The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor No. 4 of 2015

25 March 2015

ISSN 2201-8689 (print)
ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.[1]

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

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.[2]

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

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

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **25 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 27 February 2015 and 5 March 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

Defence Determination 2015/7, Deployment allowance - amendment

Purpose	Amends the deployment allowance and additional recreation leave provisions to clarify that when a member is on a period of leave during their deployment, the member is eligible for the payment of deployment allowance; provides a transitional provision for members on non-warlike deployment who took a period of travelling leave between 1 January 2015 and the commencement of this Determination; and amends a transitional provision for members on deployment to amend the calculation of the payment of deployment allowance or international campaign allowance for leave accrued while on deployment before 1 January 2015
Last day to disallow	16 June 2015
Authorising legislation	*Defence Act 1903*
Department	Defence

1 Senate Disallowable Instruments List, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List

Issue:

Retrospectivity

The instrument was made on 20 February 2015. Section 5 of the instrument provides that the amendments made by the instrument are back-dated to 1 January 2015. This means the instrument has a retrospective operation. While the explanatory statement (ES) indicates the retrospective operation of the amendment is beneficial to members (placing members who took travelling leave in the period between 1 January 2015 and the commencement of the instrument in the same position as members who took leave after the commencement of the 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 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.**

Defence Determination 2015/8, Post indexes amendment

Purpose	Implements revised post indexes for ADF members at overseas posting locations; and adds Sri Lanka to the list of overseas locations with post indexes
Last day to disallow	16 June 2015
Authorising legislation	*Defence Act 1903*
Department	Defence

Issue:

Retrospectivity

The instrument was made on 2 March 2015. Section 5.1 of the instrument provides that the amendments made by the instrument are back-dated to 10 January 2015. This means the instrument has a retrospective operation. While the ES indicates the retrospective operation of the amendment is beneficial to members (entitling a member who was on a long-term posting to Sri Lanka on or after 10 January 2015 to the same overseas benefits that they would be entitled to after the commencement of the 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 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.

Continuing matters

Staffing and Delegations Rule 2014 [F2014L01296]

Purpose	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
Last day to disallow[2]	4 December 2014
Authorising legislation	National Land (Road Transport) Ordinance 2014
Department	Infrastructure and Regional Development

[The committee first reported on this instrument in *Delegated legislation monitor* No. 14 of 2014; and subsequently in *Delegated legislation monitor* No. 1 of 2015]

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 ES notes:

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

> 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 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 thanked the assistant minister for his response and concluded its examination of this matter in *Delegated legislation monitor* No. 1 of 2015].

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:

[The committee noted this issue was not specifically addressed in the minister's response and therefore requested the minister's advice on this matter].

MINISTER'S RESPONSE:

The Assistant Minister for Infrastructure and Regional Development advised:

> I can delegate general power to make Rules authorised by provisions of the National Land (Road Transport) Ordinance 2014 (the Ordinance). The Chief Executive of the National Capital Authority (NCA) may only authorise people in accordance with the Ordinance.
>
> The Rules I can create must be in respect to Section 11 - Rule making power of the Ordinance. The Chief Executive is only permitted to authorise people in accordance with Section 10 - Authorised people of the Ordinance.
>
> Staffing and Delegations Rule 2014 [F2014L01269] relies upon section 11 (a), which provides that the Minister may make rules prescribing matters 'required or permitted' by the Ordinance.
>
> The 'required or permitted' instrument-making power gives me no power to make Rules beyond that authorised by the other provisions of the

Ordinance. It provides an administrative efficiency for exercising powers under the Ordinance.

COMMITTEE RESPONSE:

The committee thanks the assistant minister for his response.

However, the committee's understanding is that the 'required or permitted' limb of the general power operates in conjunction with certain provisions in the enabling Act or, in this case, the Ordinance. The committee therefore requests the minister's advice as to the specific provision(s) in the Ordinance that operate in conjunction with the 'required or permitted' limb of the general power to provide for the matters prescribed by the rule. **The committee therefore requests the minister's further 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'.

COMMITTEE RESPONSE:

[The committee thanked the assistant minister for his response and concluded its examination of this matter in *Delegated legislation monitor* No. 1 of 2015].

However, the committee considers that the assistant minister's advice that he 'can delegate [the] general power to make Rules authorised by provisions of the National Land (Road Transport) Ordinance 2014' (see response above in relation to the issue 'Limb of the rule-making power being relied on') casts doubt on his previous advice

that 'the rule making powers are only able to be exercised by the Responsible Minister. The Rule cannot be used to delegate Ministerial responsibility'.

With reference to the most recent response, the extent to which the minister can delegate the general power to make rules is unclear. The committee notes its 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 Implementation of a general instrument-making power in *Delegated legislation monitor* No. 17 of 2014).[3] The committee also notes that Drafting Direction 3.8 states that 'as a general rule, a general instrument-making power of a person should not be able to be delegated'.[4] A question therefore arises about the extent to which the minister is able to delegate the general power to make rules and the extent to which that power is consistent with Drafting Direction 3.8. **The committee therefore requests the minister's further advice on this matter.**

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.[5]

3 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 17 of 2014 (3 December 2014) 6–24.

4 Office of Parliamentary Counsel, Drafting Direction 3.8 (December 2014) 6

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

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

Civil Aviation Order 82.0 Amendment Instrument 2015 (No. 1) [F2015L00226]

Health Insurance (MRI Crohn's disease) Amendment Determination 2015 [F2015L00219]

Privacy (Tax File Number) Rule 2015 [F2015L00249]

Private Health Insurance (Prostheses) Rules 2015 (No. 1) [F2015L00241]

Chapter 2
Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **25 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.

Legislative Instruments Amendment (Exemptions) Regulation 2014 [F2014L01730]

Purpose	Amends the Legislative Instruments Regulations 2004 to exempt certain legislative instruments from the sunsetting provisions of the *Legislative Instruments Act 2003* and other matters
Last day to disallow	26 March 2015
Authorising legislation	*Legislative Instruments Act 2003*
Department	Attorney-General's

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

Issue:

Classes of instruments to be exempt from sunsetting 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 sunsetting. The explanatory statement (ES) states that the instruments to be exempt from sunsetting 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 sunsetting. To be considered suitable, an instrument must satisfy at least one of the critieria. 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 sunsetting. 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 requested further information from the Attorney-General].

ATTORNEY-GENERAL'S RESPONSE:

The Attorney-General advised that Attachment A to the ES (as originally supplied) contained most of the further information requested by the committee. The Attorney-General further advised that regulations made under the *Mutual Assistance in Business Regulation Act 1992* were exempted from sunsetting to ensure commercial certainty would not be undermined.

COMMITTEE RESPONSE:

The committee thanks the Attorney-General for his response.

The committee apologises for having overlooked the information contained in Attachment A and thanks the Attorney-General for the further information regarding regulations made under the *Mutual Assistance in Business Regulation Act 1992*.

The committee has therefore concluded its examination of the instrument.

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

Purpose	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
Last day to disallow	25 March 2015
Authorising legislation	*Customs Administration Act 1985*
Department	Immigration and Border Protection

[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 Immigration and Border Protection advised:

> … no consultation was undertaken in relation to the Regulation as the amendments are minor and machinery in nature and do not substantially alter existing arrangements to the Drug and Alcohol Management Program (DAMP). The amendments were prepared to enhance the governance and accountability of the DAMP to enable a sufficient amount of hair to be taken for the conduct of a prohibited drug test and provide more certainty as to where on the body samples can be taken from. The record keeping requirements were also amended to enable the DAMP to maintain more accurate records of testing for auditing and reporting purposes.

The minister further advised that the ES had been amended 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.

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

Purpose	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 *Life Insurance Act 1995*, 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
Last day to disallow	26 March 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

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

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 requested further information from the minister (as to the justification for this approach)].

MINISTER'S RESPONSE:

The Minister for Immigration and Border Protection advised that broadening the definition of eligible investments is 'entirely beneficial' because 'the affected applicants would have more investment options to choose from to satisfy the requirements of their business visa'.

The minister further advised that regulation 2.03AA did not impose additional burdens, but rather added a legal requirement to the existing policy with regard to the requirement for visa applicants to satisfy public interest criteria:

> 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 and makes changes consequential to the Migration Amendment (Character and General Visa Cancellation) Act 2014, in order to give full effect to the legislative amendments. New subclause 3803(1) in Schedule 4 to this instrument provides that amendments made by Items 1, 2 and 3 of Schedule 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.
>
> Public interest criteria (PICs) are set out in Part 1 of Schedule 4 to the Migration Regulations. PIC 4001 (satisfying the character test) and PIC 4002 (risk to security) are imposed on certain visa subclasses in Schedule 2 of the Migration Regulations. Applicants for those visa subclasses are required to satisfy these PICS, which relate to an applicant satisfying the Minister that there are no character-related reasons why they should not be granted the visa, and to an assessment by the Australian Security Intelligence Organisation in relation to being a risk to security.
>
> Regulation 2.03AA provides that, where a person is required to satisfy PIC 4001 or PIC 4002 for grant of a visa that, the person must provide a statement from an appropriate authority about a person’s criminal history and a completed Form 80 (personal particulars for assessment including character assessment), if requested by the Minister. A waiver of the requirement to provide the criminal history statement is available where the Minister is satisfied that it is not reasonable for the applicant to provide it.
>
> Regulation 2.03AA made no change to the requirement for existing visa applicants to be assessed against PIC 4001 and PIC 4002. Historically however, there have been numbers of visa applicants who have not completed the Form 80, or have not provided requested information about their criminal history. Within the previous regulatory framework, there was no mechanism by which an applicant could be compelled to provide the requested information, thus limiting the ability of the department to comprehensively assess whether a visa applicant presented a character or security risk. The amendment ensures that the applicant is required by law to provide the documentation required to assess these PICS, rather than under policy only, with a waiver available in certain circumstances.
>
> Visa applicants will be provided natural justice and given the opportunity to provide requested documents relating to character or security within a

reasonable timeframe, or provide reasons as to why they cannot provide said documents. It is appropriate that these requirements be applied to all undecided applications as they relate to an assessment of character and security risks before a visa is granted. Regulation 2.03AA does not place any additional burden on a visa applicant to meet requirements different to what was in place under policy at time of application. It is entirely appropriate that persons seeking a visa are required to provide information necessary for the assessment of character and security before a visa is granted and that the department is able to refuse a visa application in circumstances where an applicant does not provide the necessary information relevant to assessing character or security risks.

The amendments do not offend subsection 12(2) of the Legislative Instruments Act 2003 as they do not take effect before the date of registration. Further, section 504 of the Migration Act authorises the amendments as it authorises the making of regulations that are necessary or convenient to be prescribed to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these amendments apply to all relevant applications decided on or after the commencement of the Instrument.

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

The committee notes that its inquiry related to retrospective effect, requiring the committee to ensure the instrument does not unduly trespass on personal rights and liberties (scrutiny principle (b)), rather than to a strict case of retrospectivity with reference to subsection 12(2) of the *Legislative Instruments Act 2003*.

However, the committee also notes the minister's advice that regulation 2.03AA does not place an additional burden on a visa applicant to meet requirements (the provision of documents relating to character and security) that are different to those that were in place under policy at the time of application. The committee further notes the minister's advice that visa applicants will be provided natural justice with regard to the provision of requested documents relating to character or security.

The committee has therefore concluded its examination of the instrument.

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

Purpose	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
Last day to disallow	26 March 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

[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 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 the provision of reasoning in cases where 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 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 Immigration and Border Protection advised that, as part of the government's border protection reform agenda:

> The Instrument was required as a matter of urgency because the debating of the Resolving the Legacy Caseload Bill presented an opportunity to complete portfolio legislative priorities by the end of the parliamentary year. The timing of the instrument had the benefit of giving Senators an overview of related legislation, without which they may not have appreciated the interdependencies of the measures.

The minister further advised:

> Consultation for the Instrument specifically was considered unnecessary because there is a long-established annual consultation process that allows individuals, business, organisations, states and territories, government departments and senior ministers to express their views on the size and composition of the Humanitarian Programme. Every year, the department publishes a discussion paper and invites the public to make submissions on the Humanitarian Programme. The department consults state and territory governments and other government agencies, as well as peak refugee and humanitarian bodies. It also considers the advice of the United Nations High Commissioner for Refugees on global resettlement needs and priorities. These consultations inform the government's decisions on the size and composition of the Humanitarian Programme in the year ahead.

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

The committee notes the minister's response could be taken as an indication that the instrument was required as a matter of convenience at the time the Resolving the Legacy Caseload Bill was being debated (rather than necessarily being considered a matter of urgency). However, the committee also notes the minister's advice that specific consultation on the instrument was considered unnecessary because of the wider annual consultation undertaken on the Humanitarian Program.

The committee has therefore concluded its examination of the instrument.

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

Purpose	Determines Prudential Standard APS 001 definitions
Last day to disallow	26 March 2015
Authorising legislation	*Banking Act 1959*
Department	Treasury

[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 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 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 Assistant Treasurer advised that the Australian Prudential Regulation Authority (APRA) had consulted widely in relation to a new cross-industry Prudential Standard CPS 220 Risk Management (CPS 220) that applied to Australian Deposit-taking Institutions (ADIs), general insurers and life insurers, and Level 2 and Level 3 – groups, and that APRA had subsequently consulted more narrowly on the minor and machinery consequential amendments to existing industry-specific and cross-industry prudential standards (including this instrument):

In May 2013, APRA commenced consultation on CPS 220 and CPS 510 with the release of the discussion paper *Harmonising cross-industry risk management requirements* and accompanying draft versions of the two standards. These set out APRA's approach to harmonising risk management requirements across the banking and insurance industries, including the adoption of standard definitions of key concepts such as 'risk management framework', 'risk management strategy' and 'risk management declaration'. APRA also consulted separately on specific aspects of its proposals. APRA received a number of formal and informal responses to which it responded with the release in January 2014 of the response to submissions paper, *Harmonising cross-industry risk management requirements,* which was accompanied by final versions of CPS 220 and CPS 510.

On 24 August 2014, APRA released a letter seeking submissions on its proposed implementation of changes to a number of prudential standards applying to ADIs, general insurers, life insurers and cross-industry arising from its proposals regarding CPS 220 and CPS 510. Accompanying this letter was a draft of the relevant prudential standards, including the nine applying specifically to ADIs that have now been determined. The amendments in these standards were either minor or machinery changes or included provisions that had been addressed through the CPS 220 and CPS 510 consultation process (such as the standard definitions to be incorporated into APS 001). The letter therefore sought feedback only on errors or omissions in the draft prudential standards. APRA published its response to the four submissions it received by letter dated 8 November 2014.

The minister also provided the committee with a copy of the amended ES.

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

The committee notes that its inquiries are also relevant to the instruments listed below:

- Banking, Insurance and Life Insurance (prudential standard) determination No. 1 of 2014 - Prudential Standard CPS 231 – Outsourcing [F2014L01650];
- Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2014 - Prudential Standard CPS 232 - Business Continuity Management [F2014L01651];
- Banking (prudential standard) determination No. 8 of 2014 - Prudential Standard APS 220 - Credit Quality [F2014L01652];
- Banking (prudential standard) determination No. 4 of 2014 - Prudential Standard APS 116 - Capital Adequacy - Market Risk [F2014L01653];
- Banking (prudential standard) determination No. 9 of 2014 - Prudential Standard APS 222 - Associations with Related Entities [F2014L01654];
- Banking (prudential standard) determination No. 5 of 2014 - Prudential Standard - APS 221 - Large Exposures [F2014L01655];

- Banking (prudential standard) determination No. 6 of 2014 - Prudential Standard APS 610 - Prudential Requirements for Providers of Purchased Payment Facilities [F2014L01656];
- Banking (prudential standard) determination No. 10 of 2014 - Prudential Standard APS 310 - Audit and Related Matters [F2014L01657];
- Banking (prudential standard) determination No. 7 of 2014 - Prudential Standard APS 120 – Securitisation [F2014L01658];
- Banking (prudential standard) determination No. 11 of 2014 - Prudential Standard APS 330 - Public Disclosure [F2014L01669];
- Life Insurance (prudential standard) determination No. 1 of 2014 - Prudential Standard LPS 001 – Definitions [F2014L01670];
- Life Insurance (prudential standard) determination No. 2 of 2014 - Prudential Standard LPS 320 - Actuarial and Related Matters [F2014L01672];
- Insurance (prudential standard) determination No. 2 of 2014 - Prudential Standard GPS 001 - Definitions [F2014L01675];
- Insurance (prudential standard) determination No. 3 of 2014 - Prudential Standard GPS 110 - Capital Adequacy [F2014L01677];
- Insurance (prudential standard) determination No. 5 of 2014 - Prudential Standard GPS 310 - Audit and Related Matters [F2014L01678];
- Insurance (prudential standard) determination No. 4 of 2014 - Prudential Standard GPS 113 - Capital Adequacy: Internal Model-based Method [F2014L01679]; and
- Insurance (prudential standard) determination No. 6 of 2014 - Prudential Standard GPS 320 - Actuarial and Related Matters [F2014L01680].

Noting that the minister's response is relevant to the making of the instruments listed above, the committee has therefore concluded its examination of the instrument.

Appendix 1
Correspondence

The Hon Jamie Briggs MP
Assistant Minister for Infrastructure
and Regional Development
Member for Mayo

PDR ID: MB15-000072

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

Dear Senator John

I am writing in response to the Senate Regulations and Ordinances Committee Secretary's letter of 12 February 2015, about the Staffing and Delegations Rule 2014 [F2014L01269].

I can delegate general power to make Rules authorised by provisions of the *National Land (Road Transport) Ordinance 2014* (the Ordinance). The Chief Executive of the National Capital Authority (NCA) may only authorise people in accordance with the Ordinance.

The Rules I can create must be in respect to Section 11 - Rule making power of the Ordinance. The Chief Executive is only permitted to authorise people in accordance with Section 10 - Authorised people of the Ordinance.

Staffing and Delegations Rule 2014 [F2014L01269] relies upon section 11 (a), which provides that the Minister may make rules prescribing matters 'required or permitted' by the Ordinance.

The 'required or permitted' instrument-making power gives me no power to make Rules beyond that authorised by the other provisions of the Ordinance. It provides an administrative efficiency for exercising powers under the Ordinance.

Instruments made by the Chief Executive of the NCA were drafted with the assistance of Legal Counsel to ensure they are succinct and of a high quality. If new instruments are required the NCA will seek the Office of Parliamentary Counsel's assistance with drafting such documentation.

Parliament House, Canberra ACT 2600
Telephone: 02 6277 7020
Facsimile: 02 6273 4126
www.minister.infrastructure.gov.au

I trust this information addresses the Committee's concerns.

Yours sincerely

Jamie Briggs

19 MAR 2015

ATTORNEY-GENERAL

CANBERRA

MC15/01668

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

18 MAR 2015

Dear Chair

I refer to the letter dated 12 February 2015 from the Committee Secretary, Mr Ivan Powell, to my Office regarding the comments of the Senate Standing Committee on Regulations and Ordinances in the *Delegated legislation monitor* (No. 1 of 2015) on the *Legislative Instruments Amendment (Exemptions) Regulation 2014* (the Regulation). I understand my Department has been in contact with the Committee Secretariat about these comments.

The Regulation exempts a number of instruments from sunsetting under Part 6 of the *Legislative Instruments Act 2003*. This assessment is conducted against five established criteria which are set out in the Explanatory Statement to the Regulation.

I note the Committee asked I provide further information about which of the established criteria apply to each class of legislative instrument the Regulation exempted from sunsetting.

The Explanatory Statement includes an attachment which sets out most of the further information the Committee has requested. I have enclosed a copy of the Explanatory Statement and its attachment for the Committee's reference.

I note the attachment to the Explanatory Statement does not state the established criteria which supported the sunsetting exemption applying to regulations made under the *Mutual Assistance in Business Regulation Act 1992*. I can advise that regulations made under that Act were exempted from sunsetting to ensure commercial certainty would not be undermined.

Thank you for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Explanatory Statement to the *Legislative Instruments Amendment (Exemptions) Regulation 2014* and Attachment A to the Explanatory Statement

Legislative Instruments Amendment (Exemptions) Regulation 2014

EXPLANATORY STATEMENT

Select Legislative Instrument No. 187, 2014

Issued under the Authority of the Attorney-General

OUTLINE

Section 62 of the *Legislative Instruments Act 2003* (the Act) provides that the Governor-General may make regulations 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.

The Act establishes a comprehensive regime for the management of Commonwealth legislative instruments.

Section 7 of the Act lists categories of instruments that are not legislative instruments and therefore not subject to the Act. Item 24 of the table in section 7(1) of the Act provides that instruments prescribed by the regulations for the purposes of that table are not legislative instruments. Regulation 7 of the *Legislative Instruments Regulations 2004* (the Principal Regulations) provides that an instrument listed in Schedule 1 to the Principal Regulations is not a legislative instrument.

Part 6 of the Act provides a regime for the sunsetting (automatic ceasing) of legislative instruments after 10 years of operation. The regime ensures that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Item 51 of subsection 54(2) of the Act provides that Part 6 of the Act does not apply to legislative instruments prescribed by the regulations for the purposes of the table. Regulation 9 of the Principal Regulations provides that an instrument listed in Schedule 3 to the Principal Regulations is declared to be exempt from the sunsetting provisions of the Act.

The purpose of the *Legislative Instruments Amendment (Exemptions) Regulation 2014* (the Regulations) is to amend Schedule 1 and Schedule 3 to the Principal Regulations to add and make corrections to items in those Schedules.

The amendments serve three purposes. Firstly, the Regulations insert an item in Schedule 1 of the Principal Regulations to confirm that total fire ban orders made under subsection 85(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014* are not legislative instruments and are exempt from the operation of the Act.

The intention is to put beyond doubt that Jervis Bay Territory total fire ban orders are not legislative instruments, following consultation with the Department of Infrastructure and Regional.

Secondly, the Regulations add seven new items to Schedule 3 of the Principal Regulations. The instruments to be exempt from sunsetting by this Regulation have each been assessed as not suitable for regular review under Part 6 of the Act.

Exemptions from sunsetting for certain categories of legislative instruments were either requested by the responsible Minister or their Department, or were identified by the Attorney-General's Department. The Regulations were then developed in consultation with responsible Departments.

There is a long-standing principle that exemptions from sunsetting should only be granted where the instrument is not suitable for regular review. To satisfy this principle an exemption should meet at least one of five established criteria:

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector
- the instrument is designed to be enduring and not subject to regular review
- commercial certainty would be undermined by sunsetting
- the instrument is part of an intergovernmental scheme, or
- the instrument is subject to a more rigorous statutory review process.

Each exemption from sunsetting made by the Regulations was analysed against the above criteria and found to be not suitable for regular review under Part 6 of the Act.

Thirdly, the Regulations update the title of the Act referred to in item 51 of Schedule 3 of the Principal Regulations, repealing the outdated reference to the *War Precautions Act Repeal Act 1920* and replacing it with the current title of *Protection of Word "Anzac" Act 1920*. This correction makes no substantive change to the law and merely reflects a change made to the title of the Act in question.

The Act does not specify any conditions that must be fulfilled before the power to make these Regulations may be exercised.

The Regulations will be a legislative instrument for the purposes of the Legislative Instruments Act.

The Regulations will commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulatory impact analysis

Before this Regulation was made, its expected impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). That assessment indicated that it will have no or low impact on business, individuals and the economy. This assessment has been confirmed by the OBPR (OBPR reference 17635).

Statement of compatibility with human rights obligations

Before this regulation was made, its impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. This Regulation will make technical amendments to the Principal Regulations which will have no impact on the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Regulation is compatible with human rights as it does not raise any human rights issues.

PROCESSES FOR REVIEW OF THIS REGULATION

This Regulation is subject to tabling and disallowance under Part 5 of the LIA, and will cease as if repealed on the day after the last of its provisions commence.

OTHER ISSUES

Matter incorporated by reference

This Regulation does not apply, adopt or incorporate other matter by reference.

More information

An explanation of the provisions and the Schedules to the regulation is provided in Attachment A.

NOTES ON SECTIONS **ATTACHMENT A**

Section 1 Name of regulation

This section provides for the Regulations to be named as the *Legislative Instruments Amendment (Exemptions) Regulation 2014*. The Regulations may be cited by that name.

Section 2 Commencement

This section provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Section 3 Authority

This section identifies the *Legislative Instruments Act 2003* (the LIA) as the Act that authorises the making of the Regulations.

Section 4 Schedule(s)

This section provides that the *Legislative Instruments Regulations 2004* (the Principal Regulations) are amended as set out in the Schedule.

Schedule 1 Amendments

Schedule 1 of the Regulations adds additional items to Schedules 1 and 3 of the Principal Regulations. Part 2 of Schedule 1 of the Regulations lists instruments made under particular provisions that are declared not to be legislative instruments. Instruments listed in this Schedule are not subject to the provisions of the LIA. Schedule 3 to the Principal Regulations lists instruments that are declared not to be subject to the sunsetting regime provided under the LIA.

Item 1 provides that an order made under subsection 85(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014* is not a legislative instrument.

Item 2 provides exemptions from sunsetting for determinations made solely for the purposes of either or both of sections 13 and 13A of the *Currency Act 1965* (table item 15A), and for regulations made under that Act (table item 15B). These determinations and regulations provide for matters that are intended to be enduring and not subject to regular review under the LIA, such as the standard weight and dimensions of coins.

Item 3 provides exemption from sunsetting for multiple instruments made under different Acts.

Table item 17A provides exemptions from sunsetting for Disability Standards made under section 31 of the *Disability Discrimination Act 1992*. The Disability Standards set out rights and responsibilities with more detail than is provided under the Act. A more stringent statutory review process than sunsetting applies to these provisions and should be preserved. Commercial certainty would also be undermined by the sunsetting of these rules.

Table item 17B provides exemptions from sunsetting for regulations made under the *Extradition Act 1988* that are not otherwise automatically exempt. These regulations that are

not automatically exempt were made to implement extradition arrangements with other nations that are of less than treaty status or reciprocal arrangements with other nations. These regulations are intended to be enduring and not subject to regular review under the LIA.

Table item 17C provides exemptions from sunsetting for multiple instruments made under different provisions of the *Family Law Act* 1975. Proclamations made under the provisions referred to in paragraphs (a) to (d), (f), (g), and (i) define which Federal, State and Territory courts have jurisdiction to hear matters arising under the *Family Law Act 1975*. Proclamations made under the provisions referred to in paragraphs (e) and (h) deal with the application of certain provisions of Part VII of the *Family Law Act* 1975 in matters involving children who are subject to a child welfare law in Queensland, Tasmania, New South Wales, or Victoria. These proclamations are part of an intergovernmental scheme and are intended to be enduring.

Item 4 provides an exemption from sunsetting for regulations made under the *International Transfer of Prisoners Act 1997* (table item 20A) that are not otherwise automatically exempt. These regulations that are not automatically exempt implement prisoner transfer arrangements with other nations that are of less than treaty status. These regulations are intended to be enduring and not subject to regular review under the LIA.

Item 5 provides an exemption from sunsetting for regulations under *Mutual Assistance in Business Regulation Act 1992* (table item 23A). The regulations set out how Commonwealth business-regulating authorities may assist their foreign counterparts.

Item 6 repeals and replaces existing table item 51, to reflect the change in name of the *Protection of Word "Anzac" Act 1920*.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001008

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House, Canberra

John.
Dear Senator

Queries raised in Delegated Legislation Monitor No. 1 of 2015

I thank the Senate Standing Committee on Regulations and Ordinances for its letters of 12 February 2015 concerning Delegated Legislation Monitor No. 1 of 2015, in which the Committee requested a response regarding a number of legislative instruments. The response in relation to the each enquiry is attached, as follows

- *Customs (Drug and Alcohol Testing) Amendment Regulation 2014 (No.1)* [F2014L01616], Attachment A;
- *Migration Amendment (2014 Measures No. 2) Regulation 2014* [F2014L01696], Attachment B; and
- *Migration Act 1958 – Determination of Protection (Class XA) and Refugee Humanitarian (Class XB) Visa 2014 – IMMI 14/117* [F2014L01819]. Attachment C.

I also note the Committee's comments on the *Customs (Japanese Rules of Origin) Regulation 2014* [F2014L01713] and I will take them into consideration for future regulation amendments.

Thank you again for bringing these matters to my attention. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 19/03/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7220 Facsimile: (02) 6273 4146

Attachment A

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

The Committee noted that the Explanatory Statement for the Regulation did not include a description regarding consultation. The Committee has sought further information about the nature of the consultation undertaken for the Regulation and requested that the Explanatory Statement for the Regulation be updated in accordance with the requirements of the *Legislative Instruments Act 2003.*

I confirm that no consultation was undertaken in relation to the Regulation as the amendments are minor and machinery in nature and do not substantially alter existing arrangements to the Drug and Alcohol Management Program (DAMP). The amendments were prepared to enhance the governance and accountability of the DAMP to enable a sufficient amount of hair to be taken for the conduct of a prohibited drug test and provide more certainty as to where on the body samples can be taken from. The record keeping requirements were also amended to enable the DAMP to maintain more accurate records of testing for auditing and reporting purposes.

I confirm that the Explanatory Statement has been updated to reflect this and I will arrange for it to be re-tabled.

I thank you for bringing this matter to my attention.

Attachment B

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

The Committee has sought further information on the retrospective effect of instrument and the justification for this approach on the following issues:

1. The broadening of the definition of managed funds; and
2. Character and general visa cancellation.

Please find responses on these matters set out below.

1. The broadening of the definition of managed funds

The effect of the amendment made by Schedule 2 to this instrument is to broaden the definition of 'managed fund' and therefore broaden the range of providers of investment products available to applicants for certain subclasses of business visas when applicants choose to invest in managed funds. New clause 3802 in Schedule 4 to this instrument provides that the amendments made by Schedule 2 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.

A criterion for the grant of the Subclass 188 visa in the significant investor stream or in the significant investor extension stream, or the Subclass 888 visa in the significant investor stream, is that the visa applicant must make a complying investment. The term 'complying investment' is defined in regulation 5.19B of the *Migration Regulations 1994* (the Migration Regulations) and includes certain types of managed funds that are specified by the Minister in an instrument writing.

The previous definition of 'managed fund' only covered managed investment schemes within the meaning of the *Corporations Act 2001*. The amendment broadens this definition to also cover approved benefit funds within the meaning of the *Life Insurance Act 1995* (the Life Act) and statutory funds maintained by friendly societies under the Life Act. As such, the amendments are beneficial to the affected applicants, as the affected applicants would have more investment options to choose from to satisfy the requirements of their business visa.

The amendments do not offend subsection 12(2) of the *Legislative Instruments Act 2003*, as the amendments are entirely beneficial to the affected applicants by increasing the range of acceptable managed funds and, in any case, the amendments do not take effect before the date of registration. Further, the amendments are authorised by section 504 of the *Migration Act 1958* (Migration Act), which authorises the making of regulations that are necessary or convenient to be prescribed to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest.

I thank you for bringing this matter to my attention.

2. Character and general visa cancellation

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 and makes changes consequential to the *Migration Amendment (Character and General Visa Cancellation) Act 2014*, in order to give full effect to the legislative amendments. New subclause 3803(1) in Schedule 4 to this instrument provides that amendments made by Items 1, 2 and 3 of Schedule 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.

Public interest criteria (PICs) are set out in Part 1 of Schedule 4 to the Migration Regulations. PIC 4001 (satisfying the character test) and PIC 4002 (risk to security) are imposed on certain visa subclasses in Schedule 2 of the Migration Regulations. Applicants for those visa subclasses are required to satisfy these PICS, which relate to an applicant satisfying the Minister that that there are no character-related reasons why they should not be granted the visa, and to an assessment by the Australian Security Intelligence Organisation in relation to being a risk to security.

Regulation 2.03AA provides that, where a person is required to satisfy PIC 4001 or PIC 4002 for grant of a visa that, the person must provide a statement from an appropriate authority about a person's criminal history and a completed Form 80 (personal particulars for assessment including character assessment), if requested by the Minister. A waiver of the requirement to provide the criminal history statement is available where the Minister is satisfied that it is not reasonable for the applicant to provide it.

Regulation 2.03AA made no change to the requirement for existing visa applicants to be assessed against PIC 4001 and PIC 4002. Historically however, there have been numbers of visa applicants who have not completed the Form 80, or have not provided requested information about their criminal history. Within the previous regulatory framework, there was no mechanism by which an applicant could be compelled to provide the requested information, thus limiting the ability of the department to comprehensively assess whether a visa applicant presented a character or security risk. The amendment ensures that the applicant is required by law to provide the documentation required to assess these PICS, rather than under policy only, with a waiver available in certain circumstances.

Visa applicants will be provided natural justice and given the opportunity to provide requested documents relating to character or security within a reasonable timeframe, or provide reasons as to why they cannot provide said documents.

It is appropriate that these requirements be applied to all undecided applications as they relate to an assessment of character and security risks before a visa is granted. Regulation 2.03AA does not place any additional burden on a visa applicant to meet requirements different to what was in place under policy at time of application. It is entirely appropriate that persons seeking a visa are required to provide information necessary for the assessment of character and security before a visa is granted and that the department is able to refuse a visa application in circumstances where an applicant does not provide the necessary information relevant to assessing character or security risks.

The amendments do not offend subsection 12(2) of the *Legislative Instruments Act 2003* as they do not take effect before the date of registration. Further, section 504 of the Migration Act authorises the amendments as it authorises the making of regulations that are necessary or convenient to be prescribed to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these amendments apply to all relevant applications decided on or after the commencement of the Instrument.

I thank you for bringing this matter to my attention.

Attachment C

Migration Act 1958 – Determination of Protection (Class XA) and Refugee Humanitarian (Class XB) Visa 2014 – IMMI 14/117 **[F2014L01819]**

The Committee noted that the Explanatory Statement for the Instrument stated that "consultation was considered inappropriate due to the Instrument being required as a matter of urgency". The Committee has sought further information on information about the matter of urgency and requested that the Explanatory Statement for the Instrument be updated in accordance with the requirements of the *Legislative Instruments Act 2003.*

The Instrument, which provides for future increases in Australia's humanitarian intake, is part of the government's border protection reform agenda. The government has described this and other benefits of the cessation of illegal maritime arrivals as the 'humanitarian dividend of […] successful border protection policies'.

The Instrument was required as a matter of urgency because the debating of the Resolving the Legacy Caseload Bill presented an opportunity to complete portfolio legislative priorities by the end of the parliamentary year. The timing of the instrument had the benefit of giving Senators an overview of related legislation, without which they may not have appreciated the interdependencies of the measures. For example, the reintroduction of temporary protection visas is one of the keys to the re-expansion of the Humanitarian Programme. Places which would otherwise go to illegal maritime arrivals can now be used to resettle more refugees and others in humanitarian need from overseas.

Consultation for the Instrument specifically was considered unnecessary because there is a long-established annual consultation process that allows individuals, business, organisations, states and territories, government departments and senior ministers to express their views on the size and composition of the Humanitarian Programme. Every year, the department publishes a discussion paper and invites the public to make submissions on the Humanitarian Programme. The department consults state and territory governments and other government agencies, as well as peak refugee and humanitarian bodies. It also considers the advice of the United Nations High Commissioner for Refugees on global resettlement needs and priorities. These consultations inform the government's decisions on the size and composition of the Humanitarian Programme in the year ahead.

Settlement service providers, the main business stakeholders in the Humanitarian Programme, are kept informed of changes in the programme by the Department of Social Services. The long lead time for the implementation of the amendment will assist stakeholders to plan for the increases.

I confirm that the Explanatory Statement has been updated to reflect this and I will arrange for it to be re-tabled.

I thank you for bringing this matter to my attention.

Assistant Treasurer

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

Dear Senator Williams

Thank you for your letter of 12 February 2015 concerning the comments contained in the report of the Senate Regulations and Ordinances Committee (the Committee), *Delegated legislation monitor* No.1 of 2015 (the monitor), about the following instrument: Banking (prudential standard) determination No.3 of 2014 – Prudential Standard APS 001 – Definitions [F2014L01649].

The monitor identified that there is insufficient information regarding the consultation process that was undertaken in relation to the instrument specified above. The Committee, therefore, requested further information and that the explanatory statement to be updated.

Please find enclosed the explanatory statement updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

I trust this information will be of assistance.

Yours sincerely

JOSH FRYDENBERG

Parliament House Canberra ACT 2600
Australia
Telephone: 02 6277 7360 Facsimile: 02 6273 4125

Banking (prudential standard) determinations Nos. 3 to 11 of 2014

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959, section 11AF

Under subsection 11AF(1) of the *Banking Act 1959* (the **Act**), APRA has the power to determine standards (**prudential standards**), in writing, in relation to prudential matters to be complied with by authorised deposit-taking institutions (**ADIs**) and authorised non-operating holding companies (**authorised NOHCs**). Under subsection 11AF(3) of the Act, APRA may, in writing, vary or revoke a prudential standard.

On 3 December APRA made the following determinations (the instruments):

(1) Banking (prudential standard) determination No. 3 of 2014 (the instrument), which revokes *Prudential Standard APS 001 Definitions* made under Banking (prudential standard) determination No.2 of 2012, and determines a new *Prudential Standard APS 001 Definitions* (APS 001);

(2) Banking (prudential standard) determination No. 4 of 2014 (the instrument), which revokes *Prudential Standard APS 116 Capital Adequacy: Market Risk* made under Banking (prudential standard) determination No. 9 of 2012, and determines a new *Prudential Standard APS 116 Capital Adequacy: Market Risk* (APS 116);

(3) Banking (prudential standard) determination No. 7 of 2014 (the instrument), which revokes *Prudential Standard APS 120 Securitisation* made under Banking (prudential standard) determination No. 11 of 2012, and determines a new *Prudential Standard APS 120 Securitisation* (APS 120);

(4) Banking (prudential standard) determination No. 8 of 2014 (the instrument), which revokes *Prudential Standard APS 220 Credit Quality* made under Banking (prudential standard) determination No. 12 of 2012, and determines a new *Prudential Standard APS 220 Credit Quality* (APS 220);

(5) Banking (prudential standard) determination No. 5 of 2014 (the instrument), which revokes *Prudential Standard APS 221 Large Exposures* made under Banking (prudential standard) determination No. 13 of 2012, and determines a new *Prudential Standard APS 221 Large Exposures* (APS 221);

(6) Banking (prudential standard) determination No. 9 of 2014 (the instrument), which revokes *Prudential Standard APS 222 Associations with Related Entities* made under Banking (prudential standard) determination No. 14 of 2012, and determines a new *Prudential Standard APS 222 Associations with Related Entities* (APS 222);

(7) Banking (prudential standard) determination No. 10 of 2014 (the instrument), which revokes *Prudential Standard APS 310 Audit and Related Matters* made under Banking (prudential standard) determination No. 15 of 2012, and determines a new *Prudential Standard APS 310 Audit and Related Matters* (APS 310);

(8) Banking (prudential standard) determination No. 11 of 2014 (the instrument),

which revokes *Prudential Standard APS 330 Capital Adequacy: Public Disclosure* made under Banking (prudential standard) determination No. 1 of 2013, and determines a new *Prudential Standard APS 330 Capital Adequacy: Public Disclosure* (APS 330); and

(9) Banking (prudential standard) determination No. 6 of 2014 (the instrument), which revokes *Prudential Standard APS 610 Prudential Requirements for Providers of Purchased Payment Facilities* made under Banking (prudential standard) determination No. 17 of 2012, and determines a new *Prudential Standard APS 610 Prudential Requirements for Providers of Purchased Payment Facilities* (APS 610).

The instruments commence on 1 January 2015.

1. Background

In January 2014, APRA released a new cross-industry prudential standard *Prudential Standard CPS 220 Risk Management* (CPS 220), that applies to ADIs, general insurers and life insurers, and Level 2 and Level 3 groups. A revised *Prudential Standard CPS 510 Governance* (CPS 510) was also released to ensure risk management governance principles were aligned to the new CPS 220.

These new and amended standards come into effect from 1 January 2015.

CPS 220 and revised CPS 510 necessitate a series of consequential amendments to existing industry-specific and cross-industry prudential standards. The majority of changes are necessary to remove duplication and to update cross-references.

2. Purpose and operation of the instruments

Banking (prudential standard) determination No. 3 of 2014

The purpose of the instrument is to revoke APS 001 and to replace it with a new version of APS 001.

APS 001 incorporates common definitions used in ADI prudential standards into a single prudential standard. Generally, only definitions that are unique to a particular prudential standard will be retained in that prudential standard; otherwise, definitions common to two or more prudential standards have been consolidated in APS 001.

The instrument makes changes to APS 001 to insert new definitions related to CPS 220 and to delete a redundant list of ADI prudential standards, prudential practice guides and guidance notes.

Banking (prudential standard) determination No. 4 of 2014

The purpose of the instrument is to revoke APS 116 and to replace it with a new version of APS 116.

APS 116 requires an ADI engaged in activities that give rise to risks associated with potential movements in market prices to adopt risk management practices and hold regulatory capital commensurate with the risks involved.

The instrument makes changes to APS 116 to incorporate references to CPS 220.

Banking (prudential standard) determination No. 7 of 2014

The purpose of the instrument is to revoke APS 120 and to replace it with a new version of APS 120.

APS 120 requires ADIs to adopt prudent practices in managing the risks associated with securitisation and to ensure that sufficient regulatory capital is held against the associated credit risk.

The instrument makes minor alterations to APS 120 to update references to CPS 510.

Banking (prudential standard) determination No. 8 of 2014

The purpose of the instrument is to revoke APS 220 and to replace it with a new version of APS 220.

APS 220 requires an ADI to adopt prudent credit risk management policies and procedures for the recognition, measurement and reporting of, and provisioning for, impaired facilities.

The instrument changes APS 220 to update references to CPS 510.

Banking (prudential standard) determination No. 5 of 2014

The purpose of the instrument is to revoke APS 221 and to replace it with a new version of APS 221.

APS 221 requires ADIs to implement prudent measures and to set prudent limits to monitor and control their large exposures, on both a Level 1 and Level 2 basis.

The instrument makes minor alterations to APS 221 to update cross references to requirements formerly included in APS 310 but are now contained in CPS 220.

Banking (prudential standard) determination No. 9 of 2014

The purpose of the instrument is to revoke APS 222 and to replace it with a new version of APS 222.

APS 222 sets out prudential requirements for ADIs in their dealings with related entities, and requires that they give due consideration to the risks associated with the corporate group of which they are a member and that they are not exposed to excessive risk as a result of their dealings with related entities.

The purpose of the instrument is to delete sections of the standard (i.e. Monitoring of Contagion Risk and Group Risk Management) that are replaced by requirements in CPS 220.

Banking (prudential standard) determination No. 10 of 2014

The purpose of the instrument is to revoke APS 310 and to replace it with a new version of APS 310.

APS 310 requires an ADI to ensure that APRA has access to independent advice from an auditor relating to the operations, internal controls and information provided to APRA in respect of that ADI. APS 310 also sets out requirements for the roles and responsibilities of the appointed auditor.

The instrument makes minor alterations to APS 310 to align with the updated requirements of CPS 510 and to delete requirements related to Risk Management Systems that are now covered by CPS 220.

Banking (prudential standard) determination No. 11 of 2014

The purpose of the instrument is to revoke APS 330 and to replace it with a new version of APS 330.

APS 330 requires locally incorporated ADIs to meet minimum requirements for the public disclosure of information on their risk management practices and capital adequacy to enhance transparency in Australian financial markets.

The instrument makes minor alterations to APS 330 to update references to CPS 510.

Banking (prudential standard) determination No. 6 of 2014

The purpose of the instrument is to revoke APS 610 and to replace it with a new version of APS 610.

APS 610 requires an ADI that has an authority to provide purchased payment facilities to meet prudential requirements commensurate with its risk profile.

The instrument makes minor consequential amendments to APS 610 to include CPS 220 in the listing of prudential standards that apply to providers of purchased payment facilities.

3. Consultation

In May 2013, APRA commenced consultation on CPS 220 and CPS 510 with the release of the discussion paper *Harmonising cross-industry risk management requirements* and accompanying draft versions of the two standards. These set out APRA's approach to harmonising risk management requirements across the banking and insurance industries, including the adoption of standard definitions of key concepts such as 'risk management framework', 'risk management strategy' and 'risk management declaration'. APRA also consulted separately on specific aspects of its proposals. APRA received a number of formal and informal responses to which it responded with the release in January 2014 of the response to submissions paper, *Harmonising cross-industry risk management requirements*, which was accompanied by final versions of CPS 220 and CPS 510.

On 24 August 2014, APRA released a letter seeking submissions on its proposed implementation of changes to a number of prudential standards applying to ADIs, general insurers, life insurers and cross-industry arising from its proposals regarding CPS 220 and CPS 510. Accompanying this letter was a draft of the relevant prudential standards, including the nine applying specifically to ADIs that have now been determined. The amendments in these standards were either minor or machinery changes or included provisions that had been addressed through the CPS 220 and CPS 510 consultation process (such as the standard definitions to be incorporated into APS 001). The letter therefore sought feedback only on errors or omissions in the draft prudential standards. APRA published its response to the four submissions it received by letter dated 28 November 2014.

4. Regulation Impact Statement

A Preliminary Assessment was submitted the Office of Best Practice Regulation who confirmed that a Regulation Impact Statement is not required.

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

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

Attachment A

Statement of Compatibility with Human Rights

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

Banking (prudential standard) determinations Nos. 3 to 11 of 2014

The instruments are 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 instruments make changes to prudential standards to incorporate changes consequential to new *Prudential Standard CPS 220 Risk Management* and revised *Prudential Standard CPS 510 Governance.* These instruments:

- include a new definition for 'ensure';
- update references to applicable standards; and
- remove duplication of detail.

Human rights implications

APRA has assessed these instruments and is of the view that they do not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.* Accordingly, in APRA's assessment, the instruments are compatible with human rights.

Conclusion

The instruments are compatible with human rights as they do not raise any human rights issues.

Appendix 2
Guideline on consultation

Standing Committee on Regulations and Ordinances
Addressing consultation in explanatory statements

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with non-partisan principles 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'.

Issues raised in consultations and outcomes

An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must *explain why no consultation was undertaken*. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

Specific examples listed in the Act

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

Timing of consultation

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm or by contacting the committee secretariat at:

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