

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

Monitor No. 1 of 2013

7 February 2013

© Commonwealth of Australia 2013

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

Membership of the committee

Current members

Senator Mark Furner (Chair)	Queensland, ALP
Senator the Hon Richard Colbeck (Deputy Chair)	Tasmania, LP
Senator Claire Moore	Queensland, ALP
Senator Louise Pratt	Western Australia, ALP
Senator Scott Ryan	Victoria, LP
Senator Arthur Sinodinos AO	New South Wales, LP

Secretariat

Mr Ivan Powell, Secretary
Ms Janice Paull, 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/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm

Contents

Membership of committee	iii
Introduction	ix
Chapter 1 – New and continuing matters	
Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 260] [F2012L02267]	1
Superannuation (prudential standard) determination No. 1 of 2012 - Prudential Standard SPS 114 - Operational Risk Financial Requirement [F2012L02221] and seven related instruments	2
Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278] and two related instruments	3
Water Act 2007 – Basin Plan 2012 [F2012L02240]	4
Defence and Strategic Goods List Amendment 2012 (No. 1) [F2012L02318]	4
National Environment Protection (Movement of Controlled Waste between States and Territories) Measure Minor Variation 2012 (No. 1) [F2012L02300]	5
ASQA Authorised Officer Requirements [F2012L02326]	6
Aviation Transport Security Amendment Regulation 2012 (No. 6) [Select Legislative Instrument 2012 No. 304] [F2012L02424]	7
Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2012 [F2012L02440] and three related instruments	7
Banking Sector Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 319] [F2012L02397]	8
SSAT Child Support Review General Directions 2012 [F2012L02459]	9
CASA 390/12 - Instructions - GNSS primary means navigation (B737 NG aircraft) [F2012L02428]	10
CASA EX184/12 - Exemption - from standard take-off minima - Virgin Australia International Airlines [F2012L02425]	11
Clean Energy Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 289] [F2012L02384]	12
Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 308] [F2012L02414]	12
Family Law Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 278] [F2012L02391]; and Federal Court and Federal Magistrates Court Regulation 2012 [Select Legislative Instrument 2012 No. 280] [F2012L02411]	13
Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 309] [F2012L02410]	14
Health Insurance (Diagnostic Imaging Services Table) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 295] [F2012L02399]	15
Health Insurance (General Medical Services Table) Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 296] [F2012L02406]	16

Legislative Instruments Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 283] [F2012L02376]	17
Life Insurance Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 311] [F2012L02401]	17
Motor Vehicle Standards Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 305] [F2012L02377]	18
Retirement Savings Accounts Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 315] [F2012L02403]; and	19
Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 316] [F2012L02386]	
Fair Work Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 321] [F2012L02417]	20
Fair Work Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 322] [F2012L02409]	20
Migration Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 301] [F2012L02381]	21
Customs Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 276] [F2012L02382]	22
Trans-Tasman Proceedings Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 284] [F2012L02412]	22
Work Health and Safety Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 291] [F2012L02438]	23
Determination to Reduce Appropriations Upon Request (No. 11 of 2011-2012) [F2012L01927]	23
Chapter 2 – Concluded matters	
Interim (Small Pelagic Fishery) Declaration 2012 [F2012L01901]	25
Financial Management and Accountability Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 229] [F2012L01988]	26
Greenhouse and Energy Minimum Standards Regulation 2012 [Select Legislative Instrument 2012 No. 239] [F2012L02037]	27
ASIC Class Order [CO 12/1266] [F2012L01918]; and	28
ASIC Class Order [CO 12/1267] [F2012L01919]	
Professional Standards Scheme Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 247] [F2012L02102]	29
Residential Care Subsidy Amendment Principles 2012 (No. 3) [F2012L02057]	30
Greenhouse and Energy Minimum Standards (Air Conditioners and Heat Pumps) Determination 2012 [F2012L02129] and four related instruments	31
High Court Rules 2004 (Amendment) (November 2012) [F2012L02165]	32
Carbon Credits (Carbon Farming Initiative) (Conservative Estimates, Projections or Assumptions: Greenhouse Friendly Initiative Transitional Crediting Calculation (Alternative Waste Treatment) Determination 2012 [F2012L02191]	34
Defence Determination 2012/65, Cadet forces allowance – amendment	35
Customs Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 249] [F2012L02159]	35

Financial Management and Accountability Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 248] [F2012L02091]	36
Migration Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 230] [F2012L01961]	37
CASA 364/12 - Direction - number of cabin attendants (National Jet Systems) [F2012L02169]	38
Appendix 1 – Index of instruments scrutinised by the committee	41
Appendix 2 – Guideline on explanatory statements: consultation	55
Appendix 3 – Correspondence relating to committee's scrutiny	61

Delegated legislation monitor

Introduction

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

The 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

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.

principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

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

Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;
- Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;
- 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 Mark Furner

Chair

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

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **7 February 2013**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers seeking further information or an appropriate undertaking within the disallowance period.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 260] [F2012L02267]

Purpose	Increases the permit application fees specified in the principal regulations from 1 January 2013
Last day to disallow¹	21 March 2013
Authorising legislation	<i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>
Department	Sustainability, Environment, Water, Population and Communities

ISSUE:

Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).² With reference to these requirements, the committee notes that, while the ES for the instrument refers to a 'short period' of unspecified duration during which advice on the fee increases will be provided to industry members, there is no indication that there has been any consultation prior to the making of the instrument. **The committee will therefore seek further**

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

2 The committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003* is included at Appendix 2.

information from the minister and request that the ES be updated in accordance with the requirements of the LIA.

Superannuation (prudential standard) determination No. 1 of 2012 - Prudential Standard SPS 114 - Operational Risk Financial Requirement [F2012L02221] and seven related instruments³

Purpose	These instruments determine a number of prudential standards
Last day to disallow	19 March 2013
Authorising legislation	<i>Superannuation Industry (Supervision) Act 1993</i>
Department	Treasury

ISSUE:

Regulation Impact Statement not provided

Each of the ESs which accompanies the instruments notes that a Regulation Impact Statement (RIS) is required for the relevant standard. However, no RISs have been provided with the instruments. Where a RIS has been prepared in relation to an instrument, the committee's longstanding practice is to require that it be provided as an attachment to the ES. **The committee will therefore draw this issue to the attention of the minister.**

3 Superannuation (prudential standard) determination No. 2 of 2012 - Prudential Standard SPS 220 - Risk Management [F2012L02222]; Superannuation (prudential standard) determination No. 3 of 2012 - Prudential Standard SPS 231 – Outsourcing [F2012L02223]; Superannuation (prudential standard) determination No. 4 of 2012 - Prudential Standard SPS 232 - Business Continuity Management [F2012L02224]; Superannuation (prudential standard) determination No. 5 of 2012 - Prudential Standard SPS 250 - Insurance in Superannuation [F2012L02225]; Superannuation (prudential standard) determination No. 6 of 2012 - Prudential Standard SPS 510 – Governance [F2012L02229]; Superannuation (prudential standard) determination No. 7 of 2012 - Prudential Standard SPS 521 - Conflicts of Interest [2012L02230]; and Superannuation (prudential standard) determination No. 8 of 2012 - Prudential Standard SPS 530 - Investment Governance [F2012L02231].

Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278] and two related instruments⁴

Purpose	Substitutes a new Part 4 in the principal regulations dealing with the reporting of immediately reportable and routinely reportable matters; amends the principal regulations as a consequence of the Transport Safety Investigation (Confidential Reporting Scheme) Regulation 2012; and establishes a scheme for confidential reporting that applies to aviation, marine and rail transport
Last day to disallow	14 May 2013
Authorising legislation	<i>Air Navigation Act 1920; Navigation Act 1912; and Transport Safety Investigation Act 2003</i>
Department	Infrastructure and Transport

ISSUE:

No 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 accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

⁴ Transport Safety Investigation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 264] [F2012L02280]; and Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012 [Select Legislative Instrument 2012 No. 265] [F2012L02281].

Water Act 2007 – Basin Plan 2012 [F2012L02240]

Purpose	Specifies a Basin Plan for the Murray-Darling Basin
Last day to disallow	19 March 2013
Authorising legislation	<i>Water Act 2007</i>
Department	Sustainability, Environment, Water, Population and Communities

ISSUE:

Availability of merits review for certain decisions

Part 3 of the plan requires an irrigation infrastructure operator to specify a person's water delivery rights, changes to those rights, and irrigation rights and changes to those rights. The committee considers that it is not clear from the plan what rights of review a person has in relation to decisions made by an irrigation infrastructure operator. **The committee will therefore seek further information from the minister.**

Defence and Strategic Goods List Amendment 2012 (No. 1) [F2012L02318]

Purpose	Amends the list of defence and dual-use goods which are prohibited from being exported from Australia without a licence or permission granted by the minister or an authorised person
Last day to disallow	15 May 2013
Authorising legislation	<i>Customs Act 1901</i>
Department	Defence

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, while the ES for the instrument refers to issues raised in the review of the Defence Trade Control Bill, it goes on to state that these issues (and more general stakeholder engagement) will be addressed through the provision of training and materials through the Defence Export Control Office, in consultation with the Strengthened Export Controls Steering Group (the composition of which is not described).

The committee considers that it is unclear as to why consultation was considered unnecessary or inappropriate in this case. **The committee will therefore seek further information from the minister and request that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

National Environment Protection (Movement of Controlled Waste between States and Territories) Measure Minor Variation 2012 (No. 1) [F2012L02300]

Purpose	Makes minor editorial changes and corrects typographical errors in the principal instrument
Last day to disallow	15 May 2013
Authorising legislation	<i>National Environment Protection Council Act 1994</i>
Department	Sustainability, Environment, Water, Population and Communities

ISSUES:

(a) No 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 accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

(b) No statement of compatibility with human rights

(2) Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility with specified human rights for each disallowable legislative instrument. Subsection 9(2) requires the statement of compatibility to include an assessment of whether the legislative instrument is compatible with human rights. No statement of compatibility accompanies this instrument. **The committee notes that the Parliamentary Joint Committee on**

Human Rights has identified this issue (First Report of 2013),⁵ and will defer to that committee's carriage of the matter.

ASQA Authorised Officer Requirements [F2012L02326]

Purpose	Specifies the experience, training and qualification requirements for persons to be appointed as authorised officers under the <i>National Vocational Education and Training Regulator Act 2011</i>
Last day to disallow	15 May 2013
Authorising legislation	<i>National Vocational Education and Training Regulator Act 2011</i>
Department	Industry, Innovation, Science, Research and Tertiary Education

ISSUE:

Unclear term/criteria

The instrument specifies the experience, training and qualification requirements for persons to be appointed as authorised officers under the *National Vocational Education and Training Regulator Act 2011*. Item 6(1) states that a person will satisfy the experience requirements if they are able to demonstrate previous experience in specified roles 'for a length of time deemed acceptable by the Chief Commissioner', and the ES states that the relevant length of time is to be determined by the Chief Commissioner. It is thus not clear to the committee in what manner and form the Chief Commissioner will deem or determine the relevant length of time, or how prospective authorised officers will be made aware of this criterion. The committee's usual expectation with regard to instruments that establish criteria guiding administrative decision making is that such criteria are clear and objectively ascertainable on the face of an instrument and its supporting ES. **The committee will therefore seek further information from the minister.**

5 Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 19-29 November 2012 [and] Legislative Instruments registered with the Federal Register of Legislative Instruments 17 November 2012 – 4 January 2013', (First Report of 2013), February 2013, Appendix 1.

Aviation Transport Security Amendment Regulation 2012 (No. 6) [Select Legislative Instrument 2012 No. 304] [F2012L02424]

Purpose	Makes a number of amendments to the principal regulations
Last day to disallow	15 May 2013
Authorising legislation	<i>Aviation Transport Security Act 2004</i>
Department	Infrastructure and Transport

ISSUE:

No information provided 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 accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2012 [F2012L02440] and three related instruments⁶

Purpose	The instruments determine a number of prudential standards
Last day to disallow	15/5
Authorising legislation	<i>Banking Act 1959; Insurance Act 1973; and Life Insurance Act 1995</i>
Department	Treasury

ISSUE:

Drafting

The instruments contain drafting deficiencies, including an unclear expression in the definition of **registered life NOHC** and a typographical error in determination No. 1. **The committee will draw these issues to the attention of the Treasurer.**

⁶ Banking, Insurance and Life Insurance (prudential standard) determination No. 3 of 2012 [F2012L02441]; Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2012 and [F2012L02445]; and Banking Sector Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 319] [F2012L02397].

Banking Sector Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 319] [F2012L02397]

Purpose	Amends the principal regulations and the First Home Saver Accounts Regulations 2008 to specify conditions for a number of bank accounts or deposits and First Home Saver Accounts to become unclaimed moneys
Last day to disallow	15 May 2013
Authorising legislation	<i>Banking Act 1959</i> ; and <i>First Home Saver Accounts Act 2008</i>
Department	Treasury

ISSUES:

(a) Commencement

The instrument inserts into the banking regulations new regulation 20, which specifies accounts and conditions relating to those accounts for the purposes of subsection 69(1B) of the *Banking Act 1959*. Subsection 69(1B) is scheduled to commence on 1 July 2013. While the committee understands that the making of instruments prior to the commencement of the relevant empowering provision, as in this case, is authorised by section 4 of the *Acts Interpretation Act 1901* (the AIA), that section also sets out a number of conditions that must be met. The ES that accompanies the instrument does not address whether these conditions are relevant and, if so, have been met in this case. **The committee will therefore seek further information from the Treasurer.**

(b) No 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 accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the Treasurer and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

SSAT Child Support Review General Directions 2012 [F2012L02459]

Purpose	Provides for the procedures to be followed in relation to child support review hearings before the Social Security Appeals Tribunal (SSAT)
Last day to disallow	15 May 2013
Authorising legislation	<i>Child Support (Registration and Collection) Act 1988</i>
Department	Families, Housing, Community Services and Indigenous Affairs

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 the instrument states that consultation was not required in this case due to both its urgency and the fact that its effect is 'largely machinery in nature' and 'will not substantially affect or alter reviews by the SSAT'. First, the committee considers that the ES does not adequately explain the circumstances leading to the urgency of the instrument, particularly as to whether there was a reasonable opportunity to anticipate the need for the changes effected by the instrument (arising from the development and passage of the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012*). Second, the committee considers that the statement that the instrument is 'largely machinery' implies that it may also have more substantial effects that could have a bearing on the conclusion that consultation was unnecessary or inappropriate in this case. **The committee will therefore seek further information from the minister and request that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

CASA 390/12 - Instructions - GNSS primary means navigation (B737 NG aircraft) [F2012L02428]

Purpose	Allows Virgin Australia International Airlines B737 NG aircraft that are capable of meeting the applicable Required Navigation Performance to carry out RNAV (GNSS) approach procedures
Last day to disallow	15 May 2013
Authorising legislation	Civil Aviation Regulations 1988
Department	Infrastructure and Transport

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 the instrument states that consultation was not undertaken, because the instrument is 'consistent with previous instruments issued to Virgin Australia International Airlines Pty Ltd and other Australian airlines [and will]...allow Virgin Australia International Airlines Pty Ltd to reduce dependence on ground based systems'. While the committee does not usually interpret section 26 as requiring a highly detailed explanation as to why consultation was not undertaken, it considers that an overly bare or general explanation is not sufficient to satisfy the requirement that an ES explain why consultation was not undertaken. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

CASA EX184/12 - Exemption - from standard take-off minima - Virgin Australia International Airlines [F2012L02425]

Purpose	Allows Virgin Australia International Airlines Pty Ltd to operate B737 NG aircraft in low visibility conditions on the same terms as Virgin Australia Airlines Pty Limited, subject to conditions.
Last day to disallow	15 May 2013
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Transport

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 the instrument states that consultation was not undertaken, because the instrument is 'required by the operator to enable low visibility take-offs inside and outside Australian territory consistent with the standards and requirements specified in the instrument which are not considered prejudicial to the interests of safety'. While the committee does not usually interpret section 26 as requiring a highly detailed explanation as to why consultation was not undertaken, it considers that an overly bare or general explanation is not sufficient to satisfy the requirement that an ES explain why consultation was not undertaken. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Clean Energy Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 289] [F2012L02384]

Purpose	Amends the Clean Energy Regulations 2011 to establish the liquid fuels Opt-in Scheme and make other amendments
Last day to disallow	15 May 2013
Authorising legislation	<i>Clean Energy Act 2011</i>
Department	Climate Change and Energy Efficiency

ISSUE:

Drafting

This instrument inserts a new Division 7 into the Clean Energy Regulations 2011, and contains a number of definitions. One of these is as follows:

joint venture operator, of a GST joint venture, has the same meaning as in the *Fuel Tax Act 2006*

The relevant definition in the *Fuel Tax Act 2006* is that 'joint venture operator' has the meaning given by section 195-1 of the GST Act. In contrast, the instrument in other cases provides a more direct definition to the GST Act, such as for 'representative member, of a GST group', which has the meaning given by section 195-1 of the GST Act. The committee considers that it is unclear why divergent approaches have been taken in relation to these definitions. **The committee will therefore seek further information from the minister.**

Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 308] [F2012L02414]

Purpose	Amends the Corporations Amendment Regulation 2012 (No. 6) to correct a number of deficiencies
Last day to disallow	15 May 2013
Authorising legislation	<i>Corporations Act 2001</i>
Department	Treasury

ISSUE:

No information provided 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

accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Family Law Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 278] [F2012L02391]; and

Federal Court and Federal Magistrates Court Regulation 2012 [Select Legislative Instrument 2012 No. 280] [F2012L02411]

Purpose	Repeals and replaces the Federal Court of Australia Regulations 2004 and the Federal Magistrates Regulations 2000 with a consolidated regulation for proceedings in the Federal Court of Australia and the Federal Magistrates Court of Australia
Last day to disallow	15 May 2013
Authorising legislation	<i>Federal Court of Australia Act 1976</i> ; and <i>Federal Magistrates Act 1999</i>
Department	Attorney-General's

ISSUE:

Drafting

Item [4] of Schedule 1 to the first instrument mentioned inserts a new regulation 83 into the Family Law Regulations 1984, and provides:

- (1) Despite the amendments made by the Family Law Amendment Regulation 2012 (No. 4), these Regulations, as in force immediately before 1 January 2013, (the old Regulations) continue to apply to a fee for a service requested under the old Regulations before 1 January 2013, unless another transitional provision says otherwise.

The committee notes that the bracketed phrase '(the old Regulations)' should presubaly appear before the comma, to make it quite clear that that phrase refers to the 'Regulations, as in force immediately before 1 January 2013'. The same issue arises in relation to subregulations 5.01(2) and 5.02(2) of the second instrument mentioned. The committee generally raises such matters on an advice-only basis in the interests of ensuring the highest quality of standards of drafting in legislative instruments in accordance with subsection 3(c) of the *Legislative Instruments Act 2003*, which states that one of its objects is 'encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users'. **The committee will therefore draw the issue to the Attorney-General's attention.**

Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1)
[Select Legislative Instrument 2012 No. 309] [F2012L02410]

Purpose	Amends the Foreign Acquisitions and Takeovers Regulations 1989 to give effect to Australia's commitments under the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement
Last day to disallow	15 May 2013
Authorising legislation	<i>Foreign Acquisitions and Takeovers Act 1975</i>
Department	Treasury

ISSUE:

(a) Drafting

The committee notes that section 2 of the instrument provides:

- (1) This regulation commences on the day notified by the Minister in an instrument.
- (2) An instrument made under subsection (1) is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the instrument.

In the committee's experience, declarations as to whether or not a particular instrument is a legislative instrument, and as to the application of section 4 (disallowance) and part 6 of the *Legislative Instruments Act 2003* (the Act), are commonly situated in primary rather than subordinate legislation. The basis for this approach is not apparent or otherwise addressed in the ES for the instrument. **The committee will therefore seek further information from the Assistant Treasurer.**

(b) 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 the instrument states only that 'the National Interest Analysis provided to the Joint Standing Committee outlines the extensive consultation process undertaken as part of the negotiations'. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken (or explanation as to why consultation was not undertaken), it considers that an overly bare or general explanation is not sufficient to satisfy the requirements of section 26 of the *Legislative Instruments Act 2003*. **The committee will therefore seek further information from**

the Assistant Treasurer and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Health Insurance (Diagnostic Imaging Services Table) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 295] [F2012L02399]

Purpose	Amends the Health Insurance (Diagnostic Imaging Services Table) Regulation 2012 to correct an error in the description of item 63513
Last day to disallow	15 May 2013
Authorising legislation	<i>Health Insurance Act 1973</i>
Department	Health and Ageing

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 on the issue of consultation the ES for the instrument states only that the 'change is a minor amendment to correct an omission in the Principal Regulation'. In the committee's view, this statement is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken, or provide an explanation of why consultation was not undertaken. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Health Insurance (General Medical Services Table) Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 296] [F2012L02406]

Purpose	Amends the Health Insurance (General Medical Services Table) Regulation 2012 to include a number of minor changes to implement Government policies in relation to Medicare
Last day to disallow	15 May 2013
Authorising legislation	<i>Health Insurance Act 1973</i>
Department	Health and Ageing

ISSUES:

(a) 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 that accompanies the instrument states only that the 'change is a minor amendment to correct an omission in the Principal Regulation'. In the committee's view, this statement is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken, or provide an explanation of why consultation was not undertaken. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

(b) drafting

The committee notes that in item [14] of schedule 1 the reference to 'Clause 2.11.1 table, item 389. should presumably be a reference to 'clause 2.11.1, table, item 389'. The committee generally raises such matters on an advice-only basis in the interests of ensuring the highest quality of standards of drafting in legislative instruments in accordance with subsection 3(c) of the *Legislative Instruments Act 2003*, which states that one of its objects is 'encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users'. **The committee will therefore draw the issue to the minister's attention.**

Legislative Instruments Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 283] [F2012L02376]

Purpose	Amends the Legislative Instruments Regulations 2004 to make technical amendments which relate to amendments made to the Intelligence Services Act 2001 in July 2011.
Last day to disallow	15 May 2013
Authorising legislation	<i>Legislative Instruments Act 2003</i>
Department	Attorney-General's

ISSUE:

No 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 accompanying the instrument contains no reference to consultation. **The committee will therefore seek further information from the Attorney-General and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Life Insurance Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 311] [F2012L02401]

Purpose	A mends the Life Insurance Regulations 1995 to implement a commitment by Australia to allow New Zealand life insurance companies to seek approval to operate in Australia as a branch
Last day to disallow	15 May 2013
Authorising legislation	<i>Life Insurance Act 1995</i>
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 that accompanies the instrument states only that 'the National Interest Analysis provided to the Joint Standing Committee outlines the extensive consultation process undertaken as part of the negotiations consultation'. In the committee's view, this statement is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken or, alternatively, provide an explanation of why consultation was not undertaken. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Motor Vehicle Standards Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 305] [F2012L02377]

Purpose	Amends the Motor Vehicle Standards Regulations 1989
Last day to disallow	15 May 2013
Authorising legislation	<i>Motor Vehicle Standards Act 1989</i>
Department	Infrastructure and Transport

ISSUE:

Drafting

The committee notes that paragraph 6 of the ES for this instrument refers to the 'Principle regulations'. The committee generally raises such matters on an advice-only basis in the interests of ensuring the highest quality of standards of drafting in legislative instruments in accordance with subsection 3(c) of the *Legislative Instruments Act 2003*, which states that one of its objects is 'encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users'. **The committee will therefore draw the issue to the minister's attention.**

Retirement Savings Accounts Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 315] [F2012L02403]; and

Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 316] [F2012L02386]

Purpose	These instruments amend the Retirement Savings Accounts Regulations 1997 and the Superannuation Industry (Supervision) Regulations 1994 to introduce a 12-month inactivity test for uncontactable members of a super fund
Last day to disallow	15 May 2013
Authorising legislation	<i>Retirement Savings Accounts Act 1997</i> ; and <i>Superannuation Industry (Supervision) Act 1993</i>
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 instrument addresses the issue of consultation only indirectly (and apparently seeks to rely on an inquiry into the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 conducted by the Senate Standing Committee on Economics). In the committee's view, the information provided in the ES is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken in relation to the making of an instrument. **The committee will therefore seek further information from the minister and request that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Fair Work Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 321] [F2012L02417]

Purpose	Amends the Fair Work Regulations 2009, the Fair Work (Registered Organisations) Regulations 2009, the Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 and the Occupational Health and Safety (Maritime Industry) Regulations 1995
Last day to disallow	15 May 2013
Authorising legislation	<i>Fair Work (Registered Organisations) Act 2009; Occupational Health and Safety (Maritime Industry) Act 1993; Fair Work Act 2009; and Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
Department	Education, Employment and Workplace Relations

ISSUE:

Drafting

Regulation 3.16A requires, inter alia, that a protected ballot agent must ensure that in the conduct of an electronic ballot 'there is no way of identifying how any employee has voted'. The committee notes, however, that the ability to identify ballot papers is necessary to ensure that ballots are conducted fairly. Given also that the regulation later provides that an agent must remove any identifiers from an electronic (and postal) ballot before the scrutineer can examine them (see, for example, new paragraph 3.20(6)(a)), it would appear that the intent of regulation 3.16A is rather that electronic (and other identifiable) ballots are able to have identifiers removed (that is, are capable of being rendered unidentifiable). **The committee will therefore seek further information from the minister.**

Fair Work Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 322] [F2012L02409]

Purpose	Amends the Fair Work Regulations 2009 and the Fair Work (Registered Organisations) Regulations 2009
Last day to disallow	15 May 2013
Authorising legislation	<i>Fair Work (Registered Organisations) Act 2009; and Fair Work Act 2009</i>
Department	Education, Employment and Workplace Relations

ISSUE:

Drafting

Clause (6)(b)(iii) of Schedule 6.1A to the regulation states, inter alia, that an employee must comply with a direction unless it is 'not appropriate for the employee to perform'. In the committee's view this criterion, depending as it does on the notion of

appropriateness, appears to involve a subjective judgement that could give rise to uncertainty about its application in a given case. **The committee will therefore seek further information from the minister.**

Migration Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 301] [F2012L02381]

Purpose	Amends the Migration Regulations 1994 to strengthen and improve immigration policy
Last day to disallow	15 May 2013
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Citizenship

ISSUE:

Unclear basis for increase in fees

The ES which accompanies the instrument states that Schedule 2 of the regulation introduces increases to certain visa application charges (VACs), in one case being an increase of 300 per cent. While these changes are subsequently described as being 'minor or machinery in nature' and as not substantially altering existing arrangements, the ES does not indicate the basis on which the VAC increases were determined. The committee's usual expectation in cases where an instrument of delegation legislation introduces or adjusts a charge, fee or levy is that the relevant ES makes clear on its face the basis on which that charge, fee or levy has been calculated (in addition to the quantum of the relative change in those cases where there is an adjustment to an existing charge, fee or levy). **The committee will therefore seek further information from the minister.**

Customs Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 276] [F2012L02382]

Purpose	Amends the Customs Regulations 1926 to prescribe the methods by which a notice prohibiting the exportation of goods under new section 112BA of the <i>Customs Act 1901</i> is to be given, and the time at which such a notice is taken to have been received
Last day to disallow	15 May 2013
Authorising legislation	<i>Customs Act 1901</i>
Department	Attorney-General's

ISSUE:

Protection of rights

This instrument prescribes the methods by which a notice prohibiting the exportation of goods from Australia may be given, and the time at which such a notice is taken to have been received. It is an offence to export a good in contravention of any such notice. Paragraph 2(c)(iii) provides for a form of 'constructive notice', whereby a notice given to a 'person who appears to work in a management or executive position' (at a previously notified address for service) will be taken to have been served at the time it was given to that person. In the committee's view, it is not clear why there is not a more stringent requirement to ascertain whether a person to whom a notice is given in such cases is in fact in a management or executive position, particularly given that it is an offence to export a good in contravention of any such notice. **The committee will therefore seek further information from the minister.**

Trans-Tasman Proceedings Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 284] [F2012L02412]

Purpose	Amends three principal regulations to provide for fees for the filing of applications under the <i>Trans-Tasman Proceedings Act 2010</i>
Last day to disallow	15 May 2013
Authorising legislation	<i>Family Law Act 1975; Federal Court of Australia Act 1976; Federal Magistrates Act 1999</i>
Department	Attorney-General's

ISSUE:

Unclear basis for increase in fees

The ES which accompanies the instrument does not appear to indicate the basis on which the fees being introduced have been set or calculated, or to describe the new fees relative to those which have been replaced. The committee's usual expectation in cases where an instrument of delegation legislation introduces or adjusts a charge, fee or levy is that the relevant ES makes clear on its face the basis on which that charge,

fee or levy has been calculated (in addition to the quantum of the relative change in those cases where there is an adjustment to an existing charge, fee or levy). **The committee will therefore seek further information from the Attorney-General.**

Work Health and Safety Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No 291] [F2012L02438]

Purpose	Amends the Work Health and Safety Regulations 2011
Last day to disallow	15 May 2013
Authorising legislation	<i>Work Health and Safety Act 2011</i>
Department	Education, Employment and Workplace Relations

ISSUE:

Unclear basis for calculating a fee

The regulation, inter alia, introduces a new fee for the issue of a general construction induction card. However, the ES for the instrument does not appear to indicate the basis on which the new fee has been set or calculated. The committee's usual expectation in cases where an instrument of delegation legislation introduces or adjusts a charge, fee or levy is that the relevant ES makes clear on its face the basis on which that charge, fee or levy has been calculated (in addition to the quantum of the relative change in those cases where there is an adjustment to an existing charge, fee or levy). **The committee will therefore seek further information from the minister.**

Determination to Reduce Appropriations Upon Request (No. 11 of 2011-2012) [F2012L01927]

Purpose	Reduces departmental appropriation items for the Department of Foreign Affairs and Trade by specified amounts
Last day to disallow	5 February 2013
Authorising legislation	<i>Appropriation Act (No. 1) 2009-2010</i> ; and <i>Appropriation Act (No. 1) 2010-2011</i>
Department	Finance and Deregulation

ISSUE:

Drafting

The committee raises the following matters in the interests of ensuring the highest quality of standards of drafting in legislative instruments in accordance with subsection 3(c) of the *Legislative Instruments Act 2003*, which states that one of its objects is 'encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users'. First, the committee notes that amending instruments generally contain an amendment instruction in the place of the heading in Schedule 1 of this instrument,

which reads: [1] DEFENCE PORTFOLIO. While section 7 of the instrument provides for the effect of Schedule 1, it is not clear to the committee how the amendment in Schedule 1 is actually effected via the drafting construction of the instrument. Second, the committee notes that section 8 of the instrument also refers to Schedule 1 of the instrument. It is not clear to the committee whether this should in fact be a reference to Schedule 2 (and, if so, whether this would lead to any undermining of the legal effect of the instrument). Last, and what may be a related question, the committee has not been able to identify what the reference in Schedule 2 to 'the other departmental item' in fact relates. **The committee will therefore seek further information from the minister.**

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **7 February 2013**. 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 3.

Interim (Small Pelagic Fishery) Declaration 2012 [F2012L01901]

Purpose	Declares a specified type of commercial fishing activity and thus prohibits fishing by large mid-water trawl freezer vessels in the Small Pelagic Fishery for a period of 60 days
Last day to disallow¹	5 February 2013
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Department	Sustainability, Environment, Water, Population and Communities

ISSUE:

Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).² With reference to these requirements, the committee notes that ES for the instrument does not indicate whether there was consultation with any operators of large mid-water trawl freezer vessels whose interests would be affected by the interim prohibition or, if there was no such consultation, explain why none was undertaken **[the committee sought further information from the minister]**.

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

2 The committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003* is included at Appendix 2.

MINISTER'S RESPONSE:

The minister advised that consultation with parties other than the Minister for Agriculture, Fisheries and Forestry was considered to be inappropriate as the interim instrument was required as a matter of urgency. However, wider consultation had since taken place in the development of a final instrument.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in the matter.

Financial Management and Accountability Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 229] [F2012L01988]

Purpose	Adds one new Government program to Part 4 of Schedule 1AA to the Financial Management and Accountability Regulations 1997
Last day to disallow	5 February 2013
Authorising legislation	<i>Financial Management and Accountability Act 1997</i>
Department	Finance and Deregulation

ISSUE:***Insufficient information regarding program***

The amendment relies on section 32B of the *Financial Management and Accountability Act 1997*, which provides legislative authority for the Government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997. Section 32B was introduced in response to the decision of the High Court in *Williams v Commonwealth* ([2012] HCA 23) in June 2012. The new program has the objective of providing financial assistance to persons acquiring Commonwealth real property. However, no further information is supplied about the nature of the program, such as how decisions are to be made about the provision of financial assistance, the criteria for decisions regarding the provision of assistance and whether independent review is available in respect of those decisions **[the committee sought further information from the minister]**.

MINISTER'S RESPONSE:

The minister advised that the amendment was necessary to allow the Government to provide financial assistance to persons acquiring Commonwealth real property, including in relation to the acquisition of, and maintenance and compliance with legal requirements associated with, a property (for example, to undertake capital maintenance to maintain the heritage status of the property). The factors to be taken into account in any decision to provide such financial assistance would be: whether and for how long a property was surplus to requirements; the cost to the Commonwealth of managing a property and the potential for cost recovery; and the fact that the market value of a property could not be obtained through its sale on the open market due to social or community considerations.

In relation to the availability of independent merits review of decisions to provide assistance under the program, the minister advised that such decisions involved the allocation of finite resources and were therefore not suitable for merits review (such as by the Administrative Appeals Tribunal (AAT)). Decisions under items listed in Schedule 1AA of the Financial Management and Accountability Regulations 1997 had been specifically excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act). However, review may be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution, in addition to recourse to the Ombudsman.

COMMITTEE RESPONSE:

The committee thanks the minister for her response and has concluded its interest in the matter. However, the committee notes the concerns of the Senate Scrutiny of Bills Committee regarding the justification for excluding from the ADJR Act decisions under items listed in Schedule 1AA to the Financial Management and Accountability Regulations 1997, and draws the attention of senators to the comments of that committee on the Financial Framework Legislation Amendment Bill 2012 in its Eleventh Report of 2012 (19 September 2012).

Greenhouse and Energy Minimum Standards Regulation 2012 [Select Legislative Instrument 2012 No. 239] [F2012L02037]

Purpose	Specifies the circumstances in which the Greenhouse and Energy Minimum Standards Regulator may exempt product models from compliance with obligations under the <i>Greenhouse and Energy Minimum Standards Act 2012</i> and prescribes matters which a person must provide when applying to register a product model under that Act
Last day to disallow	25 February 2013
Authorising legislation	<i>Greenhouse and Energy Minimum Standards Act 2012</i>
Department	Climate Change and Energy Efficiency

ISSUE:

Availability of merits review

Part 4 of the regulation specifies the circumstances in which the Greenhouse and Energy Minimum Standards Regulator may exempt product models from compliance with obligations under the *Greenhouse and Energy Minimum Standards Act 2012*. However, it is not clear on the face of the instrument and its ES whether a decision by the Greenhouse and Energy Minimum Standards (GEMS) Regulator under Part 4 is reviewable [the committee sought further information from the parliamentary secretary].

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary advised that a decision to exempt a model from a GEMS determination is not subject to review. This arises from section 164 of the *Greenhouse and Energy Minimum Standards Act 2012*, which sets out those decisions of the GEMS Regulator that are subject to review by the AAT. A decision to exempt a model from a GEMS determination is made under subsection 37(1) and is not a reviewable decision under section 164.

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

ASIC Class Order [CO 12/1266] [F2012L01918]; and**ASIC Class Order [CO 12/1267] [F2012L01919]**

Purpose	Amends several class orders (to correct an unintended consequence of a previous amendment) to exempt foreign financial services providers from the requirement to notify ASIC of significant investigations where this is prohibited by foreign law
Last day to disallow	5 February 2013
Authorising legislation	<i>Corporations Act 2001</i>
Department	Treasury

ISSUE:***Whether any person has been disadvantaged by previous operation of the order***

The amendments made by the two class orders were considered necessary to to correct the unintended consequence of a previous amendment which required exempt foreign financial services providers and exempt foreign collective investment scheme operators to notify ASIC of significant investigations. The unintended consequence was that such notifications could be in breach of foreign law. In such cases, in which an instrument is corrective in nature, it is the committee's usual expectation that the accompanying ES address the question of whether any person or entity was disadvantaged by any unintended consequence of the previous amendment and, if so, whether and what steps have been taken to address any such disadvantage **[the committee sought further information from the parliamentary secretary]**.

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary advised that persons or entities that could have been disadvantaged were any that became obliged to notify ASIC that the person or entity was the subject of a significant investigation by an overseas regulator relating to the provision of financial services in a foreign jurisdiction, and who was prohibited by foreign law from giving that notification. ASIC had advised that it was aware of only one entity to which these circumstances applied, and in that case the entity obtained

the permission of the relevant foreign authority to publicly disclose the investigation. The entity was therefore able to comply with both foreign law and the requirement to notify ASIC.

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

Professional Standards Scheme Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 247] [F2012L02102]

Purpose	Prescribes two professional standards schemes
Last day to disallow	27 February 2013
Authorising legislation	<i>Competition and Consumer Act 2010; Australian Securities and Investments Commission Act 2001; and Corporations Act 2001</i>
Department	Treasury

ISSUE:

No 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 of the Act, 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 accompanying the instrument contains no reference to consultation **[the committee sought further information from the parliamentary secretary and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].**

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary advised that, prior to prescribing a scheme, the Professional Standards Council seeks the opinion of independent actuarial consultants and calls for public comment via public notification in major newspapers in the relevant jurisdiction. Given this, further consultation in relation to the making of the instrument was considered unnecessary (as per section 18(2)(e) of the *Legislative Instruments Act 2003*). The parliamentary secretary provided an assurance that future ESs would provide information regarding consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

Residential Care Subsidy Amendment Principles 2012 (No. 3) [F2012L02057]

Purpose	Specifies matters to which the Secretary must have regard in determining that the daily income reduction for a care recipient is taken to be zero
Last day to disallow	25 February 2013
Authorising legislation	<i>Aged Care Act 1997</i>
Department	Health and Ageing

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 of the Act, 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 states only that consultation was not undertaken regarding the amendments because they 'do not impose any disadvantage on any person other than the Commonwealth'. The committee considers that, without further information, it is difficult to ascertain what impact, advantageous or otherwise, the amendments might have **[the committee sought further information from the minister and requested that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

MINISTER'S RESPONSE:

The minister advised that the criteria specified in the instrument are the same criteria as are applied for other hardship determinations in relation to the waiver of income tested fees, and had been inserted into the principles simply for the avoidance of doubt. The criteria would be applied in individual cases to adjusting a person's requirement to pay the basic daily fee or an income tested fee for residential aged care. Given that the instrument was effectively clarifying the prior application of the criteria to decisions to waive the income tested fee, the minister had considered that no person would be subject to any disadvantage, and therefore concluded that consultation was unnecessary.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in the matter.

Greenhouse and Energy Minimum Standards (Air Conditioners and Heat Pumps) Determination 2012 [F2012L02129] and four related instruments³

Purpose	These instruments specify minimum energy efficiency, energy labelling and product performance requirements, and associated requirements for conducting tests, for various appliances
Last day to disallow	28 February 2013
Authorising legislation	<i>Greenhouse and Energy Minimum Standards Act 2012</i>
Department	Climate Change and Energy Efficiency

ISSUE:

Drafting

The front page of the first determination has the words 'DRAFT ONLY' in the footer; and the final page of the remaining remaining determinations has the words 'DRAFT ONLY' in the footer. In such cases, the committee generally inquires as to whether the version of the instrument it has received is in fact the final approved version. **[the committee sought further information from the parliamentary secretary].**

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary confirmed that the instruments received by the committee were the final approved versions. The words 'DRAFT ONLY' had been inadvertently missed in the final proof-reading of the documents, and had since been removed from the versions of the instruments published on the Federal Register of Legislative Instruments (FRLI).

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

3 Greenhouse and Energy Minimum Standards (Clothes Washing Machines) Determination 2012 [F2012L02117]; Greenhouse and Energy Minimum Standards (Refrigerated Display Cabinets) Determination 2012 [F2012L02131]; Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012 [F2012L02128]; and Greenhouse and Energy Minimum Standards (Transformers and Electronic Step-down Converters for ELV Lamps) Determination 2012 [F2012L02130].

High Court Rules 2004 (Amendment) (November 2012) [F2012L02165]

Purpose	Specifies a revised schedule of fees for work done or service performed in respect of proceedings in the High Court of Australia
Last day to disallow	12 March 2013
Authorising legislation	<i>Judiciary Act 1903</i>
Department	Attorney-General's

ISSUES:

(a) Unclear basis for calculation of fees

The ES notes that the new schedule of fees implements 2.7 per cent increase as recommended by the Joint Costs Advisory Committee. However, the ES does not indicate the basis for this increase. The committee's usual expectation in cases where an instrument introduces or adjusts a fee or levy is that the relevant ES makes clear on its face the basis on which the new fee or levy has been calculated **[the committee sought further information from the Principal Registrar]**.

(b) Drafting

The making statement for the instrument states only that the instrument is made under the *Judiciary Act 1903*, and does not contain a specific reference to the provision under which it is made (section 86). The committee considers that an instrument and its ES should identify clearly the legislative authority for the making of the instrument, and generally raises such matters in the interests of ensuring the highest quality of standards of drafting in legislative instruments in accordance with subsection 3(c) of the *Legislative Instruments Act 2003*, which states that an object of the Act is 'encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users' **[the committee drew this issue to the attention of the Principal Registrar]**.

(c) No 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 accompanying the instrument contains no reference to consultation **[the committee sought further information from the Principal Registrar and requested that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

(d) No statement of compatibility with human rights

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility with specified human rights for each disallowable legislative instrument. No statement of compatibility has been supplied with these amendment rules **[the committee sought further information from the Principal Registrar]**.

PRINCIPAL REGISTRAR'S RESPONSE:

In relation to issue (a), the Principal Registrar advised that increase to the schedule of fees was a 'mechanistic' amendment adopting the recommendations of the Joint Costs Advisory Committee (JCAC), and provided a copy of the JCAC report containing the formula applied to the annual review of the schedule of fees. The Principal Registrar indicated that the Court would be willing to include this information in future ESs, noting that this may increase their length and complexity.

In relation to issue (b), the Principal Registrar advised that the Court would be willing in future to include specific reference to the authorising provision(s) under which a rule was made.

In relation to issue (c), the Principal Registrar advised that in conducting its annual review the longstanding practice of the JCAC was to invite the Attorney-General's Department, the Law Council of Australia, the National Association of Community Legal Aid Centres and the National legal Aid to make submissions to the review. The Principal Registrar indicated that the Court would be willing to provide information on consultation in ESs in future.

In relation to issue (d), the Principal Registrar advised that, in the course of drafting the instrument, the Office of Legislative Drafting and Publishing (OLDP) had advised that the requirement to provide a statement of compatibility did not apply to rules of court made by a federal court (including the High Court). This was because a precondition of the requirement was that the instrument in question be a 'legislative instrument' to which section 42 of the *Legislative Instruments Act 2003* applies (that is, the instrument is subject to disallowance under that Act). As section 9 of the *Legislative Instruments Act 2003* provides that rules of court are not legislative instruments for the purposes of that Act, a statement of compatibility was not required in respect of the current instrument.

COMMITTEE RESPONSE:

The committee thanks the Principal Registrar for his response and has concluded its interest in the matter.

Carbon Credits (Carbon Farming Initiative) (Conservative Estimates, Projections or Assumptions: Greenhouse Friendly Initiative Transitional Crediting Calculation (Alternative Waste Treatment) Determination 2012 [F2012L02191]

Purpose	Determines that a specified estimate for alternative waste treatment projects transitioning from the Greenhouse Friendly initiative is conservative
Last day to disallow	18 March 2013
Authorising legislation	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Department	Climate Change and Energy Efficiency

ISSUE:

No 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 accompanying the instrument contains no reference to consultation **[the committee sought further information from the parliamentary secretary and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary advised that the department sought public submissions on the instrument's approach to crediting, which was published on the department's website for two separate 40-day periods as components of the methodology proposals for legacy alternative waste treatment. The submissions received were a contributing factor to the instrument's creation. The parliamentary secretary further advised that the ES had been amended to include information regarding consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

Defence Determination 2012/65, Cadet forces allowance – amendment

Purpose	Specifies adjustments to the rates of cadet forces allowance
Last day to disallow	14 March 2013
Authorising legislation	<i>Defence Act 1903</i>
Department	Defence

ISSUE:

Unclear basis for calculation of

The ES for the instrument notes that the determination specifies a 2.5 per cent increase in the rates of cadet forces allowance, following an annual review of the allowance. However, the ES does not indicate the basis on which this increase was determined. The committee's usual expectation in cases where an instrument introduces or adjusts an allowance or entitlement is that the relevant ES makes clear on its face the basis on which the new rate has been calculated [the committee sought further information from the parliamentary secretary].

PARLIAMENTARY SECRETARY'S RESPONSE:

The parliamentary secretary advised that the allowance was adjusted by the same percentage as the general salary increase provided to the Australian Defence Force, in keeping with the method that has been used to calculate the allowance since 2010. The parliamentary secretary further advised that ESs for future changes to this allowance would detail the methodology used to calculate the amount of allowance.

COMMITTEE RESPONSE:

The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter.

Customs Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 249] [F2012L02159]

Purpose	Amends the drawback provisions in the principal regulations as they apply to tobacco and tobacco products, and makes related amendments
Last day to disallow	12 March 2013
Authorising legislation	<i>Customs Act 1901</i>
Department	Attorney-General's

ISSUE:

Adequacy of consultation

The ES to this instrument states that no consultation was undertaken because the amendments are of 'a minor or machinery nature'. While the committee recognises that this is a common and recognised reason for not undertaking consultation (as per section 18(2)(a) of the *Legislative Instruments Act 2003*), the ES elsewhere states that

the amendments impose 'more stringent requirements' regarding the payment of a drawback for tobacco and tobacco products. For example, the time period within which a person may make a claim for drawback is reduced from four years to 12 months. In the committee's view, it is not clear how the imposition of more stringent requirements such as this can be described as 'minor or machinery', and it follows that there is a question as to whether consultation would have been appropriate in relation to these amendments **[the committee sought further information from the Attorney-General]**.

MINISTER'S RESPONSE:

The Minister for Home Affairs responded, and advised that the impact of the reduced time period in which a person may claim for drawback was considered to be minor and would have affected less than only 0.5 per cent of all claims made since October 2005. The minister further noted that industry had been consulted and supported the proposed changes to the drawback and refund provisions.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in the matter.

Financial Management and Accountability Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 248] [F2012L02091]

Purpose	Adds one new Government program to Part 4 of Schedule 1AA to the principal regulations, and amends an existing program description
Last day to disallow	27 February 2013
Authorising legislation	<i>Financial Management and Accountability Act 1997</i>
Department	Finance and Deregulation

ISSUE:

Lack of information regarding administration of program

The amendment relies on section 32B of the *Financial Management and Accountability Act 1997*, which provides legislative authority for the Government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997. Section 32B was introduced in response to the decision of the High Court in *Williams v Commonwealth* ([2012] HCA 23) in June 2012. The program that is amended by this amendment regulation involves a number of payment arrangements for the Mature-Age Participation–Assistance Program. However, no further information is supplied about the nature of the program, such as how decisions are to be made made about the provision of financial assistance under the various sub-programs, the criteria for decisions regarding the provision of assistance and whether independent review is available in respect of those decisions **[the committee sought further information from the minister]**.

MINISTER'S RESPONSE:

The minister advised that the instrument effectively broadened the description of the Mature-Age Participation–Assistance Program to ensure that the description adequately covered the range of subprograms under the program. The subprograms were Experience+Jobs Bonus, Corporate Champions, Mature Age Participation—Job Seeker Assistance Program and Mature Age Communications Strategy, and each of these had a specific allocation and guidelines or processes (such as tender) to guide the allocation of assistance (described in detail in the minister's letter).

In relation to the availability of independent merits review of decisions to provide assistance under the program or subprograms, the minister advised that such decisions involved the allocation of finite resources and were therefore not suitable for merits review (such as by the AAT). Decisions under items listed in Schedule 1AA of the Financial Management and Accountability Regulations 1997 had been specifically excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act). However, review may be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution, in addition to recourse to the Ombudsman.

COMMITTEE RESPONSE:

The committee thanks the minister for her response and has concluded its interest in the matter. However, the committee notes the concerns of the Senate Scrutiny of Bills Committee regarding the justification for excluding from the ADJR Act decisions under items listed in Schedule 1AA to the Financial Management and Accountability Regulations 1997, and draws the attention of senators to the comments of that committee on the Financial Framework Legislation Amendment Bill 2012 in its Eleventh Report of 2012 (19 September 2012).

Migration Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 230] [F2012L01961]

Purpose	Amends the principal regulations to define the term 'irregular maritime arrival' and to provide for consequential matters
Last day to disallow	5 February 2013
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Citizenship

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 the instrument states that it was made in response to the Report of the Expert Panel on Asylum Seekers and, due to the urgency of giving effect to that report's recommendations, no consultation was undertaken in relation to the instrument (beyond that undertaken by the Expert Panel). However, no indication is given as to the reason for the need to give urgent effect to the report's recommendations and, to the extent that the consultation conducted by the Expert Panel is being relied on, the nature of that consultation is not described **[the committee sought further information from the minister]**.

MINISTER'S RESPONSE:

The minister advised that the instrument was made following the government's decision on 13 August 2012 to immediately implement certain recommendations of the Expert Panel in order to deter people from attempting dangerous maritime voyages to Australia. In preparing its report, the Expert Panel held meetings with key stakeholders and representatives with some refugee communities in Australia and called for and received more than 550 written submissions on asylum issues.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in the matter.

CASA 364/12 - Direction - number of cabin attendants (National Jet Systems) [F2012L02169]

Purpose	Permits a named operator to operate a certain type of aircraft with less than three cabin attendants
Last day to disallow	12 March 2013
Authorising legislation	Civil Aviation Regulations 1988
Department	Infrastructure and Transport

ISSUE:

Timetable for making of substantive amendments to orders

The instrument specifies the minimum number of cabin attendants required on specified aircraft operated by a particular operator, and revokes and replaces a previous instrument of similar effect. In doing so, the instrument grants an exemption from Civil Aviation Order 20.16.3. The ES for this instrument states that CASA is investigating amendments to that Civil Aviation Order so as to avoid the need for individual exemptions. The committee generally prefers that exemptions are not used or do not operate as de facto amendments to principal legislation, and has previously written to the minister as to the continued need for exemptions with a similar purpose to the present instrument, and seeking advice as to the progress on the amendments to

Civil Aviation Order 20.16.3 [**the committee sought further information from the minister**].

MINISTER'S RESPONSE:

The minister advised that progress on this issue is dependent on the progress of developing the proposed Civil Aviation Safety Regulations Part 121 'Air Transport Operations – Large Aeroplanes'. Development of this part would be progressed in 2013.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in the matter.

Appendix 1

Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **7 February 2013**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.¹ Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

Instruments received week ending 30 November 2012

Australian Crime Commission Act 2002

Australian Crime Commission Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 269] [F2012L02242]

Australian Meat and Live-stock Industry Act 1997

Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union – Quota Year 2013) Order 2012 [F2012L02274]

Australian Prudential Regulation Authority Act 1998

Australian Prudential Regulation Authority (confidentiality) determination No. 25 of 2012 [F2012L02264]

Aviation Transport Security Act 2004

Aviation Transport Security Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 257] [F2012L02247]

Broadcasting Services Act 1992

Television Licence Area Plan (Broken Hill) Variation 2012 [F2012L02259]

Television Licence Area Plan (Riverland) Variation 2012 [F2012L02252]

Television Licence Area Plan (Spencer Gulf) Variation 2012 [F2012L02255]

Civil Aviation Act 1988

CASA EX168/12 – Exemption – from standard take-off and landing minima – AirBridgeCargo Airlines Ltd [F2012L02265]

CASA EX170/12 – Exemption – of authorised flying instructors employed by Singapore Flying College Pte Ltd [F2012L02268]

¹ FRLI is found online at <http://www.comlaw.gov.au/>.

Climate Change Authority Act 2011

Climate Change Authority Act 2011 – specification under section 62(1)(c) – National Wildlife Corridors [F2012L02262]

Corporations Act 2001

ASIC Market Integrity Rules (ASX Market) Amendment 2012 (No. 3) [F2012L02248]

ASIC Market Integrity Rules (Chi-X Australian Market) Amendment 2012 (No. 3) [F2012L02251]

ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2012 (No. 1) [F2012L02250]

Corporations Amendment Regulations 2010 (No. 3) Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 266] [F2012L02245]

Corporations Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 267] [F2012L02235]

Corporations Amendment Regulation 2012 (No. 10) [Select Legislative Instrument 2012 No. 268] [F2012L02261]

Defence Act 1903

Defence Determination 2012/66, Senior officer transitional bonus – amendment

Defence Determination 2012/67, Carer's leave – amendment

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 270] [F2012L02260]

Fisheries Management Act 1991

Heard Island and McDonald Islands Fishery Total Allowable Catch Determination 2012 [F2012L02257]

Fuel Quality Standards Act 2000

Fuel Quality Standards Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 259] [F2012L02266]

Fuel Tax Act 2006

Fuel Tax Act 2006 – Correcting Fuel Tax Errors Determination (No. 1) 2012 [F2012L02279]

Health Insurance Act 1973

Health Insurance (Pathology Services Table) Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 254] [F2012L02242]

Higher Education Support Act 2003

Higher Education Support Act 2003 – Higher Education (Disclosure of Information to Other Bodies) Determination 2012 [F2012L02256]

Maritime Transport and Offshore Facilities Security Act 2003

Maritime Transport and Offshore Facilities Security Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 258] [F2012L02263]

Migration Act 1958

Migration Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 255] [F2012L02233]

Migration Legislation Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 256] [F2012L02236]

National Transmission Network Sale Act 1998

National Transmission Network (Declared Successor) Declaration No. 1 of 2012 [F2012L02234]

Ozone Protection and Synthetic Greenhouse Gas Management Act 1989

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 260] [F2012L02267]

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 261] [F2012L02270]

Private Health Insurance Act 2007

Private Health Insurance (Complying Product) Amendment Rules 2012 (No. 9) [F2012L02269]

Product Stewardship Act 2011

Product Stewardship Regulation 2012 [Select Legislative Instrument 2012 No. 262] [F2012L02244]

Product Stewardship (Voluntary Arrangements) Instrument 2012 [F2012L02258]

Superannuation Industry (Supervision) Act 1993

Superannuation (prudential standard) determination No. 1 of 2012 – Prudential Standard SPS 114 Operational Risk Financial Requirement [F2012L02221]

Superannuation (prudential standard) determination No. 2 of 2012 – Prudential Standard SPS 220 Risk Management [F2012L02222]

Superannuation (prudential standard) determination No. 3 of 2012 – Prudential Standard SPS 231 Outsourcing [F2012L02223]

Superannuation (prudential standard) determination No. 4 of 2012 – Prudential Standard SPS 232 Business Continuity Management [F2012L02224]

Superannuation (prudential standard) determination No. 5 of 2012 – Prudential Standard SPS 250 Insurance in Superannuation [F2012L02225]

Superannuation (prudential standard) determination No. 6 of 2012 – Prudential Standard SPS 510 Governance [F2012L02229]

Superannuation (prudential standard) determination No. 7 of 2012 – Prudential Standard SPS 521 Conflicts of Interest [F2012L02230]

Superannuation (prudential standard) determination No. 8 of 2012 – Prudential Standard SPS 530 Investment Governance [F2012L02231]

Telecommunications Act 1997

Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 1 of 2012) [F2012L02218]

Therapeutic Goods Act 1989

Therapeutic Goods Information (Joint Adverse Event Notifications System) Specification 2012 [F2012L02272]

Transport Safety Investigation Act 2003

Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278]

Transport Safety Investigation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 264] [F2012L02280]

Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012 [Select Legislative Instrument 2012 No. 265] [F2012L02281]

Water Act 2007

Water Act 2007 – Basin Plan 2012 [F2012L02240]

Instruments received week ending 14 December 2012***Aged Care Act 1997***

Classification Amendment Principles 2012 [F2012L02298]

Annual Appropriation Acts

Determination to Reduce Appropriations (No. 3 of 2012-2013) [F2012L02320]

Auditor-General Act 1997

Australian National Audit Office (ANAO) Auditing Standards (30/11/2012) [F2012L02316]

Australian Capital Territory (Planning and Land Management) Act 1988

National Capital Plan – Amendment 74 – Section 5 Campbell [F2012L02324]

National Capital Plan – Amendment 76 – Policy 4.4(d) for Urban Areas [F2012L02325]

Australian Communications and Media Authority Act 2005

Radiocommunications (Interpretation) Amendment Determination 2012 (No. 1) [F2012L02304]

Australian Participants in British Nuclear Tests (Treatment) Act 2006

Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (Removal of Prior Approval/New Dental Providers) Instrument 2012 (No. R29/2012) [F2012L02321]

Australian Prudential Regulation Authority Act 1998

Australian Prudential Regulation Authority (confidentiality) determination No. 22 of 2012 [F2012L02336]

Banking Act 1959

Banking (prudential standard) determination No. 2 of 2012 – Prudential Standard APS 001 – Definitions [F2012L02328]

Banking (prudential standard) determination No. 3 of 2012 – Prudential Standard APS 110 – Capital Adequacy [F2012L02327]

Banking (prudential standard) determination No. 4 of 2012 – Prudential Standard APS 111 – Capital Adequacy: Measurement of Capital [F2012L02335]

Banking (prudential standard) determination No. 5 of 2012 – Prudential Standard APS 112 – Capital Adequacy: Standardised Approach to Credit Risk [F2012L02330]

Banking (prudential standard) determination No. 6 of 2012 – Prudential Standard APS 113 – Capital Adequacy: Internal Ratings-based Approach to Credit Risk [F2012L02329]

Banking (prudential standard) determination No. 7 of 2012 – Prudential Standard APS 114 – Capital Adequacy: Standardised Approach to Operational Risk [F2012L02332]

Banking (prudential standard) determination No. 8 of 2012 – Prudential Standard APS 115 – Capital Adequacy: Advanced Measurement Approaches to Operational Risk [F2012L02331]

Banking (prudential standard) determination No. 9 of 2012 – Prudential Standard APS 116 – Capital Adequacy: Market Risk [F2012L02338]

Banking (prudential standard) determination No. 10 of 2012 – Prudential Standard APS 117 – Capital Adequacy: Interest Rate Risk in the Banking Book (Advanced ADIs) [F2012L02334]

Banking (prudential standard) determination No. 11 of 2012 – Prudential Standard APS 120 – Securitisation [F2012L02339]

Banking (prudential standard) determination No. 12 of 2012 – Prudential Standard APS 220 – Credit Quality [F2012L02345]

Banking (prudential standard) determination No. 13 of 2012 – Prudential Standard APS 221 – Large Exposures [F2012L02340]

Banking (prudential standard) determination No. 14 of 2012 – Prudential Standard APS 222 – Associations with Related Entities [F2012L02342]

Banking (prudential standard) determination No. 16 of 2012 – Prudential Standard APS 330 – Public Disclosure of Prudential Information [F2012L02344]

Broadcasting Services Act 1992

Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 14 of 2012) [F2012L02322]

Carbon Credits (Carbon Farming Initiative) Act 2011

Carbon Credits (Carbon Farming Initiative) (Avoided Emissions from Diverting Legacy Waste from Landfill for Process Engineered Fuel Manufacture) Methodology Determination 2012 [F2012L02341]

Civil Aviation Act 1988

AD/EC 135/10 Amdt 1 – Main Rotor – Sliding Sleeve [F2012L02319]

AD/TPE 331/63 Amdt 2 – Fuel Control Unit Drive Spline [F2012L02317]

CASA ADCX 024/12 – Revocation of Airworthiness Directives [F2012L02293]

CASA EX167/12 – Exemption – from CASR Subpart 99.B for micro-businesses [F2012L02283]

CASA EX172/12 – Exemption – minimum height and lateral separation for operations [F2012L02294]

CASA EX175/12 – Exemption – side-facing seats on aircraft not occupied for take-off or landing [F2012L02288]

CASA EX176/12 – Exemption – recency requirements for night flying (National Jet Express Pty Ltd) [F2012L02296]

CASA EX177/12 – Exemption – from flight simulator user approval [F2012L02323]

CASA EX179/12 – Exemption – minimum height and lateral separation for operations [F2012L02297]

CASA EX181/12 – Exemption – CASR Part 99 DAMP requirements for CAR 30 or Part 145 organisations overseas [F2012L02302]

Corporations Act 2001

ASIC Class Order [CO 12/1592] [F2012L02299]

Customs Act 1901

Defence and Strategic Goods List Amendment 2012 (No. 1) [F2012L02318]

Environment Protection and Biodiversity Conservation Act 1999

Amendment – List of Specimens taken to be Suitable for Live Import (13/11/2012) [F2012L02312]

Financial Management and Accountability Act 1997

Financial Management and Accountability (Abolition of 27 Special Account Determinations) Determination 2012/17 [F2012L02308]

Fisheries Management Act 1992

Southern Squid Jig Fishery Total Allowable Effort Determination 2012 [F2012L02337]

Health Insurance Act 1973

Health Insurance (Professional Services Review) Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 298] [F2012L02370]

Higher Education Support Act 2003

Higher Education Provider Approval No. 13 of 2012 [F2012L02310]

Higher Education Support Act 2003 – Revocation of Approval as a Higher Education Provider (Minister for Employment, Higher Education and Skills (SA)) [F2012L02314]

Higher Education Support Act 2003 – VET Provider Approval (No. 25 of 2012) [F2012L02305]

Higher Education Support Act 2003 – VET Provider Approval (No. 26 of 2012) [F2012L02306]

Insurance Act 1973

Insurance (prudential standard) determination No. 12 of 2012 – Prudential Standard GPS 310 – Audit and Related Matters [F2012L02369]

Military Rehabilitation and Compensation Act 2004

Military Rehabilitation and Compensation Act Education and Training Scheme (Portability Adjustments) Determination 2012 (No. MRCC 57/2012) [F2012L02315]

MRCA Treatment Principles (Removal of Prior Approval/New Dental Providers/Coordinated Care Adjustment) Instrument 2012 (No. MRCC 28/2012) [F2012L02307]

National Environment Protection Council Act 1994

National Environment Protection (Movement of Controlled Waste between States and Territories) Measure Minor Variation 2012 (No. 1) [F2012L02300]

National Greenhouse and Energy Reporting Act 2007

National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2012 [F2012L02295]

National Health Act 1953

National Health Act 1953 – Amendment Determination under paragraph 98C(1)(b) (No. PB 95 of 2012) [F2012L02287]

National Health Act 1953 – Amendment Determination under section 84AH (2012) (No. 3) (No. PB 103 of 2012) [F2012L02285]

National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2012 (No. 9) (No. PB 97 of 2012) [F2012L02290]

National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2012 (No. 1) (No. PB 106 of 2012) [F2012L02286]

National Health (Listed drugs on F1 or F2) Amendment Determination 2012 (No. 8) (No. PB 99 of 2012) [F2012L02282]

National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2012 (No. 8) (No. PB 93 of 2012) [F2012L02291]

National Health Act (Pharmaceutical Benefits – Early Supply) Amendment December 2012 – specification under subsection 84AAA(2) (No. PB 104 of 2012) [F2012L02292]

National Health (Prescriber bag supplies) Amendment Determination 2012 (No. 1) (No. PB 100 of 2012) [F2012L02289]

National Health (Price and Special Patient Contribution) Amendment Determination 2012 (No. 7) (No. PB 94 of 2012) [F2012L02284]

National Vocational Education and Training Regulator Act 2011

ASQA Authorised Officer Requirements [F2012L02326]

Taxation Administration Act 1953

Taxation Administration Act 1953 – Notice of exemption from providing payment summaries to passbook account holders [F2012L02333]

Veterans' Entitlements Act 1986

Veterans' Entitlements (Treatment Principles – Removal of Prior Approval/New Dental Providers/Coordinated Care Adjustment) 2012 (No. R27/2012) [F2012L02309]

Veterans' Entitlements (Veterans' Children Education Scheme – Portability Adjustments) Instrument 2012 (No. R56/2012) [F2012L02313]

Instruments received week ending 4 January 2013

Australian Broadcasting Corporation Act 1983

Australian Broadcasting Corporation (Election of Staff-elected Director) Regulation 2012 [Select Legislative Instrument 2012 No. 285] [F2012L02400]

Australian Meat and Live-stock Industry Act 1997

Australian Meat and Live-stock Industry (Beef Export to the USA-Quota Year 2013) Order 2012 [F2012L02418]

Australian National Registry of Emissions Units Act 2011

Australian National Registry of Emissions Units Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 288] [F2012L02443]

Australian Prudential Regulation Authority Act 1998

Australian Prudential Regulation Authority (confidentiality) determination No. 23 of 2012 [F2012L02373]

Australian Prudential Regulation Authority (confidentiality) determination No. 24 of 2012 [F2012L02351]

Australian Sports Anti-Doping Authority Act 2006

Australian Sports Anti-Doping Authority Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 307] [F2012L02385]

Aviation Transport Security Act 2004

Aviation Transport Security Amendment Regulation 2012 (No. 6) [Select Legislative Instrument 2012 No. 304] [F2012L02424]

Banking Act 1959

Banking, Insurance and Life Insurance (prudential standard) determination No. 1 of 2012 - Prudential Standard CPS 231 – Outsourcing [F2012L02439]

Banking, Insurance and Life Insurance (prudential standard) determination No. 2 of 2012 - Prudential Standard CPS 232 - Business Continuity Management [F2012L02440]

Banking, Insurance and Life Insurance (prudential standard) determination No. 3 of 2012 - Prudential Standard CPS 510 – Governance [F2012L02441]

Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2012 - Prudential Standard CPS 520 - Fit and Proper [F2012L02445]

Banking (prudential standard) determination No. 15 of 2012 - Prudential Standard APS 310 - Audit and Related Matters [F2012L02343]

Banking (prudential standard) determination No. 17 of 2012 - Prudential Standard APS 610 - Prudential Requirements for Providers of Purchased Payment Facilities [F2012L02346]

Banking Sector Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 319] [F2012L02397]

Broadcasting Services Act 1992

Broadcasting Services (Regional Commercial Radio - Specification of Periods for Subsections 43C(1A) and 61CD(2)) Instrument 2012 [F2012L02471]

Television Licence Area Plan (Adelaide) 2012 [F2012L02437]

Television Licence Area Plan (Melbourne) 2012 [F2012L02431]

Television Licence Area Plan (Mildura/Sunraysia) 2012 [F2012L02447]

Television Licence Area Plan (Perth) 2012 [F2012L02394]

Television Licence Area Plan (Regional Victoria) 2012 [F2012L02454]

Television Licence Area Plan (Southern New South Wales) 2012 [F2012L02457]

Television Licence Area Plan (Sydney) 2012 [F2012L02396]

Television Licence Area Plan (Tasmania) 2012 [F2012L02455]

Child Support (Registration and Collection) Act 1988

SSAT Child Support Review General Directions 2012 [F2012L02459]

Civil Aviation Act 1988

CASA 388/12 - Permission - radiocommunication systems - Lloyd Helicopters Pty Ltd [F2012L02352]

CASA 390/12 - Instructions - GNSS primary means navigation (B737 NG aircraft) [F2012L02428]

CASA 398/12 - Direction - number of cabin attendants (Virgin Australia International Airlines) [F2012L02449]

CASA EX184/12 - Exemption - from standard take-off minima - Virgin Australia International Airlines [F2012L02425]

CASA EX185/12 - Exemption - carriage of children suffering from a serious medical condition [F2012L02426]

CASA EX186/12 - Exemption - Virgin Australia International Airlines from subregulation 217 (2) of CAR 1988 and paragraph 3.3 of CAO 82.5 [F2012L02427]

Clean Energy Act 2011

Clean Energy Amendment Regulation 2012 (No. 7) [Select Legislative Instrument 2012 No. 289] [F2012L02384]

Corporations Act 2001

Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 308] [F2012L02414]

Crimes Act 1914

Crimes Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 274] [F2012L02379]

Crimes (Overseas) Act 1964

Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 275] [F2012L02357]

Customs Act 1901

Customs Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 276] [F2012L02382]

Customs Amendment Regulation 2012 (No.10) [Select Legislative Instrument 2012 No. 327] [F2012L02416]

Customs Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 320] [F2012L02371]

Dental Benefits Act 2008

Dental Benefits Amendment Rules 2012 [F2012L02347]

Environment Protection and Biodiversity Conservation Act 1999

Amendment of List of Exempt Native Specimens - Northern Territory Aquarium Fishery (12/12/2012) (deletion) [F2012L02433]

Amendment of List of Exempt Native Specimens - Northern Territory Aquarium Fishery (12/12/2012) (inclusion) [F2012L02436]

Amendment of List of Exempt Native Specimens - Queensland Gulf of Carpentaria Inshore Fin Fish Fishery [F2012L02389]

Amendment of List of Exempt Native Specimens - Western Deepwater Trawl Fishery and North West Slope Trawl Fishery (28/11/2012) [F2012L02392]

Threat Abatement Plan to reduce the impacts on northern Australia's biodiversity by the five listed grasses [F2012L02359]

Excise Act 1901

Excise (Volume - residual oil) Determination 2012 (No. 1) [F2012L02350]

Extradition Act 1988

Extradition (Convention for Suppression of Acts of Nuclear Terrorism) Regulation 2012 [Select Legislative Instrument 2012 No. 277] [F2012L02434]

Fair Work Act 2009

Fair Work Legislation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 321] [F2012L02417]

Fair Work Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 322] [F2012L02409]

Fair Work Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 323] [F2012L02402]

Family Law Act 1975

Family Law Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 278] [F2012L02391]

Family Law (Fees) Regulation 2012 [Select Legislative Instrument 2012 No. 279] [F2012L02395]

Trans-Tasman Proceedings Legislation Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 284] [F2012L02412]

Federal Court of Australia Act 1976

Federal Court and Federal Magistrates Court Regulation 2012 [Select Legislative Instrument 2012 No. 280] [F2012L02411]

Financial Management and Accountability Act 1997

Financial Management and Accountability Amendment Regulation 2012 (No. 9) [Select Legislative Instrument 2012 No. 328] [F2012L02387]

Financial Sector (Collection of Data) Act 2001

Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2012 - ARS 110.0 - Capital Adequacy [F2012L02483]

Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2012 - ARS 111.0 - Fair Values [F2012L02485]

Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2012 - ARS 112.1 - Standardised Credit Risk - On-balance Sheet Assets [F2012L02486]

Fisheries Levy Act 1984

Fisheries Levy (Torres Strait Prawn Fishery) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 273] [F2012L02355]

Fishing Levy Act 1991

Fishing Levy Regulation 2012 [Select Legislative Instrument 2012 No. 272] [06/12/12]

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 309] [F2012L02410]

Foreign Evidence Amendment Act 2010

Foreign Evidence (Application of Amendments) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 281] [F2012L02390]

Health Insurance Act 1973

Health Insurance (Diagnostic Imaging Services Table) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 295] [F2012L02399]

Health Insurance (General Medical Services Table) Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 296] [F2012L02406]

Health Insurance (Pathology Services Table) Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 297] [F2012L02413]

Health Insurance Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 293] [F2012L02368]

Health Insurance Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 294] [F2012L02372]

Higher Education Support Act 2003

Commonwealth Grant Scheme Guidelines 2012 [F2012L02442]

Illegal Logging Prohibition Act 2012

Illegal Logging Prohibition Regulation 2012 [Select Legislative Instrument 2012 No. 271] [F2012L02404]

Income Tax Assessment Act 1997

Income Tax Assessment Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 310] [F2012L02398]

Insurance Act 1973

Insurance (prudential standard) determination No. 1 of 2012 - Prudential Standard GPS 001 – Definitions [F2012L02349]

Insurance (prudential standard) determination No. 2 of 2012 - Prudential Standard GPS 110 - Capital Adequacy [F2012L02358]

Insurance (prudential standard) determination No. 3 of 2012 - Prudential Standard GPS 113 - Capital Adequacy: Internal Model-based Method [F2012L02356]

Insurance (prudential standard) determination No. 4 of 2012 - Prudential Standard GPS 114 - Capital Adequacy: Asset Risk Charge [F2012L02360]

Insurance (prudential standard) determination No. 5 of 2012 - Prudential Standard GPS 115 - Capital Adequacy: Insurance Risk Charge [F2012L02380]

Insurance (prudential standard) determination No. 6 of 2012 - Prudential Standard GPS 116 - Capital Adequacy: Insurance Concentration Risk Charge [F2012L02362]

Insurance (prudential standard) determination No. 7 of 2012 - Prudential Standard GPS 117 - Capital Adequacy: Asset Concentration Risk Charge [F2012L02363]

Insurance (prudential standard) determination No. 8 of 2012 - Prudential Standard GPS 118 - Capital Adequacy: Operational Risk Charge [F2012L02364]

Insurance (prudential standard) determination No. 9 of 2012 - Prudential Standard GPS 120 - Assets in Australia [F2012L02366]

Insurance (prudential standard) determination No. 10 of 2012 - Prudential Standard GPS 220 - Risk Management [F2012L02361]

Insurance (prudential standard) determination No. 11 of 2012 - Prudential standard GPS 230 - Reinsurance Management [F2012L02365]

Insurance (prudential standard) determination No. 13 of 2012 - Prudential Standard GPS 320 - Actuarial and Related Matters [F2012L02446]

Insurance (prudential standard) determination No. 14 of 2012 - Prudential Standard GPS 111 - Capital Adequacy: Level 2 Insurance Groups; Prudential Standard GPS 221 - Risk Management: Level 2 Insurance Groups; Prudential Standard GPS 311 - Audit and Acturial Reporting and Valuation: Level 2 Insurance Groups [F2012L02448]

Insurance (prudential standard) determination No. 15 of 2012 - Prudential Standard GPS 112 - Capital Adequacy: [Measurement of Capital [F2012L02451]

Judiciary Act 1903

High Court of Australia (Fees) Regulation 2012 [Select Legislative Instrument 2012 No. 282] [F2012L02393]

Legislative Instruments Act 2003

Legislative Instruments Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 283] [F2012L02376]

Life Insurance Act 1995

Life Insurance Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 311] [F2012L02401]

Life Insurance (prudential standard) determination No. 1 of 2012 - Prudential Standard LPS 001 – Definitions [F2012L02461]

Life Insurance (prudential standard) determination No. 2 of 2012 - Prudential Standard LPS 110 - Capital Adequacy [F2012L02460]

Life Insurance (prudential standard) determination No. 3 of 2012 - Prudential Standard LPS 112 - Capital Adequacy: Measurement of Capital [F2012L02463]

Life Insurance (prudential standard) determination No. 4 of 2012 - Prudential Standard LPS 114 - Capital Adequacy: Asset Risk Charge [F2012L02464]

Life Insurance (prudential standard) determination No. 5 of 2012 - Prudential Standard LPS 115 - Capital Adequacy: Insurance Risk Charge [F2012L02462]

Life Insurance (prudential standard) determination No. 6 of 2012 - Prudential Standard LPS 117 - Capital Adequacy: Asset Concentration Risk Charge [F2012L02465]

Life Insurance (prudential standard) determination No. 7 of 2012 - Prudential Standard LPS 118 - Capital Adequacy: Operational Risk Charge [F2012L02466]

Life Insurance (prudential standard) determination No. 8 of 2012 - Prudential Standard LPS 100 - Solvency Standard [F2012L02468]

Life Insurance (prudential standard) determination No. 9 of 2012 - Prudential Standard LPS 220 - Risk Management [F2012L02469]

Life Insurance (prudential standard) determination No. 10 of 2012 - Prudential Standard LPS 310 - Audit and Related Matters [F2012L02467]

Life Insurance (prudential standard) determination No. 12 of 2012 - Prudential Standard LPS 340 - Valuation of Policy Liabilities [F2012L02475]

Life Insurance (prudential standard) determination No. 13 of 2012 - Prudential Standard LPS 360 - Termination Values, Minimum Surrender Values and Paid-up Values [F2012L02477]

Life Insurance (prudential standard) determination No. 14 of 2012 - Prudential Standard LPS 370 - Cost of Investment Performance Guarantees [F2012L02478]

Life Insurance (prudential standard) determination No. 16 of 2012 - Prudential Standard LPS 700 - Friendly Society Benefit Funds [F2012L02482]

Life Insurance (prudential standard) determination No. 17 of 2012 [F2012L02484]

Migration Act 1958

Migration Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 301] [F2012L02381]

Motor Vehicle Standards Act 1989

Motor Vehicle Standards Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 305] [F2012L02377]

Mutual Assistance in Business Regulation Act 1992

Mutual Assistance in Business Regulation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 312] [F2012L02432]

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 313] [F2012L02415]

National Consumer Credit Protection Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 314] [F2012L02429]

National Health Act 1953

National Health (Pharmaceutical Benefits) Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 299] [F2012L02388]

National Measurement Act 1960

National Trade Measurement Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 302] [F2012L02420]

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 300] [F2012L02444]

Personally Controlled Electronic Health Records Act 2012

PCEHR (Assisted Registration) Rules 2012 [F2012L02383]

Primary Industries (Customs) Charges Act 1999

Primary Industries (Customs) Charges Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 324] [F2012L02353]

Primary Industries Levies and Charges Collection Act 1991

Primary Industries Levies and Charges Collection Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 325] [F2012L02354]

Renewable Energy (Electricity) Act 2000

Renewable Energy (Electricity) Amendment Regulation 2012 (No. 8) [Select Legislative Instrument 2012 No. 290] [F2012L02419]

Retirement Savings Accounts Act 1997

Retirement Savings Accounts Amendment Regulation 2012 (No. 3) [Select Legislative Instrument 2012 No. 315] [F2012L02403]

Superannuation Auditor Registration Imposition Act 2012

Superannuation Auditor Registration Imposition Regulation 2012 [Select Legislative Instrument 2012 No. 329] [F2012L02405]

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 4) [Select Legislative Instrument 2012 No. 316] [F2012L02386]

Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 5) [Select Legislative Instrument 2012 No. 317] [F2012L02407]

Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 6) [Select Legislative Instrument 2012 No. 330] [F2012L02408]

Telecommunications (Interception and Access) Act 1979

Telecommunications (Interception and Access) (Requirements for Authorisations, Notifications and Revocations) Amendment Determination 2012 [F2012L02348]

Telecommunications Act 1997

Telecommunications Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 286] [F2012L02374]

Telecommunications Service Provider (Mobile Premium Services) Amendment Determination 2012 (No. 1) [F2012L02458]

Television Licence Fees Act 1964

Television Licence Fees Amendment Regulation 2012 (No. 2) [Select Legislative Instrument 2012 No. 287] [F2012L02375]

Trans-Tasman Mutual Recognition Act 1997

Trans-Tasman Mutual Recognition (Amendment of Act) Regulation 2012 [Select Legislative Instrument 2012] [F2012L02422]

Work Health and Safety Act 2011

Work Health and Safety Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 291] [F2012L02438]

Total number of instruments scrutinised: 232

Appendix 2

Guideline on explanatory statements: consultation

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Guideline for preparation of explanatory statements: consultation

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](#) of personal rights and parliamentary propriety.

Purpose of guideline

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

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

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to [disallowance](#).

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

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

Requirements of the Legislative Instruments Act 2003

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

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

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

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

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

Describing the nature of consultation

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

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

Method and purpose of consultation

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

Bodies/groups/individuals consulted

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

Issues raised in consultations and outcomes

An ES should identify the nature of any issues raised in consultations, as well 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

Appendix 3

Correspondence relating to committee's scrutiny



The Hon Tony Burke MP

RECEIVED

29 NOV 2012
Senate Standing C'ttee
on Regulations
and Ordinances

Minister for Sustainability, Environment, Water, Population and Communities

C12/22215

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

28 NOV 2012

Dear Senator 

Thank you for your letter of 11 October 2012 in relation to the consultation process undertaken before making the Interim (Small Pelagic Fishery) Declaration 2012 (interim declaration).

You have requested information on whether there was consultation other than with the Minister for Agriculture, Fisheries and Forestry prior to the making of the interim declaration and, if there was not, the reasons for this.

Instrument required as a matter of urgency

It was important to act quickly, as the Minister for Agriculture, Fisheries and Forestry and I agreed that there was uncertainty about the environmental impacts of the proposed commercial fishing activity. We also agreed that it was appropriate to prohibit the commercial fishing activity while further consultation took place with declaration affected persons as provided for under section 390SE of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act). Consultation with the Minister for Agriculture Fisheries and Forestry was the only consultation requirement of the EPBC Act at this interim stage.

Consultation with parties other than the Minister for Agriculture Fisheries and Forestry was considered unnecessary in these urgent circumstances.

Short-term measure

The explanatory memorandum for the Environmental Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012 (DFA Bill), which establishes the process of making an interim declaration, provides, at paragraph 16, that the objective of the interim declaration is to prohibit a commercial fishing activity while appropriate consultation takes place.

The interim declaration must not be in place for longer than 60 days, as per subsection 390SD(5) on the EPBC Act.

Consultation provided for in making of final declaration

The purpose of allowing for both an interim declaration and a final declaration was to balance the need for consultation with affected parties, with the need to act urgently to prohibit the commercial fishing activity given the uncertainty of its impacts upon the environment.

The consultation process, established by section 390SE of the EPBC Act, goes to the final declaration, as that is the instrument which will have a direct effect on business. The explanatory memorandum to the DFA Bill, at paragraph 20, states:

The intention of this section is to ensure that any fishing concession holders who may be adversely impacted by a final declaration decision (for example, because they would be prohibited from fishing under a final declaration) have an opportunity to make submissions to the Minister about how their rights or interests would be affected under a final declaration. This is so that the Minister can take those submissions into account before making a final declaration. This process ensures that all affected fishing concession holders are accorded procedural fairness.

On 20 September 2012 I made the interim declaration. The interim declaration prohibits the declared commercial fishing activity for a period of 60 days which ends on 19 November 2012. Declaration affected persons were invited to make a written submission to the Department of Sustainability, Environment, Water, Population and Communities by 16 October 2012 about the impact on their rights or interests in relation to fishing if a final declaration was to be made for the same commercial fishing activity that is specified in the interim declaration.

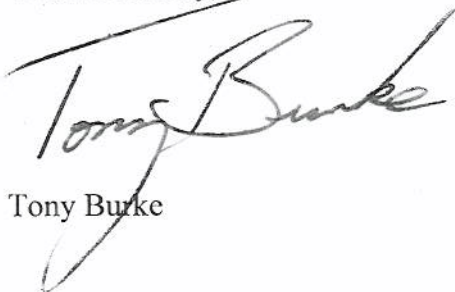
Over 100 such responses have been received. I am now considering those responses as required by subsection 390SF(2)(c) of the EPBC Act.

Other matters

It is pertinent to note that, as per section 390SD of the EPBC Act, an interim declaration cannot be made for commercial fishing activity that has been engaged in before 11 September 2012. This means that existing commercial fishing activities cannot be affected by Chapter 5B of the EPBC Act.

Thank you for your consideration of this response. If I can assist you further, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Tony Burke', with a stylized, flowing script.

Tony Burke



RECEIVED

11 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation

REF:C12/3425

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

10 DEC 2012

Dear Senator *Mark*

Thank you for your letter of 1 November 2012, concerning the *Financial Management and Accountability Amendment Regulation 2012 (No. 7)* (the Amendment Regulation), which added a new spending activity to Part 4 of Schedule 1AA of the *Financial Management and Accountability Regulations 1997* (the FMA Regulations). I understand that you are seeking further information in relation to:

- (a) who will make any spending decisions under the newly listed spending activity and what criteria will or may guide those decisions; and
- (b) whether there will be any form of independent review of any such spending decisions.

(a) New spending activity – decision maker and criteria for making a decision

The particular amendment you have asked about establishes legislative authority for the Government to provide financial assistance to persons acquiring Commonwealth real property, including in relation to:

- the acquisition and maintenance of the property; and
- compliance with legal requirements associated with the property.

From time to time the Commonwealth will dispose of its interests in real property, subject to the purchaser agreeing to certain terms and legal requirements (eg, to undertake capital maintenance to maintain the heritage status of the property). To assist the purchaser with these conditions of sale, the Government may agree to provide the purchaser with some financial assistance.

The following factors will be taken into account in relation to any decision to provide financial assistance to persons acquiring Commonwealth real property:

- whether the property is surplus to the requirements of the Commonwealth, and if so for how long;
- the annual costs incurred by the Commonwealth in managing the property and opportunity for the Commonwealth to recover costs; and
- the fact that the market value of the property cannot be obtained on the sale or transfer of this property in the open market, due to social or community considerations.

The Amendment Regulation added a new item to Schedule 1AA of the FMA Regulations to establish legislative authority to enable, in particular, the concessional sale of Commonwealth property at Myilly Point in Darwin to the National Trust of Australia (Northern Territory) on 5 November 2012. Under the terms of the arrangement the Commonwealth provided the purchaser with financial assistance to undertake capital maintenance to maintain the heritage status of the property, fulfil any ongoing obligations to manage the property, and obtain legal advice. The authority provided by the program added by the Amendment Regulation may also support the provision of financial assistance in relation to future disposals of real property that meet the criteria set out above.

(b) Independent review

You also asked whether there will be any form of independent review of the spending decisions authorised by the new item in Schedule 1AA. These spending decisions involve the allocation of finite resources. Given the way in which the funds are allocated, a review outcome which overturned the original decision would necessarily affect an allocation that had already been made to another party. In the 2009 publication, *What decisions should be subject to merits review*, the Administrative Review Council noted that such decisions are not suitable for merits review.

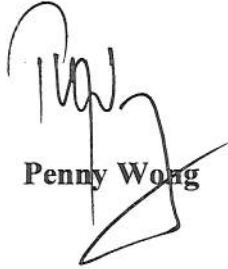
The review and audit process undertaken by the Australian National Audit Office provides a mechanism to review Government spending decisions and report any concerns to Parliament. Government decisions to spend public money are also subject to rules in the *Financial Management and Accountability Act 1997* and the FMA Regulations. This includes the requirements in the *Commonwealth Procurement Rules* or *Commonwealth Grants Guidelines*, where applicable. These not only help to ensure the proper use of Commonwealth resources, but also that there is appropriate transparency around decisions relating to making, varying or administering arrangements to spend public money.

Further, a person who is unhappy with a spending decision may utilise other administrative mechanisms. These include the scheme for Compensation for Detriment caused by Defective Administration, or recourse to the Ombudsman. Judicial review may also be available in some situations under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution.

Decisions under this scheme are not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Explanatory Memorandum to the *Financial Framework Legislation Amendment Act (No 3) 2012* sets out the policy reasons for excluding ADJR Act review of decisions under items which are listed in Schedule 1AA of the FMA Regulations. Further information is also set out in my letter to the Senate Standing Committee for the Scrutiny of Bills that was published in that Committee's Eleventh Report of 2012 (19 September 2012).

Thank you for the opportunity to provide further information on the Amendment Regulation.

Yours sincerely



Penny Wong



Cabinet Secretary
Parliamentary Secretary for Climate Change and Energy Efficiency
Parliamentary Secretary for Industry and Innovation

C12/4227

Senator Mark Furner
Chair - Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra ACT 2600

RECEIVED

12 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

Dear Senator Furner

I refer to the Committee's request for advice to clarify whether a decision by the Greenhouse and Energy Minimum Standards (GEMS) Regulator under Part 4 of the *Greenhouse and Energy Minimum Standards Regulation 2012* is reviewable.

I can confirm that a decision to exempt a model from requirements of a GEMS determination is not reviewable. That such a decision is not reviewable, however, arises from the terms of the *Greenhouse and Energy Minimum Standards Act 2012* (the Act) rather than from the terms of the Regulation. Decisions of the GEMS Regulator that are subject to internal review and review by the Administrative Appeals Tribunal, i.e. "reviewable decisions", are set out at section 164 of the Act.

Part 4 of the Regulation provides for various matters relating to the circumstances in which a decision may be made to exempt a model from requirements of a GEMS determination. However, the decision to exempt a model is not made under the Regulation. The power to exempt a model from requirements of a GEMS determination instead arises under subsection 37 (1) of the Act.

As a decision regarding the exemption of a model under subsection 37 (1) is not listed at section 164 it is not a reviewable decision. I note that there is no power in the Act to make regulations to extend the scope of the decisions that are reviewable decisions. A decision under subsection 37 (1), therefore, cannot be deemed by the Regulation to be a reviewable decision.

Yours sincerely

MARK DREYFUS QC MP

29/11/12



The Hon Bernie Ripoll MP
Parliamentary Secretary to the Treasurer

RECEIVED
19 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

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

Dear Senator Furner

Mark

Thank you for your letter of 1 November 2012 to the Deputy Prime Minister and Treasurer concerning ASIC Class Orders CO 12/1266 and CO 12/1267. Your letter has been referred to me as I have portfolio responsibility for this matter.

As you are aware, these orders have amended several class orders to ensure that certain foreign financial services providers are not required to notify the Australian Securities and Investments Commission (ASIC) of significant investigations where they are prohibited from doing so by a foreign law.

I note that the Committee usually expects Explanatory Statements to such corrective instruments to clarify whether any person or entity was disadvantaged by any unintended effects of the previous amendment.

Persons or entities that could have been disadvantaged by the previous class orders are those who during the relevant period of less than three months:

- became obliged to notify ASIC of a significant investigation (but not an enforcement or disciplinary action) into itself by an overseas regulator in a foreign jurisdiction relating to the provision of financial services in the jurisdiction; and
- was prohibited by foreign law from giving such notification.

ASIC is aware of only one entity to which these circumstances applied. That entity obtained the permission of the relevant foreign authority to publicly disclose the investigation, thus complying with both foreign law and the requirement to notify ASIC.

Therefore, I confirm that, as best as ASIC is able to determine no person or entity was disadvantaged by any unintended consequence of the previous class orders.

Also, no person or entity has indicated to ASIC that they were obliged to notify ASIC of an investigation, but prohibited by foreign law from doing so. This indicates that no-one has been disadvantaged, in that the disadvantage imposed by the first amendment would be the obligation to notify ASIC.

I trust this information will be of assistance to the Committee.

Yours sincerely

A handwritten signature in cursive script, appearing to read "B. Ripoll".

BERNIE RIPOLL

12.14.12



The Hon Bernie Ripoll MP
Parliamentary Secretary to the Treasurer

RECEIVED
19 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

Senator Mark Furner
Chair
Standing Committee on Regulations and Ordinances
Room S1 111
Parliament House
CANBERRA ACT 2600

Dear Senator Furner

Mark

Thank you for your letter of 22 November 2012 requesting an explanation as to why the explanatory statement that accompanied the *Professional Standards Scheme Legislation Amendment Regulation (No. 1)* failed to describe the nature of consultation undertaken.

The omission of a reference to the nature of consultations was caused by an administrative oversight when the explanatory statement was being finalised.

The regulation referred to in your correspondence gives effect, under Commonwealth legislation, to two schemes prescribed by the Professional Standards Council in a State. Prior to prescribing a scheme for the purposes of state jurisdiction, the Professional Standards Council seeks the opinion of independent actuarial consultants and calls for public comment on professional standards schemes via public notification in major newspapers circulating throughout the relevant jurisdictions prior to approving schemes.

Given the consultation conducted by the Professional Standards Council, no further consultation was deemed necessary (the relevant provision is subsection 18(2)(e) of the *Legislative Instruments Act 2003*).

My Department will endeavour to ensure that future explanatory statements will not overlook the requirement to provide information on consultation in accordance with the requirements of the LIA.

Yours sincerely

BERNIE RIPOLL 12.12.12



RECEIVED

24 DEC 2012

Senate Standing C'ttee
on Regulations
and Ordinances

THE HON MARK BUTLER MP
MINISTER FOR MENTAL HEALTH AND AGEING
MINISTER FOR SOCIAL INCLUSION
MINISTER ASSISTING THE PRIME MINISTER ON MENTAL HEALTH REFORM

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

Dear Senator *Mark*

Thank you for your letter of 22 November 2012 regarding the *Residential Care Subsidy Amendment Principles 2012 (No. 3)* (the Amending Principles). The Committee has sought my advice as to why no consultation was undertaken in regard to the proposed instrument.

I note the Committee's concerns regarding the need for the Explanatory Statement to describe the nature of any consultation that has been carried or, if there has been no consultation, to explain why none was undertaken.

In this instance, consultation was unnecessary or inappropriate as the instrument is of a minor or machinery nature and does not substantially alter existing arrangements. The criteria specified in the Amending Principles are the criteria applied for other hardship determinations which have previously been applied administratively to the waiver of income tested fees. They have been inserted for the avoidance of doubt.

Depending on their level of income or deemed income, there are two daily fees which a care recipient may be required to pay as a contribution to their daily costs in residential aged care. These are the basic daily fee (also known as the standard resident contribution) and an income tested fee.

If payment of the basic daily fee or an income tested fee will cause a care recipient undue hardship, they may apply for hardship assistance. Each case of hardship assistance will be assessed on an individual basis.

If it is found that paying their basic daily fee will cause a person financial hardship, the Australian Government pays a hardship supplement instead of the care recipient paying the fee, or the resident may pay a lesser amount of basic daily fee and the hardship supplement compensates for the reduction in the fee.

By contrast, if it is found that paying their income tested fee will cause a person financial hardship, the Government waives the payment of the income tested fee. No hardship supplement is payable, due to the way that the income tested fee operates. If a care recipient has a high income and pays an income tested fee, the Government reduces the subsidy paid in respect of that care recipient. The approved provider of the residential care service receives the income tested fee from the care recipient in place of that subsidy. Therefore, if a care recipient is in financial hardship and cannot afford to pay an income tested fee, all that the Government needs to do is waive the income tested fee. The approved provider will receive the full amount of subsidy and does not need to recover monies from the care recipient.

All the Amending Principles do is clarify that the same criteria apply to the waiver of the income tested fee as apply to the reduction of the basic daily fee. The criteria in the Amending Principles are identical to those in section 21.39 of the Residential Care Subsidy Principles 1997.

It had previously been assumed that these criteria applied to both types of hardship determination as section 44-31 (Determining cases of financial hardship) of the *Aged Care Act 1997* provides that:

- (1) The Secretary may, in accordance with the Residential Care Subsidy Principles, determine that the care recipient is eligible for a hardship supplement if the Secretary is satisfied that paying the maximum daily amount of resident fees worked out under section 58-2 would cause the care recipient financial hardship.

The 'maximum daily amount of resident fees worked out under section 58-2' includes the amount of the daily income tested reduction. It was therefore assumed that the criteria in section 21.39 of the Residential Care Subsidy Principles, which specifies the matters to be considered by the Secretary in deciding whether to make a determination that a care recipient is eligible for a hardship supplement, and in determining a lesser amount of resident fees, applied to hardship assistance for both the basic daily fee and the income tested fee.

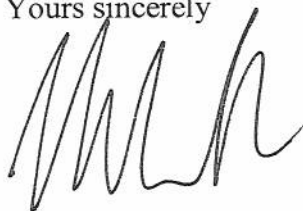
However, until the Amending Principles were made, there were no matters in the Residential Care Subsidy Principles which related specifically to the waiver of the income tested fee. The Amending Principles clarify that the Secretary must have regard to the same matters, regardless of whether the Secretary is making a determination to reduce the basic daily fee or waive the income tested fee of a care recipient experiencing financial hardship.

There is therefore no effect, either advantageous or otherwise, from the introduction of the requirement to have regard to the specified matters in the Amending Principles.

I hope this clarifies the matters that the Committee has raised.

I trust that the above information is of use.

Yours sincerely



MARK BUTLER

21 DEC 2012



Cabinet Secretary
Parliamentary Secretary for Climate Change and Energy Efficiency
Parliamentary Secretary for Industry and Innovation

RECEIVED
19 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

C12/4379

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

Mark
Dear Senator Furner

Thank you for your letter of 1 November 2012 concerning the signed copies of five Greenhouse and Energy Minimum Standards (GEMS) determinations received by the committee with the words 'DRAFT ONLY' printed in the footer.

I can confirm that the versions of the GEMS (Air Conditioners and Heat Pumps) Determination 2012, the GEMS (Clothes Washing Machines) Determination 2012, the GEMS (Refrigerated Display Cabinets) Determination 2012, the GEMS (Three Phase Cage Induction Motors) Determination 2012, and the GEMS (Transformers and Electronic Step-down Converters for ELV Lamps) Determination 2012 received by the committee are the final approved versions.

These determinations were part of a package of 19 GEMS determinations made at the same time to ensure that previously existing regulatory requirements were in place at the beginning of the new GEMS regime. While the words you noted were missed in the final proof-reading of the documents, I can confirm that the words have been removed from the published versions on the ComLaw website.

Thank you for bringing your concerns to my attention.

Yours sincerely

Mark Dreyfus
MARK DREYFUS QC MP
14/12/12



HIGH COURT OF AUSTRALIA

RECEIVED

19 DEC 2012
Senate Standing C'ttee
on Regulations
and Ordinances

Parkes Place
CANBERRA ACT 2600

Chief Executive &
Principal Registrar

Senator the Hon Mark Furner
Chair
Senate Standing Committee on
Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT

13 December 2012

Dear Senator Furner

High Court Rules 2004 (Amendment) (November 2012) [F2012L02165]

Thank you for your letter dated 29 November 2012 seeking my comments on the Explanatory Statement (ES) accompanying the above-named instrument. I will deal with each of the matters you raised in the order in which they appear in your letter.

Before doing so, I should clarify that the instrument does not set a 'new fee or levy'. Rather, it amends Schedule 2 to the *High Court Rules 2004* (the Rules), which provides an adjusted scale of costs for fees which solicitors may charge and be allowed on taxation in the event that the Court or a Justice does not fix an amount of costs in an order – see Part 52 of the Rules, supported by s26 of the *Judiciary Act 1903*. Generally, the actual fees charged by solicitors are higher than will be allowed but the Court reviews the scale annually having regard to movements generated by a formula set out below.

Basis for the increase

Consistent with the practice adopted in all previous years, the ES does not explain the basis for the increase in the fees provided in Schedule 2 to the Rules. This is because the change is a mechanistic amendment adopting the recommendations made by the Joint Costs Advisory Committee (JCAC) from time to time.

I attach a copy of the latest report by the JCAC. This explains the origins of the JCAC and its predecessor, the Federal Costs Advisory Committee (FCAC), and sets out what is known as the FCAC formula which continues in use for annual reviews.

The amending Rules and ES have been lodged and promulgated in the same format for a number of years without comment. If the Committee wishes, the Court could in future provide details of the basis of any change in the Schedule, although this might produce an ES of some length and

mathematical complexity. I note that the Court recently decided to review in 2013 the relevance and operation of the scale of costs provided in Schedule 2 of the Rules.

'Making statement'

Again, this has not previously been raised with the Court as an issue. The Court could in future include reference in the 'making statement' to s86 of the *Judiciary Act* 1903 (and the other rule-making provisions in other Acts) if this is considered necessary.

Consultation required by s 17 of the *Legislative Instruments Act* 2003

As indicated above, the ES to the Rules adopting the recommendations of the JCAC have been prepared in the same form for a number of years. In its annual review, the JCAC writes to the Commonwealth Attorney-General's Department, the Law Council of Australia, the National Association of Community Legal Centres and National Legal Aid inviting them and their respective constituent bodies to make submissions to the review. A notice of the review is also placed on the web site of each court. If necessary the Court could in future include in the ES details of the organisations the JCAC invited to make submissions and the fact that a notice of the review is placed on the web site of each court.

The *Human Rights (Parliamentary Scrutiny) Act* 2011

From 1 January 2012 the *Human Rights (Parliamentary Scrutiny) Act* 2011 requires a statement of compatibility to be included in the ES for all legislative instruments to which s42 of the *Legislative Instruments Act* 2003 applies. The statement of compatibility must include an assessment of whether the legislative instrument is compatible with Australia's human rights obligations under specified international human rights treaties. In the course of drafting the amendments made to the Rules by High Court Amendment Rules 2012 (No. 1), the Office of Legislative Drafting advised that this requirement does not apply to rules of court made by the federal courts (including the High Court).

The basis of this advice is that the precondition in section 9 of the *Human Rights (Parliamentary Scrutiny) Act* 2011 is that the instrument be a 'legislative instrument' to which section 42 of the *Legislative Instruments Act* 2003 applies. Section 9 of the *Legislative Instruments Act* provides that rules of court are not legislative instruments for the purposes of the *Legislative Instruments Act*. However, section 86(2) of the *Judiciary Act* provides that the *Legislative Instruments Act* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the High Court as if a reference to a legislative instrument were a reference to a rule of court. Section 42 of the *Legislative Instruments Act* thus applies to rules of court not because they are 'legislative instruments' but because of the provisions in their enabling Acts.

I would be happy to discuss any aspect of this with the Committee should you wish.

Yours sincerely



Andrew Phelan



RECEIVED

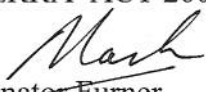
- 9 JAN 2013

Senate Standing C'ttee
on Regulations
and Ordinances

Cabinet Secretary
Parliamentary Secretary for Climate Change and Energy Efficiency
Parliamentary Secretary for Industry and Innovation

C12/4443

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


Dear Senator Furner

Carbon Credits (Carbon Farming Initiative)(Conservative Estimates, Projections, or Assumptions: (Greenhouse Friendly Initiative Transitional Crediting Calculation (Alternative Waste Treatment) Determination 2012 [F2012I02191]

Thank you for your letter of 29 November 2012 concerning the above-named Instrument (the Instrument), which determines that a specified estimate for alternative waste treatment projects transitioning from the Greenhouse Friendly initiative is conservative. Your letter brought to my attention that the Instrument's explanatory statement (ES) does not contain a description of the nature of the consultation process undertaken on the Instrument, as required by Section 17 of the *Legislative Instruments Act 2003*.

Please find attached an updated ES for your consideration. This updated ES describes the consultation process that was carried out.

The Instrument was made under section 133(4) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act). Its purpose is to facilitate Carbon Farming Initiative methodology determinations which retain a similar crediting approach to the Greenhouse FriendlyTM program for legacy Alternative Waste Treatment (AWT) projects.

The businesses directly affected by the instrument made significant financial investments in their projects, and may be unable to adapt their pre-existing business model to a radically changed crediting approach. This would be a poor outcome in terms of both greenhouse gas abatement and the protection of Australia's natural environment as these projects generate real abatement with environmental co-benefits.


As explained in the updated ES, consultation was carried out in relation to the instrument's approach to crediting. This is the specified estimate taken to be conservative, and was published on the Department's website for two separate 40 day periods as integral components of methodology proposals that apply to legacy AWT projects. In fact, submissions received as a result of these consultations were a contributing factor to the instrument's creation.

The methodology proposal for 'Avoided Emissions from Diverting Legacy Waste from Landfill for Process Engineered Fuel Manufacture' was released for public consultation from 30 September 2011 to 9 November 2011. As a result of this consultation, five public submissions were received and considered by the Domestic Offsets Integrity Committee (DOIC) in their endorsement of the proposal under Section 112 of the Act.

In addition, the methodology proposals for 'Diversion of Legacy Waste to an Alternative Waste Treatment Facility' and 'Avoided Emissions from Diverting Waste from Landfill through a Composting Alternative Waste Technology' were released for consultation from 23 April 2012 to 2 June 2012. As a result of these last two consultations, four public submissions were received. These proposals are currently under DOIC consideration.

Thank you for bringing your concerns to my attention.

Yours sincerely



MARK DREYFUS QC MP

21/12/12



RECEIVED

9 JAN 2013

Senate Standing Committee
on Regulations
and Ordinances

**Senator the Hon David Feeney
Parliamentary Secretary for Defence**

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

14 DEC 2012

Dear Senator Furner

Thank you for your letter of 29 November 2012 requesting clarification of Defence Determination 2012/65, made under the *Defence Act 1903*, which provides an allowance to Officers and Instructors of Cadets. This Determination amends Defence Determination 2005/15, *Conditions of Service* (the Principal Determination).

You asked for information about the basis on which the allowance increase was calculated. I am advised that the allowance was not arbitrary, it was adjusted in the same percentage as the general salary increase provided to the Australian Defence Forces under Defence Force Remuneration Tribunal Determination 2012/10 in November 2012, of 2.5 per cent.

This is the same method that has been used to calculate annual increases to Cadet Forces Allowance since 2010. However, it should be noted that this allowance was originally only intended to provide assistance with expenses for Officers and Instructors who might have out-of-pocket expenses, due to their performance of a dual role (other employment and occasional Officer/Instructor of Cadets). Payment is dependent on attendance at pre-approved Cadet activities, and is generally limited to a maximum number of days per year. The allowance is not intended to act as pay, but as a compensation (partial payment) for expenses incurred in attending to instruct, conduct administration or direct Cadets in their activities.

Officers and Instructors of Cadets may also claim expenses relating to travel costs incurred in attending approved events.

Explanatory statements for future changes to this allowance will detail the methodology used to calculate the amount of allowance. I trust that this information will assist in meeting the Committee's concern.

Yours sincerely

DAVID FEENEY

Encl

18 JAN 2013



THE HON JASON CLARE MP

Minister for Home Affairs

Minister for Justice

RECEIVED

23 JAN 2013

Senate Standing C'ttee
on Regulations
and Ordinances

Ministerial number: 106686

Senator Mark Furner
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2601

Dear Senator 

Thank you for your letter of 29 November 2012 to the Attorney-General, the Hon Nicola Roxon MP regarding amendments to the drawback provisions in the Customs Regulations 1926 as they apply to tobacco and tobacco products. As this matter is within my portfolio responsibilities, it has been forwarded to me for response.

The reference in the Explanatory Statement to the amending regulations that the changes imposed 'more stringent requirements' on exporters refers to the alignment of the Australian Customs and Border Protection Service's (Customs and Border Protection) practices with the practices of the Australian Taxation Office for protection of revenue purposes.

The regulations now provide Customs and Border Protection an opportunity to verify the tobacco and tobacco products that are being exported and for which an application for duty drawback will be made. Prior to these amendments, drawback applications for tobacco and tobacco products could be made for up to four years after the goods had been exported from Australia without verification of export. As the rate of Customs Duty on tobacco products is significant, providing Customs and Border Protection a reasonable opportunity to verify tobacco exports is prudent. This was described as being a more stringent process in the Explanatory Statement however the actual impact of the change was assessed as minor.

The impact of the reduced time period within which a person may make a claim for drawback was considered to be minor. The new timeframe would only have affected less than 0.5% of all claims made since October 2005.

The assessment that the impact of these changes was minor was endorsed by the Office of Best Practice Regulation.

I also note that industry was consulted during the drafting of the new provisions and they were supportive of the proposed changes to the drawback and refund provisions.

The officer responsible for this matter in Customs and Border Protection is Mr Geoff Johannes National Manager, Trade Policy and Implementation who can be contacted on (02) 6275 6462.

I trust this is of assistance to the committee.

Yours sincerely

A handwritten signature in black ink, appearing to read "Jason Clare". The signature is fluid and cursive, with the first name "Jason" and the last name "Clare" clearly distinguishable.

Jason Clare

A large, stylized handwritten flourish or signature in black ink. It consists of a large, sweeping loop that starts from the left, goes down and around, and then comes back up towards the right. The loop is very large and open, with a smaller, more defined loop at the top right.



RECEIVED

25 JAN 2013
Senate Standing C'ttee
on Regulations
and Ordinances

SENATOR THE HON PENNY WONG
Minister for Finance and Deregulation

REF:C12/3689

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

23 JAN 2013

Dear Senator *Mark*

Thank you for your letter of 22 November 2012, concerning the *Financial Management and Accountability Amendment Regulation 2012 (No.8)* (the Amendment Regulation), which amended Part 4 of Schedule 1AA of the *Financial Management and Accountability Regulations 1997* (the FMA Regulations). The amendment added a new program, the Centre for Workplace Leadership Fund (item 407.071) and also broadened the objective for the Mature-age work participation - assistance program (item 407.050). Your letter concerns the Mature-age work participation - assistance program. I understand that you are seeking further information in relation to:

- (a) the criteria that will guide any decisions to provide financial assistance under the Mature-age participation - assistance program and who the decision-makers will be; and
- (b) whether these spending decisions will be subject to independent review.

(a) Mature-age participation - assistance program

The Amendment Regulation amended the FMA Regulations to address the High Court decision in *Williams*, which requires legislative authority to support certain spending activities. The amendment to the particular item you have asked about (item 407.050) clarified and broadened the legislative authority for the Government to assist, directly or indirectly, job seekers, aged 45 years and over, to re-enter and/or remain in the workforce.

It was necessary to broaden the description of the Mature-age participation - assistance program in Schedule 1AA of the FMA Regulations to ensure that the description adequately covered the range of subprograms delivered under that program to assist job seekers aged 45 years and over to continue in the workforce, including:

- (i) Experience+ Jobs Bonus;
- (ii) Corporate Champions;
- (iii) Mature Age Participation - Job Seeker Assistance Program; and
- (iv) Mature Age Communications Strategy.

Experience+ Jobs Bonus provides payments of \$1000 each financial year for up to 2500 employers who employ an eligible mature age job seeker for at least 13 weeks. The bonus payments are made in accordance with the *Guidelines for the Experience+ Jobs Bonus* that were developed by the Department of Education, Employment and Workplace Relations (DEEWR) in consultation with the Department of the Prime Minister and Cabinet and my Department and approved by the Minister for Employment Participation. Information for employers on how to apply for a bonus is available on the DEEWR website. Staff at DEEWR will assess employer applications against the criteria in the Guidelines and recommend payments. Based on these recommendations, the Secretary of DEEWR or her delegate will enter into arrangements for the payments.

\$10 million over four years has been allocated to support these bonus payments.

Corporate Champions supports employers who publicly commit to moving towards best practice in the recruitment and retention of mature-age staff aged 45 years and over. Eligible employers will receive tailored support and assistance provided by an industry expert. This support may include an assessment of workforce demographics, practical help on improving recruitment and retention practices and accessing Government initiatives.

The Corporate Champions program recently published a Request for Tender (RFT) to identify providers to assist employers. Successful providers will be announced in early 2013. The Secretary of DEEWR or her delegate will enter into arrangements with the successful providers.

\$15.6 million over four years has been allocated to the program to assist employers (small, medium and large).

The *Mature Age Participation – Job Seeker Assistance program* will provide eligible mature-age job seekers with job preparation assistance including training in using computers and new technology. The program will be provided by a panel of expert providers in areas where the Australian Government considers it will best meet individual, employer and community needs. The panel of providers will be established through a RFT process, with the Secretary of DEEWR or her delegate entering into arrangements with the successful providers.

\$25.8 million over four years has been allocated for the Mature Age Participation – Job Seeker Assistance Program.

The *Mature Age Communications Strategy* is being developed in line with Government communication policy. A component of the strategy will be a radio, print and digital media information campaign. The objectives of the information campaign are to increase awareness of the benefits of employing (and retaining) mature-age Australians and generate awareness and encourage take up of the services available to employers and mature-age workers. This campaign will have several elements: concept testing research; creative development; benchmarking research; and media buy. The campaign will be developed in accordance with the *Guidelines on Information and Advertising Campaigns* managed by my Department. All elements of the campaign, including the research, will be considered by the Peer Review Group and the Independent Communications Committee.

The Secretary of DEEWR or her delegate will enter into arrangements in relation to the information campaign.

(b) Independent review

You also asked whether there would be any form of independent review of the spending decisions authorised by item 407.050 in Schedule 1AA of the FMA Regulations. As I have advised the Committee in relation to previous amendments to Schedule 1AA, the spending decisions authorised by Schedule 1AA involve the allocation of finite resources. Given the way in which the funds are allocated, a review outcome which overturned the original decision would necessarily affect an allocation that had already been made to another party. In the 1999 publication, *What decisions should be subject to merits review*, the Administrative Review Council noted that such decisions are not suitable for merits review.

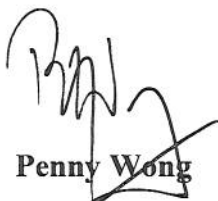
Government decisions to spend public money are subject to rules in the *Financial Management and Accountability Act 1997* (FMA Act) and the FMA Regulations. This includes, where applicable, the requirements in the *Commonwealth Procurement Rules* or *Commonwealth Grants Guidelines*. The review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review Government spending decisions and report any concerns to Parliament. These requirements and mechanisms not only help to ensure the proper use of Commonwealth resources, but also that there is appropriate transparency around decisions relating to making, varying or administering arrangements to spend public money.

Further, a person who is unhappy with a spending decision may utilise other administrative mechanisms. These include the scheme for Compensation for Detriment caused by Defective Administration, or recourse to the Ombudsman. Judicial review may also be available in some situations under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution.

Decisions under this program are not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Explanatory Memorandum to the *Financial Framework Legislation Amendment Act (No 3) 2012* sets out the policy reasons for excluding ADJR Act review of decisions made in relation to activities which are listed in Schedule 1AA of the FMA Regulations. Further information is also set out in my letter to the Senate Standing Committee for the Scrutiny of Bills that was published in that Committee's Eleventh Report of 2012 (19 September 2012).

Thank you for the opportunity to provide further information on the Amendment Regulation.

Yours sincerely



Penny Wong



The Hon Chris Bowen MP
Minister for Immigration and Citizenship

RECEIVED

25 JAN 2013

Senate Standing C'ttee
on Regulations
and Ordinances

Senator the Hon. Mark Furner
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Furner

Thank you for your letter of 1 November 2012 about the *Migration Amendment Regulation 2012 (No. 5)* [Select Legislative Instrument 2012 No. 230] (the Amendment Regulation).

The Explanatory Statement (ES) accompanying the Amendment Regulation states that the Amendment Regulation implements a number of recommendations contained in the report of the Expert Panel on Asylum Seekers (the Panel). As the Committee noted, the ES stated that, due to the urgency of giving effect to that report, no further consultation on the Amendment Regulation was conducted beyond that done by the Panel. The Committee considered that the ES does not explain the reason for giving urgent effect to the report of the Panel.

I agree that the ES could have more explicitly explained the reason for giving urgent effect to the report of the Expert Panel on Asylum Seekers. The change was required urgently as a result of the Government's decision, announced on 13 August 2012, to immediately implement certain recommendations of the Panel and deter people from attempting dangerous maritime voyages to Australia.

The Committee also considered that, to the extent that the consultation conducted by the Panel was relied on in connection with the making of the Amendment Regulation, the ES does not describe the nature of that consultation, as per the requirements of sections 17, 18 and 26 of the *Legislative Instruments Act 2003* (the Act).

As the Committee noted, section 18 of the Act provides that in some circumstances, consultation may be unnecessary or inappropriate. Subsection 18(2) of the Act relevantly provides that the rule-maker may be satisfied that consultation is unnecessary or inappropriate if, amongst other matters, the instrument is required as a matter of urgency or if appropriate consultation has already been undertaken by someone other than the rule-maker.

The Amendment Regulation was made as a result of the Government's decision to immediately give effect to certain recommendations of the Panel. Given its urgency, and its purpose of giving effect to the Panel's recommendations, no consultation beyond what was conducted by the Panel in formulating its recommendations was done.

I note that the Panel had consulted widely in preparing their report, held meetings with key stakeholders and had discussions with representatives of some refugee communities in Australia and refugees who travelled to Australia more recently through irregular means. The Panel had also received and considered more than 550 written submissions on asylum issues. Attachment 12 to the Panel's report (available at <http://expertpanelonasylumseekers.dpmc.gov.au/>) sets out who was consulted and is enclosed for your convenience.

Consequently, I consider that, in the circumstances of this amendment, it was necessary and appropriate to proceed with the Amendment Regulation without further consultation and I believe it is consistent with sections 17, 18 and 26 of the Act.

I hope the information provided is helpful to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Bowen', with a stylized flourish at the end.

CHRIS BOWEN

22 JAN 2013



The Hon Anthony Albanese MP

Minister for Infrastructure and Transport
Leader of the House

RECEIVED

30 JAN 2013
Senate Standing Cttee
on Regulations
and Ordinances

Reference: 05400-2012

23 JAN 2013

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

Dear Senator Furner

Mark,

Thank you for your letter dated 29 November 2012 regarding instrument number CASA 364/12 made under regulation 208 of the Civil Aviation Regulations 1988 relating to the number of cabin attendants on Boeing 717 type aircraft operated by National Jet Systems.

This instrument has been issued revoking CASA 219/12 while the Government considers its response to the report of the House of Representatives Standing Committee on Infrastructure and Communications into cabin crew ratios on Australian aircraft.

I would also note that a range of rule changes will be progressed in 2013 as part of the aviation safety regulatory reform program including the proposed Civil Aviation Safety Regulations Part 121 'Air Transport Operations – Large Aeroplanes'. This part will include regulations for cabin crew resource management including communications, threat and error management, teamwork, leadership, stress and fatigue management and is expected to be finalised in 2013.

Any necessary amendments to Civil Aviation Order 20.16.3 flowing from the Government's response to the report would be progressed in accordance with normal processes and within the broader CASA regulatory reform program in 2013.

Thank you for raising this matter.

Yours sincerely


ANTHONY ALBANESE