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Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Membership of the committee

**Current members**

Senator John Williams (Chair) New South Wales, NAT

Senator Gavin Marshall (Deputy Chair) Victoria, ALP

Senator Sam Dastyari New South Wales, ALP

Senator Nova Peris OAM Northern Territory, ALP

Senator Linda Reynolds Western Australia, LP

Senator Zed Seselja Australian Capital Territory, LP

**Secretariat**

Mr Ivan Powell, Secretary

Dr Patrick Hodder, Senior Research Officer

**Committee legal adviser**

Mr Stephen Argument

**Committee contacts**

PO Box 6100

Parliament House

Canberra ACT 2600

Ph: 02 6277 3066

Email: regords.sen@aph.gov.au

Website: <http://www.aph.gov.au/senate_regord_ctte>

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# Introduction

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

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

### The committee's terms of reference

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

(1) 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.

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

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

### Structure of the report

The report is comprised of the following parts:

Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;

Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date;

Appendix 1 contains correspondence relating to concluded matters.

Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

### Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

**Senator John Williams**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 11 February 2015, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

This report considers all disallowable instruments tabled between 7 November 2014 and 29 January 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[[3]](#footnote-3)

## New matters

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

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

**Issue:**

*Retrospectivity*

This instrument was made on 13 November 2014. Section 15 of the instrument provides that the amendments made by the instrument are back-dated to 26 August 2014. This means the instrument has a retrospective operation. While the explanatory statement (ES) indicates the instrument provides for an 'expansion' of existing entitlements and for a 'higher rate of hardship allowance', the ES does not expressly address the prohibition in subsection 12(2) of the *Legislative Instruments Act 2003* against retrospectivity that is disadvantageous to the rights of persons other than the Commonwealth. The committee's usual expectation is that this matter would be specifically addressed in the ES. **Noting both the apparently beneficial effect of the retrospective provisions and the generally high drafting standard of Defence instruments, the committee therefore draws this matter to the minister's attention.**

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

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

**Issue:**

*Retrospectivity*

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

### 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 |

**Issue:**

*No description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

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

|  |  |
| --- | --- |
| **Purpose** | Enables certain passenger seats not to be in the upright position when taking off or landing |
| **Last day to disallow** | 26 March 2015 |
| **Authorising legislation** | Civil Aviation Safety Regulations 1998 |
| **Department** | Infrastructure and Regional Development |

**Issue:**

*No description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

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

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

**Issue:**

*Insufficient information regarding consultation*

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

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

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

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes the ES for the instrument states that, in accordance with paragraph 184(1)(d) of the Environment Protection and Biodiversity Conservation Act 1999, under which the instrument is made, 'consultation was not required to be undertaken before the instrument was made'. However, there is no reference to the consultation requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003.**

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

|  |  |
| --- | --- |
| **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 |

**Issue:**

*Retrospective effect of instrument*

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

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

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

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

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

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

**Background:**

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

**Issue:**

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

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

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

Funding for the Hub will be provided from unallocated funding within the Infrastructure Investment Programme ($11.3 million) (Department of Infrastructure and Regional Development) and the Moorebank Units Relocation contingency ($18.7 million) (Department of Finance).[[5]](#footnote-5) **The committee therefore notes that the instrument appears to authorise the redirection of existing expenditure and makes no further comment on this matter.**

**Issue:**

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

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

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

In relation to the information provided by the minister setting out the constitutional authority for the program added to Schedule 1AB by the regulation, the committee notes that the ES identifies certain constitutional heads of power that purportedly support the scheme listed in the instrument. **The committee notes that, consistent with the committee's expectations, this information has been included in the ES for the instrument, and thanks the minister and the department for their assistance on this matter.**

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

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

**Issue:**

*Insufficient information regarding consultation*

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

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

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

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

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

**Background:**

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[[6]](#footnote-6)

**Issue:**

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

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

The instrument adds two news item to Part 2 (Grants of financial assistance to a State or Territory) and seven new items to Part 4 (Programs) of Schedule 1AB to the FF(SP) regulations, to establish legislative authority for various activities within five portfolios.

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

New table item 4 of Part 2 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide grants of financial assistance to States and Territories to implement the Stronger Biosecurity and Quarantine program. The Commonwealth allocated funding of $20 million over four years to the Agriculture portfolio in the 2014-15 Budget.

New table item 64 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to support, and establish, Industry Growth Centres. The Commonwealth announced funding of $188.5 million over four years from 2014-15. The program will be administered by the Department of Industry.

New table item 65 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funds to non-government external parties to support State and Territory governments in the early stages of a response to pest and/or disease incursions, and for activities to strengthen Australia's biosecurity preparedness. This item supports the implementation of the Stronger Biosecurity and Quarantine program (see above). The program will be administered by the Department of Agriculture. No funding details are provided.

New table item 66 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund a program to assist, support and encourage access by farmers to a greater range of safe and effective uses of agricultural chemicals and veterinary medicines. The Commonwealth allocated funding of $8.0 million over four years to the Agriculture portfolio in the 2014-15 Budget.

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

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

**Stronger Biosecurity and Quarantine program—grants to States and Territories to conduct biosecurity response and preparedness activities;**

**Industry Growth Centres Initiative;**

**Stronger Biosecurity and Quarantine program—grants to external parties to conduct biosecurity response and preparedness activities; and**

**Improved Access to Agricultural and Veterinary Chemicals Program.**

**Issue:**

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

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

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

In relation to the information provided by the minister setting out the constitutional authority for the programs added to Schedule 1AB by the regulation, the committee notes that the ES identifies certain constitutional heads of power that purportedly support the schemes listed in the instrument. **The committee notes that, consistent with the committee's expectations, this information has been included in the ES for the instrument, and thanks the minister and the department for their assistance on this matter.**

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

|  |  |
| --- | --- |
| **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 |

**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 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 requests further information from the minister.**

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

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

**Issue:**

*No description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

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

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

**Issue:**

*Insufficient information regarding consultation*

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

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

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

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

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

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

**Issue:**

*Insufficient information regarding consultation*

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

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

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

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

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

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

**Issue:**

*Insufficient information regarding consultation*

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

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

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

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

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

**Issue:**

*Drafting*

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

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

There appears to be a verb missing from the first line of paragraph 6(1)(b) above. A reading of the ES for the instrument suggests the word 'issue' is missing between 'can' and 'a VET qualification'. **The committee therefore draws the matter to the minister's attention.**

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

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

**Issue:**

*Retrospective effect of instrument*

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

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

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

**Issue:**

*No description regarding consultation*

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

### 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 |

**Issue:**

*Insufficient information regarding consultation*

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

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

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

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

However, the increase commences in the financial year starting 1 July 2017. There is no change from the existing visa numbers for the financial years starting 1 July 2015 and 1 July 2016. It is not immediately apparent, therefore, why the instrument was required as a matter of urgency. The committee's expectations regarding why consultation has not been undertaken are set out in the 'Guideline on consultation' in Appendix 2 of this report. In particular, the committee would generally expect the ES to explain the reasoning as to why the instrument was considered urgent (as opposed to, for example, it being convenient or preferable not to undertake consultation). **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

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

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

**Issue:**

*No description regarding consultation*

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

## Continuing matters

### Staffing and Delegations Rule 2014 [F2014L01296]

|  |  |
| --- | --- |
| **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[[7]](#footnote-7)** | 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].**

**Issue:**

*Delegation of power to a 'person'*

Section 3 of the rule provides:

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

Section 4 of the rule provides:

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

(a) an officer or employee of the NCA established under the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth); or

(b) a person whose services have been made available under section 3 of this rule.

The explanatory statement (ES) notes:

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

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

**MINISTER'S RESPONSE:**

The Assistant Minister for Infrastructure and Regional Development advised:

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

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

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

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

**COMMITTEE RESPONSE:**

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

**Issue:**

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

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

The Minister may make rules prescribing matters:

(a) required or permitted by this Ordinance to be prescribed by rule; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

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

**COMMITTEE RESPONSE:**

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

**Issue:**

*Potential delegation of general rule-making power*

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

**MINISTER'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

### Implementation of a general instrument-making power

**[A comprehensive account of the committee's examination of this matter during 2014 is contained in *Delegated legislation monitor* No. 17 of 2014].[[8]](#footnote-8)**

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

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

scope of the general power;

consequences of the general instrument-making power for the quality of drafting;

assessing whether instruments contain matters more appropriate for regulations;

regulations to prevail in the event of conflict;

delegation of the general instrument-making power; and

consultation over the implementation of the general instrument-making power.

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

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

**Issue:**

*Scope of the general power*

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

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

**FPC'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

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

**Issue:**

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

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

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

Any appreciable lowering of drafting standards arising from more widespread non-expert drafting of instruments could impact adversely on the committee, particularly to the extent that this would effectively transfer the task of policing drafting standards from OPC to the committee (in respect of those instruments). In this regard, the committee does not have sufficient expertise and resources to perform this task as effectively as the expert and professional drafters and officers in OPC.

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

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

The committee notes the measures that FPC has undertaken to try to improve the general standard of legislative instruments. However, the committee is of the view that the question of OPC's efforts to monitor the impact of the general instrument-making power on the quality of drafting of instruments, and more generally to promote higher standards of drafting in instruments, is best seen through the prism of FPC's responsibility under section 16 of the *Legislative Instruments Act 2003*,[[9]](#footnote-9) which provides:

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

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

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

**FPC'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

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

**Issue:**

*Assessing whether instruments contain matters more appropriate for regulations*

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

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

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

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

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

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

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

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

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

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

**FPC'S RESPONSE:**

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

offence provisions;

powers of arrest or detention;

entry provisions;

search provisions;

seizure provisions;

civil penalties;

impositions of taxes;

setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount; and

amendments of the text of an Act

FPC further advised:

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

**COMMITTEE RESPONSE:**

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

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

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

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

(a) create an offence or civil penalty;

(b) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(c) impose a tax;

(d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(e) amend this [*Act/Ordinance*].

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

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

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

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

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

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

**Issue:**

*Regulations to prevail in the event of conflict*

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

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

**FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8:

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

**COMMITTEE RESPONSE:**

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

**Issue:**

*Delegation of the general instrument-making power*

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

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

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

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

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

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

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

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

**FPC'S RESPONSE:**

FPC advised that revised Drafting Direction 3.8:

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

**COMMITTEE RESPONSE:**

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

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

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

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

While noting that that Drafting Direction 3.8 is a policy statement and not a mandatory requirement, the committee thanks FPC for settling the drafting direction and addressing the committee's concerns by requiring that Acts should include a provision preventing the delegation of the power to make legislative instruments under a general instrument-making power; and also for distinguishing between the non-delegable general instrument-making power and a delegable instrument-making power.

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

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

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

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

**Issue:**

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

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

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

The preceding discussion of the committee's inquiries into this matter establishes that the general instrument-making power was implemented prior to the settling of appropriate policy guidance on the use of the new power. The committee notes that, had appropriate consultation been undertaken early in the development of the new power, matters of particular or potential concern to the committee and the Parliament could have been identified and discussed. Equally, such an approach may have avoided the current inconsistency of legislation with the settled policy guidance on the use of the general-instrument-making power.

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

**FPC'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

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

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

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[[10]](#footnote-10)

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

|  |
| --- |
| 1. Accountability Amendment Principle 2014 (No. 1) [F2015L00050] |
| 1. Agricultural and Veterinary Chemicals Code (Prescribed Relevant Particulars - Revocation) Instrument 2014 [F2014L01765] |
| 1. Amended Electricity Supply Fees Determination 2014 (Jervis Bay Territory) [F2015L00075] |
| 1. ASIC Class Order [CO 14/1249] [F2014L01690] |
| 1. ASIC Class Order [CO 14/1276] [F2014L01735] |
| 1. ASIC Class Order [CO 14-1270] [F2015L00018] |
| 1. ASIC Class Order CO 14/1217 [F2014L01648] |
| 1. Australian Public Service Commissioner’s Amendment (Performance Management) Direction 2014 [F2014L01769] |
| 1. Civil Aviation Order 104.0 Amendment Order 2015 (No. 1) [F2015L00065] |
| 1. Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 1) [F2014L01693] |
| 1. Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3) [F2014L01793] |
| 1. Civil Aviation Order 82.6 Amendment Instrument 2014 (No. 2) [F2014L01502] |
| 1. Consumer Goods (Bean Bags) Safety Standard 2014 [F2014L01587] |
| 1. Dental Benefits Rules 2014 [F2014L01748] |
| 1. Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Determination 2014 [F2014L01660] |
| 1. Excise (Concessional spirits – class of persons) Determination 2014 (No. 1) [F2014L01667] |
| 1. Export Control (Animals) Amendment (2014 Measures No. 1) Order 2014 [F2014L01513] |
| 1. Fees and Payments Amendment Principle 2014 (No. 1) [F2015L00047] |
| 1. Goods and Services Tax: Classes of Recipient Created Tax Invoice Amendment Determination (No. 1) 2014 [F2014L01661] |
| 1. Guidelines under Section 95 of the Privacy Act 1988, 2014 [F2014L01500] |
| 1. Health Insurance (Midwife and Nurse Practitioner) Amendment Determination 2015 [F2015L00035] |
| 1. Health Insurance (Midwife and Nurse Practitioner) Revocation Determination 2015 [F2015L00048] |
| 1. Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS)) Determination 2014 [F2014L01767] |
| 1. Health Insurance (Section 19AB Exemptions) Guidelines) 2015 [F2015L00038] |
| 1. Major Sporting Events (Indicia and Images) Protection Amendment Rules 2014 (No. 1) [F2014L01727] |
| 1. Manual of Standards Part 139 Amendment Instrument 2014 (No. 1) [F2014L01506] |
| 1. National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014 [F2015L00017] |
| 1. National Health (Concession or entitlement card fee) Amendment Determination 2014 (No. 1) (No. PB 98 of 2014) [F2014L01570] |
| 1. National Health (Pharmaceutical Benefits) (Conditions of approval for approved pharmacists) Amendment (Supply from Premises) Determination 2014 (No. PB 81 of 2014) [F2014L01559] |
| 1. National Health (Supplies of out-patient medication) Determination 2014 (No. PB 103 of 2014) [F2014L01762] |
| 1. National Health (Weighted average disclosed price – April 2015 reduction day) Determination 2014 (No. PB 97 of 2014) [F2014L01729] |
| 1. Parliamentary Service Commissioner's Direction 2014 [F2015L00015] |
| 1. Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 6) [F2014L01775] |
| 1. Private Health Insurance (Prostheses) Amendment Rules 2014 (No. 3) [F2014L01573] |
| 1. Public Governance, Performance and Accountability Legislation Amendment (RBA and Other Measures) Rule 2014 [F2014L01598] |
| 1. Public Governance, Performance and Accountability Legislation Amendment Rule 2014 (No. 2) [F2015L00027] |
| 1. Quality of Care Amendment Principle 2014 (No. 1) [F2015L00021] |
| 1. Quarantine Legislation Amendment (2014 Measures No. 2) Proclamation 2014 [F2014L01734] |
| 1. Radiocommunications (Duration of Community Television Transmitter Licences) Determination (No. 1) of 2008 (Amendment No. 1 of 2014) [F2014L01523] |
| 1. Remuneration Tribunal Determination 2014/21 - Remuneration and Allowances for Holders of Public Office including Principal Executive Office - Classification Structure and Terms and Conditions [F2014L01521] |
| 1. Remuneration Tribunal Determination 2014/22 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L01751] |
| 1. Remuneration Tribunal Determination 2014/23 - Members of Parliament – Entitlements [F2014L01752] |
| 1. Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2014 [F2014L01514] |
| 1. Social Security Foreign Currency Exchange Rate Determination 2014 (No. 2) [F2014L01515] |
| 1. Taxation Administration Act 1953 - Pay as you go withholding - Tax table for additional amounts to withhold as a result of an agreement to increase withholding [F2014L01665] |
| 1. Telecommunications (Service Provider — Identity Checks for Prepaid Mobile Carriage Services) Amendment Determination 2014 (No. 1) [F2014L01750] |
| 1. Tertiary Education Quality and Standards Agency (Register) Guidelines 2015 [F2015L00073] |
| 1. Vehicle Standard (Australian Design Rule 14/02 - Rear Vision Mirrors) 2006 Amendment 1 [F2014L01642] |
| 1. Woomera Prohibited Area Amendment (Technical Amendments) Rule 2014 [F2014L01491] |

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **11 February 2015**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

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

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

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

**Issue:**

*No description regarding consultation*

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

**MINISTER'S RESPONSE:**

The Minister for Health advised:

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

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

**COMMITTEE RESPONSE:**

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

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

|  |  |
| --- | --- |
| **Purpose** | Removes current impediments in the Management Plan to vary remake or revoke the determination of Australia's national catch allocation and the actual live weight for a Statutory Fishing Right for 2013–2014 and or 2014–2015 following a further amount of Southern Bluefin Tuna being allocated to Australia |
| **Last day to disallow[[11]](#footnote-11)** | 10 February 2015 |
| **Authorising legislation** | *Fisheries Management Act 1991* |
| **Department** | Agriculture |

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

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes the ES for the instrument states that section 43 of the *Fisheries Management Act 1991*, under which the instrument is made, 'does not require the [Australian Fisheries Management] Authority to consult with the relevant Management Advisory Committee or provide any set period of notice prior to making [the instrument]'. However, there is no reference to the consultation requirements of the *Legislative Instruments Act 2003* **[the committee therefore requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The Minister for Agriculture advised:

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

…

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

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

The minister also advised that the department had amended the ES in accordance with the committee's request, and noted that the advice applies equally to the legislative instruments that were made as a consequence of the instrument, namely the Southern Bluefin Tuna Fishery Actual Live Weight Value of a Statutory Fishing Right (Amendment) Determination 2014 (F2014L01487), and the Southern Bluefin Tuna Fishery Australia's National Catch Allocation (Amendment) Determination 2014 (F2014L01482).

**COMMITTEE RESPONSE:**

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

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

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

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

**Issue:**

*No description regarding consultation*

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

**MINISTER'S RESPONSE:**

The Minister for Environment advised:

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

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

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

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

**COMMITTEE RESPONSE:**

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

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

|  |  |
| --- | --- |
| **Purpose** | Allows for States and Territories to be exempt from calling for public tenders if the work is below $100 000 |
| **Last day to disallow[[12]](#footnote-12)** | 10 February 2015 |
| **Authorising legislation** | *National Land Transport Act 2014* |
| **Department** | Infrastructure and Regional Development |

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

**Issue:**

*No description regarding consultation*

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

**MINISTER'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

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

|  |  |
| --- | --- |
| **Purpose** | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on certain activities administered by the Australian Customs and Border Protection Service, the Department of Education and the Department of Industry |
| **Last day to disallow[[13]](#footnote-13)** | 2 March 2015 |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 17 of 2014. The committee drew the Senate's attention to various items added to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations); and sought further information regarding the authority for the expenditure specified in the regulation]**

**Issue:**

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

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

The committee notes that in *Williams No. 1*,[[14]](#footnote-14) the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. The committee further notes that, as a result of the High Court decision in *Williams No. 2*,[[15]](#footnote-15) a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under the Constitution. The committee considers that, in light of *Williams No.2*, the ES for all instruments specifying programs for the purposes of section 32B of the FF(SP) Act should explicitly state, for each new program, the constitutional authority for the expenditure.

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

**MINISTER'S RESPONSE:**

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

**COMMITTEE RESPONSE:**

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

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

# Appendix 1

## Correspondence

# Appendix 2

## Guideline on consultation

**Standing Committee on Regulations and Ordinances**

**Addressing consultation in explanatory statements**

***Role of the committee***

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm) of personal rights and parliamentary propriety.

***Purpose of guideline***

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the [*Legislative Instruments Act 2003*](http://www.comlaw.gov.au/Details/C2012C00041) (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to [disallowance](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm).

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the rule-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

***Requirements of the* Legislative Instruments Act 2003**

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

***Describing the nature of consultation***

To meet the requirements of section 26 of the Act, an ES must *describe the nature of any consultation that has been undertaken*. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

*Method and purpose of consultation*

An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.

*Bodies/groups/individuals consulted*

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

*Issues raised in consultations and outcomes*

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

***Explaining why consultation has not been undertaken***

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

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

*Specific examples listed in the Act*

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

*Timing of consultation*

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

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

***Seeking further advice or information***

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

Committee Secretary

Senate Regulations and Ordinances Committee

PO Box 6100

Parliament House

Canberra ACT 2600

Australia

Phone: +61 2 6277 3066

Fax: +61 2 6277 5881

Email: [RegOrds.Sen@aph.gov.au](mailto:RegOrds.Sen@aph.gov.au)

1. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at [www.comlaw.gov.au](http://www.comlaw.gov.au) [↑](#footnote-ref-1)
2. For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15. [↑](#footnote-ref-2)
3. Senate Disallowable Instruments List, available at <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List> [↑](#footnote-ref-3)
4. For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16-17. [↑](#footnote-ref-4)
5. *Mid-Year Economic and Fiscal Outlook 2014-15*, Appendix A: Policy decisions taken since the 2014-15 Budget, Global Infrastructure Hub (December 2014) 199. [↑](#footnote-ref-5)
6. For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16-17. [↑](#footnote-ref-6)
7. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-7)
8. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 17 of 2014 (3 December 2014) 6–24. Monitor No. 17 contains all prior correspondence from FPC, answers to questions on notices, and responses from various ministers. (Prior correspondence is therefore not referenced or reproduced in full in this entry). [↑](#footnote-ref-8)
9. These responsibilities remain effectively unchanged by the Acts and Instruments (Framework Reform) Bill 2014. [↑](#footnote-ref-9)
10. For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-10)
11. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-11)
12. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-12)
13. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-13)
14. *Williams v Commonwealth* [2012] 248 CLR 156. [↑](#footnote-ref-14)
15. *Williams v Commonwealth* [2014] HCA 23 (19 June 2014). [↑](#footnote-ref-15)