrutiny committees prefer to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers may be delegated. The committees' preference is that delegates be confined to the holders of nominated offices or to members of the senior executive service **[the committee therefore requested the assistant minister's advice on this matter]**.

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

The Assistant Minister for Infrastructure and Regional Development advised:

The Rule was established to permit the Chief Executive of the National Capital Authority (NCA), acting in their capacity as an Administering Authority of the ACT road transport legislation, as modified by the Ordinance, to delegate administrative and decision making powers to a person made available for the purposes of the Ordinance. This includes NCA contractors providing services to support pay parking on National Land.

The intention of the Rule is to provide a mechanism for the Chief Executive to delegate specific powers to provide for effective administration of infringement notices issued by the Australian Government. The Rule is self limiting and only applies to powers available for the purposes of the Ordinance. The Ordinance only applies to sections of the ACT road transport legislation, specifically relevant to the operation of a pay parking scheme.

Powers are only delegated to persons that have a direct requirement to make administrative decisions related to pay parking. These powers are detailed in an Instrument of Delegation signed by the Chief Executive of the NCA and is applied to a specific position title, or position number.

There are strict processes for staff that have been delegated responsibilities by the Rule. They are comprehensively vetted, are required to exercise their delegated power in accordance with the ACT road transport legislation, and only operate in line with decision making guidelines approved by the Chief Executive of the NCA.

#### **COMMITTEE RESPONSE:**

**The committee thanks the assistant minister for his response and has concluded its examination of this matter.**

**Issue:***Limb of the rule-making power being relied on*

The rule is made under section 11 of the National Land (Road Transport) Ordinance 2014 which provides:

The Minister may make rules prescribing matters:

- (a) required or permitted by this Ordinance to be prescribed by rule; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

With regard to the delegation of power to a person (referred to above), a question arises as to whether the rule relies on the 'required or permitted' or the 'necessary or convenient' limb of the power [**the committee therefore requested the minister's advice on this matter**].

**COMMITTEE RESPONSE:**

**Noting this issue was not specifically addressed in the assistant minister's response, the committee requests the minister's advice on this matter**

**Issue:***Potential delegation of general rule-making power*

As noted above, the rule provides for the Chief Executive of the NCA to 'delegate all or any functions and powers under the Ordinance' (rather than, for example, all or any of the Chief Executive's functions and powers under the ordinance). It is therefore unclear on the face of the rule whether there is any limit on the Chief Executive's power to delegate under the ordinance. One of the powers under the ordinance is the general rule-making power in section 11 (attached to the minister). Noting the committee's previous inquiries regarding the implications of the new general rule-making power for executive exercise and oversight of Parliament's delegated legislative powers (see comments on the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] and the Farm Household Support Secretary's Rule 2014 [F2014L00614]), a question arises as to whether the Chief Executive of the NCA is able to delegate the general rule-making power, and, if so, what considerations might apply in that case [**the committee therefore requested the minister's advice on this matter**].

**MINISTER'S RESPONSE:**

The Assistant Minister for Infrastructure and Regional Development advised that 'the rule making powers are only able to be exercised by the Responsible Minister. The Rule cannot be used to delegate Ministerial responsibility'.

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**COMMITTEE RESPONSE:**

**The committee thanks the assistant minister for his response and has concluded its examination of this matter.**

**Implementation of a general instrument-making power**

**[A comprehensive account of the committee's examination of this matter during 2014 is contained in *Delegated legislation monitor* No. 17 of 2014].<sup>6</sup>**

Over the course of 2014, the committee raised a series of concerns arising from the implementation by the Office of Parliamentary Counsel (OPC) of a general instrument-making power in Acts since 2013.

The committee's inquiries into the use of the general instrument-making power focused on the following general and more specific issues:

- scope of the general power;
- consequences of the general instrument-making power for the quality of drafting;
- assessing whether instruments contain matters more appropriate for regulations;
- regulations to prevail in the event of conflict;
- delegation of the general instrument-making power; and
- consultation over the implementation of the general instrument-making power.

In its report on the matter in *Delegated legislation monitor* No. 17 of 2014, the committee discussed the key issues (listed above), highlighted outstanding concerns, sought further advice from First Parliamentary Counsel (FPC) and made certain recommendations.

FPC's responses to the committee's inquiries and recommendations are given below. In particular, FPC noted that he had now released a revised version of Drafting Direction 3.8 taking into account the matters of concern raised by the committee.

**Issue:**

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6 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 17 of 2014 (3 December 2014) 6–24. Monitor No. 17 contains all prior correspondence from FPC, answers to questions on notices, and responses from various ministers. (Prior correspondence is therefore not referenced or reproduced in full in this entry).

*Scope of the general power*

A consequence of the implementation of the general instrument-making power is that non-expert drafters will be able to draft instruments in reliance on the 'necessary or convenient' limb of that power. The committee considers that this represents a risk that misjudgements might occur about whether matters specified in an instrument are in fact complementary and confined to the same field of operation as the Act under which they are made.

**[The committee noted that it intended to closely monitor this particular aspect of drafting of instruments and, accordingly, expected that ESs will henceforth indicate where an instrument is made in reliance on the 'necessary or convenient' power].**

**FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8 requires drafters to recommend to instructors that the ES indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.

**COMMITTEE RESPONSE:**

**The committee thanks FPC for his response.**

The committee thanks FPC for revising Drafting Direction 3.8 to include the recommendation that instructors indicate in the ES when the 'necessary or convenient' power has been relied on for the making of an instrument. The committee will continue to monitor this aspect of drafting of instruments.

**Issue:***Consequences of the general instrument-making power for the quality of drafting*

The committee's key concern throughout its inquiries has been the potential for the general instrument-making power to adversely impact on drafting quality, due to the lower level of executive oversight (compared to regulations), and the absence of a requirement that such instruments be drafted by OPC (meaning that departments and agencies may elect to have drafting performed by non-expert drafters).

The committee's concern arises from the fact that, as with regulations previously, the general instrument-making power will be used to provide much of the legislative detail for the operation of Acts. Such instruments may therefore be lengthy and complex, covering all manner of subject matter within the field of operation of an Act.

Any appreciable lowering of drafting standards arising from more widespread non-expert drafting of instruments could impact adversely on the committee, particularly to the extent that this would effectively transfer the task of policing drafting standards from OPC to the committee (in respect of those instruments). In this regard, the

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committee does not have sufficient expertise and resources to perform this task as effectively as the expert and professional drafters and officers in OPC.

Further, because the committee only examines instruments that are already in force, the committee has only limited options for dealing with problematic instruments, which is to either request they be remade or to disallow them.

Given the above, the committee is unclear as to whether and how the high standards achieved by OPC drafters will be maintained in the drafting of instruments based on the general power, where departments and agencies elected to draft these in-house.

The committee notes the measures that FPC has undertaken to try to improve the general standard of legislative instruments. However, the committee is of the view that the question of OPC's efforts to monitor the impact of the general instrument-making power on the quality of drafting of instruments, and more generally to promote higher standards of drafting in instruments, is best seen through the prism of FPC's responsibility under section 16 of the *Legislative Instruments Act 2003*,<sup>7</sup> which provides:

To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.

In light of FPC's obligations in this regard, the committee is concerned that it is unable, on the basis of the information provided, to properly assess what impacts the general instrument-making power may have on drafting quality overall. In particular, the committee notes the apparent mechanism by which OPC hopes for increased billable work to fund its drafting and drafting support services will fundamentally rely on decisions of departments and agencies as to whether to use OPC's drafting services. Given such decisions may be influenced by factors outside of OPC's control (such as budgetary considerations), the committee remains concerned drafting standards will suffer under the move to the general instrument-making power.

**[The committee recommended that OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*].**

#### **FPC'S RESPONSE:**

FPC advised that he 'will include material in the OPC Annual Report about the steps that I take to fulfil my statutory obligations under section 16 of the *Legislative Instruments Act 2003*'.

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7 These responsibilities remain effectively unchanged by the Acts and Instruments (Framework Reform) Bill 2014.

**COMMITTEE RESPONSE:****The committee thanks FPC for his response.**

The committee notes that FPC's undertaking will increase the transparency and accountability of the office, and help ensure that potential adverse impacts arising from the implementing of the general instrument-making power are avoided. The committee will monitor this aspect of FPC's reporting as part of its continuing scrutiny of the use and consequences of the general instrument-making power.

**Issue:***Assessing whether instruments contain matters more appropriate for regulations*

As noted in *Delegated legislation monitor* No. 17 of 2014, FPC's justification for the implementation of the general instrument-making power includes the view that, as many regulations contain matters that do not have particular sensitivities or risks, they should not be required to be drafted by OPC (known as 'tied work').

The committee's inquiries have clarified that the use of the general instrument-making power is dependent on the initial assessment of the character or quality of matters to be prescribed. This is because, as confirmed by FPC in his letter of 13 March 2014, certain matters are not, without 'strong justification', regarded as appropriate for inclusion in instruments and should therefore be included in regulations and drafted by OPC (that is, should be subject to the higher level of executive oversight).

In light of FPC's advice that certain provisions should be included in regulations and drafted by OPC unless there is a strong justification for prescribing those provisions in another type of instrument, the committee questioned how those provisions would be introduced in the absence of a regulation-making power. This question was particularly relevant given that several recent Acts that include the general instrument-making power do not actually contain a regulation-making power. In his letter of 23 May 2014, FPC advised:

If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

In light of these matters, the committee's consideration of the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and the Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] is instructive. The ordinance contained the standard form of the new general instrument-making power (in this case, 'rules'), and provided for the prescribing of offences by rule in subsection 98(3). Noting that the ESs for the ordinance and the rule contained no justification for the authorising of offence provisions via rules rather than regulation, the committee sought further information from the minister. The Assistant Minister for Infrastructure and Regional Development subsequently advised that the drafting of the ordinance:

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...ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The committee noted its concerns about the implementation of the new general instrument-making power in the absence of any settled policy or policy guidance; and that it had been unable, on the basis of the information provided, to reach a definitive understanding of the basis on which matters, which would otherwise be considered suitable only for regulations, are able to be included in other types of instruments—that is, what factors or criteria are or may be relevant to establishing that there is a 'strong justification' for not prescribing certain matters in regulations.

**[The committee noted its expectation that ESs identify a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification].**

In addition to its concerns about the implementation of the new general instrument-making power in the absence of any settled policy or policy guidance, the committee had significant concerns about whether and how Acts containing the general instrument-making power will be reviewed to ensure consistency with the policy guidance once it is settled. Where Acts or instruments (such as the Jervis Bay Territory Rural Fires Ordinance 2014 discussed above) are not in accordance with the policy guidance (once settled), the committee considered that such Acts and instruments should be brought into conformity with that guidance.

**[The committee recommended that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power].**

#### **FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8 requires drafters to recommend to instructors that the explanatory memorandum (EM) should provide a 'strong justification' for not prescribing the following matters in regulations, and set out the factors or criteria relevant to that justification:

- offence provisions;
- powers of arrest or detention;
- entry provisions;
- search provisions;
- seizure provisions;
- civil penalties;

- impositions of taxes;
- setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount; and
- amendments of the text of an Act

FPC further advised:

OPC will work with the Attorney-General's Department to identify legislation that contains general instrument-making powers that do not comply with the Drafting Direction in its reissued form. It will then be a matter for Government to determine whether to seek to have Parliament amend the relevant Acts.

### **COMMITTEE RESPONSE:**

**The committee thanks FPC for his response.**

While noting that Drafting Direction 3.8 is a policy statement and not a mandatory requirement, the committee thanks FPC for settling the drafting direction and requiring drafters to recommend to instructors that the EM to a bill should provide a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification.

The committee also notes that section 27 of revised Drafting Direction 3.8 states that, if a bill will contain a power to make instruments other than regulations, and a provision of a kind (mentioned above) is not required to be included in the instrument, the bill should include the following provision:

To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:

- (a) create an offence or civil penalty;
- (b) provide powers of:
  - (i) arrest or detention; or
  - (ii) entry, search or seizure;
- (c) impose a tax;
- (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- (e) amend this [*Act/Ordinance*].

**Given the revisions to Drafting Direction 3.8 noted above contain requirements relating to bills and EMs, the committee draws these matters to the attention of**

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**the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee).**

In relation to the identification and rectification of legislation that is inconsistent with the revised policy, the committee notes that the Assistant Minister for Infrastructure and Regional Development advised the committee in July 2014 that the Department would work with OPC to amend the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and the Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] to expressly create a regulation-making power, amend the Rule to remove all offence provisions, and draft regulations with the offence provisions.

**The committee will continue to monitor the progress on the ministerial undertaking to amend the ordinance and the rule and would be grateful for the assistant minister's advice once the amendments are made.**

The committee acknowledges the undertaking for OPC and the Attorney-General's Department to identify legislation that contains general instrument-making powers that do not comply with revised Drafting Direction 3.8.

**The committee will continue to monitor the consistency of instruments made under the general rule-making power and their authorising legislation with Drafting Direction 3.8, and would be grateful for FPC's advice on the outcome of the undertaking to identify legislation that contains general instrument-making powers that do not comply with Drafting Direction 3.8.**

The committee acknowledges that, where any such Acts are identified, it will 'be a matter for government to determine whether to seek to have Parliament amend [the]...relevant Acts'. However, the committee considers it important that the consequences of implementing the general rule-making power without a settled statement of drafting policy being in place be addressed at the first reasonable opportunity. **The committee therefore recommends that any Acts that are inconsistent with the settled drafting policy on the use of the general instrument-making power be amended at the earliest opportunity.**

**Issue:**

*Regulations to prevail in the event of conflict*

The committee notes that the Scrutiny of Bills committee has previously raised a question as to which instrument would prevail in the event of a conflict between a regulation and an instrument made on the basis of the general instrument-making power.

**[The committee sought the advice of FPC as to the progress of consideration of whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules].**

**FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8:

...provides that Acts should include a provision to specify that, in the event of a conflict, regulations will prevail over rules. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted.

**COMMITTEE RESPONSE:**

**The committee thanks FPC for clarifying this matter in revised Drafting Direction 3.8, and draws the matter to the attention of the Scrutiny of Bills Committee.**

**Issue:**

*Delegation of the general instrument-making power*

In *Delegated legislation monitor* No. 8 of 2014 the committee drew attention to a potential delegation of the general instrument-making power (in this case a general power to make 'rules') with regard to the Farm Household Support Secretary's Rule 2014 [F2014L00614].

The committee noted that section 101 of the *Farm Household Support Act 2014* provided for the secretary to delegate their powers to officers below the Senior Executive Officer level. The committee also noted that the EM for the Farm Household Support Bill 2014 stated that the delegation powers were 'intentionally broad' for operational reasons. Noting the operational reasons cited in the EM, the committee questioned whether the secretary's general rule-making powers under section 106(2) may be delegated under section 101 and, if so, what considerations might apply in that case.

The Minister for Agriculture confirmed there was 'no legal impediment' to the secretary delegating their general rule-making power, but noted that he did not 'foresee any circumstances' where this might be necessary.

The Minister for Infrastructure and Regional Development subsequently advised that the departmental secretary had 'no intention of delegating his rule making powers' and did not consider it to be necessary at present.

The committee noted the minister's advice that the delegation of the general rule-making power was neither intended nor necessary. The committee also pointed to the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required. The committee therefore requested that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power.

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The Minister for Agriculture subsequently advised that the *Farm Household Support Act 2014* would be amended 'as the opportunity arises' to specifically exclude the delegation of the secretary's general rule-making power.

The committee noted that other recent Acts might have unnecessarily authorised the broad delegation of the general instrument-making power, thereby offending against the scrutiny principle that the delegation of power be only as broad as strictly required.

**[The committee noted its expectation that the delegation of power provided for in instruments be only as broad as strictly required; and recommended that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power].**

#### **FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8:

...provides that Acts should include a provision preventing the delegation of the power to make legislative instruments under a general instrument-making power. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted.

#### **COMMITTEE RESPONSE:**

**The committee thanks FPC for his response.**

The committee notes that revised Drafting Direction 3.8 states in sections 24 and 25:

As a general rule, a general instrument-making power of a person should not be able to be delegated (just as the general regulation-making power of the Governor-General is not able to be delegated). You should ensure that the general rule-making power is excluded from any delegation power of the instrument-maker.

If, in a particular case, an instrument will need to be made frequently and the instructors wish the power to be able to be delegated, generally, you should confer a separate instrument-making power on the instrument-maker (rather than relying on the non-delegable general instrument-making power) and ensure that the particular instrument-making power is able to be delegated. Instructors should also explain the need for this in the explanatory memorandum.

While noting that that Drafting Direction 3.8 is a policy statement and not a mandatory requirement, the committee thanks FPC for settling the drafting direction and addressing the committee's concerns by requiring that Acts should include a provision preventing the delegation of the power to make legislative instruments

under a general instrument-making power; and also for distinguishing between the non-delegable general instrument-making power and a delegable instrument-making power.

**Given that the revisions to Drafting Direction 3.8 noted above contain requirements relating to bills and EMs, the committee draws these matters to the attention of the Scrutiny of Bills Committee.**

The committee notes that the undertaking to identify legislation that contains general instrument-making powers that do not comply with revised Drafting Direction 3.8 should also identify cases where Acts have been drafted in a manner that does not prevent the inappropriate delegation of the general rule-making power.

**The committee will continue to monitor the consistency of instruments made under the general rule-making power and their authorising legislation with Drafting Direction 3.8, and would be grateful for FPC's advice on the outcome of the undertaking to identify legislation that contains general instrument-making powers that do not comply with Drafting Direction 3.8.**

The committee acknowledges that, where any such Acts are identified, it will 'be a matter for government to determine whether to seek to have Parliament amend [the]...relevant Acts'. However, the committee considers it important that the consequences of implementing the general rule-making power without a settled statement of drafting policy being in place be addressed at the first reasonable opportunity. **The committee therefore recommends that any Acts that are inconsistent with the settled drafting policy on the use of the general instrument-making power be amended at the earliest opportunity.**

**Issue:**

*Consultation over the implementation of the general instrument-making power*

The committee has previously thanked FPC and the responsible ministers for their engagement and cooperation on this issue, and noted the various ministerial undertakings to amend Acts, ordinances and rules. These positive developments are to be understood as, in one sense, a corrective to the severe shortcomings of the policy development and implementation process of the general instrument-making power.

The committee considers that significant changes in agency policy regarding the making of primary and delegated legislation should be the subject of substantial consultation with the Parliament. In this regard, the committee notes that consultation did not occur in this instance and, further, that information regarding the implementation of the general rule-making power in the EMs for relevant bills was either absent or inadequate.

The preceding discussion of the committee's inquiries into this matter establishes that the general instrument-making power was implemented prior to the settling of appropriate policy guidance on the use of the new power. The committee notes that,

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had appropriate consultation been undertaken early in the development of the new power, matters of particular or potential concern to the committee and the Parliament could have been identified and discussed. Equally, such an approach may have avoided the current inconsistency of legislation with the settled policy guidance on the use of the general-instrument-making power.

**[The committee noted its intention to continue to monitor the general instrument-making power and the settling of the policy guidance on its use].**

**FPC'S RESPONSE:**

FPC noted the committee's continuing interest in the matter and advised that he will continue to examine the *Delegated legislation monitor* as it is released.

**COMMITTEE RESPONSE:**

**The committee thanks FPC for his continued engagement with the committee in relation to the general rule-making power.**

**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:**

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>8</sup>

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

Accountability Amendment Principle 2014 (No. 1) [F2015L00050]

Agricultural and Veterinary Chemicals Code (Prescribed Relevant Particulars - Revocation)

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

Instrument 2014 [F2014L01765]

Amended Electricity Supply Fees Determination 2014 (Jervis Bay Territory) [F2015L00075]

ASIC Class Order [CO 14/1249] [F2014L01690]

ASIC Class Order [CO 14/1276] [F2014L01735]

ASIC Class Order [CO 14-1270] [F2015L00018]

ASIC Class Order CO 14/1217 [F2014L01648]

Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014 [F2014L01769]

Civil Aviation Order 104.0 Amendment Order 2015 (No. 1) [F2015L00065]

Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 1) [F2014L01693]

Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3) [F2014L01793]

Civil Aviation Order 82.6 Amendment Instrument 2014 (No. 2) [F2014L01502]

Consumer Goods (Bean Bags) Safety Standard 2014 [F2014L01587]

Dental Benefits Rules 2014 [F2014L01748]

Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Determination 2014 [F2014L01660]

Excise (Concessional spirits – class of persons) Determination 2014 (No. 1) [F2014L01667]

Export Control (Animals) Amendment (2014 Measures No. 1) Order 2014 [F2014L01513]

Fees and Payments Amendment Principle 2014 (No. 1) [F2015L00047]

Goods and Services Tax: Classes of Recipient Created Tax Invoice Amendment Determination (No. 1) 2014 [F2014L01661]

Guidelines under Section 95 of the Privacy Act 1988, 2014 [F2014L01500]

Health Insurance (Midwife and Nurse Practitioner) Amendment Determination 2015 [F2015L00035]

Health Insurance (Midwife and Nurse Practitioner) Revocation Determination 2015 [F2015L00048]

Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS)) Determination 2014 [F2014L01767]

Health Insurance (Section 19AB Exemptions) Guidelines) 2015 [F2015L00038]

Major Sporting Events (Indicia and Images) Protection Amendment Rules 2014 (No. 1) [F2014L01727]

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- Manual of Standards Part 139 Amendment Instrument 2014 (No. 1) [F2014L01506]
- National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014 [F2015L00017]
- National Health (Concession or entitlement card fee) Amendment Determination 2014 (No. 1) (No. PB 98 of 2014) [F2014L01570]
- National Health (Pharmaceutical Benefits) (Conditions of approval for approved pharmacists) Amendment (Supply from Premises) Determination 2014 (No. PB 81 of 2014) [F2014L01559]
- National Health (Supplies of out-patient medication) Determination 2014 (No. PB 103 of 2014) [F2014L01762]
- National Health (Weighted average disclosed price – April 2015 reduction day) Determination 2014 (No. PB 97 of 2014) [F2014L01729]
- Parliamentary Service Commissioner's Direction 2014 [F2015L00015]
- Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 6) [F2014L01775]
- Private Health Insurance (Prostheses) Amendment Rules 2014 (No. 3) [F2014L01573]
- Public Governance, Performance and Accountability Legislation Amendment (RBA and Other Measures) Rule 2014 [F2014L01598]
- Public Governance, Performance and Accountability Legislation Amendment Rule 2014 (No. 2) [F2015L00027]
- Quality of Care Amendment Principle 2014 (No. 1) [F2015L00021]
- Quarantine Legislation Amendment (2014 Measures No. 2) Proclamation 2014 [F2014L01734]
- Radiocommunications (Duration of Community Television Transmitter Licences) Determination (No. 1) of 2008 (Amendment No. 1 of 2014) [F2014L01523]
- Remuneration Tribunal Determination 2014/21 - Remuneration and Allowances for Holders of Public Office including Principal Executive Office - Classification Structure and Terms and Conditions [F2014L01521]
- Remuneration Tribunal Determination 2014/22 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L01751]
- Remuneration Tribunal Determination 2014/23 - Members of Parliament – Entitlements [F2014L01752]
- Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2014 [F2014L01514]
- Social Security Foreign Currency Exchange Rate Determination 2014 (No. 2) [F2014L01515]
- Taxation Administration Act 1953 - Pay as you go withholding - Tax table for additional

amounts to withhold as a result of an agreement to increase withholding [F2014L01665]

Telecommunications (Service Provider — Identity Checks for Prepaid Mobile Carriage Services) Amendment Determination 2014 (No. 1) [F2014L01750]

Tertiary Education Quality and Standards Agency (Register) Guidelines 2015 [F2015L00073]

Vehicle Standard (Australian Design Rule 14/02 - Rear Vision Mirrors) 2006 Amendment 1 [F2014L01642]

Woomera Prohibited Area Amendment (Technical Amendments) Rule 2014 [F2014L01491]

## Chapter 2

### Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **11 February 2015**. 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.

#### **Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014 [F2014L01453]**

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | Amends the Health Insurance (General Medical Services Table) Regulation 2014 to restrict certain consultation items from being claimed with certain chronic disease management items by the same provider, for the same patient, on the same day |
| <b>Last day to disallow</b>    | 2 March 2015   |
| <b>Authorising legislation</b> | <i>Health Insurance Act 1973</i>   |
| <b>Department</b>              | Health   |

**[The committee first reported on this instrument in *Delegated legislation monitor No. 17 of 2014*]**

**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 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 Health advised:

The Regulation implements a 2013-14 Budget measure – 'Medicare Benefits Schedule—Removing double billing'. My Department consulted relevant stakeholders on the implementation of this Budget measure after it was announced in May 2013 and prior to its implementation. The Royal Australian College of General Practitioners (RACGP), the Australian Medical Association (AMA), the Rural Doctors Association of Australia and the Consumers Health Forum of Australia were consulted on the proposed changes. The AMA and RACGP did not support the proposed changes. However, the changes went ahead in accordance with the terms announced in the Budget.

The minister also advised that the department had amended the ES in accordance with the committee's request.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its examination of the instrument.**

### **Fisheries Management (Southern Bluefin Tuna Fishery Management Plan 1995) Temporary Order 2014 No. 1 [F2014L01414]**

|   |   |
|---|---|
| <b>Purpose</b>                          | Removes current impediments in the Management Plan to vary remake or revoke the determination of Australia's national catch allocation and the actual live weight for a Statutory Fishing Right for 2013–2014 and or 2014–2015 following a further amount of Southern Bluefin Tuna being allocated to Australia |
| <b>Last day to disallow<sup>1</sup></b> | 10 February 2015  |
| <b>Authorising legislation</b>          | <i>Fisheries Management Act 1991</i>  |
| <b>Department</b>                       | Agriculture   |

**[The committee first reported on this instrument in *Delegated legislation monitor No. 16 of 2014*]**

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have

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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.

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 the ES for the instrument states that section 43 of the *Fisheries Management Act 1991*, under which the instrument is made, 'does not require the [Australian Fisheries Management] Authority to consult with the relevant Management Advisory Committee or provide any set period of notice prior to making [the instrument]'. However, there is no reference to the consultation requirements of the *Legislative Instruments Act 2003* **[the committee therefore 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 Agriculture advised:

The Instrument gives the Australian Fisheries Management Authority (the Authority) the power to allocate additional southern bluefin tuna quota, granted to Australia by the Commission for the Conservation of Southern Bluefin Tuna. For Australia to benefit from this additional allocation the earlier determination of Australia's National Catch Allocation must be amended before the end of the 2013-2014 fishing season on 30 November 2014.

...

As the additional quota for Australia was only available if allocated prior to the end of the 2014 fishing season the enactment of this Instrument was a matter of urgency. Indeed, urgency is a precondition for making a Temporary Order under section 43 of the Management Act. As such, broad consultation would have been unnecessary or inappropriate as per subsection 18(2)(b) of the LIA. Moreover, this Instrument is of a machinery nature as it simply permits the Authority to put in place consequential legislative instruments, otherwise inconsistent with the existing Management Plan, that have the effect of allocating additional quota for the 2013-2014 season. This instrument will not substantially alter the fundamental arrangements or rights in the Fishery (subsection 18(2)(a) of the LIA).

However, and despite the applicability of subsections 18(2)(a) and 18(2)(b) of the LIA, consultation was undertaken with the Australian Southern Bluefin Tuna Industry Association prior to making this Instrument. The Industry Association strongly supported the redetermination of Australia's National Catch Allocation for the 2013-14 season.

The minister also advised that the department had amended the ES in accordance with the committee's request, and noted that the advice applies equally to the legislative instruments that were made as a consequence of the instrument, namely the Southern Bluefin Tuna Fishery Actual Live Weight Value of a Statutory Fishing Right (Amendment) Determination 2014 (F2014L01487), and the Southern Bluefin Tuna

Fishery Australia's National Catch Allocation (Amendment) Determination 2014 (F2014L01482).

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its examination of the instrument.**

**Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014 [F2014L01475]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | Amends the Renewable Energy (Electricity) Regulations 2001 to update solar zones and update references to documentation and definitions following the passage of the <i>Clean Energy Legislation (Carbon Tax Repeal) Act 2014</i> |
| <b>Last day to disallow</b>    | 2 March 2015  |
| <b>Authorising legislation</b> | <i>Renewable Energy (Electricity) Act 2000</i>  |
| <b>Department</b>              | Environment   |

**[The committee first reported on this instrument in *Delegated legislation monitor No. 17 of 2014*]**

**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 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 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 Environment advised:

The Regulation makes minor adjustments to a table of postcodes used to allocate Renewable Energy Certificates (RECs) for solar photovoltaic systems under the Renewable Energy Target Scheme. The need to change the table arose from Australia Post allocating out-of-sequence postcodes to some locations, creating anomalies in the allocation of RECs in some locations. Given this issue was initially raised with me by affected solar

energy businesses, and the Regulation directly resolves the issue, further consultation was not necessary.

The Regulation also makes minor regulatory amendments consequential to the repeal of the carbon tax and the 'final true-up' rules that have been made for the Jobs and Competitiveness Program.

As the Regulation makes only minor amendments, which are administrative in nature and do not have a significant impact on affected parties, public consultation was not necessary.

The minister also advised that the department had amended the ES in accordance with the committee's request.

#### **COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its examination of the instrument.**

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

|   |   |
|---|---|
| <b>Purpose</b>                          | Allows for States and Territories to be exempt from calling for public tenders if the work is below \$100 000 |
| <b>Last day to disallow<sup>2</sup></b> | 10 February 2015  |
| <b>Authorising legislation</b>          | <i>National Land Transport Act 2014</i>   |
| <b>Department</b>                       | Infrastructure and Regional Development   |

**[The committee first reported on this instrument in *Delegated legislation monitor No. 15 of 2014*]**

#### **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 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 requested further information from the minister; and**

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

requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].

#### MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised that States and Territories were consulted on the provisions of the *National Land Transport Act 2014*, and that the terms of the Determination were explained as part of the process.

#### COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its examination of the instrument.

### Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01464]

|   |   |
|---|---|
| <b>Purpose</b>                          | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on certain activities administered by the Australian Customs and Border Protection Service, the Department of Education and the Department of Industry |
| <b>Last day to disallow<sup>3</sup></b> | 2 March 2015  |
| <b>Authorising legislation</b>          | <i>Financial Framework (Supplementary Powers) Act 1997</i>  |
| <b>Department</b>                       | Finance   |

[The committee first reported on this instrument in *Delegated legislation monitor No. 17 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 FF(SP) 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.

The committee notes that in *Williams No. 1*,<sup>4</sup> the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally

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

requires legislative authority. The committee further notes that, as a result of the High Court decision in *Williams No. 2*,<sup>5</sup> a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under the Constitution. The committee considers that, in light of *Williams No.2*, the ES for all instruments specifying programs for the purposes of section 32B of the FF(SP) Act should explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES identifies the constitutional basis for expenditure in relation to the Information Sharing Centre (being the treaty-making power under Chapter II of the Constitution with respect to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia) **[the committee therefore requested further information from the minister in relation to the constitutional authority for Life Education Australia and the Australian Government Innovation and Investment Fund].**

**MINISTER'S RESPONSE:**

The Minister for Finance advised that, while not a comprehensive statement of relevant constitutional considerations, the items referenced the external affairs power (section 51(xxix)) and the corporations power (section 51(xx)) of the Constitution respectively.

**COMMITTEE RESPONSE:**

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

In relation to the information provided by the minister setting out the constitutional authority for the programs added to Schedule 1AB by the regulation, the committee notes that the ES identifies a constitutional head of power that purportedly supports the schemes listed in the instrument. **The committee has therefore concluded its examination of the instrument.**

---

4 *Williams v Commonwealth* [2012] 248 CLR 156.

5 *Williams v Commonwealth* [2014] HCA 23 (19 June 2014).



# **Appendix 1**

## **Correspondence**





## The Hon Jamie Briggs MP

Assistant Minister for Infrastructure  
and Regional Development  
Member for Mayo

---

*Reference: MB14-000654*

Senator John Williams  
Chair  
Senate Regulations and Ordinances Committee  
Parliament House  
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 30 October 2014 seeking clarification on the Staffing and Delegations Rule 2014 (the Rule), a rule established under the general rule-making powers of s11 of the *National Land (Road Transport) Ordinance 2014* (the Ordinance).

The Rule was established to permit the Chief Executive of the National Capital Authority (NCA), acting in their capacity as an Administering Authority of the ACT road transport legislation, as modified by the Ordinance, to delegate administrative and decision making powers to a person made available for the purposes of the Ordinance. This includes NCA contractors providing services to support pay parking on National Land.

The intention of the Rule is to provide a mechanism for the Chief Executive to delegate specific powers to provide for effective administration of infringement notices issued by the Australian Government. The Rule is self limiting and only applies to powers available for the purposes of the Ordinance. The Ordinance only applies to sections of the ACT road transport legislation, specifically relevant to the operation of a pay parking scheme.

Powers are only delegated to persons that have a direct requirement to make administrative decisions related to pay parking. These powers are detailed in an Instrument of Delegation signed by the Chief Executive of the NCA and is applied to a specific position title, or position number.

There are strict processes for staff that have been delegated responsibilities by the Rule. They are comprehensively vetted, are required to exercise their delegated power in accordance with the ACT road transport legislation, and only operate inline with decision making guidelines approved by the Chief Executive of the NCA.

The Rule is necessary for the efficient operation of the pay parking scheme on National Land. Facilitated by the Rule, administrative decisions are made for each individual infringement notice issued on behalf of the Australian Government.

I note the committee's concern of the general rule making power to also be delegated. I wish to advise the committee that the rule making powers are only able to be exercised by the Responsible Minister. The Rule cannot be used to delegate Ministerial responsibility.

I trust this information addresses the committee's concerns.

Yours sincerely



 **Jamie Briggs**

23 JAN 2015



**Australian Government**  
**Office of Parliamentary Counsel**

**First Parliamentary Counsel**

Our ref:  
Your ref:

Mr Ivan Powell  
Committee Secretary  
Senate Standing Committee on Regulations and Ordinances  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Powell

## **Implementation of a general instrument-making power**

1 Thank you for your letter of 4 December 2014 drawing my attention to the comments of the Committee in *Delegated legislation monitor* No. 17 of 2014 and seeking my advice on the issues identified.

2 I have set out below each of the issues and my advice.

3 As a preliminary comment, I note that I have now released a revised version of Drafting Direction 3.8. I had delayed the release so that I was able to take into account the Committee's report and ensure that the Drafting Direction covered the matters of concern to the Committee.

**The committee therefore notes its expectation that ESs indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.**

The Drafting Direction requires drafters to recommend to instructors that the Explanatory Statement indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.

**The committee therefore recommends that OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*.**

I will include material in the OPC Annual Report about the steps that I take to fulfil my statutory obligations under section 16 of the *Legislative Instruments Act 2003*.

**The committee therefore notes its expectation that ESs identify a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification.**

The Drafting Direction requires drafters to recommend to instructors that the Explanatory Memorandum should provide a 'strong justification' for not prescribing the following matters in regulations, and set out the factors or criteria relevant to that justification:

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions;
- (e) seizure provisions;
- (f) civil penalties;
- (g) impositions of taxes;
- (h) setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount;
- (i) amendments of the text of an Act.

**The committee therefore recommends that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.**

The Drafting Direction has now been issued.

OPC will work with the Attorney-General's Department to identify legislation that contains general instrument-making powers that do not comply with the Drafting Direction in its reissued form. It will then be a matter for Government to determine whether to seek to have Parliament amend the relevant Acts.

**The committee seeks the advice of FPC as to the progress of consideration of whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.**

The Drafting Direction provides that Acts should include a provision to specify that, in the event of a conflict, regulations will prevail over rules. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted.

**The committee therefore notes its expectation that the delegation of power provided for in instruments be only as broad as strictly required.**

The Drafting Direction provides that Acts should include a provision preventing the delegation of the power to make legislative instruments under a general instrument-making power. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted.

**In light of the outstanding matters of concern identified above, the committee notes its intention to continue to monitor the general instrument-making power and the settling of the policy guidance on its use.**

I note the Committee's continuing interest in this matter and will continue to examine the Delegated legislation monitor as it is released.

Yours sincerely

Peter Quiggin PSM  
First Parliamentary Counsel  
15 December 2014



PARLIAMENTARY COUNSEL

Drafting Direction No. 3.8  
Subordinate legislation

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC for Bills and the PLC for instruments.

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## Part 1—Introduction

1 This Drafting Direction notes some considerations, and sets out some standard forms, for drafting provisions of legislation dealing with subordinate legislation.

## Part 2—Power to make subordinate legislation

### *Use of legislative instruments*

2 OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so. Drafters should mention to instructors that it is the responsibility of the instructing agency to arrange for the drafting of instruments and, if necessary, explain the options available.

3 However, material covering the following should be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument:

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions;
- (e) seizure provisions;
- (f) civil penalties;
- (g) impositions of taxes;
- (h) setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount;
- (i) amendments of the text of an Act.

4 Provisions of this kind are dealt with further in paragraphs 26 to 32.

5 If the operation of an Act is to be modified (as distinct from actually amended), by subordinate instrument, this may be done by regulations or any other type of legislative instrument (although modifying the operation of an Act by subordinate instrument should be used sparingly). However, any textual changes of general application should be done by amendments of the text of an Act and not by modification. Consequently, these should be done by regulation.

6 It will also be appropriate to use regulations where a scheme that already makes provisions for regulations is being amended and the amendments (to the extent to which they relate to instruments) are relatively minor. FPC is happy to discuss individual cases.

7 Drafters should also see FPC to discuss whether politically sensitive provisions should be dealt with by regulation or by another type of legislative instrument.

8 Before agreeing to the use of regulations, drafters should see FPC if:

- (a) they are unsure of the approach to adopt; or
- (b) it is proposed that substantial regulations would be required.

## ***General instrument-making powers***

9 It has long been the practice to include general regulation-making powers in Acts.

10 More recently, an approach has been taken to adapt that practice for other legislative instruments. (For examples of this approach, see the “rules” in the *Public Governance, Performance and Accountability Act 2013* and the “PPL rules” in the *Paid Parental Leave Act 2010*.)

11 As with the current practice for regulations (which involves including a general regulation—making power in the Act), this approach involves including a general legislative instrument—making power in the Act. However, instead of authorising the Governor-General to make regulations when “required or permitted” or “necessary or convenient”, it authorises another person (e.g. a Minister) to make another type of legislative instrument (e.g. rules) in those circumstances. For example, see subsection 101(1) of *Public Governance, Performance and Accountability Act 2013*:

- (1) The Finance Minister may, by legislative instrument, make rules prescribing matters:
  - (a) required or permitted by this Act to be prescribed by the rules; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

All instruments that are made in accordance with this general instrument—making power will be legislative instruments.

12 Once a general legislative instrument-making power is included in an Act, the same practice that applies for regulations applies for instruments covered by the general power. For example, just as it is not necessary to include specific provisions conferring the power to make particular regulations, it is not necessary to include specific provisions conferring the power to make particular instruments covered by the general power (e.g. instead of saying “The Minister may by, legislative instrument, ...”, the Act can say “The [*rules*] may”).

13 However, it is necessary to include in the definition section a definition of the legislative instrument covered by the general power (because we cannot rely on the definition of ***regulations*** in section 2B of the *Acts Interpretation Act 1901*). For example, see section 8 of the *Public Governance, Performance and Accountability Act 2013*:

***rules*** means the rules made under section 101.

14 There have been examples where a more descriptive label has been used in the defined term for the instrument covered by the general power. For example, see section 6 of the *Paid Parental Leave Act 2010*:

***PPL rules*** (short for Paid Parental Leave Rules) means the rules made by the Minister under section 298.

15 While this defined term does not fix the actual title of the instrument that can be made, to avoid confusion in the future, drafters should avoid including additional descriptive material in the defined term (except as provided by paragraph 33) and instead replicate the name of the instrument covered by the general power (e.g. ***rules***).

16 The approach of providing for legislative instruments (rather than regulations) has a number of advantages including:

- (a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and
- (b) it enables the number and content of the legislative instruments under the Act to be rationalised; and
- (c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and
- (d) it shortens the Act.

17 Because of these advantages, drafters should adopt this approach where appropriate with new Acts. However, drafters should include a general instrument-making power in an Act that already has a regulation-making power only after discussing the issue first with FPC. Where possible, and to reduce complexity, drafters should also try to avoid having different kinds of (non-regulation) legislative instruments under an Act.

18 This approach may also be suitable in instruments which provide for other instruments.

### ***Standard forms of regulation-making powers and instrument-making powers***

#### **Regulation-making powers**

19 The standard provision authorising the making of regulations under primary legislation should be as follows:

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this [Act/Ordinance] to be prescribed by the regulations; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this [Act/Ordinance].

20 The paragraphing of the standard provisions is to make it clear that the words “for carrying out or giving effect to this Act/Ordinance” do not qualify the words “required or permitted by this Act/Ordinance to be prescribed”.

21 There is no need to specify that the regulations (or instruments) are not to be inconsistent with the primary legislation concerned (or any other primary legislation), as courts will find that any subordinate legislation that is inconsistent with the primary

legislation under which it is made (or any other primary legislation, or a right vested in a person by the common law) is invalid. (See also section 13 of the *Legislative Instruments Act 2003*.)

## Instrument-making powers—standard form

22 The standard provision authorising the making of legislative instruments under primary legislation should be as follows:

- (1) The [*maker, e.g. Minister*] may, by legislative instrument, make [*name of legislative instrument (e.g. rules)*] prescribing matters:
  - (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument (e.g. rules)*]; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].

All instruments that are made in accordance with this general instrument making power will be legislative instruments.

23 A definition of the legislative instrument should be included in the definitions section (e.g. *rules* means rules made [*under section xx*])—see paragraphs 13 to 15 above).

## Instrument-making powers—delegation

24 As a general rule, a general instrument-making power of a person should not be able to be delegated (just as the general regulation-making power of the Governor-General is not able to be delegated). You should ensure that the general rule-making power is excluded from any delegation power of the instrument-maker.

25 If, in a particular case, an instrument will need to be made frequently and the instructors wish the power to be able to be delegated, generally, you should confer a separate instrument-making power on the instrument-maker (rather than relying on the non-delegable general instrument-making power) and ensure that the particular instrument-making power is able to be delegated. Instructors should also explain the need for this in the explanatory memorandum.

## Instrument-making powers—dealing with significant provisions

26 For all instrument-making powers, it is important to clarify with your instructors whether provisions of the kind described in paragraph 3 are required and if so, how they may be dealt with. It would generally be considered that provisions of that kind would not be able to be included in subordinate legislation without express authorisation from an Act.

27 If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that a provision of a kind described above is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
  - (a) create an offence or civil penalty;
  - (b) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;

- (c) impose a tax;
- (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- (e) amend this [*Act/Ordinance*].

28 You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).

29 Alternatively, if the instructor's policy is that a provision of a kind described above should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

30 In rare cases, instructors may desire provisions of this kind to be dealt with in legislative instruments other than regulations. You should discuss any such policy with FPC before providing for this. You should also ensure that the instructors are aware that the Senate Standing Committee for the Scrutiny of Bills (and possibly when the instrument is made, the Senate Standing Committee on Regulations and Ordinances) is likely to comment adversely on such an approach. Instructors should ensure that the explanatory memorandum and the explanatory statement provide strong justification for the need to include such a provision in a legislative instrument other than regulations, and set out the factors that are relevant to that justification.

31 In this case, the instrument-making power may include something along the following lines:

- (2) The [*name of instrument e.g. rules*] may [*include description of exception e.g. impose a tax*].
- (3) However, to avoid doubt, the [*name of legislative instrument (e.g. rules)*] may not do the following:
  - (a) create an offence or civil penalty;
  - (b) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;
  - (c) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
  - (d) amend this [*Act/Ordinance*].

32 In this case, subsection (3) has been modified to remove the reference to imposing a tax. You will need to modify your provisions according to your requirements.

### **Standard form of instrument-making power where there are 2 powers**

33 It is possible that there may be 2 (or possibly more) general instrument-making powers, (e.g. because different people are to have power to make instruments about different matters), although 2 instrument-making powers should be included in an Act only after discussing the issue with FPC. In this case, each instrument-making power will need its own special label for instruments made under the power. (See for example subsection 5(1) of the *Farm Household Support Act 2014*.)

34 As a general rule, where there are 2 instrument-making powers, each power should be in the standard form and contain a power to prescribe necessary or convenient matters. Consequently, 2 rule-making powers would take the following form:

- ( ) The [*maker e.g. Minister*] may, by legislative instrument, make [*name of legislative instrument (e.g. rules)*] prescribing matters:
  - (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument (e.g. rules)*]; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].
- ( ) The [*maker e.g. Secretary*] may, by legislative instrument, make [*name of legislative instrument*] prescribing matters:
  - (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument (e.g. rules)*]; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].

35 You will also need to include a provision of a kind described in paragraphs 26 to 32, and 37 and 38. The provision will need to refer to both sets of rules.

36 It is possible that there may be both a general instrument-making power, and one or more other specific instrument-making powers (e.g. because there are special regimes for the making of the specific instruments, or because instructors want the special regime to result in a stand-alone instrument for some reason). Of course, just as with a general regulation-making power, the fact that there is a single general instrument-making power does not mean that everything that can be prescribed under the power has to be included in the same instrument made under that power.

### **Provision dealing with inconsistency where there are 2 powers**

37 As mentioned, it is possible that an Act may contain:

- (a) a regulation-making power and an instrument-making power; or
- (b) 2 instrument-making powers.

38 In such a case, you should include a provision that clarifies which instrument is to prevail in the event of an inconsistency. If one of the instruments is regulations, then, as a general rule, the regulations should prevail. If one of the instruments is Ministerial rules, and the other is another person's rules, the Ministerial rules should prevail. A provision along the following lines should be included:

- ( ) [*Rules*] that are inconsistent with the [*regulations*] have no effect to the extent of the inconsistency, but [*rules*] are taken to be consistent with the [*regulations*] to the extent that [*the rules*] are capable of operating concurrently with the [*regulations*].

39 If, in a particular case, it is decided not to include such a provision, or to provide a different order of precedence, the drafter should advise instructors that the reason for this will need to be explained in the explanatory memorandum.

## **Standard form of regulation or instrument-making power where there are preconditions for making subordinate legislation**

40 If a provision sets out a precondition for the exercise of a power to make subordinate legislation, the provision should be drafted to make clear who has the responsibility for forming the opinion, or doing the thing, that is the precondition (see Drafting Direction 3.4 for further details).

## ***Provisions for subordinate legislation to be made to do certain things***

### **Provisions for subordinate legislation to modify or amend an Act**

41 If you are considering drafting a provision allowing subordinate legislation (generally regulations) to make amendments or modifications of primary legislation, you must discuss the matter first with FPC. You should also ask your instructors to consult the Commercial and Administrative Law Branch, Civil Law Division of the Attorney-General's Department (*CALB*). You should also make it clear whether the provision is authorising actual amendment, or is authorising modification, of the primary legislation. (See also the discussion above in paragraphs 3 and 26 to 32 when choosing the type of legislative instrument to be used.)

42 If you draft a provision allowing subordinate legislation to make modifications of primary legislation, you should be aware of the following definition in section 2B of the *Acts Interpretation Act 1901*:

*modifications*, in relation to a law, includes additions, omissions and substitutions.

43 Although a provision in primary legislation authorising the modification of the legislation by subordinate legislation would not ordinarily be construed as authorising an increase in a penalty, it should be made clear in such a provision that it does not extend to a modification by way of increasing a penalty provided for in the primary legislation. Any such provision should be discussed with the Criminal Law and Law Enforcement Branch of the Attorney-General's Department (*AGD*).

### **Provisions for subordinate legislation to provide for transitional matters**

44 It is common with new schemes, or significant amendments to existing schemes, to provide an instrument-making power that allows for transitional matters to be dealt with. The standard provision for this where there are significant amendments to an existing scheme is:

- (1) The [*maker e.g. Minister*] may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this [*Act/Ordinance*].

45 If a new principal Act or Ordinance is being enacted, the provision should take the following form:

- (1) The [*maker e.g. Minister*] may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to:
  - (a) the amendments or repeals made by this [*Act/Ordinance*]; or
  - (b) the enactment of this Act or the [*new principal Act/Ordinance*].

46 You could also consider including the following provision:

- (3) This [*Act/Part etc. (other than subsection (2))*] does not limit the rules that may be made for the purposes of [*subsection (1)*].

47 A provision of a kind referred to in paragraphs 26 to 32 should also be included.

### **Provisions allowing subordinate legislation to incorporate material by reference**

48 Section 14 of the *Legislative Instruments Act 2003* (the *LIA*) deals with the extent to which a legislative instrument may apply, adopt or incorporate another document, without reproducing the text of the document in the instrument. CALB should be consulted on any proposal to displace section 14, in whole or part, by providing a contrary intention.

### **Provisions for subordinate legislation to specify things by reference to classes**

49 There is no need to state expressly in primary legislation that subordinate legislation may specify things by reference to a class of things (see subsection 33(3AB) of the *Acts Interpretation Act 1901* for non-legislative instruments and section 13 of the *LIA* for legislative instruments).

### **Early involvement of instrument drafter**

50 If, in drafting a particular Bill, you think it would be useful to have the early involvement of the drafter of an instrument to be made because of the Bill, you should raise that with FPC.

### **Scope of provisions**

51 If you are not sure whether provisions of a draft Bill that provide for subordinate legislation are appropriate to allow subordinate legislation to be made to achieve the result that you understand your instructors want, you should discuss the matter with the head drafter or one of the instrument drafting team heads. This does not limit any requirement (under Drafting Direction 4.2) to refer to AGD particular provisions conferring or affecting a power to make subordinate legislation.

### ***Repeal of provision conferring power to make subordinate legislation***

52 If a provision giving a power to make subordinate legislation is repealed and replaced, it is wise to assume that the repeal will cause the instrument to lapse. If the policy is to continue the subordinate instrument in force, you will generally need to include a transitional provision. This may also be the case for some amendments of such powers.

53 The following is an example of a transitional provision to continue an instrument in force in a case where the enabling provision has been repealed and replaced:

#### **19 Transitional—section 34 of the XYZ Act 1968**

An instrument made under section 34 of the *XYZ Act 1968* that was in force immediately before the commencement of this Act continues in force (and may be dealt with) as if it had been made under section 34 of that Act as amended by this Act.

## **Part 3—The *Legislative Instruments Act 2003***

### ***Determining whether an instrument is to be a legislative instrument***

54 The LIA contains rules dealing with various matters (including disallowance and sunseting) relating to all instruments that fall within the definition of *legislative instrument* in the LIA (see sections 5, 6 and 7 of the LIA).

55 Section 5 sets out a general definition of a legislative instrument. If you draft a provision that states that an instrument is not a legislative instrument and you are not sure whether the characterisation is correct you could talk to the head drafter or one of the instrument drafting team heads. If there is still doubt (or if you consider that the instrument would otherwise be a legislative instrument), the issue of whether the instrument should be exempted from the LIA is ultimately a decision for the Attorney-General and you should advise your instructors to discuss this issue with CALB.

56 The LIA has lists of exemptions from the Act in its totality and from the disallowance and sunseting regimes in particular. (Some of these exemptions depend on the *Legislative Instrument Regulations 2004* (the *LIR*.) However, there is still an expectation that all instruments that fall within the definition of a legislative instrument under section 5 will be subject to the full requirements of the Act unless there is a special reason that justifies a full or partial exemption.

57 An instrument that is administrative in character may be treated as a legislative instrument if the instructing department wants to apply the requirements of the LIA applying to legislative instruments to the instrument in full or part. If the LIA is to be applied in part, the issue of whether an exemption is required does not arise because the instrument is not legislative in character.

### ***Application of this Part of the Drafting Direction to certain subordinate legislation***

58 This Part of the Drafting Direction applies to subordinate legislation that can only be made by a person in an official Commonwealth capacity. (A person may make an instrument in an official Commonwealth capacity even if the person is, or is acting on behalf of, a regulatory or other body that is legally separate from the Commonwealth.) For example, an application made by a private individual, or an election made by a taxpayer, would not be subordinate legislation for the purposes of this Part of the Drafting Direction.

59 However, if you are in doubt as to whether this Part of the Drafting Direction should apply to a particular kind of instrument, then you should treat the kind of instrument as subordinate legislation for the purposes of this Part of the Drafting Direction.

### ***Generally the status of instruments to be expressly dealt with***

60 When you provide a power in a Bill to make subordinate legislation, the status of an instrument made under that power as a legislative instrument, or not a legislative instrument, must be expressly dealt with. There are 4 main ways in which this might happen:

- (a) an instrument might be stated to be a legislative instrument under section 6 of the LIA;

- (b) an instrument might be stated not to be a legislative instrument under section 7 of the LIA (including by reason of regulations made for the purposes of that section);
- (c) an instrument might be stated to be a legislative instrument in a provision of the Bill you are drafting;
- (d) an instrument might be stated not to be a legislative instrument in a provision in the Bill you are drafting (either because it is not a legislative instrument under section 5 of the LIA, or because the instrument, despite being a legislative instrument under that section, is to be totally exempted from the LIA).

61 Rules of court are stated under section 9 of the LIA not to be legislative instruments. However, under the enabling legislation providing the power to make the rules, they are treated as if they were legislative instruments.

62 Generally, if you are amending an Act that already contains powers to make subordinate legislation, you are not required to clarify by express provision whether those instruments are legislative instruments. However, you may do so if it would be appropriate to do so taking into account the amendments you are making, or if you are given instructions to do so. Also, as doing this will bring greater consistency and certainty to the statute book, you should consider doing this if there is sufficient time.

## ***Whether an instrument is to be a legislative instrument***

### **Discussions with AGD**

63 The issue of whether a legislative instrument is to be exempted from all or part of the LIA should be discussed with CALB following referral in accordance with Drafting Direction 4.2. OPC has an interest in ensuring that the LIA is not unnecessarily displaced and that there is proper accountability and approval for any displacement.

### **Instruments that are already dealt with by the LIA or regulations**

64 No further statement about the status of an instrument needs to be included in the Bill if the instrument is covered by either or both of the following paragraphs (and the effect of the relevant provision in the particular case is clear):

- (a) the instrument is expressly stated to be a legislative instrument under section 6 of the LIA;
- (b) the instrument is expressly stated not to be a legislative instrument under section 7 or 9 of the LIA (including by reason of regulations made for the purposes of section 7).

65 If an instrument is of a kind that is only covered by the LIR if it relates to a particular individual, then no further statement about the status of an instrument of that kind that relates to a class of persons need be included in the Bill (unless an exemption is required for the instrument). See paragraphs 71 to 75 for more detail.

## Instruments that are to be legislative instruments

66 If an instrument (other than one covered by paragraph 64 or 65) is to be a legislative instrument, and the entire LIA is to apply to the instrument, then you will need to state expressly in the Bill that the instrument is a legislative instrument. This can be done by using the expression “by legislative instrument” in the provision that gives the power to make the instrument. For example:

The Minister may, by legislative instrument, make rules relating to ...

The use of this expression will ensure, because of section 15AE of the *Acts Interpretation Act 1901*, that the instrument is a legislative instrument for the purposes of the LIA.

67 If it is not possible to use the expression “by legislative instrument”, then the following form should be used:

A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument.

68 Sometimes a draft of an instrument is prepared by a body or person, but the instrument does not become a legislative instrument until another person or body approves or accepts the instrument. In this case, it is important to make clear, for the purposes of the LIA, who makes the instrument, and when the instrument is made. To do so, the following form should be used:

A *[insert description of instrument]* prepared by the *[insert preparer]* and approved by the *[insert approver or acceptor]* is a legislative instrument made by the *[insert approver or acceptor]* on the day on which the *[insert description of instrument]* is *[approved or accepted]*.

69 The statement that an instrument is a legislative instrument should be in a substantive provision in the Bill and not in a note.

70 Section 15AE of the *Acts Interpretation Act 1901* provides that if an instrument is described as a legislative instrument, then the instrument must be in writing.

## Instruments that are not to be legislative instruments

### ***Express statement that instrument is not a legislative instrument***

71 If an instrument (other than one covered by paragraph 64 or 65) is not to be a legislative instrument, then you will need to state expressly that the instrument is not a legislative instrument.

72 An instrument might not be a legislative instrument for 2 reasons. First, the instrument might clearly not fall within the definition of ***legislative instrument*** in section 5 of the LIA. Secondly, although the instrument falls within this definition, the policy might be for the instrument to be wholly exempted from the LIA.

73 In either case, the standard form for dealing with such an instrument is as follows:

A *[insert description of instrument]* made under *[insert enabling provision]* is not a legislative instrument.

74 If you are providing a power to do something that, if done in writing, would not be a legislative instrument, and your instructors do not want to require the action to be done in writing, then you should include a provision like:

If the *[insert description of instrument]* is made in writing, the *[insert description of instrument]* is not a legislative instrument.

75 The statement that an instrument is not a legislative instrument should be in a substantive provision in the Bill and not in a note.

### **Explanatory drafting notes**

76 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument not being a legislative instrument, drafters of Bills should provide some guidance to instructors about including an appropriate explanation in the explanatory memorandum.

77 For instruments that are not legislative instruments within the meaning of **legislative instrument** in section 5 of the LIA, drafters of Bills should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

*[ You should explain in the explanatory memorandum that this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislative Instruments Act.]*

78 For instruments that are being exempted from the LIA, drafters of Bills should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

*[ You should explain in the explanatory memorandum that this provision is exempting the instrument from being a legislative instrument and give a detailed explanation of the justification for that exemption. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislative Instruments Act. In addition, the administrative law area of the Attorney-General's Department must be consulted on the exemption.]*

79 CALB is happy to assist instructors to draft their Explanatory Memorandum in relation to issues raised by the LIA.

### **Powers to create some legislative instruments and some instruments that are not legislative instruments**

80 In a small number of cases, the instrument-making powers can result in the making of an instrument of a legislative character if the power is exercised in relation to a class and an instrument of an administrative character if the power is exercised in relation to a particular individual or a particular act, event or case. You should confirm that the instructor is aware of the implications of declaring all instruments made under the power to be legislative instruments or not to be legislative instruments. In some cases there might be a need for some of the instruments made under the power to be declared to be legislative instruments and for other instruments to be declared not to be legislative instruments.

81 In these cases, you should create 2 separate enabling powers: one to enable the making of legislative instruments, and the other to enable the making of non-legislative instruments. You must also describe the tests that are to be used to determine which of the 2 powers to use. CALB can give you advice on the nature of the tests.

82 For example:

- (1) The *[insert name of rule-maker]* may make a *[insert description of instrument]* that *[insert condition e.g. applies to a particular person or a particular entity]*.
- (2) A *[insert description of instrument]* made under subsection (1) is not a legislative instrument.
- (3) The *[insert name of rule-maker]* may, by legislative instrument, make a *[insert description of instrument]* that *[insert condition e.g. applies to a class of persons or entities]*.

83 If you are drafting a provision of this kind, you should ask your instructors whether they need the ability to make a non-legislative instrument that covers more than one individual or entity. If this is intended, you should tailor your provision to achieve this and advise your instructors that they should consult CALB about whether the approval of the Attorney-General is required.

84 Although, the nature of the tests will be advised on by CALB, you should ensure that it will be easy to apply the tests and determine under which power an instrument is to be made. If you do not think that the tests meet this requirement, then you should speak to the head drafter.

85 Some kinds of instruments specified in the LIR must relate to particular individuals in order to be covered by the LIR. Unless your instructors envisage that instruments of those kinds could be made in relation to classes of persons, you do not need to comply with paragraphs 71 to 75 in relation to those kinds of instruments.

### ***Partial exemptions from the LIA***

#### **Exemptions from the disallowance regime**

86 If:

- (a) an instrument (other than one covered by paragraph 64 or 65) is to be a legislative instrument; and
- (b) the policy is that the disallowance regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

*A [insert description of instrument] made under [insert enabling provision] is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the [instrument].*

87 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph 80.

88 There are a number of generically-described instruments included in a table in subsection 44(2) of the LIA that are exempt from disallowance. However, you should not rely on the table to exempt an instrument from disallowance (as it is often difficult to determine whether a particular instrument is an instrument of a kind mentioned in the table), nor should new disallowance exemptions be included by amending the table in that section.

89 Any proposed exemption of an instrument that is legislative in character from the disallowance regime should be discussed with CALB and you should advise your instructors that the approval of the Attorney-General is required.

90 If an instructing department requires a Bill to provide for a different means of disallowance (for example, by shortening the period for disallowance), this would be done by exempting the legislative instrument from the disallowance regime and providing for the alternative regime. However, any alternative regime must be discussed with CALB and would require the approval of the Attorney-General. It must also be discussed with FPC as alternative tabling and disallowance regimes raise practical issues for the Publications Group.

91 Occasionally an instructing department may want to apply parts of the LIA to an instrument that is administrative in character. The non-application of provisions of the LIA to such an instrument does not require a decision of the Attorney-General.

## **Explanatory drafting notes**

92 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument being exempted from the disallowance regime, Bill drafters should provide some guidance to instructors about including an appropriate explanation in the explanatory memorandum.

93 Bill drafters should include notes along the following lines (as the case requires) under the relevant provision in the Bill. (The drafting note can be inserted using Alt + I):

*[You should explain in the explanatory memorandum the reason why this instrument is being exempted from the disallowance regime.]*

*[You should explain that the instrument is of an administrative character and would not be a legislative instrument without the provision, but that as a matter of policy it has been decided to apply particular (specified) requirements of the Legislative Instruments Act and not other (specified) requirements of that Act.]*

## **Exemptions from the sunseting regime**

94 It is the policy of CALB that all exemptions from the sunseting regime must be included in the LIR and must not be included in the Act containing the power to make the instrument.

95 Therefore, if the policy of the instructors is that there should be such an exemption, they should be referred to CALB to discuss the matter and to arrange to have the necessary regulations drafted.

96 Any proposed exemption of an instrument that is legislative in character from the sunseting regime would require the approval of the Attorney-General.

## ***Providing for other requirements for legislative instruments***

### **Publication requirements**

97 You may require a legislative instrument to be published in a particular way. This requirement is additional to the requirement to register a legislative instrument (see subsection 56(2) of the LIA in relation to a requirement to publish a legislative instrument in the Gazette).

98 If you do require a legislative instrument to be published in a particular way, you should be aware that *making*, in relation to a proposed or actual legislative instrument, is defined in section 4 of the LIA to mean “the signing, sealing or other endorsement of the instrument by the person or body empowered to make it whereby it becomes or became that legislative instrument”. Therefore, any publication requirements should occur *after* a legislative instrument is made (rather than being the process by which the instrument is made). One way of doing this is to require a *copy* of the instrument, once made, to be published in a particular way.

99 As all legislative instruments are required to be registered on the Federal Register of Legislative Instruments, the need for legislative instruments to be published in a particular way in future should be less common (and the need for legislative instruments to be published in the Gazette in future should be very unusual). However, if you are required to include a requirement that a copy of a legislative instrument be published in the Gazette, then you should use the following form:

The Minister may, by legislative instrument, make a *[insert description of instrument]*.

In addition to the requirement under the *Legislative Instruments Act 2003* for the *[instrument]* to be registered, a copy of the *[instrument]* must be published in the Gazette.

100 The reason for the form of words in paragraph 99 is to make it clear on the face of the statute book that the particular Gazettal requirement is covered by subsection 56(2) of the LIA (which states that certain Gazettal requirements are additional to registration requirements). You should also adopt a similar form of words (as appropriate) in the case of other methods of publication (such as publication in a newspaper) for consistency.

101 You might also need to consider whether a failure to publish the instrument as required affects the validity of the instrument.

### **Tabling requirements**

102 The obligation to deliver a legislative instrument for tabling lies on OPC (although that obligation only arises once the instrument is lodged for registration). There should not be any need to provide for any tabling requirements for legislative instruments that are different from those specified in Part 5 of the LIA.

## **Part 4—Instruments that are not legislative instruments and the *Acts Interpretation Act 1901***

103 The *Acts Interpretation Act 1901* contains provisions relating to instruments that are not legislative instruments: see sections 46, 46AA and 46B of that Act.

104 In particular, section 46B provides for disallowable (non-legislative) instruments. The 2008 Review of the *Legislative Instruments Act 2003* recommended that the LIA's disallowance regime be adopted as a standard for all instruments, regardless of whether they are legislative. If you are considering drafting a provision providing for a disallowable instrument for the purposes of section 46B of the *Acts Interpretation Act 1901*, you must discuss the matter first with the head drafter and ask your instructors to consult CALB.

105 If approval is given, the form for providing for such an instrument is the following:

An *[insert description of instrument]* made under *[insert enabling provision]* is not a legislative instrument, but is a disallowable instrument for the purposes of section 46B of the *Acts Interpretation Act 1901*.

## Part 5—Other matters dealing with or affecting instruments

### ***Provisions referring to regulations or other instruments***

106 It is generally undesirable to refer in an Act to particular regulations or instruments or a particular numbered provision of a regulation or instrument, because the reference could easily be made incorrect. However, if you must include such a reference, it should be in the form provided by the regulation or instrument as the name or citation of the regulation or instrument (see Drafting Direction 1.1A and Word Note 4).

### ***Provisions amending regulations or instruments***

107 Acts should not amend regulations or instruments unless there are special reasons. An example of a special reason would be a need to amend a regulation or other legislative instrument retrospectively in a way that adversely affects a person's rights or imposes new liabilities contrary to the *Acts Interpretation Act 1901* or the LIA. If you are instructed to draft a provision amending regulations or instruments, you should discuss the matter with FPC.

108 If it is decided that an Act must amend regulations or other legislative instruments, you should take care to ensure that:

- (a) any amending regulations or instruments with suspended commencements will not affect the amendments to be made by the Act (and OPC drafters are aware of the proposed amendments and the instructing department is aware of the need not to make amending regulations or instruments that could affect the amendments to be made by the Act); and
- (b) the regulations or instruments that are amended by the Act can be further amended or repealed by regulations or instruments.

109 The usual form of the clause to achieve this is as follows:

## 3 Schedules

- (1) Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

- (2) The amendment of any [*regulation/instrument*] under subsection (1) does not prevent the [*regulation/instrument*], as so amended, from being amended or repealed by the [*Governor-General/title of the maker of the instrument*].

110 The following subsection is considered unnecessary and should not be included:

- (3) To avoid doubt, [*regulations/instruments*] amended under subsection (1) are taken to still be [*regulations/instruments*].

111 If drafters are working on a Bill that they are aware will result in regulations or other instruments ceasing to have effect (for example, they are repealing provisions under which legislative instruments have been made), they should notify the General Manager of Publications. This will assist ComLaw to be kept up-to-date by identifying redundant instruments.

### ***Amendments of definitions in enabling Act relied on in instruments***

112 Before the commencement of the *Acts Interpretation Amendment Act 2011*, there was conflicting jurisprudence on the effect of an amendment of a definition in an Act on existing regulations or other instruments (compare *Birch v Allen* [1942] 65 CLR 621 with *Kostrzewa v Southern Electricity Authority of Queensland* [1970] 120 CLR 653).

113 The *Acts Interpretation Amendment Act 2011* amended section 46 of the *Acts Interpretation Act 1901* and section 13 of the *Legislative Instruments Act 2003* to clarify that expressions used in non-legislative instruments and legislative instruments have the same meaning as in the enabling legislation as in force from time to time. This means that changes in definitions in the enabling legislation will flow through to the instruments made under the enabling legislation.

### ***Instruments prescribing penalties***

114 Subsection 33(5) of the *Acts Interpretation Act 1901* provides that, if an Act confers power to make an instrument prescribing limited penalties, that limitation does not prevent the instrument from requiring the making of a statutory declaration.

### ***Explanation when relying on the necessary and convenient power***

115 For a provision of an instrument that relies for its head of power on the necessary and convenient power, drafters should include a drafting note under the provision along the following lines:

*[ : This provision relies on the necessary and convenient power in paragraph (x)(1)(b) of the Act. You should indicate in the explanatory statement that this provision relies on that power as the Senate Standing Committee on Regulations and Ordinances expects the explanatory statement to indicate when the “necessary or convenient” power has been relied on.]*

Peter Quiggin  
First Parliamentary Counsel  
15 December 2014

# UNCLASSIFIED

Drafting Direction No. 3.8  
Subordinate legislation

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## Document History

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| <b>Release</b> | <b>Release date</b> | <b>Document number</b> |
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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 4 of 2006.

UNCLASSIFIED



**THE HON PETER DUTTON MP  
MINISTER FOR HEALTH  
MINISTER FOR SPORT**

Ref No: MC14-015528

Senator the Hon John Williams  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
CANBERRA ACT 2600

Dear Chair *John,*

I refer to the correspondence of 4 December 2014 from the Committee Secretary of the Senate Regulations and Ordinances Committee advising that the Committee requests further information on consultation undertaken with respect to the *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014* (the Regulation).

The Regulation implements a 2013-14 Budget measure – ‘*Medicare Benefits Schedule – Removing double billing*’. My Department consulted relevant stakeholders on the implementation of this Budget measure after it was announced in May 2013 and prior to its implementation. The Royal Australian College of General Practitioners (RACGP), the Australian Medical Association (AMA), the Rural Doctors Association of Australia and the Consumers Health Forum of Australia were consulted on the proposed changes. The AMA and RACGP did not support the proposed changes. However, the changes went ahead in accordance with the terms announced in the Budget.

As requested by the Committee, the Explanatory Statement has been updated to reflect the consultation undertaken in accordance with section 17 of the *Legislative Instruments Act 2003*. I enclose a copy of the revised Explanatory Statement.

Thank you for bringing this issue to my attention.

Yours sincerely

*19/12/14*  
PETER DUTTON

Encl

## EXPLANATORY STATEMENT

### Select Legislative Instrument 2014 No.

#### *Health Insurance Act 1973*

#### *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014*

Subsection 133(1) of the *Health Insurance Act 1973* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part II of the Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Act provides that Medicare benefits be calculated by reference to the fees for medical services set out in prescribed tables.

Section 4 of the Act provides that regulations may prescribe a table of medical services which sets out items of medical services, the fees applicable for each item, and rules for interpreting the table. The *Health Insurance (General Medical Services Table) Regulations 2014* (GMST) currently prescribes such table.

The Amendment Regulation will amend the GMST to ensure that the medical services funded through the Medicare Benefits Schedule (MBS) represent best practice and are reflective of government commitments. The Amendment Regulation will implement the 2013-14 Budget measure – ‘*Medicare Benefits Schedule – Removing double billing*’, which is to take effect on 1 November 2014.

The Amendment Regulation will restrict 36 consultation items from being claimed with three chronic disease management items by the same provider, for the same patient, on the same day. This will improve the efficiency and effectiveness of Medicare by preventing the potential for practitioners to double bill Medicare for similar services.

#### Consultation

The Department consulted relevant stakeholders on the implementation of this Budget measure after it was announced and prior to its implementation. Stakeholders consulted included; The Royal Australian College of General Practitioners (RACGP), Australian Medical Association (AMA), Royal Doctors Association of Australia, and Consumers Health Forum of Australia. The AMA and RACGP did not support the proposed changes however the changes went ahead in accordance with the terms announced in the Budget.

Details of the Amendment Regulation are set out in the Attachment.

The Act specifies no conditions which need to be met before the power to make the Amendment Regulation may be exercised.

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amendment Regulation commences on 1 November 2014.

Authority: Subsection 133(1) of the  
*Health Insurance Act 1973*

**Details of the *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014***

**Section 1 – Name**

This section will provide for the regulation to be referred to as the *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014*.

**Section 2 – Commencement**

This section will provide for the regulation to commence on 1 November 2014.

**Section 3 – Authority**

This section will provide that the regulation is made under the *Health Insurance Act 1973*.

**Section 4 – Schedules**

This section will provide that each instrument specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned.

**Schedule 1 – Amendments**

**Item [1] – After clause 2.17.10 of Schedule 1**

This item will insert clause 2.17.10A which restricts medical practitioners from claiming consultation items 3, 4, 23, 24, 36, 37, 44, 47, 52, 53, 54, 57, 58, 59, 60, 65, 597, 599, 598, 600, 5000, 5003, 5020, 5023, 5040, 5043, 5060, 5063, 5200, 5203, 5207, 5208, 5220, 5223, 5227 and 5228 with chronic disease management items 721, 723, or 732 for the same patient, on the same day.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The *Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014* (the Amendment Regulation) amends the *Health Insurance (General Medical Services Table) Regulation 2014* (GMST), to implement the 2013-14 Budget measure – ‘*Medicare Benefits Schedule – Removing double billing*’, which is to take effect on 1 November 2014.

In accordance with section 4(1) of the *Health Insurance Act 1973* (the Act), the GMST prescribes tables of medical services containing items of medical services, the amounts of fees applicable for each item, and rules for interpretation. The regulation will amend the GMST on 1 November 2014 by inserting a new clause that restricts 36 consultation items from being claimed with three chronic disease management items by the same provider, for the same patient, on the same day.

#### **Human rights implications**

The regulations engage Articles 2, 9, and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

##### *The Right to Health*

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the ‘*highest attainable standard of health*’ takes into account the country’s available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

##### *The Right to Social Security*

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

#### Analysis

The amendment will improve the efficiency and effectiveness of Medicare by preventing the potential for practitioners to double bill Medicare for similar services. It will advance rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.

#### **Conclusion**

The Legislative Instrument is compatible with human rights because it advances the protection of human rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

**Peter Dutton**  
**Minister for Health**



## The Hon. Barnaby Joyce MP

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Minister for Agriculture  
Federal Member for New England

REF: MNMC2014-00429

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

Dear Chair

Thank you for your letter of 27 November 2014 regarding the *Fisheries Management (Southern Bluefin Tuna Fishery Management Plan 1995) Temporary Order 2014 No. 1* (the Instrument). The Committee has sought further advice on the nature of consultation, if any, that preceded the making of the Instrument.

The Instrument gives the Australian Fisheries Management Authority (the Authority) the power to allocate additional southern bluefin tuna quota, granted to Australia by the Commission for the Conservation of Southern Bluefin Tuna. For Australia to benefit from this additional allocation the earlier determination of Australia's National Catch Allocation must be amended before the end of the 2013-2014 fishing season on 30 November 2014.

Section 17 of the *Legislative Instruments Act 2003* (LIA) requires the relevant rule-maker, in this case the CEO of AFMA, to be satisfied that appropriate and reasonably practicable consultation has taken place where a legislative instrument will, relevantly, have a direct, or a substantial indirect, effect on business. Section 18 of the LIA provides that consultation may be unnecessary or inappropriate where the instrument is required as a matter of urgency, or is of a minor or machinery nature and does not substantially alter existing arrangements.

As the additional quota for Australia was only available if allocated prior to the end of the 2014 fishing season the enactment of this Instrument was a matter of urgency. Indeed, urgency is a precondition for making a Temporary Order under section 43 of the Management Act. As such, broad consultation would have been unnecessary or inappropriate as per subsection 18(2)(b) of the LIA. Moreover, this Instrument is of a machinery nature as it simply permits the Authority to put in place consequential legislative instruments, otherwise inconsistent with the existing Management Plan, that have the effect of allocating additional quota for the 2013-2014 season. This instrument will not substantially alter the fundamental arrangements or rights in the Fishery (subsection 18(2)(a) of the LIA).

However, and despite the applicability of subsections 18(2)(a) and 18(2)(b) of the LIA, consultation was undertaken with the Australian Southern Bluefin Tuna Industry Association prior to making this Instrument. The Industry Association strongly supported the re-determination of Australia's National Catch Allocation for the 2013-14 season.

The Authority has updated the Explanatory Statement in line with the Committee's request (**Attachment A**).

This advice applies equally to the legislative instruments that were made as a consequence of the Instrument, namely the:

- *Southern Bluefin Tuna Fishery Actual Live Weight Value of a Statutory Fishing Right (Amendment) Determination 2014 (F2014L01487)*; and
- *Southern Bluefin Tuna Fishery Australia's National Catch Allocation (Amendment) Determination 2014 (F2014L01482)*.

Please do not hesitate to contact my office should you require further advice.

Yours sincerely

Barnaby Joyce MP  
Minister for Agriculture

10. December 2014

- Copied  
Secretariat,  
Senate Standing Committee on Regulations and Ordinances  
[regords.sen@aph.gov.au](mailto:regords.sen@aph.gov.au)

## EXPLANATORY STATEMENT

### LEGISLATIVE INSTRUMENT

Issued by the  
Australian Fisheries Management Authority

*Fisheries Management Act 1991*

#### **Fisheries Management (Southern Bluefin Tuna Fishery Management Plan 1995) Temporary Order 2014 No. 1**

Section 43 of the *Fisheries Management Act 1991* (the Management Act) provides for the Australian Fisheries Management Authority (the Authority) to make a Temporary Order to enable quick action to deal with circumstances where urgent action is required for purposes related to the management of a fishery. An Order can be made if the Authority is satisfied that:

- a) it is necessary to take action for the purpose of [managing a fishery];
- b) the action contemplated is consistent with [the Authority's] objectives; and
- c) no other action is appropriate.

Pursuant to subsection 92(1) of the *Fisheries Administration Act 1991* (the Administration Act), the Authority has delegated the powers and functions under section 43 of the Management Act to the Chief Executive Officer of the Authority.

By virtue of subsection 43(9) of the Management Act, if an order is inconsistent with a provision of a plan of management, or a fishing concession, the order overrides the provision and, to that extent, the provision has no effect.

#### **The Fishery**

The Southern Bluefin Tuna Fishery (the Fishery) includes all areas of the Australian Fishing Zone and Australian boats fishing on the High Seas. Southern Bluefin Tuna is the target species and the only species allowed to be taken in the Fishery. The Fishery is managed under the *Southern Bluefin Tuna Fishery Management Plan 1995* (the Management Plan).

Management in the Fishery is through individually transferable quotas. Each year AFMA is required to set a National Catch Allocation which limits the total catch allowed in the fishery. Individuals in the fishery own Statutory Fishing Rights and the National Catch Allocation determines how much fish each Statutory Fishing Right is entitled to take.

The global Southern Bluefin Tuna Fishery is managed by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). Each year CCSBT sets a global total allowable catch (TAC) and allocates Australia a proportion of this total. AFMA is required to set the National Catch Allocation to be not in excess of this allocation.

#### **Background to the Temporary Order**

In October 2013, CCSBT agreed a global TAC for 2014 of 12,449t and an Australian allocation of 5,151t. CCSBT also decided an allocation for South Africa of 150t conditional on them acceding to CCSBT by 31 May 2014. CCSBT decided that, if South Africa did not accede to CCSBT by 31 May 2014, its allocation would remain at 40t and its remaining 110t would be apportioned to the other members based on their 2014 allocations. Under these circumstances Australia would receive an additional 42t.

Ultimately, South Africa did not accede to the CCSBT by the May 2014 deadline and, consequently, Australia now has a CCSBT allocation of 5,193t.

The Management Plan, and in particular Clause 17, does not allow a National Catch Allocation to be changed during a season after it has been set. The purpose of the Temporary Order is to give the AFMA Commission the ability to consider the additional CCSBT allocation to Australia and consistent with the objectives of the Management Act, to vary, remake or revoke the existing determination of Australia's National Catch Allocation for the 2013-2014 and 2014-2015 seasons. A variation to the actual live weight value of a statutory fishing right for each season may also need to be made as a consequence of the new National Catch Allocation. As such, the Temporary Order also overrides subclause 18.8 of the Management Plan to permit the AFMA Commission to vary the existing determination for the 2013-2014 and 2014-2015 fishing seasons.

The Authority is satisfied that, because of the urgent nature of the matter to be addressed by the Order (e.g. taking advantage of time-limited additional quota) and the lengthy process of amending a fishery plan under section 20 of the Management Act there is no other appropriate action than the making of a Temporary Order.

The Order is consistent with the Authority's legislative obligation to pursue its objectives as it gives the AFMA Commission the ability to consider the most up to date information and make the decision that best pursue the legislative objectives. Furthermore, it implements a decision made under an international agreement and, therefore, complies with Australia's international obligations. Finally, the Temporary Order itself will not amend the National Catch Allocation and actual live weight value but facilitate the making of a new (or varied) determination by the Authority based on the most recent evidence and decision of the Commission. This will ensure the Authority complies with its obligation to have regard to the principle of ecologically sustainable development and maximise the net economic returns to the Australian community of the SBT fishery.

The measures imposed by this Temporary Order commence on the day after registration on the Federal Register of Legislative Instruments.

### **Consultation**

Section 43 of the Management Act does not require the Authority to consult with the relevant Management Advisory Committee or provide any set period of notice prior to making a Temporary Order. However, the Temporary Order is being implemented so that the AFMA Commission can consider a direct request from the Australian Southern Bluefin Tuna Industry Association to change the National Catch Allocation.

Section 17 of the *Legislative Instruments Act 2003* requires the relevant rule-maker to be satisfied that appropriate and reasonably practicable consultation has taken place, where a legislative instrument will, relevantly, have a direct, or a substantial indirect, effect on business. Section 18 of the *Legislative Instruments Act 2003* provides that consultation may be unnecessary or inappropriate where enactment of the instrument is required as a matter of urgency, or the instrument is of a minor or machinery nature and does not substantially alter existing arrangements.

As the additional quota for Australia was only available if allocated prior to the end of the 2014 fishing season (1 November 2014) the enactment of this Temporary Order was a matter of urgency. Indeed the urgency of the situation was a precondition for making the Temporary Order under section 43 of the Management Act. As such, broad consultation would have been unnecessary or inappropriate as per subsection 18(2)(b) of the *Legislative Instruments Act 2003*. Moreover, this Temporary Order is of a machinery nature as it simply permits the Authority to put in place consequential legislative instruments, which have the effect of allocating additional quota for the 2013-2014 season, without substantially altering existing arrangements or rights in the Fishery.

However, and despite the applicability of subsections 18(2)(a) and 18(2)(b) of the *Legislative Instruments Act 2003* to this legislative instrument, consultation was undertaken with the Australian Southern Bluefin Tuna Industry Association prior to making this instrument. The Industry Association agreed to the re-determination of Australia's National Catch Allocation for the 2013-14 season.

### **Regulation Impact Statement**

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required for this legislative instrument (ID: 17760).

### **Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

The Authority has assessed that this Legislative Instrument is compatible with human rights. The Authority's Statement of Compatibility is attached as a supporting document.

### **Terms of the Order**

In general terms, this Temporary Order overrides the provision in clause 17 of the Management Plan which restricts the ability of the Authority to make a new determination or vary the National Catch Allocation determination for one or more fishing seasons. The Temporary Order also overrides clause 18 of the Management Plan, in particular subclause 18.8, to permit the Authority to vary the actual live weight value of a statutory fishing right for the 2013-2014 and 2014-2015 fishing seasons, a necessary consequence of any variation to the National Catch Allocation. Subclause 18.8 of the Management Plan relevantly provides that "AFMA must not determine more than 1 actual live weight value of a statutory fishing right for a seasons...."

Details of the Temporary Order are set out below:

**Clause 1** provides the Order is to be cited as the *Fisheries Management (Southern Bluefin Tuna Fishery Management Plan 1995) Temporary Order 2014 No. 1*

**Clause 2** provides that the Order commences on the day after registration on the Federal Register of Legislative Instruments and that it ceases on 30 November 2014. Under the Management Act a Temporary Order automatically ceases six months after it is issued, unless revoked earlier.

**Clause 3** defines the terms used in the Order.

**Clause 4** provides that clause 17 of the Management Plan has no effect. This has the effect of permitting the Authority to determine a new National Catch Allocation for the 2013-2014 and 2014-2015 seasons, or to vary the existing National Catch Allocation determination.

**Clause 5** provides that clause 17, and in particular subclause 17.2B, of the Management Plan does not limit the circumstances in which the Authority can determine a new National Catch Allocation for the 2013-2014 and 2014-2015 seasons.

**Clause 6** provides that clause 18, and in particular subclause 18.8, of the Management Plan does not prevent the Authority from varying the actual live weight value of a statutory fishing right for the 2013-2014 and 2014-2015 fishing season. This is a consequential step necessary to facilitate the allocation of the additional quota to existing fishing concession holders.

**Clause 7** provides that, for the avoidance of doubt, the Authority is still bound to pursue the objectives set out in Part 1.2 of the Management Plan and sections 3 and 3A of the Management Act. These objectives include accountability to the fishing industry and the Australian community and implementing Australia's obligations under international agreements.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Fisheries Management (Southern Bluefin Tuna Fishery Management Plan 1995) Temporary Order 2014 No. 1.**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The instrument overrides clause 17 of the *Southern Bluefin Tuna Fishery Management Plan 1995* (Management Plan) to allow the AFMA Commission to re-determine the national catch allocation (or Total Allowable Catch) of Southern Bluefin Tuna for the 2013-2014 and 2014-2015 seasons to take advantage of additional, one-off quota granted to Australia by the Commission on the Conservation of Southern Bluefin Tuna. The instrument also overrides clause 18 of the Management Plan to facilitate the allocation of the additional quota to existing fishing concession holders.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.



**The Hon Greg Hunt MP**  
**Minister for the Environment**

PDR: MC14-035854

Senator John Williams  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Room 1.111  
Parliament House  
CANBERRA ACT 2600

- 9 JAN 2015

Dear Senator

*Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures)  
Regulation 2014*

I refer to the letter of 4 December 2014 from Mr Powell, Committee Secretary, to my office regarding the Standing Committee on Regulations and Ordinances' consideration of the above mentioned Regulation.

The Regulation makes minor adjustments to a table of postcodes used to allocate Renewable Energy Certificates (RECs) for solar photovoltaic systems under the Renewable Energy Target Scheme. The need to change the table arose from Australia Post allocating out-of-sequence postcodes to some locations, creating anomalies in the allocation of RECs in some locations. Given this issue was initially raised with me by affected solar energy businesses, and the Regulation directly resolves the issue, further consultation was not necessary.

The Regulation also makes minor regulatory amendments consequential to the repeal of the carbon tax and the 'final true-up' rules that have been made for the Jobs and Competitiveness Program.

As the Regulation makes only minor amendments, which are administrative in nature and do not have a significant impact on affected parties, public consultation was not necessary.

Attached, for the Committee's information, is a copy of the amended Explanatory Statement for the Regulation which I have requested the Department of the Environment to table in both Houses of the Parliament as soon as practicable.

Thank you for writing to me on this matter.

Yours sincerely

Greg Hunt

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## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 155, 2014**

Issued by authority of the Minister for the Environment

*Renewable Energy (Electricity) Act 2000*

*Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures)  
Regulation 2014*

Section 161 of the *Renewable Energy (Electricity) Act 2000* (the “RET Act”) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Renewable Energy Target (the “RET”) scheme is established by the RET Act and is supported by the RET Regulations. The RET is designed to reduce emissions of greenhouse gases in the electricity sector, encourage the additional generation of renewable energy through financial incentives, and ensure that at least 20 per cent of Australia's electricity supply will come from renewable sources by 2020.

The *Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014* (the “Regulation”) amends the RET Regulations to update solar zones and update references to documentation and definitions following the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (the “Carbon Tax Repeal Act”).

#### Update of Solar Zones

Under the RET, solar panel systems installed according to the requirements of the Small-scale Renewable Energy Scheme are eligible for small-scale technology certificates.

The number of certificates that a solar system is eligible to create is calculated using postcode groupings as a proxy to estimate the amount of solar radiation in a particular region. The postcode grouping or solar zones are currently published in the RET Regulations.

Australia Post periodically makes amendments to Australia's postcodes. In some cases these changes involve the use of out-of-sequence postcodes that result in new postcodes in certain areas within a solar zone that do not reflect the solar radiation in that area and do not provide for the correct number of certificates to be created.

The Regulation will update the solar zone list in the RET Regulations to reflect the allocation of new postcodes by Australia Post.

As the changes to the solar zone list is minor and does not substantially alter existing arrangements, no consultation was undertaken in preparing the amendments.

## Repeal of the Carbon Tax

With the passage of the Carbon Tax Repeal Act, all carbon tax-related elements must be updated in the RET Regulations. Under the RET, emissions-intensive-trade-exposed activities may apply for Partial Exemption Certificates with respect to their RET liability. These applications can use reporting and audit requirements under the Jobs and Competitiveness Program. The Jobs and Competitiveness Program has been updated to reflect the repeal of the carbon tax, including the introduction of a true-up process. Consequential amendments are required to the Regulation to reflect these updates. Specifically, the Regulation will:

- update the definition of the Jobs and Competitiveness Program and define the true-up report under the Program; and
- update the partial exemption certificate application process to incorporate true-up reports and associated audit reports under the Jobs and Competitiveness Program.

Given that there was extensive consultation on repeal of the Carbon Tax and the rules for final true-up of the Jobs and Competitiveness Program and that these amendments minor and are consequential to the passage of the Carbon Tax Repeal Act, no consultation was undertaken in preparing these amendments.

## General

Details of the Regulation are outlined in Attachment A.

A statement of the Regulation's compatibility with human rights is set out in Attachment B.

A glossary of terms used in this Explanatory Statement is provided in Attachment C.

There are no statutory pre-conditions that need to be satisfied before the power to make the Regulation may be exercised.

## ATTACHMENT A

### **Details of the *Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014* (the “Regulation”)**

#### Section 1 – Name

Section 1 provides that the title of the Regulation is the *Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014*.

#### Section 2 – Commencement

Section 2 provides that the Regulation commences the day after it is registered.

#### Section 3 – Authority

Section 3 provides that the Regulation is made under the *Renewable Energy (Electricity) Act 2000*.

#### Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

### **Amendments**

#### Schedule 1 – Amendments

Item 1 updates the definition of the Jobs and Competitiveness Program to reflect new arrangements after the repeal of the carbon tax.

Item 2 adds a definition for the true-up report under the Jobs and Competitiveness Program which is referred to in the arrangements for partial exemption certificate applications.

Item 3 repeals subregulations 19C(5) and (6) which refer to Schedule 7 of the Regulations which has previously been repealed.

Item 4 makes reference to Schedule 5, which details the zone ratings and postcode groupings to be used to determine the rating of a solar (photovoltaic) system.

Items 5, 15 and 17 remove paragraph 20(4) and inserts the description of zone ratings and solar zones in Parts 1 and 2 of Schedule 5.

Item 6 repeals paragraphs 22P(1) and 22P(2) which are no longer applicable as they relate to applications for partial exemption certificates in 2010.

Item 7 removes reference to an audit report prepared under the emissions-intensive-trade-exposed assistance program. The assistance programme was proposed under the

Carbon Pollution Reduction Scheme Bill 2009 (the “CPRS Bill”). However, the CPRS Bill was not enacted and the programme was not established.

Item 8 adds an audit report included in a true-up report under the Jobs and Competitiveness Program as prescribed information for 2015 applications for partial exemption certificates.

Items 9-10 clarify that partial exemption certificate applications for 2015 do not need to be accompanied by an audit report if:

- the regulator has been given a true-up report that includes an audit report;
- all the relevant facilities are included in the true-up report; and
- the amount is the same as in the true-up report.

Items 11-13 update the considerations for the Regulator for a partial exemption certificate application reflecting updates to the Jobs and Competitiveness Program after the repeal of the carbon tax.

Item 14 updates the note to the Schedule 5 heading to reflect the repeal of paragraph 20(4) in Item 6 and the new reference to Schedule 5 in paragraph 20(1)(b) in Item 4.

Items 16 and 18 update the headings of the tables in Parts 1 and 2 of Schedule 5 to provide a more detailed description of the tables.

Items 19-21 update the postcode groupings table in Part 2 of Schedule 5 to reflect the allocation of new postcodes by Australia Post.

Item 22 is a typographical amendment to rename the second paragraph 646(1)(e) which was listed twice in the RET Regulations. Paragraphs 646(1)(d) to (f) will be renamed as paragraphs 646(1)(d) to (g).

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014* amends the *Renewable Energy (Electricity) Regulations 2001* in order to update the postcode groupings listed and update references to documentation and definitions following the repeal of the carbon tax.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable human rights or freedoms.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Greg Hunt MP  
Minister for the Environment**

**ATTACHMENT C**

**Glossary of Terms Used**

| <b>Term</b>           | <b>Definition</b>  |
|-----------------------|--|
| Carbon Tax Repeal Act | <i>Clean Energy Legislation (Carbon Tax Repeal) Act 2014</i>                                     |
| CPRS Bill             | Carbon Pollution Reduction Scheme Bill 2009  |
| RET                   | Renewable Energy Target  |
| RET Act               | <i>Renewable Energy (Electricity) Act 2000</i>   |
| RET Regulations       | <i>Renewable Energy (Electricity) Regulations 2001</i>   |
| Regulation            | <i>Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014</i> |
| Regulator             | Clean Energy Regulator   |





## The Hon Warren Truss MP

Deputy Prime Minister  
Minister for Infrastructure and Regional Development  
Leader of The Nationals  
Member for Wide Bay

28 JAN 2015

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*PDR ID: MS15-000107*

Senator John Williams  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Room S1.111  
Parliament House, Canberra  
CANBERRA ACT 2600

Dear Senator Williams,

I write in response to the Senate Standing Committee on Regulations and Ordinances' letter regarding the *National Land Transport (Exemption from Public Tenders for State Projects) Determination 2014* of 20 November 2014, which identifies the Committees' request for a revised Explanatory Statement for this instrument.

In response to the Committee's request, please find attached a revised Explanatory Statement for the abovementioned instrument, which now contains details of consultations conducted by my Department.

You will note that States and Territories were consulted as part of the process when developing amendments to the previous legislation. Furthermore, there is no impact on business as a result of this Determination.

Yours sincerely

**WARREN TRUSS**

## EXPLANATORY STATEMENT

Issued by Authority of the Minister for Infrastructure and Regional Development

Subject - National Land Transport (Public Tender Exemption Limit) Determination 2014 (No.1)

Subparagraph 24(1)(c)(vi) of the *National Land Transport Act 2014* allows for work on a funded project to be exempt from public tender requirements if it is less than an amount determined by the Minister.

Subsection 24(4) of the *National Land Transport Act 2014* provides that the Minister may determine the amount under which work is exempt from public tender requirements through a legislative instrument. Accordingly, the National Land Transport (Public Tender Exemption Limit) Determination 2014 (No.1) prescribes an amount (\$100,000) below which work on a funded project can be exempt from public tender requirements.

The decision to set this amount was based on the need to simplify procurement processes, yet still manage risk. In the construction industry an infrastructure project below this amount would be viewed as minor in nature, therefore the cost of conducting a tender process would likely outweigh the benefits. This takes into consideration the cost and time requirements of a tender process, and will also reduce the regulatory burden on jurisdictions by simplifying the procurement process.

This means that works exempt from public tender by subparagraph 24(1)(c)(vi) are likely to be works of a similar nature to those outlined in subparagraphs 24(1)(c)(i)-(iv), which may also be exempt from public tender requirements if Ministerial exemption is granted. The works included under subparagraphs 24(1)(c)(i)-(iv) are works of such a minor nature that the invitation of tenders would involve undue additional cost; or where the work is of a kind which is not practicable to prepare tender specifications; or where competitive tenders are unlikely to be received.

Despite the exemption of public tender requirements for works less than \$100,000, appropriate levels of oversight will still be provided through the requirements under the funding approval and through terms of the National Partnership Agreement on Land Transport Infrastructure Projects. As currently drafted, this National Partnership Agreement requires reporting and appropriate measures to ensure transparency, value for money and protection of the Commonwealth's investment.

Consultation occurred with jurisdictions on the provisions of the *National Land Transport Act 2014*. As part of this consultation the terms of this Determination were explained. This Determination has no impact on business.

The instrument commences on 10 October 2014.

Authority: Subsection 24(4)  
of the *National Land Transport Act 2014*

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **National Land Transport (Public Tender Exemption Limit) Determination 2014 (No.1)**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This legislative instrument prescribes an amount below which work can be exempted from public tender requirements for the purposes of Subsection 24(4) of the *National Land Transport Act 2014*.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Warren Truss, Minister for Infrastructure and Regional Development**

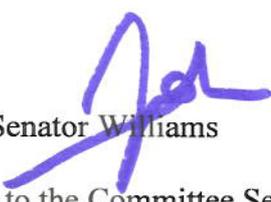




**SENATOR THE HON MATHIAS CORMANN**  
**Minister for Finance**

REF: MC14-000730

Senator John Williams  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
CANBERRA ACT 2600

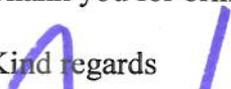
  
Dear Senator Williams

I refer to the Committee Secretary's letter of 4 December 2014 sent to my office seeking further information in relation to items in the *Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation).

In the *Delegated legislation monitor* No. 17 of 2014, the Committee requested further information in relation to the constitutional authority for two items in the Regulation, namely grants to Life Education Australia and the Australian Government Innovation and Investment Fund. Information in the attached response has been provided by the relevant departments that administer these items.

I trust this information addresses the Committee's concerns.

Thank you for bringing the Committee's views to the attention of the Government.

Kind regards 

 Mathias Cormann  
**Minister for Finance**

 28 January 2015

***Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014***

Further information about the *Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014* has been provided by the relevant departments that administer the items.

**Part 3 of Schedule 1AB**

| <b>Item</b> | <b>Name</b>                        | <b>Purpose</b>   |
|-------------|------------------------------------|--|
| Item 5      | Grants to Life Education Australia | In conformity with Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights, to fund research, development, monitoring, evaluation, relationship management, marketing, fundraising and other activities associated with the Life Education programme. |

The Department of Education and Training has provided the following information.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the purpose of the item references the external affairs power (section 51(xxix)) of the Constitution.

**Part 4 of Schedule 1AB**

| <b>Item</b> | <b>Program</b>                                       | <b>Objective(s)</b>  |
|-------------|--|--|
| Item 63     | Australian Government Innovation and Investment Fund | To establish and fund a scheme to encourage new sustainable economic growth and jobs in Tasmania by providing regulated assistance to trading, financial or foreign corporations to which paragraph 51(xx) of the Constitution applies where the assistance relates to the activities of the corporations. |

The Department of Industry and Science has provided the following information.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the corporations power (section 51(xx)) of the Constitution.

## Appendix 2

### Guideline on consultation

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#### Standing Committee on Regulations and Ordinances

##### Addressing consultation in explanatory statements

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#### *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.

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'.

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### *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](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)