The Senate

# Standing Committee on Regulations and Ordinances

## Delegated legislation monitor

Monitor No. 4 of 2013

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# Membership of the committee

## Current members

| | |
|---|---|
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| Senator the Hon Richard Colbeck (Deputy Chair) | Tasmania, LP |
| Senator Claire Moore | Queensland, ALP |
| Senator Louise Pratt | Western Australia, ALP |
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# 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

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1 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at www.comlaw.gov.au.

cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

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

## Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; 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 **21 March 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.

### CASA ADCX 004/13 - Revocation of Airworthiness Directives [F2013L00427]

| | |
|---|---|
| **Purpose** | Revokes two airworthiness directives |
| **Last day to disallow**[1] | 25 June 2013 |
| **Authorising legislation** | Civil Aviation Safety Regulations 1998 |
| **Department** | Infrastructure and Transport |

**ISSUE:**

***Drafting***

The explanatory statement (ES) to the instrument states that it is made under subregulation 39.001(1) of the Civil Aviation Safety Regulations 1998. As subregulation 39.001(1) contains no express power to amend, vary or revoke an airworthiness directive, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of 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.

## Migration Regulations 1994 – Specification under regulation 3.10A – Access to Movement Records – September 2012 [F2013L00444]

| | |
|---|---|
| **Purpose** | Revokes the Migration Regulations 1994 - Specification under regulation 3.10A - Access to Movement Records - September 2012 and permits the use of movement records information by external agencies to administer a variety of legislation |
| **Last day to disallow** | 25 June 2013 |
| **Authorising legislation** | Migration Regulations 1994 |
| **Department** | Immigration and Citizenship |

**ISSUE:**

***Drafting***

The ES to the instrument states that it is made under regulation 3.10A of the Migration Regulations 1994. As regulation 3.10A contains no express power to amend, vary or revoke an instrument, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of the minister**.

## Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 1 of 2013 [F2013L00438]

| | |
|---|---|
| **Purpose** | Specifies the fees that TEQSA may charge for things done in the performance of its functions. |
| **Last day to disallow** | 25 June 2013 |
| **Authorising legislation** | *Tertiary Education Quality and Standards Agency Act 2011* |
| **Department** | Industry, Innovation, Science, Research and Tertiary Education |

**ISSUE:**

***Drafting***

Subparagraph (i) of the instrument, which revokes the previous instrument, states that it is made under subsection 158(1) of the *Tertiary Education Quality and Standards Agency Act 2011*. As subsection 158(1) contains no express power to amend, vary or revoke an instrument, the instrument presumably also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee will therefore draw this issue to the attention of the minister**.

## Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278] and two related instruments[2]

| | |
|---|---|
| **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** | *Air Navigation Act 1920*; *Navigation Act 1912*; and *Transport Safety Investigation Act 2003* |
| **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).[3] 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 minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that consultation was undertaken in relation to two of the instruments. In relation to F201202278, this had comprised the release of a discussion paper on enhanced mandatory reporting requirements for rail accidents and occurrences, with an invitation for public submissions. Submissions had been generally supportive of the proposals in the discussion paper. An exposure draft of the

2 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].

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

proposed amendments was subsequently also the subject of public consultation, with comments being received from such bodies as the Australian Rail Association and the Rail, Tram and Bus Union. In relation to F2012L02281, the Australian Transport Safety Bureau (ATSB) undertook extensive consultation, based on release of a public consultation paper and subsequent drafts of the instrument and ES for public comment. In relation to F2012L02280, this instrument made amendments to the principal regulation to correct an out-dated reference and make minor clarifications and corrections. Consultation was therefore considered unnecessary as the instrument was considered to be 'minor or machinery' in nature.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response. However, the committee notes that the minister did not provide an undertaking to update the relevant ES in accordance with the requirements of the *Legislative Instruments Act 2003*. The committee will therefore seek such an undertaking from the minister.**

## Health Insurance (Diagnostic Imaging Capital Sensitivity) Amendment Determination 2012 (No. 3) [F2012L02510]

| | |
|---|---|
| **Purpose** | Amends the Health Insurance (Diagnostic Imaging Capital Sensitivity) Determination 2011 to correct a drafting error in the description of item 63514 to clarify that the use of anaesthetic and contrast is permissible where a General Practitioner requests an MRI knee scan for a child under the age of 16 years |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Department** | Health and Ageing |

**ISSUE:**

***Whether any person disadvantaged by previous error***

The instrument corrects an omission in the description of an item in the principal determination, which meant that the item did not, as intended, authorise the claiming of Medicare benefits for anaesthetic and contrast compounds used in diagnostic imaging. In such cases, the committee usually expects an assurance that no person has been disadvantaged or, if they have, an explanation of what steps have been taken to address that disadvantage (for example, a person may have been out of pocket by not being able to claim the benefit for the anaesthetic and contrast compounds) **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the consequence of the omission in the description of MBS item 63491 (used when a contrast agent is administered to perform MBS item 63512 – MRI knee for under 16 years) was that a patient would not have access to MBS item 63491 when billed in conjunction with MBS item 63512. The minister's department had reviewed the relevant period and identified nine services undertaken against MBS item 63512. However, the department was not able to determine how many of these were performed with contrast.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response. However, while the committee recognises that it is not possible in every case to identify if a person or persons have been disadvantaged by administrative error, it is not clear from the minister's response why the department is unable to ascertain whether any person was disadvantaged in this case. 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 **21 March 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.

## 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**[1] | 15 May 2013 |
| **Authorising legislation** | *National Environment Protection Council Act 1994* |
| **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 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 the ES accompanying the instrument contains no reference to consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

### *(b) 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. Subsection 9(2) requires the statement of

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.

compatibility to include an assessment of whether the legislative instrument is compatible with human rights. No statement of compatibility accompanies this instrument **[the committee noted that the Parliamentary Joint Committee on Human Rights had identified this issue (First Report of 2013),[3] and deferred to that committee's carriage of the matter].**

**PARLIAMENTARY SECRETARY'S RESPONSE:**

On behalf of the minister, the parliamentary secretary advised that public consultation in relation to the making of the instrument had been undertaken in accordance with section 22B of the *National Environment Protection Council Act 1994*. The consultation comprised publication of the draft proposed variation and ES, along with an invitation for public submissions (with none being received). The parliamentary secretary provided an updated ES for the instrument, which included the additional information on consultation.

**COMMITTEE RESPONSE:**

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

## Defence Determination 2012/68, Reserve employer support payments

| | |
|---|---|
| **Purpose** | Repeals and replaces the Defence (Employer Support) Determination 2005, which provides for payments to be made to the employers of certain members of the Australian Defence Force who serve as reservists |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Defence Act 1903* |
| **Department** | Defence |

**ISSUES:**

***(a) Trespass on personal rights***

Subsections 3.5(a) and (b) of the determination provide that nothing in section 3 (relating to repeal, saving and transition matters) is taken to preserve the monetary amount or value of a person's entitlements under the former determination. While the committee appreciates that the section facilitates the transition between the two determinations by, for example, ensuring that a person who has qualified for an entitlement under the previous determination will be taken to have qualified for the corresponding requirement under the new determination, the committee notes that the ES provides only a general description of the purpose and operation of the section

3 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.

and, particularly, subsections 3.5(a) and (b) **[the committee sought further information from the parliamentary secretary on the intended purpose of subsections 3.5(a) and (b) of the determination, and particularly as to whether there was potential for a person to be disadvantaged due to their operation]**.

***(b) Review of decisions on their merits***

Part 5 of the instrument deals with the question of review of decisions. It is apparent from the transitional provisions that the new instrument removes the right of review by the Administrative Appeals Tribunal (AAT) for certain decisions relating to employer support payments; however, the ES notes that a review of a decision may be conducted by the Commonwealth Ombudsman. In the committee's view, it is unclear as to why AAT review has been excluded, and what will be the nature and potential outcomes of a review by the Ombudsman **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

In relation to issue (a), the parliamentary secretary advised that the purpose of the provision was to provide transitional arrangements to avoid any detriment to claimants by ensuring continuity of applications, claims and decisions across the two determinations, without matters needing to be recommenced or delayed. The provision was in substantially the same form as that used whenever a determination repealed and replaced an earlier determination. Sufficient discretion also existed for a requirement to be waived, in cases where a member providing a required capability failed to meet a test that they had met under the previous determination.

In relation to issue (b), the parliamentary secretary advised that the removal of AAT review of decisions for all claimants was intended not to prevent review but to ensure that review took place 'at the lowest possible level'. While the Ombudsman would not be able to substitute an original decision as could the AAT, he or she could inquire into and assist self-employed members to resolve claim-related complaints through the giving of advice to claimants and the making of recommendations to decision makers (a function said to be analogous to the referral of a matter by the AAT back to a decision maker for fresh consideration, although 'less formal'). The less formal and technical nature of the Ombudsman's processes were thought to be advantageous to claimants by providing more timely and less costly review of decisions, and to be appropriate to the number and outcomes of previous reviews conducted by the AAT over the life of the scheme.

**COMMITTEE RESPONSE:**

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

**However, in relation to merits review of decisions by the AAT the committee notes that, while the parliamentary secretary has advanced a substantial justification the removal of AAT review, this step nevertheless represents a diminution of the principle that administrative decisions should be subject to review on their merits by a judicial or other independent tribunal. The committee therefore draws this matter to the attention of senators**.

## 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** | *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* |
| **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 sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the intention of the regulation was not to restrict the ability of protected action ballot agents to identify ballot papers but to ensure the integrity of the ballot process was able to be maintained. In the minister's view, other requirements in the regulation clearly required a protected ballot agent to be able to identify the identity of a voter, such that the requirement at regulation 3.16A was to operate in addition to the requirement that identifiers are to be removed from a ballot paper before the scrutineer is present (regulations 3.19(8) and 3.20(6)).

**COMMITTEE RESPONSE:**

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

## 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** | *Fair Work (Registered Organisations) Act 2009*; and *Fair Work Act 2009* |
| **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 sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister noted that the instrument (and specifically regulation 6.1A) prescribed a model dispute settlement term for a copied state instrument, as provided for under section 768BK of the *Fair Work Act 2009*. This term was modelled on and effectively the same as the existing model term for enterprise agreements in Schedule 6.1 of the regulations. The minister advised that the Australian Industrial Relations Commission (AIRC) had developed a model clause for inclusion in modern awards that, while not identical to the wording of regulation 6.1A, contained a similar requirement that work be 'safe and appropriate for the employee to perform'. Dispute resolution provisions with similar wording had been a feature of workplace relations for a significant time, although the meaning of the term 'appropriate work' was yet to be judicially considered in the dispute settlement context. In view of the above, the minister considered that the dispute settlement provisions were working satisfactorily and did not require any further clarification.

**COMMITTEE RESPONSE:**

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

## Levy Amount Formula Modification Determination 2013 [F2013L00158]

| | |
|---|---|
| **Purpose** | Modifies the formula by which a levy amount is calculated for a participating persons, in the first or second eligible revenue period, to provide for the calculations to be adjusted in the event that a participating person goes into receivership, liquidation, general administration or ceases to exist |
| **Last day to disallow** | 17 June 2013 |
| **Authorising legislation** | *Telecommunications Universal Service Management Agency Act 2012* |
| **Department** | Broadband, Communications and the Digital Economy |

**ISSUE:**

***Whether instrument is validly made***

Section 99 of the *Telecommunications Universal Service Management Agency Act 2012* sets out a number of formulas for the setting of a levy amount applicable to a participating person for an eligible revenue period. The instrument is made under subsection 99(8), which provides that the minister may, by legislative instrument, 'modify' the formula in subsection 99(3). However, noting that the effect of this instrument is to wholly replace subsection 99(3) with four new subsections, the committee is unsure as to whether, on a strict interpretation, the power to 'modify the formula in subsection 99(3)' provides sufficient authority to wholly replace subsection 99(3), as the instrument does or purports to do **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that section 2B of the *Acts Interpretation Act 1901* provides that 'modifications' in relation to a law includes additions, omissions and substitutions, meaning that it was within the minister's power to omit and substitute the formula as effected by the determination.

**COMMITTEE RESPONSE:**

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

## Therapeutic Goods Information (Stakeholder Consultation on the System for Australian Recall Actions) Specification 2013 [F2013L00117]

| | |
|---|---|
| **Purpose** | Permits the secretary to release certain therapeutic goods information to the persons and bodies mentioned in the specification, for specified purposes |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Therapeutic Goods Act 1989* |
| **Department** | Health and Ageing |

**ISSUE:**

***Insufficient explanation provided regarding consultation***

Regarding consultation, the ES for the instrument states:

> The release of therapeutic goods information in relation to recall actions for the purpose of testing a prototype of the SARA database is the proposed mechanism for consulting stakeholders on the database. It is considered to be minor and machinery in nature.

Section 26 of the *Legislative Instruments Act* 2003, requires that an ES provide an explanation of why consultation was not undertaken in a given case. The issue of consultation is addressed only indirectly in the ES, and it is not clear to the committee whether consultation was considered unnecessary or inappropriate due to the nature of the instrument or because of plans for future consultation **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

On behalf of the minister, the parliamentary secretary advised that a number of bodies had been targeted and invited to participate in the testing of the prototype System for Recall Actions (SARA) database, which is currently being created. These bodies were listed in Schedule 1 of the instrument, and included consumer and practitioner bodies such as Medicines Australia, the Generic Medicines Industry Association of Australia and the Australian Medical Association. The specification allowed those bodies to participate in the testing of the prototype database by allowing them to access the information it contained, and the comments and feedback from the testing process had been taken into account in determining the final form of the database. The parliamentary secretary advised that the ES would be amended to include the information on consultation provided.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary and has concluded its interest in the matter**.

## Water Efficiency Labelling and Standards Determination 2013 [F2013L00067]

| | |
|---|---|
| **Purpose** | Repeals the Water Efficiency Labelling and Standards Determination 2011 and sets the registration requirements and rules for products that are covered by the WELS Scheme and also sets the fee amount for those registrations. |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Water Efficiency Labelling and Standards Act 2005* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUE:**

***Unclear basis for calculation of fees***

The determination repeals the previous determination, sets the registration requirements and rules for products that are covered by the Water Efficiency Labelling and Standards (WELS) Scheme and sets the fee amount for those registrations. Contrary to the committee's usual expectation, the ES does not indicate whether the registration fees have decreased or increased or describe the basis for the calculation of the registration fees **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that the registration fees had been set with the intention of raising $923,000, being the proportion of the WELS budget relating to registration (the scheme being restricted to cost recovery only for registration related costs). The fee calculation took into account the cost recovery target, the number of registrations in each tier, the number of products in each tier and an estimate of the number of new products expected to be registered during the year.

**COMMITTEE RESPONSE:**

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

## Native Title (Assistance from Attorney-General) Guideline 2012 [F2012L02564]

| | |
|---|---|
| **Purpose** | To be applied in authorising the provision of financial assistance under section 213A of the *Native Title Act 1993* |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Native Title Act 1993* |
| **Department** | Attorney-General's |

**ISSUE:**

***Unclear term***

The guideline sets out how the Attorney-General is to make decisions about providing financial assistance to native title claimants. Section 4.2 of the guideline provides that a decision maker must not authorise the provision of financial assistance for costs incurred before a complete application for assistance has been received unless there are 'exceptional circumstances'. However, there is no guidance or examples as to what might constitute exceptional circumstances, and the committee considers that this could be a potentially uncertain criteria **[the committee sought further information from the Attorney-General]**.

**MINISTER'S RESPONSE:**

The Minister for Emergency Management responded, advising that there would be limited circumstances where an applicant would be unable to complete an application before incurring costs. The term 'exceptional circumstances' had therefore been intentionally left undefined to avoid creating expectations that costs would be covered in certain circumstances, and to allow the decision maker to exercise his or her discretion in cases where a strict application of the policy would produce an unfair result. The minister further advised that section 4.2 of the guideline was consistent with the *Commonwealth guidelines for legal financial assistance*, which were applied in a number of comparable financial assistance schemes. In general, the minister expected that requests for assistance based on a claim of 'exceptional circumstances' would be assessed with reference to whether it would be unreasonable to refuse assistance due to severe time constraints, where an applicant experiences difficulty in being able to submit an application, or where procedural issues mean it would be unfair to refuse assistance with the payment of retrospective costs.

**COMMITTEE RESPONSE:**

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

## Amendment - List of Specimens Taken to be suitable for Live Import (03/01/2013) [F2013L00105]

| | |
|---|---|
| **Purpose** | Amends the List of Specimens Taken to be Suitable for Live Import (29/11/2001) to update the scientific name for the sucker catfish |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Environment Protection and Biodiversity Conservation Act 1999* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

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

**MINISTER'S RESPONSE:**

The minister advised that, as the amendment was a simple taxonomic update to a species name, the instrument was considered to be 'minor or machinery' in nature and consultation was therefore considered unnecessary. The minister further advised that the ES would be updated as requested by the committee.

**COMMITTEE RESPONSE:**

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

## Amendment of List of Exempt Native Specimens - Pandanus spiralis (18/12/2012) [F2013L00107]

| | |
|---|---|
| **Purpose** | Amends the List of Exempt Native Specimens (29/11/2001) by adding *Pandanus spiralis* to the list |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Environment Protection and Biodiversity Conservation Act 1999* |
| **Department** | Sustainability, Environment, Water, Population and Communities |

**ISSUE:**

***Insufficient explanation provided in relation to consultation***

Regarding consultation, the ES for the instrument provides a substantial description of the nature of consultation undertaken in relation to the making of the instrument. However, a reference to the 'relevant state department' is unclear, as the committee is not able to determine which department is referred to on the face of the instrument and more generally **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the department referred to was the Western Australian Department for Environment and Water. On the basis of the consultation undertaken, that department had supported the inclusion of *Pandanus spiralis* on the List of Exempt Native Species.

**COMMITTEE RESPONSE:**

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

## Carbon Credits (Carbon Farming Initiative) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571]

| | |
|---|---|
| **Purpose** | Sets out the rules for implementing an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to reduce the methane generated from manure in dairy production systems |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Climate Change and Energy Efficiency |

**ISSUE:**

***Insufficient explanation provided in relation to consultation***

Regarding consultation, the explanatory statement (ES) for this instrument states:

> The methodology proposal was developed by the Department of Climate Change and Energy Efficiency (the Department) in collaboration with a technical working group made up of representatives from the dairy industry, the Australian Government and State and Territory governments.
>
> The methodology proposal was published on the Department's website for public consultation from 13 June 2012 to 21 July 2012. Stakeholders and members of the public who asked to be listed on the mailing list maintained by the Department were notified of the public consultation period.'

Unlike the ES for a similar instrument, the Carbon Credits (Carbon Farming Initiative) (Capture and Combustion of Methane in Landfill Gas for Legacy Waste: Upgrade projects) Methodology Determination 2012 [F2012L02583], no information is provided as to the outcome of the consultation, such as the number, if any, of submissions received and the extent to which any comments may have been or were required to be taken into account **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that public consultation was undertaken in relation to the instrument. The methodology proposal was developed by the Department of Climate Change and Energy Efficiency in collaboration with a technical working group made up of representatives from the dairy industry and the Commonwealth, state and territory governments. The proposal was published with an invitation for public comments, with five submissions being received and considered. The parliamentary secretary provided a revised ES in accordance with the committee's request.

**COMMITTEE RESPONSE:**

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

## Coastal Trading (Revitalising Australian Shipping) Act 2012 – Section 11 exemption for cruise vessels [F2012L02585]

| | |
|---|---|
| **Purpose** | Provides an exemption from the Coastal Trading (Revitalising Australian Shipping) Act 2012 for certain cruise vessels |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Coastal Trading (Revitalising Australian Shipping) Act 2012* |
| **Department** | Infrastructure and Transport |

**ISSUE:**

***(a) No explanation 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 sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

***(b) Whether exemption more appropriate for parliamentary enactment***

The instrument allows a certain class of vessel to engage in carriage of passengers between Australian ports (except Victoria and Tasmania) without a licence, continuing for a further four years an exemption in effect since 1998. The committee considers that the exemption could be characterised as a de facto amendment to the Act, and as such it may be that the exemption would be more appropriately effected through an amendment to the principal Act. **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

Regarding issue (a), the minister advised that consultation in relation to the instrument was undertaken as part of the development of the Stronger Shipping for a Stronger Economy reform. In addition, the Minister for Tourism was consulted and advised of the proposed continuance of the exemption. The minister further advised that the ES had been reissued in accordance with the committee's request.

Regarding issue (b), the minister advised that the extension to the exemption until 31 December 2017 was intended to align with the review of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* that was to occur five years after its commencement, and that this approach had been accepted by industry stakeholders. The department continued to consult with industry regarding the administration and operation of the *Coastal Trading (Revitalising Australian Shipping) Act 2012*, and

would give consideration, if necessary, to the question of whether the current exemption could be more properly effected through an amendment to that Act.

**COMMITTEE RESPONSE:**

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

## 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** | *Foreign Acquisitions and Takeovers Act 1975* |
| **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 sought 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 description or explanation is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee sought further information from the Assistant Treasurer and requested that, if necessary, the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**ASSISTANT TREASURER'S RESPONSE:**

Regarding issue (a), the Assistant Treasurer advised that the purpose of subsection 2(2) of the instrument was to provide for public notification of when the regulation will commence, and that the approach taken ensured such notification through both the instrument and the regulation it commenced being registered on the Federal Register of Legislative Instruments (FRLI). More generally, subsection 4(1) of the *Legislative Instruments Act 2003* clearly contemplated that a legislative instrument may be made under another legislative instrument as the 'enabling legislation'. However, in light of the committee's inquiry, the Office of Parliamentary Counsel (OPC) had advised that in future such notifications would instead be made by Gazette notices, which would be published electronically and linked to the legislation to which they relate.

Regarding issue (b), the Assistant Treasurer advised that, as the changes made by the regulation replicated existing provisions (extended in their operation to New Zealand by the instrument), they were considered to be minor and consultation was therefore considered unnecessary. More broadly, the Assistant Treasurer noted that extensive consultation was undertaken in relation to the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, including a process of public consultation and direct consultation with the states and territories.

**COMMITTEE RESPONSE:**

**The committee thanks the Assistant Treasurer for his response and has concluded its interest in the matter**.

## Carbon Credits (Carbon Farming Initiative) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571]; and

## Carbon Credits (Carbon Farming Initiative) (Destruction of Methane from Piggeries using Engineered Biodigesters) Methodology Determination 2013 [F2013L00124]

| | |
|---|---|
| **Purpose** | Sets out the detailed rules for implementing and monitoring an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to capture biogas generated from dairy farms and to reduce the methane generated from manure in conventional piggeries |
| **Last day to disallow** | 16 May 2013 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Climate Change and Energy Efficiency |

**ISSUE:**

***Vague or uncertain terminology***

These instruments set out the rules for implementing and monitoring an agricultural emissions avoidance project under the Carbon Farming Initiative (CFI) to capture biogas generated from dairy farms; and to reduce the methane generated from manure in conventional piggeries. Subsection 3.5(4) of the first determination (F2012L02571), setting out one of the methods for measuring solids removal efficiency of the dairy production system, and the table in section 5.2 of the second determination (F2013L00124), setting out matters which must be measured for the purposes of calculating baseline emissions, require that certain parameters must be 'sampled on enough occasions to produce an unbiased, representative sample'. While the committee recognises that there may be a legitimate reason for drafting the requirement in such broad terms, it considers that this could be a potentially uncertain requirement **[the committee sought further information from the parliamentary secretary]**.

**PARLIAMENTARY SECRETARY'S RESPONSE:**

The parliamentary secretary advised that, in general, methodology determinations related to the Carbon Farming Initiative are drafted so as to strike an appropriate balance between prescription and flexibility, while satisfying the offsets integrity standards outlined in the *Carbon Credits (Carbon Farming Initiative) Act 2011*. The methodology determinations were only made once endorsed by the independent Domestic Offsets Integrity Committee, comprised of experts in agricultural and land emissions abatement and sequestration. In the case of the two methodology determinations in question, there was currently no measurement standard directly applicable to determining the solids removal efficiency of manure solids or for sampling volatile solids. Given this, the methodology determinations instead provided overarching guidance as to the objective of achieving an unbiased, representative sample to allow proponents to achieve this outcome in the most efficient manner. The

parliamentary secretary further advised that the Clean Energy Regulator would determine on a case-by-case basis which practices would satisfy the requirements of the methodology determinations, and provide guidance to assist proponents to understand the scope of the requirement.

**COMMITTEE RESPONSE:**

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

## Nuclear Non-Proliferation (Safeguards) Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 292] [F2012L02423]

| | |
|---|---|
| **Purpose** | Amends the Nuclear Non-Proliferation (Safeguards) Regulations 1987 to update the list of prescribed international agreements in accordance with which powers under *the Nuclear Non-Proliferation (Safeguards) Act 1987* are to be exercised |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Nuclear Non-Proliferation (Safeguards) Act 1987* |
| **Department** | Foreign Affairs and Trade |

**ISSUE:**

***No explanation 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 sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that the regulation updated the list of prescribed international agreements according to which powers under the *Nuclear Non-Proliferation (Safeguards) Act 1987* are to be exercised. Those agreements had been tabled in both Houses of Parliament prior to ratification to facilitate public consultations and scrutiny by the Joint Standing Committee on Treaties. The minister considered that consultation in relation to the regulation was unnecessary as it effected only minor changes.

**COMMITTEE RESPONSE:**

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

## 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** | *Child Support (Registration and Collection) Act 1988* |
| **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 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 there was a period of approximately one month to prepare the directions, which commenced the day after the changes made by the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012*. The minister further advised that there were two areas in which

the directions altered existing arrangements. First, section 18 of the directions permits an SSAT member to communicate protected information to a person if that information concerns a threat to the life, health or welfare of a person (reflecting a new subsection 16(3A) of the *Child Support (Registration and Collection) Act 1988*). Second, section 31, which establishes procedures for dealing with requests for reinstatement of a child support application previously dismissed by the SSAT, reflects changes to section 100 of the *Child Support (Registration and Collection) Act 1988*. This change gives the Principal Member powers to reinstate a child support application that had been dismissed in certain circumstances, as previously there had been no capacity to reinstate a child support application that had been dismissed by the SSAT.

**COMMITTEE RESPONSE:**

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

## 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 *Customs Act 1901* 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** | *Customs Act 1901* |
| **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 sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that he considers the construction of the provision to be appropriate, given that there are 'obvious complexities' in serving notices on companies. The requirement that such a notice be given to a person who reasonably

appears to be in a management or executive position (as opposed to any person on the company premises) was therefore a sufficient safeguard and meant, for example, that the notice provision would not have been complied with if the notice was given to administrative staff at a given company. The minister further advised that the Department of Defence would instruct all persons authorised to give notices to make appropriate inquiries when serving a notice on a company to ensure that the person being given the notice was in a management or executive position. More generally, the minister noted that the regulation was reasonable when compared with other methods by which a notice can be served, such as notices served by mail, which are taken to have been received seven business days after the date of response.

**COMMITTEE RESPONSE:**

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

## Customs (Malaysian Rules of Origin) Regulation 2012 [Select Legislative Instrument 2012 No. 318] [F2012L02435]

| | |
|---|---|
| **Purpose** | Prescribes matters relating to the rules of origin that are required to be prescribed under Division 1H of the *Customs Act 1901* and which are required to fulfil, in part, Australia's obligations under Chapter 3 of the Malaysia-Australia Free Trade Agreement |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Customs Act 1901* |
| **Department** | Attorney-General's |

**ISSUE:**

***Insufficient explanation regarding consultation***

Regarding consultation, the ES for the instrument states:

> No particular consultation was undertaken with regard to this regulation; however, consultation regarding the Malaysia-Australia Free Trade Agreement was undertaken as part of the Joint Standing Committee on Treaty's [sic] consideration of the Agreement.

Section 26 of the *Legislative Instruments Act 2003* requires that an ES provide an explanation of why consultation was not undertaken in a given case. It is not clear to the committee how, of itself, the stated reason for not consulting in relation to the making of the instrument necessarily relates to a conclusion by the rule maker that consultation was 'unnecessary' or 'inappropriate' (as provided for by section 18) **[the committee sought further information from the minister]**

**MINISTER'S RESPONSE:**

The minister advised that extensive public and targeted stakeholder consultation were undertaken during the Malaysia-Australia Free Trade Agreement (MAFTA) negotiations. In addition, the Joint Standing Committee on Treaties conducted an

inquiry on the MAFTA, which included the acceptance of written submissions and a public hearing resulting in a report recommending that binding treaty action be taken. The minister further advised that the ES would be updated to include the information provided on consultation.

**COMMITTEE RESPONSE:**

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

## Customs Act 1901 - Amendment of Approved Statement Instrument No. 6 of 2013 - Amendment of "Self-Assessed Clearance Declaration (Sea) (To Be Communicated With a Cargo Report)" [F2013L00142]

| | |
|---|---|
| **Purpose** | Amends the Customs Act 1901 - CEO Instrument of Approval No. 4 of 2006 to update references and the specified low value goods threshold |
| **Last day to disallow** | 16 May 2013 |
| **Authorising legislation** | *Customs Act 1901* |
| **Department** | Attorney-General's |

**ISSUE:**

***Insufficient explanation provided in relation to consultation***

Regarding consultation, the ES for the instrument states:

> No consultation was undertaken under section 17 of the Legislative Instruments Act 2003 before this instrument was made as it is of a minor or machinery nature and does not substantially alter existing arrangements.

However, the instrument appears to make very similar changes to those made by Customs Act 1901 - Amendment of Approved Statement Instrument No. 2 of 2013 - Amendment of "Self-Assessed Clearance Declaration (Air) (To be Communicated with a Cargo Report)" [F2013L00134], for which the ES identified consultation as having taken place with the Conference of Asia Pacific Air Carriers. Given the similarity between the instruments, the committee considers that is unclear as to why consultation was not considered necessary or appropriate in the case of the current instrument **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that the instrument was part of a package of six instruments that amended approved statements administered by Australian Customs and Border Protection. Instruments one to five included, at the request of the Conference of Asia Pacific Air Carriers, an additional field to be completed in certain circumstances. Consultation undertaken on these five instruments related only to the inclusion of the additional field, as the other changes were considered to be minor or machinery in nature. As the instrument which was the subject of the committee's inquiry did not

include the additional field, no consultation was undertaken in respect of that instrument.

**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 **21 March 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 15 March 2013

***Australian Passports Act 2005***

Australian Passports Amendment Determination 2013 (No. 1) [F2013L00440]

***Australian Prudential Regulation Authority Act 1998***

Australian Prudential Regulation Authority (confidentiality) determination No.4 of 2013 [F2013L00429]

***Civil Aviation Act 1988***

CASA ADCX 004/13 - Revocation of Airworthiness Directives [F2013L00427]

***Coastal Trading (Revitalising Australian Shipping) Act 2012***

Coastal Trading (Revitalising Australian Shipping) Act 2012 – Section 11 exemption for voyages between Christmas Island and Australian States and Territories [F2013L00450]

***Defence Act 1903***

Defence Determination 2013/13, Post indexes – amendment

Defence Determination 2013/14, Excess commuting costs - amendment

***Environment Protection and Biodiversity Conservation Act 1999***

Amendment – List of Specimens Taken to be Suitable for Live Import (19/2/2013) [F2013L0443]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (136) (05/03/2013) [F2013L00432]

Coral Sea Commonwealth Marine Reserve Management Plan 2014-24 [F2013L00425]

Environment Protection and Biodiversity Conservation Act 1999 – section 280 – Instrument of Approval of Variation to Adopted Recovery Plan (21/02/2013) [F2013l00447]

North Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00426]

North-West Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00428]

South-east Commonwealth Marine Reserves Network Management Plan 2013-23 [F2013L00423]

South-west Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00422]

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

Temperate East Commonwealth Marine Reserves Network Management Plan 2014-24 [F2013L00421]

### *Fair Entitlements Guarantee Act 2012*

Fair Entitlements Guarantee (Extended operation of the Act in relation to Rosella Foods Pty Ltd and Rosella Food Holdco Pty Ltd in Administration) Declaration 01/2013 [F2013L0446]

### *Family Law Act 1975*

Family Law (Superannuation – Provision of Information: Governors-General Pension Scheme) Determination 2013 [F2013L00453]

Family Law (Superannuation – Provision of Information: Judges' Pensions Act Scheme) Determination 2013 [F2013L00452]

### *Financial Management and Accountability Act 1997*

Financial Management and Accountability (Local Hospital Networks Special Account) Determination 2013/1 [F2013L00451]

### *Fisheries Management Act 1991*

Northern Prawn Fishery (Closures) Direction No. 161 [F2013L00431]

Northern Prawn Fishery (Closures) Direction No. 162 [F2013L00430]

Northern Prawn Fishery (Closures) Direction No. 163 [F2013L00442]

Western Tuna and Billfish Fishery Overcatch and Undercatch Determination 2013 [F2013L00424]

### *Higher Education Support Act 2003*

Higher Education Support Act 2003 - Revocation of Approval as a Higher Education Provider (Gordon Institute of TAFE) [F2013L00439]

Higher Education Support Act 2003 - VET Provider Approval (No. 9 of 2013) [F2013L00437]

### *Migration Act 1958*

Migration Regulations 1994 – Specification under regulation 3.10A – Access to Movement Records – September 2012 [F2013L00444]

### *National Health Act 1953*

National Health (Weighted average disclosure price – main disclosure cycle) Amendment Determination 2013 (No. 1) (No. PB 18 of 2013) [F2013L00445]

### *Public Service Act 1999*

Australian Public Service Commissioner's Directions 2013 [F2013L0448]

Public Service Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 35, 2013] [F2013L00460]

### *Tertiary Education Quality and Standards Agency Act 2011*

Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 1 of 2013 [F2013L00438]

### *Therapeutic Goods Act 1989*

Therapeutic Goods Information (System for Australian Recall Actions) Specification 2013 [F2013L0449]

### *Veterans' Entitlements Act 1986*

Veterans' Entitlements (Special Assistance) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 20, 2013] [F2013L00441]

***Workplace Gender Equality Act 2012***

Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) [F2013L00434]

## Total number of instruments scrutinised: 33

# Appendix 2

## Guideline on explanatory statements: consultation

AUSTRALIAN SENATE

# 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 Anthony Albanese MP
Minister for Infrastructure and Transport
Leader of the House

RECEIVED
15 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

*Reference: 00483-2013*

14 MAR 2013

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

Dear Senator Furner Mark,

**Transport Safety Investigation Amendment 2012 (No. 1)**
**[Select Legislative Instrument 2012 No 263] [F201202278];**
**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]**

Thank you for your letter dated 7 February 2013.

I am advised by the Australian Transport Safety Bureau (ATSB) that consultation did take place in respect of two of the above named instruments. On one instrument no consultation took place; however that was not regarded as necessary.

The details of the consultation undertaken and the reasons for no consultation on one instrument are as follows:

1. **Transport Safety Investigation Amendment 2012 (No. 1)**
**[Select Legislative Instrument 2012 No 263] [F201202278].**

The ATSB conducted two rounds of consultation in relation to these amendments to Part 4 of the *Transport Safety Investigation Regulations 2003* (TSI Regulations). On 12 June 2012 the ATSB released a discussion paper on enhanced mandatory reporting requirements for rail accidents and occurrences. Submissions were invited on that discussion paper and the period for making submissions was open until 27 July 2012. I am advised that the ATSB received submissions generally supportive of the proposals in the discussion paper. Following the consultation paper the ATSB engaged with the Office of Legislative Drafting and Publishing, (as it was then known) to produce an Exposure Draft of proposed amendments to Part 4 of the TSI Regulations for a further round of public consultation. The Exposure Draft was released by the ATSB for consultation on 25 September 2012.

As the proposed amendments were intended to harmonize with regulations made for the purpose of establishing the National Rail Safety Regulator (Explanatory Statement to this

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instrument refers), the proposed amendments were released for consultation concurrently with complementary regulations under the *Rail Safety National Law (South Australia) Act 2012* that were released for the same purpose by the National Transport Commission. I am advised that the ATSB received only a small number of queries on the Exposure Draft, principally from the Australasian Rail Association and the Rail, Tram and Bus Union. Again, the submissions was broadly supportive of the proposed changes;

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

No consultation took place in respect of this instrument. It was not considered necessary as the instrument was of a minor or machinery nature that did not substantially alter existing arrangements.

The Explanatory Statement to this instrument sets out in detail the purpose of the amendments. The amendment to regulation 5.2A was to replace an out-dated reference to regulations that were repealed by the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012.*

The purpose of the amendment to regulation 5.8(2) was to draw a distinction between information obtained in the course of an investigation of a transport safety matter under the *Transport Safety Investigation Act 2003* and that obtained under the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012.* This is because arrangements for disclosure of information obtained under that regulation are specifically dealt with by that regulation. Those arrangements did not substantially alter arrangements in place prior to the making of the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012.*

The amendment to regulation 5.8(2)(a)(ii) was merely to correct a technical anomaly in the regulations.

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

Consistent with the progression of reforms to make the ATSB the national rail safety investigator, the ATSB sought to develop a voluntary and confidential reporting scheme for the rail sector. Concurrent with the development of the scheme, the ATSB also sought to consolidate the existing voluntary and confidential reporting schemes for aviation and marine with the new rail scheme. Extensive consultation was undertaken, as follows:

(a) In December 2010 the ATSB presented a consultation paper to rail industry stakeholders comprising representatives of the States and Territories, the Commonwealth, the Australasian Rail Association, the Association of Tourist and Heritage Rail Australia and the Rail Tram and Bus Union. The purpose of that paper was to ascertain the views of rail industry to gauge support for the development of a voluntary and confidential reporting scheme for rail. The response was generally positive.

(b) Following the provision of the consultation paper the ATSB developed an unofficial draft of proposed regulations that established a consolidated scheme of voluntary and confidential reporting for aviation, marine and rail. The unofficial draft regulations, along with explanatory material, were released to the aviation, marine and rail industries and generally for public consultation on 12 September 2011. Stakeholders were given until 16 December 2011 to comment.

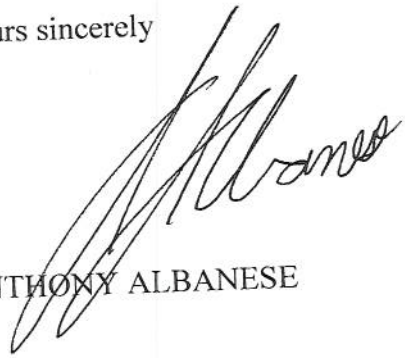
A number of submissions across the industries were received by the ATSB with a summary of the issues raised and the ATSB response to those issues was published on the ATSB website. The response was, as with the initial discussion paper, positive as to the initiative.

(c) Following the release of the unofficial draft the ATSB instructed the Office of Legislative Drafting and Publishing to prepare an Exposure Draft of the regulation for a further round of public comment. The Exposure Draft and explanatory material were released for consultation on 12 June 2012 with stakeholders given until 27 July 2012 to make further comment. As with the previous rounds of consultation the ATSB noted the broad support for the scheme, with any concerns expressed generally relating to operational issues rather than the form of the regulation itself. Only minor changes were made to the text of the Exposure Draft prior to the regulation being finalised. The ATSB will shortly be publishing a summary of the issues raised in the consultation on the Exposure Draft along with the ATSB responses.

I also advise that the document titled 'Guidance to explanatory statements: consultation' has been brought to the attention of the relevant officers and work areas of the ATSB. I also provide my assurance that future Explanatory Statements will provide information on consultation.

Thank you for bringing these matters to my attention.

Yours sincerely



ANTHONY ALBANESE

RECEIVED
18 MAR 2013
Senate Standing Cttee
on Regulations
and Ordinances

**The Hon Tanya Plibersek MP**
**Minister for Health**

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

Dear Senator Furner

Thank you for your letter of 28 February 2013 regarding Health Insurance (Diagnostic Imaging Capital Sensitivity) Amendment Determination 2012 (No.3) [Legislative Instrument F2012L02510].

I note your concern that the accompanying Explanatory Statement (ES) to this amendment did not provide sufficient detail on whether any person was disadvantaged by the drafting error for Magnetic Resonance Imaging (MRI) item 63512 in the determination.

The Health Insurance (Diagnostic Imaging Capital Sensitivity) Amendment Determination 2012 (No.3) corrected access to the Medicare Benefits Schedule (MBS) modifying item, 63491. Item 63491 is used when a contrast agent is administered to perform MBS item 63512. The error did not impact patient's access to item 63512 but limited access to item 63491 when billed in conjunction with 63512.

My Department has reviewed the number of services that were undertaken in the effected period. Approximately nine services (63512 – MRI knee for under 16 years of age) were undertaken. My Department is not able to determine how many of these were performed with contrast.

My Department will note the Committee's advice on the drafting of instruments and associated Explanatory Statements in the future.

Once again, thank you for writing.

Yours sincerely

Tanya Plibersek

**Tanya Plibersek**

18-3-13

Parliament House
CANBERRA ACT 2600

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RECEIVED
13 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

**Senator the Hon Don Farrell**

**Parliamentary Secretary for Sustainability and Urban Water**

RECEIVED
13 MAR 2013

C13/2933

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

Dear Mark Senator

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

I refer to your letter of 7 February 2013 concerning the National Environment Protection (Movement of Controlled Waste between States and Territories) Measure (MCW NEPM) Minor Variation 2012 (No.1). The Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, referred your letter to me for response.

The above-named instrument was developed to make minor editorial changes and correct typographical errors in the principal instrument. I understand the Committee's concern regarding the omission in the explanatory statement of any information about consultation on the instrument.

I wish to assure the Committee that, pursuant to Section 22B of the *National Environment Protection Council Act 1994* relating to public consultation for minor variations of national environment protection measures, the National Environment Protection Council (NEPC) ensured appropriate consultation was carried out. A notice was published stating that the draft of the proposed minor variation and draft explanatory statement were available via the website of the Standing Council on Environment and Water.

The notice stated that submissions on these documents were welcome and the closing date for submissions was Monday 13 August 2012. The notice was published in *The Australian* on 12 July and 18 July 2012 and in *The Gazette* on Wednesday 18 July 2012. No comments were received by the closing date.

Thank you for drawing my attention to the guideline regarding information on consultation that is to be included in explanatory statements. I have brought it to the notice of relevant officials for future reference and action.

Parliament House, Canberra ACT 2600 Telephone (02) 6277 3400 Fax (02) 6277 5805

I have enclosed a copy of the updated explanatory statement, which now includes a description of the consultation process undertaken in accordance with section 17 of the *Legislative Instruments Act 2003*.

Thank you for writing on this matter.

Yours sincerely

Senator Don Farrell

Enc.

RECEIVED
14 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

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

Senator the Hon Mark Furner
Chair – Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Furner

Defence Determination 2012/68

I write in response to correspondence received on 28 February 2013, regarding amendments to the Defence (Employer Support) Determination 2005. I note the matters raised by the Standing Committee on Regulations and Ordinances, and have set them out below, with a detailed response and a brief background on the scheme and the recent amendments.

*Background to the Scheme and recent amendments.*

As you may be aware, the Employer Support Payment Scheme (ESPS), introduced in 2001, provides payments to employers and self-employed Reservists who make a claim in accordance with the determination in force at the time a claim is made. Claimants seek payments from the Commonwealth for their employee's absence, or in the case of self-employed Reservists, their absence, from the workplace, while they are undertaking Defence Service. Payments are made at the average weekly full time adult ordinary time earning. For financial year 12/13, this is $1345.20 for every five days of Defence service. Employers do not always pay their Reservist whilst they are taking Defence leave, and the employer can use the payment as they see fit. The Reservists also receive their Defence pay for their Defence Service. In the case of self-employed Reservists this means that the Commonwealth will, in effect, pay one person twice for the Defence service. Since 2001, over $180 million dollars has been dispensed under the scheme.

Prior to the recent amendments there was no requirement for Defence to establish whether the capability or work performed by the Reservist was indeed a necessary capability or whether the capability could have been acquired in a more cost effective manner. Furthermore, the criteria to establish eligibility as a self-employed person was incredibly weak, in effect allowing persons to set up a business, with little or no proof that the business was providing actual income to the Reservist for a legitimate period of time, or was indeed a viable legitimate concern.

Defence has conducted seven internal audit reports, all with adverse results, highlighting both the lack of appropriate eligibility criteria and key performance indicators which demonstrate its intended aims. The latest internal audit was conducted before the amendments made in June 2012 and December 2012. One of its key conclusions was that "the lack of adequate performance management information makes it difficult to assess the scheme's intended aim of supporting

extended periods of training and operational deployment". It also found that the ESP claim and payment processing arrangements are in "urgent need of review to ensure consistent administration, reduce costs and manage risks".

The amendments to the scheme seek to address these and other issues. In addition, these amendments ensure that there a real need is addressed and a measurable basis exists for a scheme which expends significant amounts of public funds. This scheme must deliver a required capability for Defence in the most cost effective manner.

Importantly, these changes do not prevent Reservists from undertaking Defence service. In the case of self-employed Reservists, they simply mean that a self-employed Reservist must satisfy the capability and value for money requirement if they wish to make a claim for an Employer Support payment. All Reservists are volunteers who must take into account all of their personal circumstances before deciding to volunteer for Defence service. Self-employed Reservists make decision to run a business. If faced with a choice of buying an item or hiring personnel at double or triple the cost of an identical alternative, it is understandable that a self-employed person would choose the most cost effective option for their business. Australian taxpayers should not expect a different standard to apply to the expenditure of public funds. The Australian public rightly expect that the expenditure of public funds delivers value for money on capability that is required for the efficient and effective functioning of the Australian Defence Force.

A self-employed member also has greater control over the decision to volunteer to perform service, as they are both employer and employee in relation to their business. A self-employed member is able to assess their own potential to keep their business running and to provide Defence service. Employers of Reservists have less control regarding releasing a Reservist employee and the impact Defence service may have on their business. Accordingly, this significant difference ought to be reflected in a legislative regime from an accountability perspective. The Determination has consistently contained different criteria for establishing employment relationships, which is necessitated by the simple fact that the very nature of self-employment is different to that of employment by a third party. For example, the differing qualifying periods for self-employed Reservists as opposed to employers, seeks to ensure that self-employed Reservists are indeed self-employed – that is their business is their principle source of income/employment, as opposed to a short term "arrangement". This is aimed at discouraging sham situations and rorting, to ensure that the scheme is not exploited by persons who establish a "business" which is not a genuine concern generating income, simply in order to claim payments under the scheme.

*Response to questions from the Committee.*

The Committee sought further advice on the intended purpose of subsections 3.5(a) and (b) of the determination, and particularly as to whether there is potential for a person to be disadvantaged due to its operation.

The purpose of the transitional provisions was to avoid any detriment to claimants by ensuring that any administrative issues such as qualifying periods already served, decisions already made in relation to an extant period of Defence service at the time the determination commenced, would continue to be effective for those claimants. Therefore, these provisions are intended to avoid disadvantage. In particular, it was intended to avoid the need for people to rework claims that had already been lodged

to Defence and for decision-makers to revisit foundation considerations simply due to the change in the determination under which benefits would be provided. There should not be potential for a person to be disadvantaged, rather, the idea is to ensure continuity as far as possible. It should be noted that in addition to this transitional provision (which is in substantially the same form as is used whenever a significant Defence benefit is remade when a primary determination is repealed and replaced with another), the capability payment features significant discretion as to compliance with preconditions where there is a concern as to continued payments as necessary to support capability. Put simply, if a member failed to meet a test that they had met under the previous determination, it would be open to the decision-maker to 'waive' that requirement for a period in order to ensure the member could continue to provide the required capability.

The Committee also sought further advice as to the reason(s) for removing the availability of review by the Administrative Appeals Tribunal (AAT) for decisions relating to ESPs; the nature of any review of such a decision by the Ombudsman; and the potential outcomes of any review of such a decision by the Ombudsman.

The determination removes review in the AAT for all claimants. This is done not to prevent review, but in order to ensure it happens at the lowest possible level. The change will promote the resolution of factual issues that go to the merits of a decision with decision makers in the first instance. Given that issues relevant to the eligibility for payments may involve issues of Defence service, the Defence Ombudsman is expressly referred to and may be able to inquire into and assist self-employed members to resolve complaints around their service as it relates to the claim. Note the Ombudsman does not 'substitute' their decision for the original decision-maker's and this is a point of difference between AAT jurisdiction and the Ombudsman inquiry function.

Because the Ombudsman is able to look holistically at a complaint and recommend actions to resolve it, this is seen as the simplest way to resolve problems. Many of the actions taken to the AAT have been grounded in mistaken understandings of the determination and the role of Reserve service. These are issues which the Ombudsman may be able to address either by advice to the complainant or recommendations to the decision-makers about the action that has been taken. This is similar to, but less formal than, the AAT action of referring a matter back to a decision-maker for fresh consideration, having regard to the outcomes of a hearing. Reports made by the Ombudsman from time to time will assist in ensuring scrutiny of the whole scheme and all of its processes, rather than just individual cases and decisions.

Given the importance of the scheme to small business, it is considered that the least amount of technical legal process possible should be involved in the review of decisions that Defence has made.

The change does not remove any jurisdiction relating to judicial review. Importantly, the rights of any person already involved in AAT activity relating to the scheme are preserved, so such persons are not disadvantaged.

It should be noted that, the Defence (Employer Support) Determination 2005, is made pursuant to section 58B of the *Defence Act 1903*, and that no other benefits determined under section 58B Defence Act have ever been subject to review in the Administrative Appeals Tribunal. However, the fact that other section

58B Determinations are not subject to AAT review, has not prevented the review of decisions relating to those benefits where issues have arisen that required review.

The broad powers of the Ombudsman to inquire into and examine the whole process of a decision assist in ensuring that any problems in the process are identified and can be resolved with a minimum expense to the claimant. It should be noted that formalising the Ombudsman role by mentioning it in the Determination makes very clear to claimants the existence of an avenue that has previously been inherent in the operation of section 19C of the *Ombudsman Act 1976* and that is currently extended to beneficiaries of payments relating to Defence service other than members, such as the family of the member. However, the AAT appears to have been used by employers as it was expressly referred to in the Determination, rather than because it was the only avenue for review.

The committee seeks advice as to the underlying justification for decisions relating to self-employed claimants also not being subject to AAT review (an entitlement which the committee understands was removed previously); as well as self-employed claimants not being entitled under Part 5 to request that a decision-maker review a decision.

As above, the minimum amount of technical process is seen as advantageous in getting a quick resolution of any issue so that assistance can be provided as proximate as possible to a period of Defence service. For a small business, it does not appear to make sense to litigate an issue in the AAT, given the potential for this to cost the member a significant amount of money and time away from both their business and their Defence service (even though the AAT takes care to minimise costs and delay).

Defence confirms that there is no bar to a self-employed claimant requesting that a decision-maker review their decision. The words of subsection 56.1 deliberately refer to a 'claimant' so as to describe both self-employed members and other employers, both being claimants under the scheme. It is not certain why there has been a perception that self-employed members did not have the ability to make this request; they do.

You may also wish to note that over the 12 years the scheme has operated, approximately 8 matters have been reviewed by the AAT. I am advised that in all cases the Defence decision was affirmed.

Finally, I would like to highlight that these are the first changes which introduce a value for money and capability requirement to a scheme which has been in operation for over 12 years and dispensed more than $180 million dollars of taxpayers money.

I trust this information is of assistance.

Yours sincerely

**DAVID FEENEY**

RECEIVED
14 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

# MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
# MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Our Ref BR13-000495

14 MAR 2013

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

Dear Senator Furner

Thank you for your letter of 7 February 2013 on behalf of the Standing Committee on Regulations and Ordinances (the Committee) concerning Fair Work Legislation Amendment Regulation 2012 (No.1) (the amending regulation).

I note that the Committee seeks my view as to the intent of regulation 3.16A which was inserted into the Fair Work Regulations 2009 by the amending regulation. The Committee's focus appears to be directed to paragraph 3.16A(1)(d) which provides that where a protected action ballot is conducted by electronic voting, the protected action ballot agent must ensure that "there is no way of identifying how any employee voted".

I confirm that the intent is not to restrict or impair the ability of protected action ballot agents to identify ballot papers but to assist in maintaining the integrity of the electronic voting process. Other protections to the integrity of that process are contained in the amending regulation. In particular other paragraphs within regulation 3.16A provide that the protected action ballot agent must ensure that only employees on the roll of voters are provided with access to the electronic voting system; that each employee can vote only once in the ballot; that there is a record of who has voted; and that the sum of votes cast both for and against each proposition is the same as the total votes cast.

It is in my view clear that in order to satisfy the requirements of the amending regulation the protected action ballot agent must be able to identify the votes cast for each proposition. Regulation 3.16A is not intended to provide that the vote cast for each proposition is not identifiable.

Whilst sub - regulations 3.19(8) and 3.20(6) provide that identifiers are to be removed before the scrutineer is present, paragraph 3.16A (d) is intended to operate in addition to those protections to ensure that there is no capacity for anyone (not only the scrutineers) to be able to determine how employees have voted. It is noted that this requirement would attach to the records that the protected action ballot agent is required to maintain.

This additional protection was inserted into the amending regulation following consultation with the Australian Electoral Commission.

An amendment to the regulation is accordingly not appropriate in this case.

I trust the information provided is helpful.

Regards

Bill Shorten

BILL SHORTEN

RECEIVED
14 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

# MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
# MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Our Ref BR13-000496

14 MAR 2013

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

Dear Senator Mark

Thank you for your letter of 7 February 2013 on behalf of the Standing Committee on Regulations and Ordinances concerning the *Fair Work Legislation Amendment Regulation 2012 (No.2)* (the Regulation) which amended the *Fair Work Regulations 2009* (the Regulations).

You have asked for my advice on the intended scope and application of clause (6)(b)(iii) of schedule 6.1A of the Regulations, which states that an employee must comply with a direction by an employer to perform other available work unless the work is 'not appropriate for the employee to perform'. I note the Committee's view that clause (6)(b)(iii) "would appear to involve a relatively subjective judgment that could give rise to uncertainty about its application in a given case".

New Part 6-3A of the *Fair Work Act 2009* (the Act) provides transfer of business rules for employees who are transferring from a State public sector employer to a new employer who is a national system employer. Where there is a transfer of business between a State public sector employer and a new national system employer and a State public sector employee transfers to the new employer, a 'copied State instrument' (reflecting the terms of the State award or State employment agreement that previously covered the employee) covers the employee and the new national system employer.

Relevantly, section 768BK of the Act provides that regulations may be made prescribing a model dispute settlement term for a copied State instrument, if the original State instrument did not include such a procedure.

Schedule 6.1A of the Regulations prescribes that model term. The term is modelled on the existing model term for enterprise agreements under the Act. Enterprise agreements are required under subsection 186(6) of the Act to contain a dispute settlement term, and parties are able to include the model term. Pursuant to section 737 of the Act that model term is prescribed in schedule 6.1 of the Regulations. Aside from some matters of form that model term is in the same terms as the model term in schedule 6.1A. In particular clause (6) of each model term is identical.

Additionally the Australian Industrial Relations Commission (AIRC) developed a model clause for inclusion in modern awards. Although not identical in wording, the AIRC model clause contained in a large number of modern awards also requires that work be 'safe and appropriate for the employee to perform'.

Dispute resolution provisions with similar wording have been a feature of the workplace relations landscape for some time. For instance, under sections 353 and 514 of the *Workplace Relations Act 1996* (the WR Act), (as it was from 27 March 2006 until 30 June 2009) workplace agreements and awards were required to include dispute settlement procedures. The model dispute resolution process was set out in Part 13 of the WR Act. Relevantly as part of that process an employer was required by section 697 of the WR Act to have regard to whether the 'work is appropriate for the employee to perform' when directing an employee to perform other available work.

I am advised by my Department that during the development of schedule 6.1A reference was made to dispute settlement clauses contained in State enterprise agreements and awards. Those dispute settlement clauses were broadly similar to schedule 6.1 and the modern award model clause. For example clause 27.1.1 of the *South Australian Public Sector Wages Parity Enterprise Agreement: Salaried 2012* relevantly provides that an employee must comply with a direction to perform other available work unless 'the work is not appropriate for the employee to perform'. There was also consultation with members of the National Workplace Relations Consultative Council during development and no concerns were raised concerning this clause.

I am also advised that an examination of the case law indicates that the meaning of 'appropriate work' has not been considered by the Courts or the Fair Work Commission (and its predecessors) in the dispute settlement context.

I further note that the Panel for the Post-Implementation Review of the Act (the Panel) considered the existing dispute settlement requirements for enterprise agreements and awards. Though the Panel did not specifically consider the meaning of 'appropriate work', it did not recommend any changes to the existing dispute settlement requirements for enterprise agreements and awards.

In light of the history and widespread use of the word 'appropriate' in this context, and the absence of evidence of any issues with its use, I consider that it is reasonable conclude that the dispute settlement provisions are working satisfactorily in practice. As schedule 6.1A effectively mirrors those existing dispute settlement provisions, I do not believe an amendment to that schedule is necessary in this case.

I trust the information provided is helpful.

Regards

BILL SHORTEN

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
MINISTER ASSISTING THE PRIME MINISTER ON DIGITAL PRODUCTIVITY
LEADER OF THE GOVERNMENT IN THE SENATE

RECEIVED
14 MAR 2013
Senate Standing C'ttee
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and Ordinances

08 MAR 2013

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

Dear Senator Furner Mark

***Levy Amount Formula Modification Determination 2013***

Thank you for your letter dated 28 February 2013 concerning the *Levy Amount Formula Modification Determination 2013* (the Determination), made by me under subsection 99(8) of the *Telecommunications Universal Service Management Agency Act 2012* (the TUSMA Act) on 31 January 2013.

The committee has validly asked whether the power to modify the levy amount formula under subsection 99(8) "provides sufficient authority to wholly replace subsection 99(3)" of the TUSMA Act. In my view, the answer is in the affirmative, for the reasons explained below.

Operation of the *Acts Interpretation Act 1901* (AI Act)

Section 2B of the AI Act provides that "**modifications**, in relation to a law, includes additions, omissions and substitutions". It follows that the Determination is consistent with the definition of "modification" provided under the AI Act and that it is therefore within my power to substitute the formula. In so doing, you may appreciate that the substantive intent of the original formulation remains the same.

The Determination refers to "omitting" the formula in subsection 99(3) and "substituting" this formula with provisions designed to cover certain circumstances which may arise over the course of the first or second eligible revenue period under the TUSMA Act (i.e. financial years 2011-12 and 2012-13). The reason for this omission and substitution is because experience under the Universal Service Obligation (USO) levy scheme indicates that, over the course of any given eligible revenue period, a number of participating persons will enter into external administration or otherwise cease to exist. If the original subsection 99(3) formula were to be left unmodified, this would present a real risk that insufficient levy would be collected by the Australian Communications and Media Authority (ACMA) to cover TUSMA's expenses for the forthcoming financial year.

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Policy reasons for the modification

By way of further explanation as to the operation of the Determination, I draw the committee's attention to the Explanatory Memorandum for the Telecommunications Universal Service Management Agency Bill 2011, which states that:

> "This ability to vary the formula of a levy amount would allow the Minister to modify the means by which the overall levy amount is calculated to account for any irregularities that might otherwise adversely affect the accurate assessment of a levy amount under [subsection 99(3)]. For example, this power could be utilised to adjust the calculations of a levy amount in the event of a participating person going into receivership, liquidation or general administration or who for any reason has ceased to exist."

As noted in the Explanatory Statement accompanying the Determination, it provides a mechanism to automatically recover a shortfall in the levy amount to be collected should any of the above-listed circumstances arise during the course of the first or second eligible revenue period. The Determination does this in an equitable manner by enabling the ACMA to distribute any shortfall from such carriers amongst the remaining participating persons for payment, thus ensuring that sufficient levy is collected to cover TUSMA's operating expenses for the following financial year.

Consistency with previous levy scheme

I also note that the Determination is consistent with the *Levy Debit Formula Modification Determination (No. 1) 2002*, made by the then Minister under subsection 20R(3) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This 2002 Determination similarly provides for a special formula to apply with respect to the previous USO levy if a participating person enters into receivership or liquidation or for any other reason ceases to exist prior to the end of an eligible revenue period.

As noted in the Explanatory Statement, the Determination ensures that existing and well-understood regulatory mechanisms that apply with respect to the USO levy are carried over to the new levy scheme under the TUSMA Act. The Determination does not impose new obligations on participating persons, nor does it alter their existing obligations in any significant way. It is simply a machinery instrument designed to ensure that sufficient levy is collected to cover the payments TUSMA is obliged to make with respect to contracts and grants and grants entered into under section 13 of the TUSMA Act, as well as the Agency's administrative costs.

I trust this information is of assistance to you.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

# The Hon Catherine King MP

**Parliamentary Secretary for Health and Ageing**


RECEIVED
14 MAR 2013
Senate Standing Ctee on Regulations and Ordinances

14 MAR 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 of 28 February 2013 to the Minister for Health, the Hon Tanya Plibersek MP, regarding the Therapeutic Goods Information (Stakeholder Consultation on the System for Australian Recall Actions) Specification 2013 (the SARA Instrument). As Parliamentary Secretary for Health and Ageing with responsibility for this matter, I am responding on behalf of the Australian Government.

You refer in your letter to the consultation requirements for a legislative instrument under the *Legislative Instruments Act 2003* (LI Act) and requested information about:

- consultation undertaken in the case of the SARA Instrument; or
- an explanation as to why consultation was considered unnecessary or inappropriate.

You have also requested that steps be taken to update the Explanatory Statement to the SARA Instrument.

The System for Australian Recall Actions (SARA) database is being created by the Therapeutic Goods Administration (TGA) and contains information about recall actions for therapeutic goods supplied in Australia. It is important to note that the SARA database is intended to provide public access to a sub-set of information that is already held in the database of Australian recall actions that the TGA keeps for the purpose of performing its monitoring and compliance functions under the *Therapeutic Goods Act 1989* (the Act).

Currently, only Australian recall actions that involve consumers are published on the TGA's website. Information about other Australian recall actions (such as recalls involving wholesalers or hospitals) is provided by the TGA to a limited group of external stakeholders such as state and territory recall coordinators (with the sponsor of the goods providing information to others affected by the recall). The creation of the SARA database will allow access by the public to information about Australian recall actions more generally for the first time.

In December 2012 and January 2013, the TGA wrote to a number of bodies that the TGA considered to be in a position to provide useful feedback about the proposed SARA database and invited them to participate in testing of a prototype.

The stakeholder bodies contacted were the organisations listed in Schedule 1 of the SARA Instrument, and included industry, consumer and practitioner bodies, for example, Medicines Australia, the Generic Medicines Industry Association of Australia, the Australian Self Medication Industry Incorporated, the Complementary Healthcare Council of Australia, the Australian Medical Association and Consumers Health Forum of Australia.

Representatives of most of the bodies contacted by the TGA responded to that invitation, indicating their interest in participating. Access to the prototype of the SARA database was then arranged for those bodies shortly after the making of the SARA Instrument so they could provide comments on its functionality, suitability (in terms of informing the public about Australian recall actions) and presentation, including any impacts on industry that might result from its launch. Those comments have been taken into account by the TGA in determining the final form of the database.

In order for the information contained in a prototype of the SARA database to be released to these stakeholders in accordance with the Act, it was necessary for a legislative instrument to be made under section 61 of the Act.

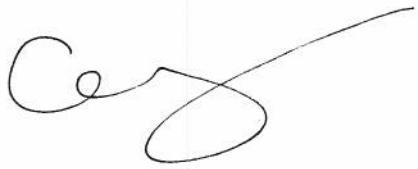
I acknowledge that the Explanatory Statement to the SARA Instrument could have more clearly explained the steps taken to engage these stakeholders in this process. The information in the Explanatory Statement under the heading 'Consultation' appears to have focussed on the purpose of the SARA Instrument itself, rather than indicating that stakeholder bodies were contacted.

I note that in January 2013 the TGA wrote to the Office of Best Practice Regulation (OBPR) to ascertain whether a Regulatory Impact Statement (RIS) was required in relation to the making of the SARA Instrument. In response, the OBPR confirmed that a RIS was not required as the 'proposal [did] not appear to change the regulatory burden placed on business or the non-profit sector'. In those circumstances the view might be taken that the SARA Instrument was 'minor or machinery in nature' thus making consultation unnecessary within section 18 of the LI Act.

The Explanatory Statement will be updated as soon as possible to more fully explain the processes involved in the making of the SARA Instrument.

I trust that the above information is of assistance.

Yours sincerely



Catherine King

cc: regords.sen@aph.gov.au

**Senator the Hon Don Farrell**

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Senate Standing C'ttee
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and Ordinances

**Parliamentary Secretary for Sustainability and Urban Water**

C13/6042

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

12 MAR 2013

Dear Mark

I refer to your letter of 28 February 2013 concerning the *Water Efficiency Labelling and Standards Determination 2013*. Specifically, you have sought advice regarding the basis for the fees which were set in that instrument, as this information was not included in the Explanatory Statement.

The fees have been set in a manner which is:

- efficient and cost effective;
- cost reflective and activity based;
- consistent with policy goals; and
- feasible and legal.

The 2012-15 Water Efficiency Labelling and Standards (WELS) Strategic Plan, agreed by the COAG Standing Council on Environment and Water set the WELS budget at $1.85 million in 2012-13. The fees set in this instrument are intended to raise $923,000, which is the proportion of the WELS budget that relates to registration. This is because the scheme is only able to recover its costs through a fee for service, meaning it may take into consideration its registration-related costs, but not those related to activities such as monitoring compliance, standards development and enforcement.

The WELS scheme was started with the intention to recover 80 per cent of its costs through fees, however this has not been achieved. New legislation has been prepared to ensure that fees for all activities of the scheme can be collected and a new instrument is expected if the bill is passed.

The tiered fee approach was selected to reduce the number of fee transactions, providing efficiencies for the WELS scheme and its registrants, and was agreed by stakeholders through a consultative process and is consistent with other charging methods in the industry.

The fee calculation took into account the cost recovery target, the number of registrants in each tier, the number of products in each tier, and an estimate of the number of new products expected to be registered during the year. The fees per model are lower for registrants with higher numbers of products being registered, in recognition that assessing applications for those larger companies is generally more efficient, because their applications are of a better quality.

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As required by the *Water Efficiency Labelling and Standards Act 2005*, this legislative instrument was made by me with the agreement of a majority of the states and territories.

I trust that this information is of assistance to the Committee in its consideration of the instrument. I understand that it is the Standing Committee's preference that information regarding the basis for the fees be included in the Explanatory Statement for the legislative instrument, and will endeavour to include this information in future.

Yours sincerely

Senator Don Farrell

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and Ordinances

# Attorney-General
# Minister For Emergency Management

MC13/02985

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

Dear Senator Furner

I refer to your correspondence of 28 February 2013 on behalf of the Standing Committee on Regulations and Ordinances, your reference number 044/2013.

In your letter, you raise the Committee's concern that section 4.2 of the *Native Title (Assistance from Attorney-General) Guideline 2012* (the guidelines) does not include any guidance or examples of what might constitute 'exceptional circumstances'.

For ease of reference, section 4.2 of the guidelines is extracted below:

> **4.2 No assistance for retrospective costs**
>
> A decision maker must not authorise the provision of assistance for costs incurred before the date on which the Department receives a complete application, except in exceptional circumstances.

I am advised that there are limited circumstances where an applicant would be unable to provide a complete application prior to costs being incurred. Therefore, 'exceptional circumstances' has intentionally been undefined to avoid creating false expectations that costs will be covered, whilst allowing the decision-maker to exercise his or her discretion where a strict application of the policy would produce an unfair result.

I am further advised that section 4.2 of the guidelines is consistent with section 6.7 of the *Commonwealth Guidelines for Legal Financial Assistance 2012,* which is applied in authorising the provision of assistance under many comparable financial assistance schemes administered by my department.

Some examples of where financial assistance might be granted retrospectively under other financial assistance schemes include:

- where an applicant is summoned at short notice to give evidence before the Australian Crime Commission and seeks assistance under section 27 of the *Australian Crime Commission Act 2002* (Cth),

- where an applicant was not informed of the availability of financial assistance by a relevant government department or agency prior to costs being incurred in an overseas child abduction matter, or

- where an applicant experiences difficulty in submitting a complete application due to disability, language barrier, remote locality or incarceration.

For decisions to authorise the provision of assistance under section 213A of the *Native Title Act 1993* (Cth), I would expect requests for retrospective assistance to be assessed on a case-by-case basis, and for 'exceptional circumstances' to applied in a similar manner to other schemes of financial assistance. This will include where it would be unreasonable to refuse assistance due to: severe time constraints, where an applicant experiences difficulty in being able to submit an application, or where procedural issues mean it would be unfair to refuse retrospective costs.

I hope this information and advice is of assistance to the Committee.

Yours sincerely

**MARK DREYFUS QC MP**

14/3/13

**The Hon Tony Burke MP**

**Minister for Sustainability, Environment, Water, Population and Communities**

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C13/6086

13 MAR 2013

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

Dear Senator Mark

I refer to your letter of 28 February 2013 concerning an instrument which amends the List of Specimens Taken to be Suitable for Live Import to update the scientific name for the sucker catfish [F2013L00105].

You have noted that the explanatory statement accompanying this instrument did not provide information on consultation or reasons for lack of consultation.

As this amendment to the list was a simple taxonomic update to the species name, section 303EC(1)(c) of the *Environment Protection and Biodiversity Conservation Act 1999* does not require consultation. Section 18 of the *Legislative Instruments Act 2003* identifies circumstances where consultation may be unnecessary or inappropriate. In this case the delegate was satisfied that the amendment was of a minor or machinery nature and that it does not substantially alter existing arrangements. An update of the explanatory statement is being made to include this information.

The 'Guideline to explanatory statements: consultation' has been forwarded to the relevant area of the department for future reference.

Thank you for writing on this matter.

Yours sincerely

Tony Burke

Tony Burke

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**The Hon Tony Burke MP**

**Minister for Sustainability, Environment, Water, Population and Communities**

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C13/6081

13 MAR 2013

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

Dear Senator Mark

I refer to your letter regarding the Explanatory Statement for Amendment of the List of Exempt Native Specimens—*Pandanus spiralis* (18/12/2012) [F2013L00107]. I understand that the Standing Committee on Regulations and Ordinances has requested a minor point of clarification regarding the description of consultation in the instrument.

The Explanatory Statement says that 'Further consultation was undertaken with the relevant state department and upon receipt of further information, the state department advised that they were satisfied and supported the proposal'. This statement relates to further consultation that was conducted with the Western Australian Department for Environment and Water. After being provided with additional information, the department was satisfied that the proposal presented a low risk to the endangered Edgar Plains Pandanus and therefore supported the inclusion of *Pandanus spiralis* on the List of Exempt Native Species.

I trust that this information provides a satisfactory explanation on this matter.

Yours sincerely

Tony Burke

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**Parliamentary Secretary for Climate Change and Energy Efficiency**

C13/519

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) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571]**

Thank you for your letter of 28 February 2013 concerning the above-named instrument (the Instrument), which sets out rules for implementing an agricultural emissions avoidance project to capture biogas generated from dairy farms.

Your letter brought to my attention the fact that the Instrument's explanatory statement (ES) does not contain detail about the outcome of the public consultation process and to what extent public submissions were taken into account.

Please find attached a revised explanatory statement for your consideration. This notes that five public submissions were received and subsequently taken into consideration during the assessment of the methodology proposal, in accordance with the requirements set out in section 112 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act).

This revised explanatory statement is now consistent with those accompanying similar instruments made under the Act.

Thank you for bringing your concerns to my attention.

Yours sincerely

**YVETTE D'ATH MP**

Enc

14/3/13

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The Hon Anthony Albanese MP
Minister for Infrastructure and Transport
Leader of the House

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*Reference: 00822-2013*

13 MAR 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 28 February 2013 about the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (the Act) – Section 11 exemption for cruise vessels [F2012L02585].

I note the omission of a reference to consultation measures in the Explanatory Statement (ES) accompanying the instrument. The Department of Infrastructure and Transport (the Department) will remedy this by reissuing the ES with a reference to the extensive consultation process undertaken as part of the development of the Stronger Shipping for a Stronger Economy reform, which included consultation on the exemption for cruise vessels.

The Hon Martin Ferguson MP, Minister for Tourism, has also been consulted and advised of the continuance of the exemption applying to cruise vessels in excess of 5000GT, capable of carrying at least 100 passengers, and capable of speed of 15 knots.

In response to your second point, the exemption has been extended until 31 December 2017, in order to align with the review of the Act that is intended to occur after five years of its operation. This approach to extending the exemption has been accepted by industry stakeholders.

The Department is currently undertaking consultations with industry and other key stakeholders regarding the administration and operation of the Act. Should it be considered that amendments to the Act are necessary in future, consideration will be given to whether the current exemption could be more properly effected via the Act rather than via a legislative instrument.

Thank you for raising this matter.

Yours sincerely

ANTHONY ALBANESE

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# The Hon David Bradbury MP
## Assistant Treasurer
## Minister Assisting for Deregulation

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

14 MAR 2013

Dear Senator Mark Furner,

Thank you for your letters of 7 February 2013 on behalf of the Senate Standing Committee on Regulations and Ordinances concerning the *Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1)* and the *Life Insurance Amendment Regulation 2012 (No.1)*.

The Committee sought advice as to the legal basis for subsection 2(2) of the *Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1)* (the regulation). The Office of Parliamentary Counsel has advised that the definition of 'enabling legislation' in subsection 4(1) of the *Legislative Instruments Act 2003* contemplates that a legislative instrument may be made under another legislative instrument.

The purpose of subsection 2(2) of the regulation is to ensure that the notification of when the regulation will commence is made public. The intention was that the public notification would occur by registering the commencement instrument on the Federal Register of Legislative Instruments so that the Federal Register of Legislative Instruments retains both the regulation and the instrument that commences the regulation. Accordingly, the commencement instrument has been made and registered on the Federal Register of Legislative Instruments and is therefore taken to be a legislative instrument.

In light of the concerns of the Committee, the Office of Parliamentary Counsel has advised that in future notifications of this kind will be made by Gazette notice and not by legislative instrument. As a result of recent changes to ComLaw, Gazette notices are now published electronically on ComLaw and linked to the legislation to which they relate. This will ensure that commencement instruments for legislative instruments are publicly notified and are accessible through legislative instrument pages on the Federal Register of Legislative Instruments.

The Committee also sought further information describing the nature of consultation in relation to the *Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1)* and the *Life Insurance Amendment Regulation 2012 (No.1)*. Australia has worked closely with New Zealand to ensure implementation is consistent with the agreed Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement. As the changes made by the two regulations replicated existing provisions already contained in the regulations (reflecting that New Zealand investors were to receive treatment equivalent to that already provided to United States investors),

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the changes were considered simple and minor, with further public consultation beyond that already undertaken on the Investment Protocol unnecessary.

The Government undertook significant consultation in relation to the Protocol. In 2006, public submissions were invited via advertisements in major Australian newspapers. Submissions were received from Australian businesses with investments in New Zealand and from Australian business representatives. Officers from the Treasury and the Department of Foreign Affairs and Trade held face-to-face consultations with stakeholders in Sydney and Melbourne on the objectives and scope of the Investment Protocol. These consultations suggested that:

- there was strong support from businesses and other stakeholders on both sides of the Tasman for reducing barriers to bilateral investment flows;
- the business communities of Australia and New Zealand considered that liberalisation of the respective foreign investment screening regimes was long overdue; and
- the objective of the Investment Protocol should be to minimise compliance costs associated with foreign investment screening.

Consultations with the states and territories regarding the Investment Protocol commenced in 2006. At this time the states and territories were advised of aspects of the Investment Protocol that may affect their jurisdictions. In 2009 and 2010, further consultation with the states and territories occurred regarding the following issues:

- the Schedule of non-conforming measures: Consistent with Australia's preferred practice with free trade agreements, states and territories were asked to agree to Australia's market access offer, which envisaged all existing non-conforming measures at the state and territory level being dealt with in a single blanket listing in Annex I of the Investment Protocol;
- most-favoured nation inconsistent measures: states and territories were asked to provide details of any measures in their jurisdiction that discriminated against New Zealand investors in favour of third country investors.

The outcome of these consultations was that the states and territories agreed to Australia's market access offer and undertook to provide details of most-favoured nation inconsistent measures. Consultation with the states and territories in relation to developing a list of non-conforming measures, required for the Parties' first meeting to review the Protocol, is ongoing.

As noted in the Explanatory Statements, the Investment Protocol was tabled with the Joint Standing Committee on Treaties and considered at a hearing of the Committee. The Joint Standing Committee on Treaties recommended that binding treaty action be taken.

As per the Committee's request, I will make arrangements to update the Explanatory Statements to incorporate the additional information regarding consultation.

I hope this information will be of assistance to you.

Yours sincerely

DAVID BRADBURY

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19 MAR 2013
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and Ordinances

**Parliamentary Secretary for Climate Change and Energy Efficiency**

C13/520

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

Dear Senator Furner

Thank you for your letter of 28 February 2013 concerning the Carbon Credits (Carbon Farming Initiative) (Capture and Combustion of Methane in Landfill Gas from Legacy Waste: Upgrade projects) Methodology Determination 2012 [F2012L02583]; and the Carbon Credits (Carbon Farming Initiative) (Destruction of Methane from Piggeries using Engineered Biodigesters) Methodology Determination 2013 [F2013L00124].

By way of clarification, it appears that, in addition to the determination numbered F2013L00124, your query concerns the provisions of the Carbon Credits (Carbon Farming Initiative) (Destruction of Methane Generated from Dairy Manure in Covered Anaerobic Ponds) Methodology Determination 2012 [F2012L02571] rather than determination F2012L02583. I have addressed my response accordingly.

The Carbon Farming Initiative (CFI) is a carbon offsets scheme that provides new economic opportunities for farmers, forest growers and landholders while helping the environment by reducing carbon pollution. These new opportunities often involve novel approaches and pioneering science. The Department of Climate Change and Energy Efficiency (the Department) is working in partnership with industry and scientists to develop methodologies that are both practical and supported by scientific evidence. Methodology determinations are drafted so as to strike an appropriate balance between prescription and flexibility while satisfying the offsets integrity standards outlined in the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act).

The Australian Government is committed to ensuring that methodology determinations align with these standards and, as such, all determinations are only made if they give effect to methodology proposals that have been endorsed by the independent Domestic Offsets Integrity Committee (the Committee). The Committee is made up of experts in agricultural and land emissions abatement and sequestration and their role is to support the environmental integrity of carbon offsets generated under the CFI. In making their decision to endorse proposed methodologies, the Committee assesses each proposal against the offsets integrity standards including whether an activity achieves measurable and verifiable abatement (Section 133(1)(b) of the CFI Act).

In some cases it is not possible or necessary for a methodology determination to prescribe in detail how to undertake a certain component of an activity. With regards to the two methodology determinations in question, I note that there is currently no measurement standard directly applicable for determining the solids removal efficiency of manure solids separators, or for sampling volatile solids.

Where there is an absence of such standards, it is normal practice for the methodology determination to give overarching guidance as to the objective of the exercise (in this case that the proponent must obtain an unbiased, representative sample) and provide proponents with the flexibility to achieve this objective in the most efficient manner. The most efficient and appropriate requirements to obtain a sample that is both representative and unbiased cannot be generically prescribed as it is dependent on individual attributes of the population being sampled. These attributes include the rate of sampling and range of variability which could be unique to each project. Various methods of statistical analysis can be undertaken to test for bias and demonstrate representativeness. This approach has been endorsed by the Committee.

In such cases the Clean Energy Regulator determines on a case by case basis which practices will satisfy the requirements of the methodology determination and provides guidance to assist proponents to understand the scope of these requirements. One example of such guidance developed by the Clean Energy Regulator is the definition of ripping and mounding for the purposes of the Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012 (see www.cleanenergyregulator.gov.au/Carbon-Farming-Initiative/How-does-it-work/Step-2-Apply-for-a-project/Regulatory-Guidance/Pages/Ripping-and-Mounding.aspx).

The Department works closely with the Clean Energy Regulator when developing guidance material to ensure it aligns with the requirements of the CFI Act and relevant methodology determinations.

Thank you for bringing your concerns to my attention.

Yours sincerely

**YVETTE D'ATH MP**

18/3/13

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SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

15 MAR 2013

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

Dear Senator Furner

I refer to your letter of February 28, 2013, seeking advice on the consultations concerning the Nuclear Non-Proliferation (Safeguards) Regulations.

The Regulations update the list of international agreements with which powers under the *Nuclear Non-Proliferation (Safeguards) Act 1987* are to be exercised. These agreements were tabled in both Houses of Parliament prior to ratification to facilitate public consultations and scrutiny by the Joint Standing Committee on Treaties. Due to the minor changes proposed in the Regulations, no public consultations were deemed necessary.

DFAT will take steps to update the relevant explanatory statement as soon as practicable and ensure that all future explanatory statements provide information on consultation as required by the *Legislative Instruments Act 2003*.

Thank you for bringing this matter to my attention.

Yours sincerely

Bob Carr

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**The Hon Jenny Macklin MP**
**Minister for Families, Community Services and Indigenous Affairs**
**Minister for Disability Reform**

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MC13-001461

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

19 MAR 2013

Dear Senator ~~Furner~~ Mark

Thank you for your letter of 7 February 2013 about the Social Security Appeals Tribunal (SSAT) Child Support Review General Directions 2012 (the 2012 Directions).

My Department has sought comment from the Principal Member of the SSAT about the matters you raised.

You sought advice on whether there was a reasonable opportunity to anticipate the changes made by the 2012 Directions. The 2012 Directions commenced the day after the changes made by the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012* (the Act), providing a preparation period of approximately one month.

You also sought advice on areas where the effects of the 2012 Directions are not machinery in nature, or whether there have been alterations to existing arrangements.

The 2012 Directions are mainly of a machinery nature. They are concerned with the procedure to be followed by the SSAT in reviewing child support decisions and primarily affect the members and staff of the SSAT.

I have been advised that there are two areas where the 2012 Directions have altered existing arrangements to be consistent with changes made by the Act. These are as follows:

- Section 18 of the 2012 Directions, which applies to the communication of protected information by an SSAT member, reflects a new subsection 16(3A) of the *Child Support (Registration and Collection) Act 1988* (Child Support Act). This subsection permits an SSAT member to communicate protected information to a person if the information concerns a threat to the life, health or welfare of a person; and
- Section 31 of the 2012 Directions, which establishes procedures for dealing with requests for reinstatement of a child support application previously dismissed by the SSAT, reflects changes to section 100 of the Child Support Act. This change gives the Principal Member powers to reinstate a child support application that had been dismissed in certain circumstances, where it is appropriate to do so. Previously, there was no capacity to reinstate a child support application that had been dismissed by the SSAT.

I understand that although the Explanatory Statement indicated that public consultation was not required, the Principal Member did consult with my Department and with the Department of Human Services when preparing the 2012 Directions.

I trust that these comments assist the Regulations and Ordinances Committee and I thank you for the opportunity to comment.

Yours sincerely

**JENNY MACKLIN MP**

18 MAR 2013

**THE HON JASON CLARE MP**
Cabinet Secretary
Minister for Home Affairs
Minister for Justice

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19 MAR 2013
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on Regulations
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Ministerial No: 107106

Senator Mark Furner
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Senator Furner,

I refer to your letter of 7 February 2013 to the Hon Mark Dreyfus MP, Attorney-General, in relation to the Customs Amendment Regulation (No. 9) 2012. As this regulation amends the *Customs Regulations 1926*, I have been asked to respond on his behalf.

The Customs Amendment Regulation (No. 9) 2012 introduced notification provisions for the purposes of new section 112BA of the *Customs Act 1901*. Under this section, the Minister for Defence may give a notice to a person prohibiting the exportation of certain goods from Australia. This power may be exercised if the Minister for Defence suspects that if particular goods were exported by a person to a particular place or particular person, the goods would or may be for a military end-use that would prejudice the security, defence or international relations of Australia.

The Amendment Regulation sets out the methods by which a notice can be given and when such a notice is taken to be received. The Committee has now raised concerns where a notice is given personally to "a person who appears to be in a management or executive position", in particular why there is not a more stringent requirement to ascertain whether a person to whom a notice is given is actually in a management or executive position.

I consider that the current wording of the regulation is appropriate. If a notice is to be served personally on a natural person, the notice must be given to that person. However, there are obvious complexities when serving notices on companies. I consider that the regulation contains a sufficient safeguard in relation to the service of the notice, in that it requires it to be given to a person who reasonably appears to be in a management or executive position, as opposed to any person on a company's premises. Therefore, the notice provision would not have been complied with if the notice was given to administrative staff` at a particular company.

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I am advised that the Department of Defence will ensure that all persons authorised to give notices will be instructed to make appropriate enquiries when serving a notice on a company to ensure that the person being given the notice are in a management or executive position. Given the importance of the circumstances in which such a notice will be served, I consider that the regulation as drafted strikes an appropriate balance.

I also consider that the regulation in relation to giving the notice personally is reasonable when compared with the other methods by which a notice can be given. For example, a notice that is posted in Australia by registered mail will be taken to have been received 7 business days after the date of the notice.

Officers of Customs and Border Protection have consulted with the relevant officers on the Department of Defence in preparing this response.

The officer responsible for this matter in Customs and Border Protection is Renae Hutchinson who can be contacted on 02 6275 6189.

Yours sincerely

**Jason Clare**

19 MAR 2013

# THE HON JASON CLARE MP

Cabinet Secretary
Minister for Home Affairs
Minister for Justice

RECEIVED
20 MAR 2013
Senate Standing C'ttee
on Regulations
and Ordinances

Ministerial number: 107202

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

Dear Senator

I refer to your letter dated 28 February 2013, on behalf of the Senate Standing Committee on Regulations and Ordinances, in relation to the *Customs (Malaysia Rules of Origin) Regulation 2012* (the Regulations). You have requested advice regarding the consultation undertaken on the Regulations in accordance with section 26 of the *Legislative Instruments Act 2003*.

In particular, you have sought information on the nature of the consultation that was undertaken prior to the Regulations being made. You have also requested that the relevant Explanatory Statement be updated to include information regarding the consultation and an assurance that future Explanatory Statements will provide information on consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

The *Customs Amendment (Malaysia-Australia Free Trade Agreement Implementation and Other Measures) Act 2012* amends the *Customs Act 1901* (the Act) to fulfil Australia's obligations under Chapter 3 Rules of Origin of the Malaysia-Australia Free Trade Agreement (MAFTA). The rules of origin determine whether goods imported into Australia from Malaysia are Malaysian originating goods and are thereby eligible for preferential rates of customs duty. The purpose of the Regulations is to prescribe matters relating to the rules of origin as required under the Act, including the product specific rules set out in the MAFTA. Consequently, the consultation process undertaken for the MAFTA also encompassed matters set out in the Regulations.

I am advised that extensive public and targeted stakeholder consultations were conducted during the MAFTA negotiations by the Department of Foreign Affairs and Trade. Details of these consultations were set out in the consultation attachment to the National Interest Analysis of MAFTA. The Joint Standing Committee on Treaties also conducted an enquiry on the MAFTA. The enquiry included written submissions and a public hearing that resulted in a report recommending binding treaty action be taken.

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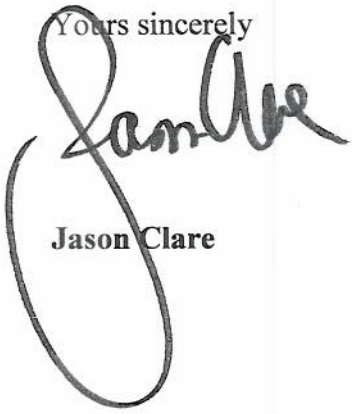
I am advised by Customs and Border Protection that the relevant Explanatory Statement will be updated to reflect this information. Customs and Border Protection also provides the assurance that future Explanatory Statements will include information on consultation in accordance with the requirements of the *Legislative Instruments Act 2003*.

Yours sincerely



**Jason Clare**

19 MAR 2013

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20 MAR 2013
Senate Standing C'ttee
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Senator Mark Furner
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Senator Furner,

I refer to your letter of 28 February in relation to "Amendment of Approved Statement Instrument No. 6 of 2013" (Instrument No. 6). You note in your letter that a related instrument (Amendment of Approved Statement Instrument No. 2 of 2013) was the subject of consultation and you have sought advice as to whether similar consultation was undertaken for Instrument No.6.

Instrument No. 6 was part of a package of six instruments that amended approved statements that are administered by the Australian Customs and Border Protection. Instruments 1 to 5 included an additional field to be completed in some circumstances at the request of the Conference of Asia Pacific Air Couriers (CAPEC). Consultation that was undertaken for these five instruments related only to this additional field. Other changes included in these Instruments were of a minor and machinery nature and were not the subject of consultation.

The additional field introduced in Instruments 1 to 5 does not have application in the sea cargo environment and has not been included in Instrument 6 which amends the "Self-Assessed Clearance Declaration (Sea) (To Be Communicated with a Cargo Report)". The amendments in Instrument No. 6 are of a minor or machinery nature only and for this reason, consultation has not been undertaken.

The officer responsible for this matter in Customs and Border Protection is Alan Green who can be contacted on 02 6275 6117.

Yours sincerely

**Jason Clare**

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