

The Senate

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Committee on
Regulations and
Ordinances

Delegated legislation monitor

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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 cases where an instrument is considered not to comply with the committee's scrutiny

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

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

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

Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;
- Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;
- Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

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

Senator Mark Furner

Chair

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

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **20 June 2013**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

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

Guidelines for the use of the word 'university' in company names (Revocation) Instrument 2013 [F2013L00757]

| | |
|---|--|
| Purpose | Revokes the guidelines for the use of the word 'university' in company names |
| Last day to disallow¹ | 27 August 2013 ² |
| Authorising legislation | Corporations Regulations 2001 |
| Department | Treasury |

ISSUE:

Insufficient description regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states only that the 'Department of Industry, Innovation, Science, Research and Tertiary Education has consulted with the Department of Treasury on the development of this instrument.' While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description, such

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 In the event that the disallowance period is interrupted for the election of the 43rd Parliament, as is expected to occur over August-September 2013, the counting of the 15-day disallowance period will continue from the first day of sitting of the new Parliament.

as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. **The committee therefore requests further information from the minister and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-camp allowance and compulsory tuition fees – amendment

| | |
|--------------------------------|--|
| Purpose | Clarifies the class of rail travel that should be used when an Australian Defence Force (ADF) member or dependant is required to travel by rail, removes unhelpful examples in the ADF remote location leave travel provisions, adds a new position to the list of those eligible for aide-de-camp allowance and renumbers a subclause relating to education costs for ADF members posted overseas |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>Defence Act 1903</i> |
| Department | Defence |

ISSUE

Uncertain term

The determination makes a number of amendments to Defence Determination 2005/15, which is the main determination of ADF conditions of service within Australia and overseas. One of the amendments is intended to clarify that where a member or dependent is required to travel by rail they are entitled to travel first class, or in the highest class available. The amendment also provides that the member or dependent is entitled to a sleeping berth if the travel is expected to extend over 'a major portion of the night'. The concept of a 'major portion' of the night does not appear to be defined in the principal determination and it is potentially unclear how the term might be interpreted or understood in practice. **The committee therefore requests further information from the minister.**

National Capital Plan – Amendment 81 – Removal of Outdated and Unnecessary Policy Material [F2013L00782]

| | |
|--------------------------------|--|
| Purpose | Amends the National Capital Plan (December 1990) to remove redundant and out-of-date material and increase the clarity of the plan |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Australian Capital Territory (Planning and Land Management) Act 1988</i> |
| Department | Regional Australia, Local Government, Arts and Sport |

ISSUE:***Drafting***

The instrument amends the National Capital Plan to remove outdated and redundant material. Schedule 1 (Amendment B) provides for the deletion of 'the following annotation on Figure 17':

For details of proposed widening of Morshead Drive refer to Appendix R.

The committee notes, however, that there is no apparent annotation on Figure 17. **The committee therefore draws this issue to the attention of the minister.**

Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 72, 2013] [F2013L00791]; and Charter of the United Nations (Sanctions - the Taliban) Regulation 2013 [Select Legislative Instrument No. 73, 2013] [F2013L00787]

| | |
|--------------------------------|---|
| Purpose | (1) Amends several regulations implementing United Nations Security Council sanctions in order to give effect to recent changes, but principally amends the Charter of the United Nations (Sanctions - Al Qaida and the Taliban) Regulations 2008 to create a stand-alone regime for Al Qaida; and (2) gives effect to the decision to split the Al-Qaida and Taliban sanctions regimes into separate instruments currently governed by the Charter of the United Nations (Sanctions - Al-Qaida and the Taliban) Regulations 2008 |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Charter of the United Nations Act 1945</i> |
| Department | Foreign Affairs and Trade |

ISSUE:***Insufficient information regarding strict liability offences***

The instruments amend several regulations implementing United Nations Security Council sanctions in order to give effect to recent changes. One of these is that, where authorisation by the Minister for Foreign Affairs is required to make a sanctioned supply, perform a sanctioned service or make available or deal with an asset, the element of the offence for unsanctioned behaviour relating to 'not authorised by a permit' is subject to a strict liability test. While the ES states that this change reflects the strict liability provisions set out in Part 4 of the *Charter of the United Nations Act 1945*, the committee's usual expectation is that an ES for an instrument providing for offences (particularly offences of strict liability) provide adequate information regarding the justification for the framing of the offence. **The committee therefore requests further information from the minister.**

Financial Management and Accountability Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 70, 2013] [F2013L00802]

| | |
|--------------------------------|---|
| Purpose | Amends the Financial Management and Accountability Regulations 1997 to add a new program to Schedule 1AA relating to the proposed referendum on the recognition of local government in the Constitution |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Financial Management and Accountability Act 1997</i> |
| Department | Finance and Deregulation |

ISSUE:

Addition of new program to Schedule 1AA of Financial Management and Accountability Regulations 1997

The amendment relies on section 32B of the *Financial Management and Accountability Act 1997*, which provides legislative authority for the Government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997. Section 32B was introduced in response to the decision of the High Court in *Williams v Commonwealth* ([2012] HCA 23) in June 2012. The new program is described as providing legislative authority for the Government to spend on activities related to a referendum on the financial recognition of local government. The objectives of the referendum are to provide for (a) a national civics education campaign and (b) the implementation of a communications campaign by non-government bodies and those with various views on the referendum question. The ES to the instrument notes that spending decisions under the program will not be subject to judicial merits review (ADJR), an issue about which the committee has previously made inquiries. **The committee notes the concerns of the Senate Standing Committee for the Scrutiny of Bills regarding the justification for excluding such decisions from the *Administrative Decisions (Judicial Review) Act 1997*, and draws the attention of senators to the comments of that committee on the Financial Framework Legislation Amendment Bill (No. 2) 2013 in Alert Digest No. 5 of 2013 (15 May 2013).**

CASA 67/13 – Authorisation – pilot maintenance on class B rotorcraft [F2013L00756]; CASA ADCX 007/13 - Revocation of Airworthiness Directives [F2013L00738]; CASA ADCX 008/13 - Revocation of Airworthiness Directives [F2013L00750]; and CASA ADCX 009/13 - Revocation of Airworthiness Directives [F2013L00751]

| | |
|--------------------------------|--|
| Purpose | (1) Permits suitably trained pilots of rotorcraft, other than rotorcraft that are certificated in the transport category or are under an air operator's certificate for regular public transport operations, to carry out maintenance on those aircraft in the form of specified types of inspection; and (2) the remaining instruments each revoke two airworthiness directives |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | Civil Aviation Regulations 1988; and Civil Aviation Safety Regulations 1998 |
| Department | Infrastructure and Transport |

ASIC Class Order [CO 13/552] [F2013L00742]; and ASIC Market Integrity Rules (ASX 24 Market) Amendment 2013 (No. 1) [F2013L00739]

| | |
|--------------------------------|--|
| Purpose | (1) Amends ASIC Class Order [CO 10/321] by extending the minimum subscription requirement of at least \$50 million until 12 November 2013; and (2) amends the ASIC Market Integrity Rules (ASX 24 Market) 2010 to address changes in market structure and growth in automation and innovation in electronic trading (in particular, proprietary trading) in domestic futures markets |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>Corporations Act 2001</i> |
| Department | Treasury |

Defence Determination 2013/15, Disturbance allowance and vehicle allowance – amendment; Defence Determination 2013/16, Medical officers specialist officer career structure – amendment; Defence Determination 2013/17, Post indexes – amendment; Defence Determination 2013/18, Leave travel to a restricted destination – amendment; Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-camp allowance and compulsory tuition fees – amendment; Defence Determination 2013/20, Living-in contribution for Residential Support Officers – amendment; and Defence Determination 2013/21, Post indexes and approved clubs – amendment

| | |
|--------------------------------|---|
| Purpose | (1) Amends the principal determination to make an annual adjustment to disturbance allowance and vehicle allowance rates; (2) amends the current rules for increment advancement through the medical officers specialist career structure to encompass the new medical procedural specialists; (3) implements revised post indexes for ADF members at overseas posting locations; (4) modifies the appointment that holds a selection of powers in relation to travel to certain restricted destinations while a member is on recreation leave and corrects an incorrect cross reference; (5) makes a number of minor technical amendments, including to clarify the class of rail travel to be used by ADF members and to remove unhelpful examples in the ADF remote location leave travel provisions; (5) exempts members from the requirement to contribute to the cost of living-in accommodation and meals if performing the role of Residential Support Officer; and (6) revises post indexes for ADF members at overseas posting locations and includes a new approved club |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>Defence Act 1903</i> |
| Department | Defence |

Private Health Insurance (Data Provision) Amendment Rules 2013 (No. 1) [F2013L00771]

| | |
|--------------------------------|---|
| Purpose | Amends the Private Health Insurance (Data Provision) Rules 2012 to incorporate a reference to the revised 'HCP1 Data from Insurers to the Department' document in the definitions section |
| Last day to disallow | 28 August 2013 |
| Authorising legislation | <i>Private Health Insurance Act 2007</i> |
| Department | Health and Ageing |

Public Service Commissioner's Amendment Direction 2013 (No. 2)

| | |
|--------------------------------|--|
| Purpose | Enables an Agency Head to put in place measures to address aspects of the employment related to disadvantage experienced by people with disability |
| Last day to disallow | 28 August 2013 |
| Authorising legislation | <i>Public Service Act 1999</i> |
| Department | Prime Minister and Cabinet |

Remuneration Tribunal Determination 2013/05 – Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2013L00761]

| | |
|--------------------------------|---|
| Purpose | Amends principal Tribunal determination 2012/09 (Judicial and related offices) as a result of changes to the name of the Federal Magistrates Court (now 'Federal Circuit Court') and to the titles of its judicial officers; and amends principal Tribunal determinations 2012/13 (Part-time offices) and 2012/24 (Full-time offices) to recognise restructuring of the Social Security Appeals Tribunal, to remove references to the Australian Solar Institute, and to set remuneration for certain new offices |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>Remuneration Tribunal Act 1973</i> |
| Department | Prime Minister and Cabinet |

Finance Minister's Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2012) [F2013L00773]

| | |
|--------------------------------|--|
| Purpose | Amends the Finance Minister's Orders (Financial Statements for reporting periods ending on or after 1 July 2011) to mandate financial reporting obligations for Commonwealth entities' annual financial statements |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Aboriginal and Torres Strait Islander Act 2005; Commonwealth Authorities and Companies Act 1997; Defence Service Homes Act 1918; Financial Management and Accountability Act 1997; High Court of Australia Act 1979; and Natural Heritage Trust of Australia Act 1997</i> |
| Department | Finance and Deregulation |

Private Health Insurance (Health Insurance Business) Amendment Rules 2013 (No. 1) [F2013L00775]

| | |
|--------------------------------|---|
| Purpose | Amends the Private Health Insurance (Health Insurance Business) Rules 2010 to give effect to the revised HCP Data from Hospitals to Insurers and the PHDB Data from Private Hospitals to the Department documents |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Private Health Insurance Act 2007</i> |
| Department | Health and Ageing |

Radiocommunications (Labelling) Determination 2013 [F2013L00821]; and Radiocommunications Licence Conditions (Apparatus Licence) Amendment Determination 2013 (No. 1) [F2013L00824]

| | |
|--------------------------------|--|
| Purpose | (1) sets out the requirements for the labelling of radiocommunications transmitters operated under apparatus licences; and (2) amends the Radiocommunications Licence Conditions (Apparatus Licence) Determination 2003 to replace references to the Australia Standard (AS) with references to the AS/NZS Standard and to include transitional mechanisms for compliance after this determination has commenced |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Radiocommunications Act 1992</i> |
| Department | Broadband, Communications and the Digital Economy |

Superannuation (Productivity Benefit) (Penalty Interest) Amendment Determination 2013 (No. 1) [F2013L00823]

| | |
|--------------------------------|---|
| Purpose | Amends the Superannuation (Productivity Benefit) (Penalty Interest) Determination 1995 to specify the formula used to calculate penalty interest during on and after the 2013-14 financial year |
| Last day to disallow | 9 September 2013 |
| Authorising legislation | <i>Superannuation (Productivity Benefit) Act 1988</i> |
| Department | Finance and Deregulation |

ISSUE:

Drafting

Each of the instruments listed above appears to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, 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 therefore draws this issue to the attention of relevant ministers and instrument-makers.**

National Health (Pharmaceutical Benefits) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 53, 2013] [F2013L00650]

| | |
|--------------------------------|--|
| Purpose | Amends the National Health (Pharmaceutical Benefits) Regulations 1960 to reflect changes to the provisions in Part 6A reflecting the reasons in the December 2012 <i>Sanofi-Aventis Australia Pty Limited v Minister for Health</i> Federal Court judgment |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>National Health Act 1953</i> |
| Department | Health and Ageing |

ISSUE:

Insufficient description regarding consultation undertaken

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, in part, that 'representatives of the medicines industry,

consumer, pharmacy and wholesaler organisations were briefed' in relation to the making of the instrument. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description of consultation undertaken, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* [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 was made following a December 2012 Federal Court decision concerning calculations for the Pharmaceutical Benefits Scheme price disclosure arrangements. However, while the minister undertook to update the ES in accordance with the committee's request, the minister's letter did not provide any information regarding consultation as per the committee's request.

COMMITTEE RESPONSE:

The committee thanks the minister for her response. However, as no further information was provided regarding the consultation undertaken in this case, the committee again requests this information from the minister.

Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2013 [F2013L00216]

| | |
|--------------------------------|--|
| Purpose | Revokes the Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2010 (No. 1) to change the deemed rates of income upon financial assets for the purposes of the means test for the rate of social security payments administered by FaHCSIA (from 20 March 2013) |
| Last day to disallow | 18 June 2013 |
| Authorising legislation | <i>Social Security Act 1991</i> |
| Department | Families, Housing, Community Services and Indigenous Affairs |

ISSUE:

Unclear basis for determining rates

The instrument revokes and replaces the Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2010 (No. 1) to change the deemed rates of income upon financial assets for the purposes of the means test for the rate of social security payments administered by FaHCSIA. Noting that the deeming rate would presumably have a financial impact on certain individuals, the committee's usual expectation is that the ES to an instrument with a financial impact sets out the basis on which any new fee, charge or rate has been set or calculated [the committee sought further information from the minister].

MINISTER'S RESPONSE:

The minister advised that deeming rates are subject to continuing review by the department to ensure they are set to reflect the returns available in the market to pensioners for their financial investments. The department considers a range of investment indicators including those commonly held by pensioners (such as term deposit rates) and data and analysis from the Reserve Bank of Australia and Treasury. Following consideration of these factors, the deeming rate was reduced by 0.5 per cent **[the committee thanked the minister for her response but requested that the ES be updated to include the information on the basis for reducing the deeming rates]**.

The minister subsequently advised that it was not feasible to include this information in the ES as the determination and ES had already been laid before each House of the Parliament and the disallowance period had expired. The minister indicated that she would ensure that information relevant there to the committee's terms of reference would be included in future explanatory material.

COMMITTEE RESPONSE:

The committee thanks the minister for her response. However, the committee notes that the inclusion of information in ESs regarding the basis of changes to such things as fees, levies and rates allows stakeholders to reasonably ascertain the basis for assumed costs, and generally improves the accessibility and intelligibility of explanatory material accompanying delegated legislation. Noting that the updating or correcting of ESs on the Federal Register of Legislative Instruments occurs regularly, the committee again requests that the minister update the ES with the information previously provided to the committee. Alternatively, the committee requests further advice from the minister as to the basis for the view that this is no longer feasible.

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **20 June 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.

Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 [F2013L00258]

| | |
|--------------------------------|--|
| Purpose | Contains the circumstances and number of months, as required by subsection 70(4) of the <i>Export Market Development Grants Act 1997</i> (the Act), to be complied with by Austrade in assessing whether an application for grant meets the requirements of subparagraph 70(2)(b)(ii) of the Act |
| Last day to disallow | 18 June 2013 |
| Authorising legislation | <i>Export Market Development Grants Act 1997</i> |
| Department | Foreign Affairs and Trade |

ISSUE:

Availability of merits review

Regarding review rights, the ES for this instrument states:

Review rights exist in relation to decisions made by Austrade to refuse to approve an applicant as a participating EMDG consultant or to cancel the approval of a participating EMDG consultant.

However, while the instrument clearly provides for these decisions to be reconsidered by the CEO of Austrade it does not, on its face, appear to make provision for merits review as the ES may be taken to suggest. The committee notes that the decisions in question also do not appear to be (Administrative Appeals Tribunal (AAT)) reviewable decisions for the purposes of section 97 of the *Export Market Development Act 1997* **[the committee sought further information from the minister]**.

MINISTER'S RESPONSE:

The Parliamentary Secretary for Trade responded, advising that the decisions in question are subject to merits review by the AAT. The Parliamentary Secretary noted that, when Austrade refuses to approve a consultant as a participating consultant or cancels the approval of a participating consultant, the person will be advised of their review rights, including access to merits review by the AAT.

COMMITTEE RESPONSE:

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

However, subsequent to the parliamentary secretary's response, the committee received a submission from the Export Consultants Group (ECG) outlining a number of concerns in relation to the determination, including adequacy of the description of consultation in the ES and, in broad terms, the effect of the determination on a person's ability to practice a trade or profession or carry on a business affecting livelihood. **While the committee's consideration of these matters did not identify any new matters referable to the committee's scrutiny principles, the committee draws the attention of senators to the matters raised in the correspondence from the ECG.**

Fair Entitlements Guarantee Regulation 2012 [Select Legislative Instrument 2012 No. 326] [F2012L02474]

| | |
|--------------------------------|--|
| Purpose | Builds upon the scheme created by the <i>Fair Entitlements Guarantee Act 2012</i> to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry in certain circumstances |
| Last day to disallow | 15 May 2013 |
| Authorising legislation | <i>Fair Entitlements Guarantee Act 2012</i> |
| Department | Education, Employment and Workplace Relations |

ISSUE:

Insufficient explanation provided in relation to 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 representatives from 'employer and employee groups were consulted in relation to this regulation'. The committee generally takes the view that overly bare or general descriptions, such as this, are not adequate to satisfy the requirement that an ES describe the nature of the consultation undertaken **[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 background information and a draft copy of the regulation were provided to the Australian Industry Group, the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, the Textile, Clothing & Footwear Union of Australia and the Insolvency Practitioners Association of Australia. The department provided an opportunity for these groups to discuss the details of the regulation through a teleconference or written comments. The participants at the teleconference raised no concerns regarding the effect of the regulation and no written comments were received. The minister further advised that the ES would be amended in accordance with the committee's request.

COMMITTEE RESPONSE:

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

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2013 [F2013L00477]

| | |
|--------------------------------|---|
| Purpose | Lists the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012 (the list) to give effect to the decision of the Minister for Foreign Affairs to revoke designations and declarations in relation to persons on the list |
| Last day to disallow | 20 August 2013 |
| Authorising legislation | Autonomous Sanctions Regulations 2011 |
| Department | Foreign Affairs and Trade |

ISSUE:***Insufficient description regarding consultation undertaken***

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 '[r]elevant Commonwealth Government departments were consulted prior to and during the drafting of this legislative instrument'. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee 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 department prepared the list in consultation with the Australian High Commission in Harare, the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship and the Office of Parliamentary Counsel. The department also notifies the financial services sector and the broader business community of all changes to the Department of Foreign Affairs and Trade (DFAT) Consolidated List of entities and individuals subject to autonomous and UN Security Council (UNSC) sanctions through its email subscription service. The minister further advised that the department had been requested to update the ES in accordance with the committee's request.

COMMITTEE RESPONSE:

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

Primary Industries Levies and Charges Collection Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 39, 2013] [F2013L00594]; and Primary Industries (Customs) Charges Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 37, 2013] [F2013L00595]

| | |
|--------------------------------|---|
| Purpose | (1) Amends the Primary Industries Levies and Charges Collection Regulations 1991 by adding a new Part 29 and sets out details for the payment, by olive producers, of three new statutory levies on fresh olives for processing; and (2) amends the Primary Industries (Customs) Charges Regulations 2000 by adding a new part (Part 29) in Schedule 10 to deal with olives |
| Last day to disallow | 27 August 2013 |
| Authorising legislation | <i>Primary Industries Levies and Charges Collection Act 1991</i> ; and <i>Primary Industries (Customs) Charges Act 1999</i> |
| Department | Agriculture, Fisheries and Forestry |

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

PARLIAMENTARY SECRETARY'S RESPONSE:

The Parliamentary Secretary for Agriculture, Fisheries and Forestry advised that the Australian Olive Association assisted the department in identifying and consulting with all levy payers about the proposed levies. Around 83 per cent of producers voted to support the introduction of the levies in a ballot conducted in June 2011. This information was omitted in error from the ESs and they have subsequently been amended to include details about the consultation that was undertaken.

COMMITTEE RESPONSE:

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

Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No. 1) [Select Legislative Instrument No. 31, 2013] [F2013L00479]

| | |
|--------------------------------|--|
| Purpose | Amends the Patents Regulations 1991, Trade Marks Regulations 1995, Designs Regulations 1995 and the Copyright Regulations 1969 in relation to intellectual property and for related purposes |
| Last day to disallow | 21 August 2013 |
| Authorising legislation | <i>Copyright Act 1968</i> ; <i>Patents Act 1990</i> ; <i>Trade Marks Act 1995</i> ; and <i>Designs Act 2003</i> |
| Department | Industry, Innovation, Science, Research and Tertiary Education |

ISSUE:

Insufficient information regarding offence provisions

The instrument gives effect to a number of changes to the intellectual property system (essentially flowing from the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*), including the introduction of a number of offence provisions (see new regulations 20A.13, 20A.16 and 20A.21). Regulation 20A.16, for example, establishes certain offences relating to persons appearing before a Disciplinary Tribunal, including strict liability offences for a refusal by certain persons to be sworn or make an affirmation, and an offence in relation to which a defendant bears the evidential burden in respect of certain matters. In general, the committee expects that, where an instrument makes provision for offences, the ES provide a full justification for the need, scope and framing of those offences. This is particularly so in cases of strict liability or where the evidential burden is placed on a defendant. The ES in this case provides very little information in these respects **[the committee sought further information from the minister]**.

MINISTER'S RESPONSE:

The minister advised that new Chapter 20A extends to incorporated patent attorneys (IPAs) longstanding provisions that have been in their present form since 1 July 2008. The new offences are the same as in Chapter 20 applying for individual patent attorneys.

First, the minister advised that new regulation 20A.13 'protects the public interest' by providing for disciplinary tribunal hearings involving IPAs to be held in public (except in special circumstances). The offence for failing to comply with a direction of the tribunal was intended to give force to the tribunal's capacity to direct its own proceedings.

Second, IPAs' representatives appearing before the tribunal were subject to three further potential offences to ensure the tribunal's capacity to carry out its responsibilities. These were: failing to comply with a summons, refusing to be sworn or to answer a relevant question after being summoned to appear at a hearing and refusing to be sworn or to answer a relevant question after having accepted expenses and allowances to appear as a witness (regulation 20A.16). The minister noted that strict liability was applied in the latter case as the person would not be in a position to argue lack of intent or ignorance of regulation 20A.16 as a defence.

Third, the minister advised that the regulation sought to protect consumers by obliging deregistered or suspended IPAs to help registered patent attorneys appointed as temporarily replacements. The offence for failing to comply with a notice requesting assistance (regulation 20A.21) was aimed at ensuring compliance with this requirement, and an IPA would bear the evidential burden in mounting a defence in accordance with section 13(3) of the Criminal Code.

Finally, the minister noted that the offences were all in compliance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The minister further advised that IP Australia would amend the ES to include the information provided.

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 **20 June 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 10 May 2013

A New Tax System (Goods and Services Tax) Act 1999

Goods and Services Tax: Correcting GST Errors Determination 2013 [F2013L00754]

Civil Aviation Act 1988

CASA 67/13 – Authorisation – pilot maintenance on class B rotorcraft [F2013L00756]

CASA ADCX 007/13 - Revocation of Airworthiness Directives [F2013L00738]

CASA ADCX 008/13 - Revocation of Airworthiness Directives [F2013L00750]

CASA ADCX 009/13 - Revocation of Airworthiness Directives [F2013L00751]

CASA EX53/13 – Exemption – from standard take-off and landing minima – Japan Airlines [F2013L00743]

Corporations Act 2001

ASIC Class Order [CO 13/552] [F2013L00742]

ASIC Market Integrity Rules (ASX 24 Market) Amendment 2013 (No. 1) [F2013L00739]

Guidelines for the use of the word 'university' in company names (Revocation) Instrument 2013 [F2013L00757]

Currency Act 1965

Currency Legislation (Perth Mint) Amendment Determination 2013 (No. 1) [F2013L00735]

Defence Act 1903

Defence Determination 2013/15, Disturbance allowance and vehicle allowance – amendment

Defence Determination 2013/16, Medical officers specialist officer career structure – amendment

Defence Determination 2013/17, Post indexes – amendment

Defence Determination 2013/18, Leave travel to a restricted destination – amendment

Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-damp allowance and compulsory tuition fees – amendment

Defence Determination 2013/20, Living-in contribution for Residential Support Officers – amendment

Defence Determination 2013/21, Post indexes and approval clubs – amendment

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

Environment Protection and Biodiversity Conservation Act 1999

Amendment of List of Exempt Native Specimens – Western Australian West Coast Deep Sea Crustacean Managed Fishery (29/04/2013) [F2013L00745]

Amendment of List of Exempt Native Specimens – Northern Territory Timor Reef Fishery (01/05/2013) [F2013L00747]

Federal Court of Australia Act 1976

Federal Court Amendment Rules 2013 (No. 1) [Select Legislative Instrument No. 65, 2013] [F2013L00749]

Fisheries Management Act 1991

Southern Bluefin Tuna Fishery Overcatch and Undercatch Determination 2013 [F2013L00752]

Fuel Tax Act 2006

Fuel Tax: Correct Fuel Tax Errors Determination 2013 [F2013L00753]

Greenhouse and Energy Minimum Standards Act 2012

Greenhouse and Energy Minimum Standards (Computer Monitors) Determination 2013 [F2013L00733]

Greenhouse and Energy Minimum Standards (Computers) Determination 2013 [F2013L00726]

Greenhouse and Energy Minimum Standards (Gas Water Heaters) Determination 2013 [F2013L00729]

Higher Education Support Act 2003

Higher Education Provider Approval No. 2 of 2013 [F2013L00741]

Higher Education Support Act 2003 - VET Provider Approval (No. 16 of 2013) [F2013L00740]

Higher Education Support Act 2003 - VET Provider Approval (No. 17 of 2013) [F2013L00755]

Veterans' Entitlements Act 1986

Statement of Principles concerning chronic gastritis and chronic gastropathy No. 26 of 2013 [F2013L00722]

Statement of Principles concerning goitre No. 23 of 2013 [F2013L00721]

Statement of Principles concerning goitre No. 24 of 2013 [F2013L00725]

Statement of Principles concerning Graves' disease No. 33 of 2013 [F2013L00736]

Statement of Principles concerning Graves' disease No. 34 of 2013 [F2013L00737]

Statement of Principles concerning hashimoto's thyroiditis No. 31 of 2013 [F2013L00732]

Statement of Principles concerning Hashimoto's thyroiditis No. 32 of 2013 [F2013L00731]

Statement of Principles concerning hypothyroidism No. 29 of 2013 [F2013L00728]

Statement of Principles concerning hypothyroidism No. 30 of 2013 [F2013L00730]

Statement of Principles concerning hyperthyroidism and thyrotoxicosis No. 27 of 2013 [F2013L00723]

Statement of Principles concerning hyperthyroidism and thyrotoxicosis No. 28 of 2013 [F2013L00724]

Instruments received week ending 17 May 2013

Clean Energy Act 2011

Clean Energy (Auction of Carbon Units) Determination 2013 [F2013L00759]

Clean Energy Legislation Amendment (International Linking) Regulation 2013 [Select Legislative Instrument No. 78, 2013] [F2013L00778]

Clean Energy Legislation Amendment (Various Measures) Regulation 2013 [Select Legislative Instrument No. 79, 2013] [F2013L00779]

Environment Protection and Biodiversity Conservation Act 1999

Amendment of List of Exempt Native Specimens - Western Australian Mackerel Fishery (04/05/13) (deletion) [F2013L00767]

Amendment of List of Exempt Native Specimens - Western Australian Mackerel Fishery (04/05/2013) (inclusion) [F2013L00769]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (122) (30/04/2013) [F2013L00766]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (139) (29/04/2013) [F2013L00765]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (141) (30/04/2013) [F2013L00764]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (144) (26/04/2013) [F2013L00763]

Private Health Insurance Act 2007

Private Health Insurance (Data Provision) Amendment Rules 2013 (No. 1) [F2013L00771]

Public Service Act 1999

Public Service Commissioner's Amendment Direction 2013 (No. 2)

Remuneration Tribunal Act 1973

Remuneration Tribunal Determination 2013/05 – Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices

Social Security Act 1991

Social Security (Personal Care Support - Tasmanian Self Directed Funding Pilot) (FaHCSIA) Determination 2013 [F2013L00770]

Tertiary Education Quality and Standards Agency Act 2011

Tertiary Education Quality and Standards Agency (Information) Guidelines 2013 [F2013L00760]

Instruments received week ending 24 May 2013

A New Tax System (Australian Business Number) Act 1999

A New Tax System (Australian Business Number) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 81, 2013] [F2013L00785]

Australian Capital Territory (Planning and Land Management) Act 1988

National Capital Plan - Amendment 81 - Removal of Outdated and Unnecessary Policy Material [F2013L00782]

Australian Charities and Not-for-profits Commission Act 2012

Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 82, 2013] [F2013L00793]

Australian Prudential Regulation Authority Act 1998

Australian Prudential Regulation Authority (confidentiality) determination No. 8 of 2013 [F2013L00797]

Australian Radiation Protection and Nuclear Safety Act 1998

Australian Radiation Protection and Nuclear Safety Legislation (Fees and Charges) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 74, 2013] [F2013L00796]

Broadcasting Services Act 1992

Broadcasting Services (Exempt Digital Transmission Areas) Determination (No. 2) 2013 [F2013L00818]

Carbon Credits (Carbon Farming Initiative) Act 2011

Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 77, 2013] [F2013L00800]

Charter of the United Nations Act 1945

Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 72, 2013] [F2013L00791]

Charter of the United Nations (Sanctions - the Taliban) Regulation 2013 [Select Legislative Instrument No. 73, 2013] [F2013L00787]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789]

Civil Aviation Act 1988

AD/BEECH 200/38 Amdt 6 – Wing Front Spars [F2013L00820]

Civil Aviation Legislation Amendment (Miscellaneous) Regulation 2013 [Select Legislative Instrument No. 80, 2013] [F2013L00798]

Corporations Act 2001

Corporations Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 83, 2013] [F2013L00780]

Corporations (Derivatives) Determination 2012 [F2013L00819]

Criminal Code Act 1995

Criminal Code Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 66, 2013] [F2013L00825]

Currency Act 1965

Currency (Royal Australian Mint) Determination 2013 (No. 2) [F2013L00799]

Environment Protection and Biodiversity Conservation Act 1999

Amendment of List of Exempt Native Specimens - Australian High Seas Fishery (20/05/2013) (deletion) [F2013L00810]

Amendment of List of Exempt Native Specimens - Australian High Seas Fishery (20/05/2013) (inclusion) [F2013L00812]

Amendment of List of Exempt Native Specimens - Queensland Mud Crab Fishery (10/05/2013) [F2013L00804]

Amendment of List of Exempt Native Specimens - Torres Strait Finfish Fishery (10/05/2013) [F2013L00805]

Amendment of List of Exempt Native Specimens - Western Australian South Coast Trawl Fishery (14/05/2013) (deletion) [F2013L00806]

Amendment of List of Exempt Native Specimens - Western Australian South Coast Trawl Fishery (14/05/2013) (inclusion) [F2013L00807]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (117) (02/04/2013) [F2013L00817]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (143) (07/05/2013) [F2013L00794]

Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 – Scott River Ironstone Association (EC 123) (30/04/2013) [F2013L00816]

Fair Work Act 2009

Fair Work Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 69, 2013] [F2013L00815]

Financial Management and Accountability Act 1997

Financial Management and Accountability Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 70, 2013] [F2013L00802]

Finance Minister's Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2012) [F2013L00773]

Financial Sector (Collection of Data) Act 2001

Financial Sector (Collection of Data) determination No. 62 of 2013 [F2013L00776]

Higher Education Support Act 2003

Higher Education Support Act 2003 - VET Provider Approval (No. 18 of 2013) [F2013L00781]

Income Tax Assessment Act 1997

Income Tax Assessment Amendment (Private Health Insurance Statement) Regulation 2013 [Select Legislative Instrument No. 84, 2013] [F2013L00784]

Migration Act 1958

Migration Amendment Regulation 2013 (No. 2) [Selective Legislative Instrument No. 75, 2013] [F2013L00795]

Migration Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 76, 2013] [F2013L00786]

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 85, 2013] [F2013L00814]

National Environment Protection Council Act 1994

National Environment Protection (Assessment of Site Contamination) Amendment Measure 2013 (No. 1) [F2013L00768]

Parliamentary Entitlements Act 1990

Parliamentary Entitlements Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 71, 2013] [F2013L00792]

Privacy Act 1988

Privacy (Private Sector) Amendment (Centrelink eServices Organisations) Regulation 2013 [Select Legislative Instrument No. 67, 2013] [F2013L00790]

Private Health Insurance Act 2007

Private Health Insurance (Health Insurance Business) Amendment Rules 2013 (No. 1) [F2013L00775]

Radiocommunications Act 1992

Australian Radiofrequency Spectrum Plan Variation 2013 (No. 1) [F2013L00826]

Radiocommunications (Labelling) Determination 2013 [F2013L00821]

Radiocommunications Licence Conditions (Apparatus Licence) Amendment Determination 2013 (No. 1) [F2013L00824]

Shipping Reform (Tax Incentives) Act 2012

Shipping Reform (Tax Incentives) Act 2012 - Subsection 10(5) specification of kinds of vessels [F2013L00774]

Superannuation (Productivity Benefit) Act 1988

Superannuation (Productivity Benefit) (Continuing Contributions) Declaration 2013 [F2013L00813]

Superannuation (Productivity Benefit) (First Interest Factor) Declaration 2013 [F2013L00808]

Superannuation (Productivity Benefit) (Penalty Interest) Amendment Determination 2013 (No. 1) [F2013L00823]

Superannuation (Productivity Benefit) (Second Interest Factor) Declaration 2013 [F2013L00822]

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 86, 2013] [F2013L00783]

Telecommunications Universal Service Management Agency Act 2012

Telecommunications Universal Service Management Agency Amendment (Accessible Services) Regulation 2013 [Select Legislative Instrument No. 68, 2013] [F2013L00801]

Therapeutic Goods Act 1989

Therapeutic Goods (Listing) Notice 2013 (No. 1) [F2013L00772]

Therapeutic Goods (Listing) Notice 2013 (No. 2) [F2013L00777]

Total number of instruments scrutinised: 103

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

For further advice regarding the requirements of the Act in relation to consultation or any other matters, please consult the *Legislative Instruments Handbook: a practical guide for compliance with the Legislative Instruments Act 2003 and related matters* (December 2004), published by the Office of Legislative Drafting and Publishing.

Further information is also 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



RECEIVED

16 JUN 2013

Senate Standing Committee
on Regulations
and Ordinances

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

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

Dear Senator Furner

Thank you for your letter of 16 May 2013 regarding the *National Health (Pharmaceutical Benefits) Amendment Regulation 2013 (No. 1)* [Select Legislative Instrument No. 53, 2013] [F2013L00650] (the amending Regulation).

I note your concern that the accompanying Explanatory Statement (ES) to this amendment did not provide sufficient detail on the nature of consultations undertaken. The amending Regulation followed a December 2012 Federal Court decision concerning calculations for the Pharmaceutical Benefits Scheme price disclosure arrangements.

I have reconsidered the consultation description in the ES and understand that inclusion of further details will provide a more complete picture of the consultation process. The relevant ES will be updated according to the requirements of the *Legislative Instruments Act 2003* and re-submitted in accordance with the necessary process.

Once again, thank you for writing.

Yours sincerely

Tanya Plibersek

14.6.13

RECEIVED

18 JUN 2013

Senate Standing C'ttee
on Regulations
and Ordinances



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

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

17 JUN 2013

BR13-000693

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

Dear Senator

Thank you for your letter of 27 May drawing my attention to comments contained in the Regulations and Ordinance Committee's Monitor dated 16 May 2013.

I am glad that my response to the Committee about the reasoning behind the new reduced deeming rates detailed in the *Social Security (Deeming threshold Rates) (FaHCSIA) Determination 2013* was helpful in explaining this beneficial change.

I understand the Committee has requested that the explanatory statement for the Determination be updated with the information I provided in my response. However, since the Determination and explanatory statement have already been laid before each House of Parliament and the disallowance period has ended, it is no longer feasible to make that inclusion in the explanatory statement.

Nevertheless, I will ensure as far as possible that information to address the Committee's terms of reference, or comments made by the Committee, are included in future explanatory statements for my portfolio.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Jenny Macklin'.

JENNY MACKLIN MP



RECEIVED

21 MAY 2013
Senate Standing C'ttee
on Regulations
and Ordinances

THE HON KELVIN THOMSON MP
PARLIAMENTARY SECRETARY FOR TRADE

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

20 MAY 2013

Dear Senator

Thank you for your letter dated 14 March 2013 about the *Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012* seeking advice from the Minister for Trade and Competitiveness on the availability of merits review where Austrade has refused to approve an applicant as a participating EMDG consultant, or to cancel the approval of a participating consultant. The Minister has asked that I respond on his behalf.

Merits review to a body like the Administrative Appeals Tribunal (AAT) is available under section 97 (1)(c) of the *Export Market Development Grants Act 1997*. When Austrade refuses to approve a consultant as a participating consultant or cancels the approval of a participating consultant that party will be advised of their review rights including access to merits review at the AAT.

I trust this information adequately addresses the Committee's question.

Yours sincerely

Kelvin Thomson



24th May 2013

Senator Mark Furner (Chair)
Senate Regulations and Ordinances Committee

RECEIVED

24 MAY 2013

Senate Standing C'ttee
on Regulations
and Ordinances

Attn: Committee Secretary

PO Box 6100
Parliament House
Canberra ACT 2600
Australia

**Re: Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive)
Determination 2012.**

Dear Senator Furner,

Please accept the attached submission and attachments for your review.

It is the view of the Export Consultants Group (ECG) that the Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 (the Instrument) is not in the best interest of the Export Grant Consultant Community or Australian Exporters.

ECG unanimously rejects the instrument and welcomes this opportunity to make this submission for your consideration.

We acknowledge the timing of our submission. Austrade informed us that it was proceeding with the instrument on 22/02/2013. We were not aware until quite recently (May 2013) that Austrade registered the instrument on the previous day. The Acting CEO Laurie Smith made the relevant determination two months earlier on 13 December 2012 we were also unaware of this until 22/02/2013. Austrade also informed us on the 22/02/2013 that further discussion would ensue at our Bi-annual National Conference, held 17-20 March 2013, one week after your committee met on the 14 /03/2013 to review the instrument. We feel that we have not enjoyed the same level of transparency in our dealings with Austrade regarding this matter as we afforded them. (*See attachments 1, 3*)

Austrade has further compounded the timing of events by announcing that applications for participation in the program for 2013-14 will close on May 31st (*See attachments 6, 9*)

Notwithstanding these events, we trust that the committee will be able to find sufficient time to review our submission.

We encourage the committee to seek further information from Austrade in the light of our submission to understand this instrument better, to assess its real purpose and reveal its true effect on the export consultant community, the export industry, the business operations of our members and Australian exporters.

Yours sincerely,

Stuart Mitchell

Stuart Mitchell

Acting Chairman Export Consultants Group

MITCHELL AND CO CHARTERED ACCOUNTANTS - 2A CHARLES ST NORWOOD SA 5067 08 83637277

Mobile 0439859199 stuart@mitco.com.au

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**EXPORT CONSULTANTS GROUP:
May 2013
Submission to the Senate Regulations and Ordinances Committee**

Re: The Export Market Development Grants
(Extended Lodgement and Consultant Quality Incentive)
Determination 2012

1. Summary:

In our submission, we take the view that the instrument in review and the attached Explanatory Statement (ES) fail to satisfy all requirements of the Legislative Instruments Act 2003. That the instrument:

- fails to satisfy the general requirements for preparing ES
- fails to address consultation in the ES
- raises issues that require the committee's scrutiny.

In our submission:

The instrument reduces Austrade's window to review and determine eligibility by three months delaying processing and increasing the administrative resources required to process applications. *See attachment 3*

Claim accuracy will not result entirely from consultants lodging accurate applications but will also result from Austrade's decision as to which applications to audit and its power to adjust calculation factors. *See attachment 3*

Austrade makes unwarranted and insulting remarks about Non-participating consultants. *See attachment 3*

The instrument does not enjoy industry wide support from the Export Grants Consultants Community or the Export Council of Australia. *See attachments 4,5*

Austrade has failed in the ES to include issues raised in consultation and outcomes of the consultation process. *See attachment 3*

Austrade fails to make any mention as to method, the purpose or parameters of the consultation in the ES *See attachment 3*

The members of ECG, by unanimous resolution on 19 March 2013, opposed the introduction of the Extended Lodgement and Quality Determination at The Export Consultants Group Biannual National Conference 17-20 March 2013 *See attachments 4*

The instrument places the participating EMDG consultant in conflict with their fiduciary responsibility to the applicant for a grant. *See this submission - Application of Scrutiny principals Pg 7*

Austrade intends to discriminate between participating and non-participating consultants by offering support to participating consultants and none to non-participating consultants. Austrade have undertaken to establish an exclusive participating consultant's forum initially focusing on marketing opportunities, exclusive online listing and direct promotion via EMDG Newsletters and to attendees at EMDG Coaching sessions. The support will further extend to linking participating consultants with the online application form, the participating consultants website, and the Austrade website. See attachments 6,9

The instrument operates to limit/restrict competition by creating different trading conditions between participating and non-participating export grants consultants for three months of the year. See attachments 1, 3, 5,6,8,9

The process of introducing the instrument is having a detrimental and divisive effect on the Export Grant Consultants Community and indirectly this affects exporters and the export industry. It is our view that the divisiveness within ECG will continue if the scheme proceeds. See attachments 1, 4, 5

Austrade is replacing a highly successful jointly managed (Austrade & ECG with independent Chair) committee process representing Export Grants Consultants known as COPAC. The design of COPAC facilitates the efficient, timely and effective delivery of Export Market Development Grants, services and advice to the export community. See attachments 2, 5, 7

2. **EXPLANATORY STATEMENT – General requirements for preparing explanatory statements**

General remarks as to reasons given (*reasons in italics*) – (a non-exhaustive response)

Extracts from the Explanatory Statement:

From an administrative perspective the setting of a time limitation on the lodgement of grants is important in enabling applications for grant to be appropriately reviewed to determine eligibility prior to payment and to enable a substantial majority of applications to be processed within the financial year in which they are lodged.

A time limitation is very important and for the reasons given, we note however that the proposed scheme will reduce Austrade's window to review and determine eligibility by three months.

In extending the lodgement period, the determination provides that the applications lodged in the extended period be lodged by consultants who have a demonstrated record of lodging accurate applications over the whole lodgement period. This improvement in claim accuracy reduces the overall administrative resources required to process applications and therefore allows Austrade to receive applications later and still have the resources to substantially complete processing within the financial year and at an acceptable level of risk.

In our view of this instrument, Austrade determines claim accuracy. Not consultants that have a demonstrated record of lodging accurate applications over the whole lodgement period because in the instrument the Grants Adjustment Rate measures claim accuracy and the Grants Adjustment Rate is limited to Type 1 audits. The decision to conduct a Type 1 audit is a decision for Austrade; therefore, Austrade will determine claim accuracy. Current arrangements measure all audits types when calculating Grants Adjustment/slippage and consultants are entirely accountable for the rate they achieve.

Also refer:

Part 1.4 (7) (a) or (b)

Part 1.4 (8) (a) and (b)

Austrade have stated on numerous occasions at ECG CPD events across the country that the primary reason for grant adjustment/slippage is due to the need for apportionment. The onus is on an EMDG applicant to demonstrate a basis for apportionment ie only claiming the eligible component of an expense. The instrument does not address this issue and yet participating consultants will achieve greater claim accuracy and non-participating consultants will not. See following.

Participation by consultants is entirely voluntary and those consultants who do not wish to meet the accuracy targets listed in the

determination can continue to lodge on the same basis as they do currently.

We consider the above statement insulting to those consultants who have lodged accurate claims well within the stepped maximum grant adjustment rate, without any so-called incentive. There are consultants who choose not to seek approval as a participating EMDG consultants, who consider the extended lodgement as a disincentive to their businesses, inter alia not the time of year to be conducting a paper chase and to their employees. In part due to their cultural & traditional family activities, especially given that the extended lodgement period extends over the festive season and summer holiday break etc. This applies to consultants, applicant for a grant, and their staff alike.

3. EXPLANATORY STATEMENT - Addressing consultation in the explanatory Statements

When addressing consultation in the explanatory statements, Austrade has failed to meet the requirements of s26 of the Act. Ie when *describing the nature of the consultation*.

- Austrade has failed to include issues raised in consultation and outcomes of the consultation process.
- In addition, Austrade fails to make any mention as to method, the purpose or parameters of the consultation.

Examples:

- Several consultations between ECG and Austrade personnel on this initiative occurred over approx 12 months, ECG conducted those consultations in a very transparent manner. At every stage and up to the last meeting with Austrade in October 2012, the majority view expressed dissatisfaction with several major principles of the concept. *See attachment 1,5*
- In October 2012, ECG Chair Mr Rod Campbell and ECA General Manager Mr Ian Murray met with Peter Grey CEO of Austrade and informed the CEO that the proposed program did not have the support of the Export Grants Consultants/Export Community. At that time, the CEO of Austrade gave assurances that Austrade would not recommend the scheme to the Minister. He added that Austrade would not recommend any program to the Minister that did not have the full support of the EMDG Consulting community. The then acting CEO Laurie Smith signed the instrument on 13/12/2012. Austrade did make us aware of this development on 22/02/2013. *See attachment 5*
- At the Export Consultants Group Bi-Annual National conference, held 17 -20 March 2013 in McLaren Vale South Australia, ECG members did on the 19 March 2013 reach the following unanimous consensus regarding the instrument:
 1. This program will not reduce slippage, which is a major reason for this determination.
 2. The extended lodgement timeframe is not considered to be an incentive for consultants.
 3. The basis for grant adjustment rates is unrealistic, when non-visit assessments are not taken into account.
 4. Policy and Operations staff of Austrade have conflicting objectives on slippage.
 5. The new associated Not Fit and Proper provisions are draconian, offensive and offer no appeal provisions. It is a denial of natural justice.

See attachments – 1,4,5, covering letter.

4. Application of Scrutiny principals

Principal C – does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

Concern about delegated legislation affecting the right to practice a trade or profession or to carry on a business or otherwise affecting livelihood

1. Part of the role of EMDG consultants is to legally maximise the grant entitlement of exporters. This includes providing advice on eligibility of applicants, eligible expenses and the appropriate apportionments of expenditure, however, Austrade makes a final determination on all these matters and the EMDG consultant cannot make this decision. Invariably there will be matters that Austrade will disagree with the exporter and their consultant, such that Austrade makes negative adjustments.

EMDG consultants have a **fiduciary responsibility** to their clients and must act in the interests of their client. However, by agreeing to achieve a maximum grant adjustment rate under 4.2, a consultant is putting their own interest before their client's interest, as Austrade will reward the consultant if they achieve the maximum grant adjustment rate prescribed in 4.2.

Further, it is noted that the determination proposes that only type 1 audits are to be included in assessing the grant adjustment rate. Type 1 audits are assessments where Austrade believes that there is a greater chance of disagreement between the exporter and Austrade on eligibility matters. The impact of excluding audits other than type 1 audits is shown in the following example:

An EMDG consultant may lodge 20 applications of which only 1 is considered by Austrade to be a Type 1 audit. After audit by Austrade there is a negative adjustment of 10%, but as this is the only Type 1 audit of the consultant's applications, the consultant is considered to have an overall grant adjustment rate of 10% and would breach the conditions of approval under the Determination.

As such there is widespread lack of industry support for the program;

We consider that introduction of the Scheme is having a divisive effect on members of the Export Consultants Community. We expect that it will have further divisive effects affecting members of the Export Consultants Community if it were to go ahead.

There is certainly already disagreement between members of the Export Consultants Community. The disagreements inter alia centre on rights of export Consultants to natural justice, inconsistencies with other Not Fit and Proper regulations, the administration and operation of the Not Fit and Proper provision, losing clients to competitors, unlevel playing field.

In our submission, we believe that the committee should be concerned that a split in the Export Grants Consultants Community is a real and present possibility if this program proceeds. The Export Consultants Group will find it increasingly difficult if not impossible to represent and communicate with Export Grants Consultants where

its members are subject to different rules and have competing interests and CPD needs. Such problems are starting to raise their heads at time of writing.

COPAC

Austrade informed the Export Consultants Group on the 22/02/2013 that Austrade would no longer participate in The Code of Practice Administration Committee (COPAC) Austrade foreshadowed this intent in September 2012. Austrade also informed ECG that Austrade would remove the current EMDG consultant listing website with effect from 31 March 2013. This is a rejection of a highly efficient, timely and effective delivery of export market development grants, services and advice to the export community – *See attachments 2,5,7*

BACKGROUND:

COPAC had the responsibility for ongoing administration of this Code of Practice including its protocols.

The Code of Practice for EMDG Consultants was designed to provide guidance on acceptable standards of professional conduct.

COPAC was comprised of two representatives from Austrade, two representative Grants Consultants and an independent Chairperson.

COPAC OBJECTIVES

1. To facilitate the efficient, timely and effective delivery of export market development grants, services and advice to the export community.
2. That consultants prepare accurate verifiable applications and submissions for export grants in accordance with the legislative entitlement and based on advice provided by the applicant.
3. To promote professional and ethical relations between consultants, Austrade staff and the export community.

COPAC has over the years dealt successfully with all issues raised by consultants, Austrade and the EMDG legislation, dealing with technical interpretation of the EMDG Act, dealing with errant consultants, addressed slippage issues, training and much more. *See attachments 5, 7*

5. Attachment Reference:

1. **Michael Vickers (Austrade) letter to Ian Murray (ECA/ECG) #1 – 21 February 2013**
Determination Letter ECA + ECG.pdf-
2. **Michael Vickers Letter to Ian Murray (ECA/ECG) #2 – 21 February 2013**
Notice Letter.pdf
3. **Explanatory Statement ES as provided by Michael Vickers to ECG & EMDG Consultants – 21&27/02/2013**
Consultants - Quality Incentive Program - Explanatory Statement v4 - B.docx
4. **ECG Conference resolution 19 March 2013 –**
ECG Conference 2013 - Resolution Consultant Incentive.pdf
5. **Rod Campbell (Director ECA – Chair ECG) letter to Brian Gosper (CEO Austrade) 19 May 2013 –**
ECA - CEO Austrade Page 1.pdf
ECA - CEO Austrade Page 2.pdf
6. **Email From Michael Vickers to all EMDG Consultants 15 May 2013**
Email - Reminder - closing date - EMDG Consultant Voluntary Quality Incentive Program SEC UNCLASSIFIED .msg (with attachment)
7. **ECG Code of Practice - (Current as at 2013)**
CODE OF PRACTICE - Revised 25 July 2011.docx
8. **Email From Michael Vickers to all EMDG Consultants + letter 27 February**
Email - Strategies to improve EMDG claim accuracy & final letter to consultants.pdf
9. **Email From Michael Vickers to all EMDG Consultants 05 April 2013**
Email - EMDG Consultant Voluntary Quality Incentive Program

THE ATTACHMENTS ARE
NOT REPRODUCED IN
THE MONITOR



AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

17 June 2013

Ref: 93/2013

Mr Stuart Mitchell
Acting Chairman Export Consultants Group

stuart@mitco.com.au

Dear Mr Mitchell

Thank you for your letter of 24 May 2013 regarding the Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 [F2013L00258].

The committee welcomes your correspondence on the instrument in question, and has considered the matters set out in your submission.

As you would be aware, the committee's function is to examine instruments of delegated legislation for compliance with certain principles of personal rights and parliamentary propriety, as set out in Senate Standing Order 23. In applying these scrutiny principles to its work, the committee's longstanding practice has been to restrict its analysis to a technical inquiry and not to consider the policy merits of instruments of delegated legislation.

Accordingly, I wish to advise that the committee has determined that the matters raised in Part 2 (page 4) of your submission, which concern certain administrative and regulatory settings of the Export Market Development Grants scheme, are matters of policy which fall outside the committee's usual scope of consideration.

In relation to the matters outlined in Part 3 (page 6) of your submission, regarding the description of consultation in the explanatory statement (ES) to the determination, the committee notes that individual consultants and the industry body were consulted about the changes effected by the instrument. The committee does not generally require a high level of detail to satisfy the requirement of the *Legislative Instruments Act 2003* (the Act) that an ES describe the nature of consultation undertaken, and considers that the description provided was sufficient in this case. I note that the Act does not require any description of the outcome of consultation, and the question of how stakeholder feedback is addressed is in essence a policy matter for determination by the relevant decision maker. These are matters which, again, fall outside the committee's usual scope of consideration.

Similarly, in relation to the matters outlined in Part 4 (page 7) of your submission, regarding the manner of assessment of the grant adjustment rate, the committee has not identified any aspects of this element of the scheme that would raise a concern referable to the committee's scrutiny principles.

Finally, I note that, separate to your correspondence, the committee wrote to the Minister for Trade and Competitiveness on 14 March 2013 regarding the availability of merits review in relation to certain decisions provided for in the determination (see *Delegated legislation monitor* No. 5 of 2013). The committee will report on its consideration of the minister's response in the forthcoming *Delegated legislation monitor* No. 6 of 2013.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. Furner', is positioned above the printed name.

Senator Mark Furner
Chair

RECEIVED

28 MAY 2013

Senate Standing C'ttee
on Regulations
and Ordinances



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

Our Ref BR13-000903

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

Mah
Dear ~~Senator~~

I refer to your letter of 28 February 2013 regarding the *Fair Entitlements Guarantee Regulation 2012* (the Regulation). In particular, the Committee's request that further information is provided regarding the nature of the consultation that was undertaken for this regulation.

As noted in the explanatory statement for the Regulation, employer and employee groups were consulted in relation to this regulation. The nature of the consultation involved providing background information and a draft copy of the Regulation to the following organisations:

- Australian Industry Group;
- Australian Chamber of Commerce and Industry;
- Australian Council of Trade Unions;
- Textile, Clothing & Footwear Union of Australia; and
- Insolvency Practitioners Association of Australia.

These groups were then invited to discuss the details of the Regulation at a teleconference with representatives from my Department. In the event that any of the stakeholders were not available to participate in this teleconference they were provided with the opportunity to submit written comments. None of the participants at the teleconference raised concerns regarding the effect of the Regulation that required changes to be made. In addition, no written comments were received from those that could not attend.

I assure you that future explanatory statements will provide more detail on consultation that has been undertaken, and the explanatory statement accompanying this Regulation will be updated in the near future to include this additional information.

I trust the information provided is helpful.

Regards

Bill Shorten
BILL SHORTEN

27 MAY 2013



RECEIVED

18 JUN 2013

Senate Standing C'ttee
on Regulations
and Ordinances

SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

13 JUN 2013

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

Dear Senator Furner

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013

Thank you for your letter of May 16, 2013, concerning the content of the Explanatory Statement accompanying the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013* ('the Zimbabwe Amendment List') made under the *Autonomous Sanctions Regulations 2011* ('the Regulations').

In your letter you refer to the report of the Regulations and Ordinances Committee, *Delegated legislation monitor* No. 5 of 2013 (May 16, 2013), which requests further information on the nature of the consultations that the Government undertook when making this instrument.

Following the visit to Australia in July 2012 by Zimbabwe's Prime Minister Tsvangirai and as a result of his representations, including with Prime Minister Julia Gillard, I announced on February 7, 2013, a three-step process for the removal of sanctions, with each tranche of removals contingent on the completion of a concrete step towards a return to democracy. The announcement was made in recognition of reforms that have taken place in Zimbabwe since Australia had introduced sanctions in 2002.

The Zimbabwe Amendment List gave legal effect to my announcement on March 11, 2013, that Australia would remove Australian targeted financial sanctions and travel restrictions against 55 individuals in Zimbabwe in response to the completion of the first of these steps, the setting of a date for Zimbabwe's constitutional referendum (March 16, 2013).

The Zimbabwe Amendment List was prepared by the Department of Foreign Affairs and Trade (DFAT) in consultation with the Australian High Commission in Harare, the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship and the Office of Parliamentary Counsel.

While your letter concerned the Zimbabwe Amendment List, to avoid any confusion I note that the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No 2)* commenced on May 28, 2013. This gives effect to my announcement on May 27, 2013, that Australia would lift sanctions on a further 65 individuals, including politicians, military personnel and government officials. The announcement follows Zimbabwe's completion of a constitutional referendum. The referendum was held on March 16, 2013, and broadly judged to be credible. That development satisfied the criterion for removing a second tranche.

The Australian Government consults widely and frequently with the public in relation to both autonomous and United Nations Security Council (UNSC) sanctions. The Government is in regular contact with the Australian financial services sector about the operation of targeted financial sanctions measures. DFAT notifies the financial services sector and the broader business community of all changes to the DFAT Consolidated List of entities and individuals subject to autonomous and UNSC sanctions through its email subscription service. While the Zimbabwe Amendment List amends the list of persons and entities subject to targeted financial sanctions and travel restrictions, it does not amend the regulatory nature of the sanctions.

I have requested DFAT to ensure that the Explanatory Statement is updated in accordance with the legislative requirements and that it is made available to the Committee.

I trust that this information will be of assistance to the Committee. Thank you again for writing to me on this matter.

Yours sincerely

A handwritten signature in black ink, consisting of a series of fluid, connected strokes that form a stylized representation of the name 'Bob Carr'.

Bob Carr



RECEIVED

18 JUN 2013


Senate Standing C'ttee
on Regulations
and Ordinances

The Hon. Sid Sidebottom MP

Parliamentary Secretary for Agriculture, Fisheries and Forestry
Member for Braddon

REF: MNMC2013-03024

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


Dear Senator

Thank you for your letter of 16 May 2013 advising me of your concerns about the explanatory statements accompanying the *Primary Industries Levies and Charges Collection Amendment Regulation 2013 (No. 1)* and the *Primary Industries (Customs) Charges Amendment Regulation 2013 (No. 1)*.

The Australian Olive Association Inc. assisted the department to identify and consult with all prospective levy payers about the proposed levies. Ballot papers were distributed to all identified olive producers over a period of four weeks from 2 June 2011 to 30 June 2011. Around 83 per cent of producers voted to support the introduction of all three proposed levies. This information was omitted in error from the explanatory statements.

The revised explanatory statements, enclosed for your reference, now include the consultation details. The department will endeavour to ensure future explanatory statements meet the requirements of the *Legislative Instruments Act 2003*.

Thank you for bringing this omission to my attention. I trust this information will be of assistance to you.

Yours sincerely



Sid Sidebottom

17 June 2013
Enc



**Minister for Climate Change and Energy Efficiency
Minister for Industry and Innovation**

RECEIVED

18 JUN 2013

Senate Standing C'ttee
on Regulations
and Ordinances

C13/981

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

18 JUN 2013

Dear Senator Furner

Thank you for your letter of 16 May 2013 concerning the Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No.1).

I am writing in response to your request for clarification of the Patent Regulations as discussed in the *Delegated Legislation Monitor* No. 5 of 2013. In particular, the *Delegated Legislation Monitor* noted that the Explanatory Statement for the Raising the Bar Regulation does not provide a "full justification for the need, scope and framing" of the offences set out in regulations 20A.13, 20A.16 and 20A.21. The Senate Standing Committee on Regulations and Ordinances also requested information about why the latter two regulations impose strict liability or place the evidential burden on a defendant.

The reason the Raising the Bar Regulation introduced new Chapter 20A was to accommodate incorporated patent attorneys, which were recently allowed by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*. Chapter 20A replicates the offences which already exist in Chapter 20 for individual patent attorneys (the equivalent provisions being regulations 20.38, 20.41 and 20.52).

Chapter 20A extends to incorporated patent attorneys longstanding provisions (including offences) which have been in their present form since 1 July 2008, when the provisions were inserted by the Patents and Trade Marks Legislation Amendment Regulations 2008 (No. 1) SLI 2008 No. 122. In turn, the 2008 provisions carried over the same offences presently under discussion, which had previously been reviewed in 2001 by the Criminal Justice Division of the Attorney-General's Department as part of a program to harmonise Commonwealth departments' offence provisions with Chapter 2 of the *Criminal Code Act 1995* (Criminal Code).

New regulation 20A.13 protects the public interest by providing for Disciplinary Tribunal hearings involving incorporated patent attorneys to be held in public, except in special circumstances where confidentiality better serves the public interest. In such cases, the Tribunal may restrict or prohibit the publication of evidence or matters contained in documents provided to the Tribunal, and otherwise give directions to the persons who are present. To give force to this provision, the Raising the Bar Regulation includes an offence

for failing to comply with the Tribunal's directions. In keeping with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the penalty is clearly linked to a specific offence; is commensurate with other offences under the Patents Regulations; and is expressed in penalty units.

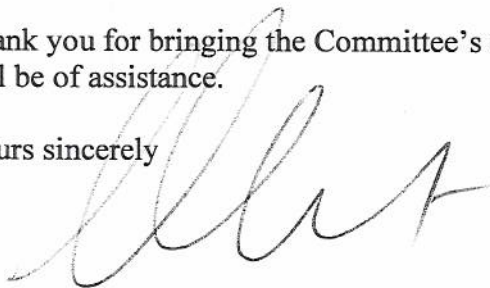
It is essential that the Disciplinary Tribunal be able to carry out its responsibilities. To that end, incorporated patent attorneys' representatives appearing before a Disciplinary Tribunal are subject to three potential offences under regulation 20A.16: failing to comply with a summons; refusing to be sworn or to answer a relevant question after being summoned to appear at a hearing; or refusing to be sworn or to answer a relevant question after having accepted expenses and allowances to appear as a witness. In the latter case, strict liability is applied because anyone called before the Tribunal as a witness and who has then accepted expenses and allowances per regulation 20A.16 would not be in a position to argue lack of intent or ignorance of regulation 20A.16 as a defence. The three offences under regulation 20A.16 are in accord with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, with penalties clearly linked to a specific offence; benchmarked to each other and to commensurate offences under the Patents Regulations; adequate to deter and punish a worst case offence; and expressed in penalty units.

Finally, new regulation 20A.21 protects consumers by obliging deregistered or suspended incorporated patent attorneys to help registered patent attorneys who have been appointed to temporarily replace them. To ensure that deregistered or suspended incorporated patent attorneys comply, regulation 20A.21 includes an offence for failing to comply with a notice requesting assistance. The regulation notes that incorporated patent attorneys wishing to mount a defence will bear the evidential burden, as required by s13(3) of the Criminal Code. Regulation 20A.21 complies with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* by clearly linking the penalty to a specific offence; benchmarking it to similar offences under the Patents Regulations; and expressing it in penalty units.

IP Australia intends to update the Explanatory Statement of the Raising the Bar Regulation to reflect the above advice. The proposed changes are attached for your reference.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely



GREG COMBET

Enc