

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Membership of the committee

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Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Sam Dastyari	New South Wales, ALP
Senator Nova Peris OAM	Northern Territory, ALP
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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 **18 March 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 20 February 2015 and 26 February 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.<sup>1</sup>

### New matters

#### Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015 [F2015L00190]

<b>Purpose</b>	Revokes and replaces the Telecommunications Labelling (Customer Equipment and Customer Cabling) Notice 2001 with some modifications to make the new arrangements simpler and clearer, to ensure that requirements are proportional to the risks associated with the supply of Customer Equipment and Customer Cabling, to reduce the administrative burden for industry and to facilitate the implementation of new technology in Australia
<b>Last day to disallow</b>	15 June 2015
<b>Authorising legislation</b>	<i>Telecommunications Act 1997</i>
<b>Department</b>	Communications

#### Issue:

*Drafting*

The explanatory statement (ES) notes the instrument incorporates various Acts and legislative instruments by reference 'as in force from time to time (in accordance with

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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)

section 13 of the LIA [*Legislative Instruments Act 2003*] and section 10 of the *Acts Interpretation Act 1901*'. The ES appears to have referenced the incorrect section of the *Legislative Instruments Act 2003*, as section 14 of the Act governs the prescribing of matters by reference to other instruments. **The committee therefore draws the matter to the minister's attention.**

### **National Health (Price and Special Patient Contribution) Amendment Determination 2015 (No. 1) (PB 11 of 2015) [F2015L00208]**

<b>Purpose</b>	Amends the National Health (Price and Special Patient Contribution) Determination 2010 (PB 109 of 2010) to provide for price determinations under section 85B of the National Health Act 1953 in relation to brands of pharmaceutical items for which the Minister and the responsible person have not been able to make a price agreement. It also provides for the circumstances in which the Commonwealth will pay the special patient contribution resulting from these price determinations
<b>Last day to disallow</b>	15 June 2015
<b>Authorising legislation</b>	<i>National Health Act 1953</i>
<b>Department</b>	Health

#### **Issue:**

##### *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 states:

This determination affects certain responsible persons with medicines listed on the PBS. Before a pharmaceutical benefit is listed on the PBS, and from time to time thereafter, price negotiations occur between the responsible person and the Minister for the purpose of reaching a price agreement for section 85AD of the Act. If the Minister and the responsible person cannot agree on a price, further consultation occurs with the responsible person, and thereafter the Minister determines the price that will be the approved ex-manufacturer price for the brand. The Minister also determines the

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corresponding price claimed by the responsible person which is used to calculate the special patient contribution that will apply to the brand.

In the committee's view, the statement above describes the process of negotiation between the minister and the responsible person, as opposed to a process of consultation. In effect, it appears that consultation (within the general meaning of public consultation or consultation with relevant stakeholders) was unnecessary in this instance because the price determination was essentially a process of negotiation (rather than consultation). In terms of complying with section 18 of the *Legislative Instruments Act 2003*, the committee considers it would be useful for the ES to have explicitly stated that consultation was considered unnecessary (or inappropriate) because the instrument essentially involves a price negotiation between the minister and the responsible person. **The committee therefore draws the matter to the minister's attention.**

## Continuing matters

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

The committee has identified a number of instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

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

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

Remuneration Tribunal Determination 2015/01 - Remuneration and Allowances for Holders of Public Office [F2015L00173]

ASIC Class Order [CO 15/130] [F2015L00195]

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

Privacy (International Money Transfers) Public Interest Determination 2015 (No. 1) [F2015L00199]

Privacy (International Money Transfers) Public Interest Determination 2015 (No. 2) [F2015L00200]

Privacy (International Money Transfers) Generalising Determination 2015 [F2015L00201]

Radiocommunications Taxes Collection (Penalties on Unpaid Tax) Determination 2015 [F2015L00179]

Telecommunications Technical Standard (Requirements for ISDN Basic Access Interface – AS/ACIF S031) 2015 [F2015L00180]

Telecommunications Technical Standard (Requirements for Customer Equipment with hierarchical digital interfaces – AS/ACIF S016) 2015 [F2015L00181]

Telecommunications Technical Standard (Requirements for customer cabling products – AS/CA S008) 2015 [F2015L00182]

Telecommunications Technical Standard (Requirements for Customer Access Equipment for connection to a Telecommunications Network – AS/CA S003) 2015 [F2015L00183]

Telecommunications Technical Standard (Analogue Interworking and Non-interference Requirements for Customer Equipment for Connection to the Public Switched Telephone Network – AS/CA S002) 2015 [F2015L00184]

Telecommunications Technical Standard (Requirements for ISDN Primary Rate Access Interface – AS/ACIF S038) 2015 [F2015L00185]

Telecommunications Technical Standard (Voice performance requirements for Customer Equipment – AS/CA S004) 2015 [F2015L00186]

Telecommunications Technical Standard (Requirements for DSL Customer Equipment for connection to the Public Switched Telephone Network – AS/ACIF S041) 2015 [F2015L00187]

Telecommunications Technical Standard (Requirements for Connection to an Air Interface of a Telecommunications Network – AS/CA S042) 2015 [F2015L00188]

Telecommunications Technical Standard (Surge Protective Devices for Telecommunication Applications – AS/NZS 4117) 2015 [F2015L00189]

Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015 [F2015L00190]

Telecommunications Technical Standard (Requirements for Customer Equipment for connection to a metallic local loop interface of a Telecommunications Network – AS/CA S043) 2015 [F2015L00192]

## Chapter 2

### Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **18 March 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.

#### **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

**[The committee first reported on this instrument in *Delegated legislation monitor No. 1 of 2015*]**

#### **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 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 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 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 the Environment advised:

The purpose of the Legislative Instrument was to correct a previous administrative error whereby multiple species were incorrectly recorded under two different threat categories on the threatened species list referred to at section 178 of the EPBC Act [*Environment Protection and Biodiversity Conservation Act 1999*]. The Legislative Instrument removed the species from the duplicative, incorrect category. This action did not alter any existing arrangements.

...

The Committee's requirements for additional justification when consultation has not been undertaken and the requirement to include reference to Section 18 of the *Legislative Instruments Act 2003* have been noted. All relevant templates have been updated to include this information.

**COMMITTEE RESPONSE:**

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

The committee notes the minister has not given an undertaking to amend the ES as requested. However, the committee notes the minor and machinery nature of the amendments in this instance, and the minister's advice that all relevant templates have been updated. **The committee has therefore concluded its examination of the instrument.**

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**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

**[The committee first reported on this instrument in *Delegated legislation monitor No. 1 of 2015*]**

**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 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 Infrastructure and Regional Development advised:

General consultation within the aviation industry was not considered necessary as the exemption only applied to Qantas. This exemption is to allow a particular type of aircraft seat to remain in the reclined position during take-off, taxiing or landing. Exemptions of this sort may be requested by individual operators from time to time. They are issued only to those who satisfy the necessary safety requirements and are considered capable of meeting the standard conditions contained in the exemption.

The minister also advised that he had forwarded the committee's 'Guideline on Consultation' to CASA and requested that future ESs provide sufficient information

on the specific nature of consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

The minister further advised that he had requested CASA to amend 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.**

**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

**[The committee first reported on this instrument in *Delegated legislation monitor No. 1 of 2015*]**

**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 requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].**



The Minister for Infrastructure and Regional Development advised that the instrument related 'only to the operational circumstances' of the individual operator and, therefore, 'further consultation was not considered necessary'. The minister also noted:

Northern Helicopter Charter and Remote Helicopters Australia made individual applications to CASA for an exemption from certain legislative requirements in order to conduct specialised operations, i.e. the harvesting of crocodile eggs in a remote environment.

The minister also advised that he had forwarded the committee's 'Guideline on Consultation' to CASA and requested that future ESs provide sufficient information on the specific nature of consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

The minister further advised that he had requested CASA to amend 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.**

#### **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

**[The committee first reported on this instrument in *Delegated legislation monitor No. 1 of 2015*]**

#### **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 requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].**

The Minister for Infrastructure and Regional Development advised that the instrument related 'only to the operational circumstances' of the individual operator and, therefore, 'further consultation was not considered necessary'. The minister also noted:

Northern Helicopter Charter and Remote Helicopters Australia made individual applications to CASA for an exemption from certain legislative requirements in order to conduct specialised operations, i.e. the harvesting of crocodile eggs in a remote environment.

The minister also advised that he had forwarded the committee's 'Guideline on Consultation' to CASA and requested that future ESs provide sufficient information on the specific nature of consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

The minister further advised that he had requested CASA to amend 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.**

# **Appendix 1**

## **Correspondence**





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

MC15-008833

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

25 FEB 2015

Dear Mr Powell 

I refer to your letter of 12 February 2015 concerning the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), amendment to the list of threatened species Legislative Instrument number 158 [F2014L01681].

Your letter refers to the issue raised in the Committee's 11 February 2015 Delegated Legislation Monitor (page 5) that the Explanatory Statement for the Legislative Instrument 158 does not contain reference to the consultation requirements of the *Legislative Instruments Act 2003*.

The 'Guidelines on Consultation' require a description of *the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken*. Additional information on how the Committee interprets this statement is provided under **Describing the nature of consultation**, which states *The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken*. In interpreting the requirements of the Guidelines on Consultation it was considered that the statement outlining that consultation was not undertaken as it was not required under s184(1)(d) of the EPBC Act was sufficient. This approach has previously been acceptable on other explanatory statements of a similar nature.

Section 184(1)(d) relates to correcting an inaccuracy in the list of threatened species. Section 18(2)(a) of the *Legislative Instruments Act 2003* states that consultation is considered unnecessary for *'an instrument that is of a minor or machinery nature and that does not substantially alter existing arrangements'*.


The purpose of the Legislative Instrument was to correct a previous administrative error whereby multiple species were incorrectly recorded under two different threat categories on the threatened species list referred to at s178 of the EPBC Act. The Legislative Instrument removed the species from the duplicative, incorrect category. This action did not alter any existing arrangements.

The Committee's requirements for additional justification when consultation has not been undertaken and the requirement to include reference to Section 18 of the *Legislative Instruments Act 2003* have been noted. All relevant templates have been updated to include this information.

Thank you for bringing this issue to my attention.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Greg Hunt', written over a horizontal line.

Greg Hunt 



## The Hon Warren Truss MP

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

03 MAR 2015

*PDR ID: MC15-000718*

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

Dear Senator Williams

*John*

Thank you for your letter dated 12 February 2015 regarding three legislative instruments prepared by the Civil Aviation Safety Authority (CASA).

CASA has informed me that in the cases of CASA 295/14 and CASA 293/14, as the legislative instruments relate only to the operational circumstances of individual operators, further consultation was not considered necessary. I am also informed that Northern Helicopter Charter and Remote Helicopters Australia made individual applications to CASA for an exemption from certain legislative requirements in order to conduct specialised operations, i.e. the harvesting of crocodile eggs in a remote environment.

In relation to CASA EX168/14 – Exemption from paragraph 5.1 of Civil Aviation Order 20.16.3 for Airbus 330 aircraft operated by Qantas Airways Limited (Qantas), general consultation within the aviation industry was not considered necessary as the exemption only applied to Qantas. This exemption is to allow a particular type of aircraft seat to remain in the reclined position during take-off, taxiing or landing. Exemptions of this sort may be requested by individual operators from time to time. They are issued only to those who satisfy the necessary safety requirements and are considered capable of meeting the standard conditions contained in the exemption.



I have forwarded the document '*Guideline for Preparation of Explanatory Statements: Consultation*' to CASA and requested that future explanatory statements provide sufficient information on the basis of the specific nature of consultation in accordance with the requirements of the *Legislative Instruments Act 2003*. CASA has also been asked to amend the existing explanatory statements as appropriate to include this further information.

Thank you for raising these matters.

Yours sincerely

 **WARREN TRUSS**



## 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:

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