The Senate

Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Introduction

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

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

### The committee's terms of reference

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

* + 1. (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
		2. (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
		3. The committee shall scrutinise each instrument to ensure:
		4. (a) that it is in accordance with the statute;
		5. (b) that it does not trespass unduly on personal rights and liberties;
		6. (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
		7. (d) that it does not contain matter more appropriate for parliamentary enactment.

### Work of the committee

The committee scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

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

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

### Structure of the report

The report is comprised of the following parts:

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

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

Appendix 1 contains correspondence relating to concluded matters.

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

### Acknowledgement

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

**Senator John Williams**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **4 March 2015**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

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

This report considers all disallowable instruments tabled between 30 January 2015 and 19 February 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[[3]](#footnote-3)

## New matters

### AASB 15 — Revenue from Contracts with Customers — December 2014 [F2015L00115]

|  |  |
| --- | --- |
| **Purpose** | Establishes the principles that an entity shall apply to report useful information to users of financial statements about the nature, amount, timing and uncertainty of revenue and cash flows arising from a contract with a customer. This standard applies to annual reporting periods beginning on or after 1 January 2017 |
| **Last day to disallow** | 12 May 2015 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |

**Issue:**

*Retrospective effect*

Paragraph Aus4.2 of the instrument provides that it applies to 'annual reporting periods beginning on or after 1 January 2017'. Paragraph Aus4.3 provides the instrument 'may be applied to annual reporting periods beginning on or after 1 January 2005 but before 1 January 2017'. Paragraph C3 of Appendix C of the instrument (which deals with 'effective date and transition') provides:

* + 1. C3 An entity shall apply this Standard using one of the following two methods:
		2. (a) retrospectively to each prior reporting period presented in accordance with AASB 108 Accounting Policies, Changes in Accounting Estimates and Errors, subject to the expedients in paragraph C5; or
		3. (b) retrospectively with the cumulative effect of initially applying this Standard recognised at the date of initial application in accordance with paragraphs C7–C8.

The two methods for applying the standard indicate that the instrument only has a retrospective operation. 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's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the explanatory statement (ES). **The committee therefore requests further information from the minister (as to the justification for this approach).**

## Continuing matters

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

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

* + 1. Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[[4]](#footnote-4)

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

|  |
| --- |
| AASB 2014-10 Amendments to Australian Accounting Standards – Sale or Contribution of Assets between an Investor and its Associate or Joint Venture [F2015L00138] |
| AASB 2014-5 Amendments to Australian Accounting Standards arising from AASB 15 [F2015L00107] |
| AASB 2014-6 - Amendments to Australian Accounting Standards – Agriculture: Bearer Plants [F2015L00106] |
| AASB 2014-7 Amendments to Australian Accounting Standards arising from AASB 9 (December 2014) [F2015L00135] |
| AASB 2014-8 Amendments to Australian Accounting Standards arising from AASB 9 (December 2014) – Application of AASB 9 (December 2009) and AASB 9 (December 2010) [F2015L00136] |
| AASB 2014-9 Amendments to Australian Accounting Standards – Equity Method in Separate Financial Statements [F2015L00137] |
| AASB 2015-1 Amendments to Australian Accounting Standards – Annual Improvements to Australian Accounting Standards 2012–2014 Cycle [F2015L00139] |
| AASB 2015-2 Amendments to Australian Accounting Standards – Disclosure Initiative: Amendments to AASB 101 [F2015L00141] |
| AASB 2015-3 - Amendments to Australian Accounting Standards arising from the Withdrawal of AASB 1031 Materiality - January 2015 [F2015L00134] |
| AASB 2015-4 - Amendments to Australian Accounting Standards – Financial Reporting Requirements for Australian Groups with a Foreign Parent - January 2015 [F2015L00140] |
| ASIC Derivative Transaction Rules (Nexus Derivatives) Class Exemption 2015 [F2015L00100] |
| Australian Passports Amendment Determination 2015 (No. 1) [F2015L00129] |
| Customs Act 1901 - CEO Directions No. 1 of 2015 [F2015L00099] |
| Customs Act 1901 - CEO Directions No. 2 of 2015 [F2015L00101] |
| Migration Regulations 1994 - Specification of Access to Movement Records 2015 - IMMI 15/011 [F2015L00114] |
| National Health (Pharmaceutical Benefits (Application to supply pharmaceutical benefits following the death of approved pharmacist — documentary evidence) Determination 2015 (PB 5 of 2015) [F2015L00094] |
| Public Governance, Performance and Accountability Legislation Amendment (Office of the Fair Work Building Industry Inspectorate) Rule 2015 [F2015L00086] |

|  |
| --- |
| Therapeutic Goods Information Specification 2009 Revocation Specification 2015 [F2015L00090] |
| Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2014-2015 Amendment [F2015L00097] |
| Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2014 - 2015 Amendment No. 2 [F2015L00155] |

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **4 March 2015**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

### ASIC Class Order [CO 14/1118] [F2014L01484]

|  |  |
| --- | --- |
| **Purpose** | Amends the ASIC Class Order [CO 12/749] by extending the relief from the shorter Product Disclosure Statement (PDS) regime, that was due to expire on 30 June 2015, to 30 June 2016 pending the outcome of the Financial System Inquiry and further work by the Government on the shorter PDS regime |
| **Last day to disallow** | 2 March 2015 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |

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

**Issue:**

*Timetable for making of substantive amendments to principal legislation*

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). This may include instruments which extend relief from compliance with principal legislation.

The Corporations Amendment Regulations 2010 (No 5) established a new shorter Product Disclosure Statement (PDS) regime under Subdivision 4.2B (for superannuation products) and Subdivision 4.2C (for simple managed investment schemes) of Division 4 of Part 7.9 of the Corporations Regulations 2001. The shorter PDS regime commenced in full on 22 June 2012. ASIC Class Order [CO 12/749] provided interim relief, until 30 June 2015, excluding multi-funds, superannuation platforms and hedge funds from the shorter PDS regime.

This instrument extends, until 30 June 2016, the relief provided by Class Order [CO 12/749], pending the outcome of the Financial System Inquiry and further work by government on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds.

The committee notes the instrument extends the previous three years of relief by a further 12 months. The committee generally prefers that relief from compliance with an Act effected via legislative instrument does not operate as a de facto amendment to primary legislation.

**[Noting the final report of the Financial System Inquiry was to be provided to the Treasurer by November 2014,[[5]](#footnote-5) the committee sought the minister's advice as to the progress of the further work by government on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds; and the appropriateness of continuing to provide relief via legislative instrument in this case].**

**MINISTER'S RESPONSE:**

The Assistant Treasurer advised that the Class Order, in providing extended relief from the Corporations Regulations 2001, effectively restored the operation of the primary legislation pending the outcome of the government's response to the Financial System Inquiry:

* + 1. ASIC Class Order [C014/1118] extends regulatory relief from the shorter Product Disclosure Statement (PDS) regime, originally granted in ASIC Class Order [C012/749], by a year to 30 June 2016. The shorter PDS regime is contained in a legislative instrument, the Corporations Regulations 2001, and acts as an alternative regime to the PDS requirements in the primary legislation, the Corporations Act 2001.
		2. The shorter PDS regime applies to simple managed investment schemes (MIS). Whether a MIS is simple depends on whether it meets one of the liquidity tests, for example, whether 80 per cent of its assets in investments could be realised at market value within ten days.
		3. As presently defined, the term 'simple MIS' inadvertently captures MIS which are liquid but would not be considered simple. This includes some superannuation platforms, multi-funds and hedge funds. The shorter PDS regime may be inappropriate for these more complex MIS and further work is required to determine whether and how the shorter PDS regime should apply. For this reason, the former Government provided exemptions for each of these categories of MIS from the shorter PDS regime in 2012.
		4. I note the Committee's request for advice as to the progress of the Governments work on application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds, and on the appropriateness of continuing to provide relief from the shorter PDS regime via legislative instrument.
		5. For the reasons which follow, I consider that it is appropriate to continue providing relief from the shorter PDS regime through ASIC Class Order [CO14/1118].
		6. As the Committee notes in its *Delegated legislation monitor* No 17 of 2014, the regulatory relief provided in Class Order [C014/1118] was extended pending the outcome of the Financial System Inquiry (the Inquiry), and the Government's work on application of the shorter PDS regime to more complex MIS.
		7. The Government was unable to progress this work whilst the Inquiry was ongoing as the Inquiry may have recommended significant changes to the existing disclosure regime. The Inquiry's Final Report was released on 7 December 2014. The Government announced that it intends to consult on the Inquiry's final report before making any decisions on the recommendations. Written submissions will be accepted until 31 March 2015.
		8. I understand the Committee's preference that relief from compliance with an Act which is effected via legislative instrument does not operate as a de facto amendment to primary legislation. In this case, ASIC Class Order [C014/1118] effectively restores the operation of the primary legislation, the *Corporations Act 2001*, providing relief from the alternative regime provided for in the Corporations Regulations 2001.

**COMMITTEE RESPONSE:**

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

### 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 |

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

**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 explanatory statement (ES).

**[The committee therefore requested further information from the General Manager (as to the justification for this approach)].**

**GENERAL MANAGER'S RESPONSE:**

The General Manager of the Fair Work Commission advised that the effect of the instrument was prospective rather than retrospective:

* + 1. The instrument sets out specific disclosures that must be made in the General Purpose Financial Report (GPFR) of reporting units. Section 253 of the Act [*Fair Work (Registered Organisations) Act 2009*] requires a reporting unit to prepare a GPFR as soon as practicable after the end of the financial year. Although a GPFR prepared for a financial year ending 30 June 2014 contains information about financial transactions that occurred prior to 30 June 2014, the GPFR cannot be prepared until after 30 June 2014. The instrument therefore imposes obligations on reporting units that have no effect until after 30 June 2014.
		2. The Commission consulted with all registered organisations in the development of the instrument and most comments of the reporting units have been included. The Commission has also advised every reporting unit of the requirements, and provided a model set of financial statements to all reporting units to ensure that the requirements of the instrument are satisfied. Of the 274 reporting units with a financial year ending 30 June 2014, all but eight have lodged their financial report with the Commission, or have sought an exemption. Our assessment of the GPFR's lodged is that most reporting units have satisfied the requirements of the instrument. This illustrates that there is significant acceptance of and support for the requirements of the instruments.

**COMMITTEE RESPONSE:**

**The committee thanks the General Manager for her response.**

However, the committee notes the instrument was not registered until 18 December 2014. Therefore, under section 31 of the *Legislative Instruments Act 2003*, the instrument was not enforceable until that date. Given this, the committee regards it as correct to identify the character of the instrument as retrospective in effect. However, the committee notes that the information provided regarding the GPFR process and the high compliance rate of reporting units have addressed the substance of the committee's inquiry. **The committee therefore draws to the attention of the General Manager the provisions of the *Legislative Instruments Act 2003* with regard to the registration of legislative instruments and has concluded its examination of the instrument.**

### 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 |

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

**Issue:**

*Insufficient information regarding consultation*

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

* + 1. 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, it usually considers that an overly bare or general description, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003.* The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report.

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

**MINISTER'S RESPONSE:**

The Minister for Small Business advised that the instrument revoked the previous direction that had provided for price monitoring related to the Carbon Tax Repeal Bill. The minister advised that extensive public consultation occurred as part of the Carbon Tax Repeal Bill:

* + 1. The Repeal Direction revoked the price monitoring Direction made on 18 February 2014 under section 95ZE of the *Competition and Consumer Act 2010* (CCA).
		2. The price monitoring Direction, which commenced on 1 March 2014, was introduced given delays in the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (the Carbon Tax Repeal Act). It directed the Australian Competition and Consumer Commission (ACCC) to undertake formal monitoring of 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 prior to its repeal (Federal Register of Legislative Instruments No.F2014L00180).
		3. The price monitoring Direction was drafted to largely mirror the price monitoring provisions of the Carbon Tax Repeal Bill. As outlined in the Explanatory Statement to the price monitoring Direction, consultation on these arrangements occurred as part of extensive public consultation on the Exposure Draft of the Bill from 15 October 2013 to 4 November 2014. The provisions of the Bill were also examined by the Environment and Communications Legislation Committee Inquiry following referral by the Senate on 14 November 2014.
		4. The Carbon Tax Repeal Act, which took effect from 1 July 2014, introduced new powers for the ACCC to monitor the prices of certain goods to assess the general effect of the carbon tax scheme and its repeal. This included powers to monitor prices to assess the effect of the carbon tax repeal on prices charged by entities for supplies in the carbon tax repeal transition period (from 1 July 2014 to 30 June 2015) and to assist in considering whether an entity has engaged, is or may engage in price exploitation (section 60G of the CCA).
		5. In effect, the repeal of the carbon tax scheme made the price monitoring Direction redundant. Its revocation by the Repeal Direction imposes no regulatory change on affected businesses as the reporting obligations have continued through the introduction of section 60G, while any perceived regulatory burden by having two monitoring regimes in place has been reduced.

The minister advised that further public consultation was therefore considered unnecessary 'as the revocation of the instrument did not substantially alter existing arrangements for which there was extensive public consultation through the Exposure Draft of the Carbon Tax Repeal Bill'.

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

**COMMITTEE RESPONSE:**

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

### 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 |

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

**Issue:**

*No description regarding consultation*

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

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

**MINISTER'S RESPONSE:**

The Minister for Employment advised that extensive consultation had occurred during the review of the Building and Construction Work Health Safety Accreditation Scheme (the review), and therefore further consultation was considered unnecessary:

* + 1. As noted in the explanatory statement, the Regulation implements the Australian Government's decision to accept all recommendations of a recent review of the Australian Government Building and Construction Work Health Safety Accreditation Scheme, with two minor adjustments. 'A review to modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme' identified options for streamlining and modernising the Scheme and to reduce any unnecessary regulatory burdens on builders.
		2. The Review was conducted by the Department of Employment supported by an advisory panel of industry groups, unions and interested parties including Master Builders Australia, the Australian Constructors Association, the Australian Industry Group, the Civil Contractors Federation, and the Australian Council of Trade Unions.
		3. The Review was also informed by public submissions provided in response to a discussion paper that was published on the Department of Employment's website. Emails inviting submissions were sent to all companies accredited under the Accreditation Scheme, state and territory work health and safety regulators, Safe Work Australia and a range of industry representatives.
		4. …
		5. Because the Regulation implements recommendations from the Review and extensive consultation occurred throughout the Review process, it was reasonably considered that any further consultation on the draft Regulation would be unnecessary if not excessive in the circumstances.

The minister also provided a copy of the review and a link to the review webpage including access to the full list of submissions.

The minister further advised that the ES would be updated in accordance with the committee's request.

**COMMITTEE RESPONSE:**

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

# Appendix 1

## Correspondence

# Appendix 2

## Guideline on consultation

**Standing Committee on Regulations and Ordinances**

**Addressing consultation in explanatory statements**

***Role of the committee***

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

***Purpose of guideline***

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

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

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

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

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

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

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

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

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

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

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

***Describing the nature of consultation***

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

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

*Method and purpose of consultation*

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

*Bodies/groups/individuals consulted*

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

*Issues raised in consultations and outcomes*

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

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

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

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

*Specific examples listed in the Act*

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

*Timing of consultation*

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

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

***Seeking further advice or information***

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

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1. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at [www.comlaw.gov.au](http://www.comlaw.gov.au) [↑](#footnote-ref-1)
2. For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15. [↑](#footnote-ref-2)
3. Senate Disallowable Instruments List, available at <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List> [↑](#footnote-ref-3)
4. For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-4)
5. Commonwealth of Australia, Financial system inquiry, Terms of reference, <http://fsi.gov.au/terms-of-reference/> (accessed 26 November 2014). [↑](#footnote-ref-5)