The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

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

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

The committee's terms of reference

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

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

Work of the committee

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

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

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

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

Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date;
- Appendix 1 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.
- Appendix 2 contains correspondence relating to concluded matters.

Acknowledgement

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

Senator John Williams

Chair

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 **29 October 2014**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

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

This report considers all disallowable instruments tabled between 12 September 2014 and 3 October 2014. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

Staffing and Delegations Rule 2014 [F2014L01296]

Purpose	Provides for the National Capital Authority (NCA) Chief Executive to delegate functions and powers under the Ordinance to officers and employees of the NCA and any person whose services have been made available for the purposes of the Ordinance
Last day to disallow[2]	11 February 2015
Authorising legislation	National Land (Road Transport) Ordinance 2014
Department	Infrastructure and Regional Development

Issue:

Delegation of power to a 'person'

Section 3 of the rule provides:

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1 Senate Disallowable Instruments List, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List

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

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

Section 4 of the rule provides:

> The NCA Chief Executive may delegate all or any functions and powers under the Ordinance to:
>
> (a) an officer or employee of the NCA established under the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth); or
>
> (b) a person whose services have been made available under section 3 of this rule.

The explanatory statement (ES) notes:

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

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

Limb of the rule-making power being relied on

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

> The Minister may make rules prescribing matters:
>
> (a) required or permitted by this Ordinance to be prescribed by rule; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

With regard to the delegation of power to a person (referred to above), a question arises as to whether the rule relies on the 'required or permitted' or the 'necessary or

convenient' limb of the power. **The committee therefore requests the minister's advice on this matter.**

Potential delegation of general rule-making power

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

Continuing matters

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

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

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

3 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

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

Aged Care (Transitional Provisions) Amendment (September 2014 Indexation) Principles 2014 [F2014L01238]

Aged Care (Subsidy, Fees and Payments) Amendment (September 2014 Indexation) Determination 2014 [F2014L01241]

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (September 2014 Indexation) Determination 2014 [F2014L01242]

Civil Aviation Order 95.55 Amendment Instrument 2014 (No. 1) [F2014L01226]

Competition and Consumer Act 2010 - Consumer Protection Notice No. 3 of 2014 - Safety Standard: Child Restraint Systems for use in Motor Vehicles [F2014L01252]

Disability Care Load Assessment (Child) Amendment Determination 2014 [F2014L01276]

Export Control (Fish and Fish Products) Amendment (2014 Measures No. 1) Order 2014 [F2014L01292]

Migration Regulations 1994 - Specification of Access to Movement Records - IMMI 14/058 [F2014L01314]

Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 6) [F2014L01234]

Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 4) [F2014L01235]

Public Governance, Performance and Accountability Legislation Amendment Rule 2014 [F2014L01244]

Vehicle Standard (Australian Design Rule 31/02 - Brake Systems for Passenger Cars) 2009 Amendment 2 [F2014L01220]

Vehicle Standard (Australian Design Rule 35/03 - Commercial Vehicle Brake Systems) 2009 Amendment 1 [F2014L01221]

Vehicle Standard (Australian Design Rule 35/04 - Commercial Vehicle Brake Systems) 2013 Amendment 1 [F2014L01222]

Vehicle Standard (Australian Design Rule 35/05 - Commercial Vehicle Brake Systems) 2013 Amendment 1 [F2014L01225]

Vehicle Standard (Australian Design Rule 38/03 - Trailer Brake Systems) 2007 Amendment 1 [F2014L01223]

Vehicle Standard (Australian Design Rule 38/04 - Trailer Brake Systems) 2013 Amendment 1 [F2014L01224]

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **29 October 2014**. 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 2.

Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891]

Purpose	Amends the Corporations Regulations 2001 to implement various amendments relating to Part 7.7A of the regulations
Last day to disallow	24 September 2014
Authorising legislation	*Corporations Act 2001*
Department	Treasury

[The committee first reported on this instrument in *Delegated legislation monitor* No. 10 of 2014, and subsequently in *Delegated legislation monitor* No. 12 of 2014].

Issue:

Matters more appropriate for parliamentary enactment

The ES for the instrument states that the instrument is intended to 'provide clarity to stakeholders' by amending the regulations for the purpose of:

- facilitating scaled advice (applying from the time the regulation commences until 31 December 2015);
- removing the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation (applying from the time the Regulation commences until 31 December 2015);
- making consequential amendments to the modified best interests duty;
- providing that non-cash payment facilities that are not related to a basic deposit product are included in the definition of a 'basic banking product';
- removing the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the 'opt-in' requirement)

(applying from the time the regulation commences until 31 December 2015); and

- removing the requirement to provide an annual fee disclosure statement to clients in ongoing fee arrangements prior to 1 July 2013 (applying from the time the regulation commences until 31 December 2015).

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

The ES for the instrument provides the following reason for introducing the changes via regulation rather than primary legislation:

> …time sensitive FOFA amendments will be dealt with through regulations and then put into legislation. This approach provides certainty to industry and allows industry to benefit from the cost savings of the changes as soon as possible.

However, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has expressed doubt as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation. That committee has stated:

> …enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.[1]

In light of these comments, the committee notes that key elements of the regulation (item 7) may be described as involving 'fundamental change' to the primary legislative scheme, and as 'mirroring' the proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Given this, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment, in respect of both their substantive effect and temporary or interim character **[the committee therefore requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> My response to the first issue raised in *Delegated Legislation Monitor* No. 10 of 2014 (the monitor) is that the magnitude of the burden on the

1 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014*, 16 July 2014, p. 348.

> financial advice industry by Labor's reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor's Future of Financial Advice (FOFA) reforms had been too costly to implement and failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor's FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.
>
> It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately $190 million per year, with one-off implementation savings of approximately $90 million; these estimates represent just over half of the estimated $375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.
>
> As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been—and will continue to be—subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are—respectively—conducting inquiries into the Bill and financial advice reforms.

COMMITTEE RESPONSE:

[The committee made the following comments and requested the minister's response to the matters outlined below (*Delegated legislation Monitor* No. 12 of 2014)].

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

However, the minister's response has not satisfactorily addressed the key scrutiny concern raised by both the Scrutiny of Bills committee and this committee—namely, that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation). While the minister cites both the need for 'swift action' and the estimated savings or benefit to industry, the minister has not addressed the committee's concern that such imperatives may not amount to sufficient justification for effecting significant policy change via regulation (and therefore without the full scrutiny and approval of the parliament). The committee notes that the minister's advice as to the scale of the intended effect of the regulation, and the existence and significance of the bill currently being considered by other Senate committees, could be equally taken as supporting a conclusion that the measures are more appropriately subject to the Senate's full deliberative processes. The committee is particularly concerned that the policy imperatives cited to justify the use of regulation in this case do not appear to be

distinguishable from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, the government might regard it as preferable or convenient to effect policy change via delegated legislation. **The committee therefore seeks further advice from the minister as to whether the legislative changes made by the regulation should be considered appropriate for delegated legislation.**

The committee further notes that, notwithstanding the minister's assurance that the regulation will be repealed once the bill receives Royal Assent, the nature of the full legislative process is such that there remains significant uncertainty as to whether and in what form the bill may eventually be passed. **Given this, the committee also seeks the minister's advice as to whether all or part of the instrument will be repealed in the event that the bill is not passed by the parliament, or is passed with substantive amendments to matters currently provided for in the regulation.**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> I previously outlined to the Committee the magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes, and I indicated that the burden warranted swift action. In my discussions with industry stakeholders since the commencement of the Regulation on 1July2014, it has become clear that the Regulation has provided much needed clarity and certainty to the financial advice industry. Importantly, the Regulation has reduced costs in the financial advice industry by removing costly and burdensome red-tape such as requiring clients to resign contracts with their advisers at least every two years to continue an ongoing advice relationship. As such, the Regulation has been a crucial first step in ensuring the ongoing availability, accessibility and affordability of high-quality financial advice; further improvements will ensue from the accompanying legislative amendments.
>
> I would like to bring to the Committee's attention the fact that some of the amendments contained in the Regulation have always been considered an interim solution. The Government has consistently stated that time-sensitive changes would initially be made through regulations and then reflected through legislative amendments. Indeed, as far back as 7 November 2013, the Assistant Treasurer, Senator the Hon Arthur Sinodinos AO, indicated that "time sensitive amendments will be dealt with through regulations and then locked in to legislation". The Government has not wavered from this commitment. Indeed I again confirmed this approach in a comprehensive statement on improvements to Labor's regulations on 20 June 2014 (attached).
>
> The Committee should note that parts of the Regulation arc designed to only have effect from 1 July 2014 to 31 December 2015. This arrangement appropriately reflects the differential treatment of primary and secondary law. It also demonstrates the bone fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact.
>
> As I indicated in my 13 September 2014 letter to the Committee, the financial impacts of Labor's FOFA reforms compelled an urgent response.

Treasury's estimates of the ongoing cost savings of the Government's Regulation to improve FOFA are approximately $190 million per year, with one-off implementation savings of approximately $90 million. These estimates represent just over half of the estimated $375 million ongoing costs to industry—and ultimately to consumers—of complying with Labor's FOFA.

Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014. This provided an interim period where the compliance emphasis was on education and assistance, before the regulator moved to a stricter enforcement approach. This provided additional impetus to ensure industry received certainty through legislative change before businesses incurred substantial costs implementing Labor's FOFA reforms in an unamended form in the 2014-15 financial year. It would be evidently less disruptive for this significant industry and for Australians saving for their retirement and managing financial risks through life, to avoid the costs of implementing short-lived changes and then incur costs to unwind them. Given this urgency, making amendments through regulations provided the most effective mechanism to ensure certainty to industry and to investors alike.

As the Committee previously noted, many of the amendments made in the Regulation are to be reflected in legislation: specifically, the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the FOFA Bill). Those provisions in the FOFA Bill have been—and will continue to be—subject to full parliamentary scrutiny.

Although Senate scrutiny processes for regulations arc different to that for principal legislation, the deliberative processes of the Senate have provided for extensive scrutiny of this Regulation. I draw the Committee's attention to the considerable Senate debate on two motions for disallowance of the Regulation: the first was a full disallowance motion, which was resolved in the negative on 15 July 2014; the second was a partial disallowance motion—on items 1 to 27 and 30 of the Regulation—which was resolved in the negative on 1 October 2014. Disallowance had been scheduled for debate and deferred on an almost daily basis for most of the Spring sittings to date.

The FOFA Bill has also been subject to two comprehensive Senate Economics Legislation Committee inquiries, which reported on 16 June 2014 and 22 September 2014 respectively, as well as consideration by the Senate Standing Committee on the Scrutiny of Hills. The Senate Economics Legislation Committee recommended that the Senate pass the FOFA Bill in both its reports. It should be noted that the FOFA Bill, which is endorsed by the Senate Economics Legislation Committee, creates entrenchment of some bridging reforms that are reflected in the Regulation.

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOF A Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

> Having provided clarity and certainty to industry through the Regulation, the Government can now turn its attention to additional efforts to improve the accessibility, affordability and quality of financial advice. This work includes progressing an enhanced public register of financial advisers and supporting efforts to raise professional, ethical and educational standards in the industry.

COMMITTEE RESPONSE:

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

The committee notes the minister's reiteration of the claim to the urgency of the measures in question, arising from the minister's assessment of the 'magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes'. The minister also reiterates his previous advice regarding the financial benefit of the changes to industry. However, the committee notes that the considerations raised are not in the nature of exigencies (intrinsically requiring the measures in question) but are in fact political and policy considerations falling outside the scope of the committee's technical scrutiny of delegated legislation. The appropriateness, desirability and cost-benefit implications of particular measures for regulating a specific industry are not matters which go to the substance of the key concern raised by this (and the Scrutiny of Bills) committee, which is that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation).

In this respect, the committee notes the minister's view that the 'deliberative processes of the Senate have provided for extensive scrutiny' of the regulation. However, while the technical matters flagged by the committee have been referenced in debates on the regulation, those debates have centred on the policy aspects of the regulation. The scrutiny concerns and principles relevant to this matter have not yet been the primary subject of any motion debated by the Senate.

Simply stated, the committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect policy change. While the committee acknowledges the minister's advice that the end-dating of some measures 'demonstrates the bona fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact', the committee considers that questions of duration are secondary to the fundamental question of whether the Parliament approves of the legislative approach.

Finally, the committee notes the minister's advice regarding the government's intentions in the event that the bill is amended or not passed by the Parliament:

> Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

The committee does not view consideration of the potential consequences of using regulation to implement fundamental changes that anticipate a particular legislative outcome on a bill as pre-emptive. As the committee has previously noted, it is in fact the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point to the significant possibility that the bill is not passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential inclusion of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of senators. Noting the end-dating of the regulation, the committee leaves the question of whether the use of regulation is appropriate in this case to the Senate as a whole.

Accordingly, the committee has determined to withdraw the 'protective' notice of motion on the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891].[2]

Issue:

Whether instrument is made in accordance with statute

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

The regulation is made under subsection 1364(1) of the *Corporations Act 2001* (the Act), which provides:

> The Governor-General may make regulations prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by regulations; or
> (b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

Without limiting subsection 1364(1), subsection 1364(2) of the Act specifies a number of purposes for which the regulations may make provision.

The ES for the instrument states that the regulation is intended to effect 'interim changes' until the Corporations Amendment (Streamlining of Future of Advice) Bill

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2 For details on the disallowance of instruments, see the Disallowance Alert at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

2014 passes the Australian Parliament and receives Royal Assent, and that the interim changes will be repealed (to the extent appropriate) following the commencement of the Corporations Amendment (Streamlining of Future of Advice) Bill 2014.

In the committee's view, given that the regulation has been made as an interim measure until the passage of primary legislation, a question arises as to whether the regulation is permitted under subsections 1364(1) and (2) of the Act **[the committee therefore requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> In response to the second issue raised in the monitor, the Regulation is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2). Specific regulation-making powers are included throughout Part 7.7 A of the Act, including: Division 2, the best interests obligation; Division 3, charging ongoing fees to clients; and Division 4, conflicted remuneration. The Australian Government Solicitor has advised that the Regulation has been made in accordance with the specific regulation-making powers in the Corporations Act; importantly, the Regulation is clearly related to the operation of the relevant provisions in the Corporations Act.

COMMITTEE RESPONSE:

[The committee made the following comments and requested the minister's response to the matters outlined below (*Delegated legislation Monitor* No. 12 of 2014)].

The committee thanks the minister for his response.

The committee notes the minister's advice that the regulation 'is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2)'. Given the minister has referred to other enabling provisions in the Act, the committee understands that in this instance the regulation (which is made under subsection 1364(1) of the Act) is relying on the 'required or permitted' limb of the general regulation-making power rather than the 'necessary or convenient' limb of the power.

In relation to the best interests duty, the committee notes that section 961B(5) provides that regulations may prescribe:

> (a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or
>
> (b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or
>
> (c) circumstances in which the duty in subsection (1) does not apply.

The regulation removes the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation. Given that removing the 'catch-all' provision is not 'required' by the Act, the committee understands the regulation is relying on the 'permitted' element of the power. However, a question arises as to whether removing the 'catch-all' provision in its entirety, so that it does not apply in any circumstances, is 'permitted' under the apparently more limited 'prescribed circumstances' in which a step may be altered in section 961B(5) of the Act. Nor is it clear that the power in paragraph 961B(5)(c) to prescribe circumstances in which the duty in subsection (1) does not apply would authorise regulations which, in practical effect, amount to the repeal of that duty. **The committee therefore seeks further advice from the minister on this matter.**

In addition, it is not clear from the minister's response which regulation-making powers 'throughout Part 7.7A of the Act' are being relied on. **The committee therefore requests the minister's advice as to which specific provisions are being relied on in relation to each of the changes made by the regulation.**

Further, the committee notes the minister refers to legal advice obtained from the Australian Government Solicitor. On past occasions, the committee has sought and been provided with legal advice on matters of relevance to the application of the committee's scrutiny principles. **The committee therefore requests from the minister a copy of the legal advice obtained in relation to this matter.**

MINISTER'S RESPONSE:

Regarding the removal of the 'catch-all' provision, the Minister for Finance and Acting Assistant Treasurer advised:

> The Committee has sought further advice on the regulation-making powers in the Corporations Act 2001(the Corporations Act) under which the Regulation has been made. In particular, the Committee has queried Regulation 7.7A.3, which removes what is commonly referred to as the "catch-all" provision in the list of steps an advice provider may take to satisfy the best interests obligation.
>
> As identified in paragraph 7.7A.3(1)(a) of the Regulation, Regulation 7.7A.3 has been made pursuant to paragraph 961B(5)(b) in the Corporations Act. Paragraph 961 (5)(b) specifics that the regulations may prescribe "that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1)". I can advise the Committee that the relevant prescribed circumstance for the Regulation is when advice is provided in the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015. As the catch-all provision will still apply to advice providers outside of the prescribed time period, Regulation 7.7A.3 does not remove the catch-all provision in its entirety.

The minister also provided details in relation to other regulation-making powers used to support the Regulation (see the minister's letter in Appendix 2).

Regarding the committee's request for legal advice from the Australian Government Solicitor, the minister advised:

> the Government does not generally disclose the content of legal advice received. It is a long-standing bipartisan position for the content of legal advice to not be made public because of its nature and the principles of legal professional privilege. In particular, it is important for any government to be able to make fully informed decisions based on comprehensive and confidential legal advice. This applies whether the legal advice is given in the context of litigation or otherwise.
>
> In the present case, the regulatory framework affects legal and commercial relationships between financial advisers and their clients and is an area that can give rise to legal disagreements—including contractual, equitable and statutory questions. Were it to be made public, internal government advice on the design of laws could misinform industry and community understanding, with a risk of influencing the course of commercial disputes. Financial advice is a commercial product that gives rise to a number of legal issues, so the risk is greater than speculative and the consequences can be significant. The nature of such legal advice to Government, provided for a public policy purpose, could—if taken out of its proper context—fuel misrepresentations about the actual state of the law, notwithstanding that such advice usually precedes legislative drafting work. Although such advice could not be presented as evidence in court cases, it could be used to misinform decision making by parties to disputes.
>
> Having consulted with the Attorney-General, and taking into account the Government's long-standing position regarding disclosing legal advice, I am of the view that disclosing legal advice from the Australian Government Solicitor would potentially prejudice the Commonwealth's interests. I have therefore decided to not provide the legal advice to the Committee on the grounds of public interest immunity. I advise the Committee that the grounds are that the material would disclose Cabinet deliberations, as well as material that is protected by legal professional privilege.

COMMITTEE RESPONSE:

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

The committee notes the minister's advice that the period between 1 July 2014 and 31 December 2015 is the relevant prescribed circumstance under paragraph 961(5)(b) of the Corporations Act; and that the regulation 'does not remove the catch-all provision in its entirety' as it 'will still apply…outside of the prescribed time period'. However, prescribing a time period as the relevant circumstance has the effect that, in this case, the catch-all provision does not apply in its entirety for the duration of the specified time. It follows that the practical outcome of prescribing a period of time as a 'prescribed circumstance' is to suspend the law for that period. In the committee's view, it may be doubted that the power to prescribe circumstances was intended to allow the law to be suspended for defined (and potentially lengthy) periods of time, particularly where a suspended provision may be defined as beneficial in character.

With regard to the provision of the legal advice from the Australian Government Solicitor, the committee notes the minister has advanced a claim of public interest immunity, essentially citing commercial damage to industry and Cabinet in-confidence as grounds for not disclosing that advice to the committee. While the committee does not necessarily regard the minister's claim as convincingly identifying a specific harm in respect of these recognised public interest grounds, the committee will not press its request further in this case.[3]

The committee notes that the question of whether the regulation is authorised in this case remains open.

The committee therefore draws this matter to the attention of senators, and leaves the question of whether the regulation is made in accordance with statute (scrutiny principle (a)) to the Senate as a whole.

Civil Aviation Order (Flight Crew Licensing) Repeal and Amendment Instrument 2014 (No. 1) [F2014L01177]

Purpose	Amends the Civil Aviation Orders (CAOs) to take into account the commencement of Parts 61, 64, 141 and 142 of the Civil Aviation Safety Regulations 1998, repeals other CAOs that will no longer be required when those parts commence, and provides related transitional provisions to allow continuation of aviation activities by qualified individuals
Last day to disallow	25 November 2014
Authorising legislation	*Civil Aviation Act 1988; Civil Aviation Regulations 1988; Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development

[The committee first reported on this instrument in *Delegated legislation monitor* No. 12 of 2014]

3 However, the committee does not accept the notion put forward by the minister that the non-disclosure of legal advice 'is a long-standing bipartisan position'. As the committee has noted on previous occasions, there exists no general government policy or practice which prevents departments from providing information containing legal (or any other) advice to the Senate and its committees. While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm to the public interest is identified), it has consistently rejected any such refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department. A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.) 595–625.

Issue:

Retrospectivity

Section 2 of the instrument states that it commences immediately before the commencement of the Civil Aviation Amendment Regulation 2013 (No. 1), which the ES identifies as having commenced on 1 September 2014. However, section 2 of the Civil Aviation Amendment Regulation 2013 (No. 1) states that it commences on 4 December 2013. The committee therefore seeks clarification as to the intended date of commencement of the instrument and notes that, if the earlier date is to be taken as the commencement date, then the instrument operates retrospectively. In cases where an instrument operates retrospectively, the committee's usual expectation is that the explanatory statement (ES) for the instrument address the question of whether the retrospective operation of the instrument is consistent with subsection 12(2) of the *Legislative Instruments Act 2003*. Subsection 12(2) provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised:

> I am informed that the commencement date of the Civil Aviation Legislation Amendment Regulation 2013 (No. 1), which inserted new Parts 61, 64, 141 and 142 into the Civil Aviation Safety Regulations 1998 (CASR 1998), was originally intended to be 4 December 2013. However this was subsequently amended by the Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 which changed the commencement date of the licensing suite of regulations to 1 September 2014.
>
> For clarification purposes, the Civil Aviation Safety Authority has been asked to amend the explanatory statement to reflect that Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 changed the commencement date of the licensing suite of regulations from 4 December 2013 to 1 September 2014. This will clarify that Parts 61, 64, 141 and 142 have been incorporated into CASR 1998 by Civil Aviation Legislation Amendment Regulation 2013 (No. 1) and the Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013.

COMMITTEE RESPONSE:

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

Work Health and Safety Exemption (Construction Induction Training Card - Workers) (August 2014) [F2014L01078]

Purpose	Exempts workers on overseas construction work within the responsibility of the Department of Foreign Affairs and Trade from the requirement to keep a general construction induction training card available for inspection
Last day to disallow	28 November 2014
Authorising legislation	*Work Health and Safety Regulations 2011*
Department	Employment

[The committee first reported on this instrument in *Delegated legislation monitor* No. 12 of 2014]

Issue:

No description regarding consultation

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

MINISTER'S RESPONSE:

The Minister for Employment advised that 'the exemption was granted following a request made by the Department of Foreign Affairs and Trade and after taking into account the relevant matters outlined in the explanatory statement'. The minister further advised:

> Comcare did not specifically consult with workers or contractors associated with Department of Foreign Affairs and Trade's current overseas construction projects as it would not have been reasonably practicable to do so and would not realistically have achieved a useful work health and safety outcome.
>
> Furthermore, the grant of the exemption to present and future workers on Department of Foreign Affairs and Trade's overseas construction projects

was not considered likely to have a direct or substantial indirect effect on business or restrict competition.

In these circumstances, Comcare was able to be satisfied that consultation would be unnecessary or inappropriate (as permitted by section 18 of the *Legislative Instruments Act 2003).*

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

COMMITTEE RESPONSE:

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

Work Health and Safety Exemption (Construction induction training - ASC AWD Shipbuilder Pty Ltd and overseas technical specialists) (September 2014) [F2014L01195]

Purpose	Provides for grant of an exemption under the Work Health and Safety Regulations 2011 from the requirement for ASC AWD Shipbuilder Pty Ltd to ensure certain workers (i.e. technical specialists) have undergone construction induction training, and also grants certain workers (i.e. technical specialists) an exemption from the construction induction training requirement
Last day to disallow	1 December 2014
Authorising legislation	*Work Health and Safety Regulations 2011*
Department	Employment

[The committee first reported on this instrument in *Delegated legislation monitor* No. 13 of 2014]

Issue:

No description regarding consultation

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

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

MINISTER'S RESPONSE:

The Minister for Employment advised:

> The exemption instrument exempts ASC AWD Shipbuilder Pty Ltd from requirements in the *Work Health and Safety Regulations 2011*. This is to ensure that technical specialists recruited from overseas undertake general construction induction training (and hold a general construction induction training card) before starting work on ships under construction as part of the Air Warfare Destroyer program at the Osborne shipyard, South Australia.
>
> The exemption instrument also exempts the technical specialists from the requirement in the Work Health and Safety Regulations 2011 to keep available for inspection general construction induction training cards.
>
> The exemptions have been granted on condition that each technical specialist undertakes safety induction training developed by ASC AWD Shipbuilder Pty Ltd and delivered in-house at the Osborne shipyard before starting work.
>
> Comcare consulted extensively with ASC AWD Shipbuilder Pty Ltd before granting the abovementioned exemptions.
>
> In addition, ASC AWD Shipbuilder Pty Ltd consulted with its Australian-based workers who would be supervising the technical specialists and others carrying out the relevant work on the Air Warfare Destroyer program. Consultation beyond these parties was not carried out.
>
> Comcare has indicated that it was able to be satisfied that further consultation would be unnecessary (as permitted by section 18 of the *Legislative Instruments Act 2003*).

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

COMMITTEE RESPONSE:

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

Social Security (Administration) (Relocation Assistance) Specification 2014 [F2014L00900]

Purpose	Ensures that the new Relocation Assistance to Take Up a Job programme is 'relocation assistance' for the purpose of section 42S of the *Social Security (Administration) Act 1999*
Last day to disallow	4 September 2014
Authorising legislation	*Social Security Administration Act 1999*
Department	Employment

[The committee first reported on this instrument in *Delegated legislation monitor* No. 10 of 2014]

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 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:

> No consultation was necessary for the purpose of this instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee therefore requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].**

MINISTER'S RESPONSE:

The Assistant Minister for Employment advised:

> The Department of Employment considered that consultation was unnecessary because the instrument is of a minor or machinery nature and does not substantially change existing arrangements.

The assistant minister also advised that the department would arrange for the ES to 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 this matter.

Appendix 1
Guideline on consultation

Standing Committee on Regulations and Ordinances
Addressing consultation in explanatory statements

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with non-partisan principles 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 as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

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

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

Specific examples listed in the Act

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

Timing of consultation

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

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

Seeking further advice or information

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

Committee Secretary
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3066
Fax: +61 2 6277 5881
Email: RegOrds.Sen@aph.gov.au

Appendix 2
Correspondence

Minister for Finance
Acting Assistant Treasurer

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite SG 108
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

On 25 September 2014, Mr Ivan Powell, Committee Secretary, wrote on behalf of the Senate Standing Committee on Regulations and Ordinances requesting further information in relation to the *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (the Regulation), as per *Delegated Legislation Monitor No. 12 of 2014*. Your letter has been referred to me as I have portfolio responsibility for this matter in my capacity as Acting Assistant Treasurer.

I previously outlined to the Committee the magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes, and I indicated that the burden warranted swift action. In my discussions with industry stakeholders since the commencement of the Regulation on 1 July 2014, it has become clear that the Regulation has provided much needed clarity and certainty to the financial advice industry. Importantly, the Regulation has reduced costs in the financial advice industry by removing costly and burdensome red-tape such as requiring clients to re-sign contracts with their advisers at least every two years to continue an ongoing advice relationship. As such, the Regulation has been a crucial first step in ensuring the ongoing availability, accessibility and affordability of high-quality financial advice; further improvements will ensue from the accompanying legislative amendments.

I would like to bring to the Committee's attention the fact that some of the amendments contained in the Regulation have always been considered an interim solution. The Government has consistently stated that time-sensitive changes would initially be made through regulations and then reflected through legislative amendments. Indeed, as far back as 7 November 2013, the Assistant Treasurer, Senator the Hon Arthur Sinodinos AO, indicated that "time sensitive amendments will be dealt with through regulations and then locked in to legislation". The Government has not wavered from this commitment. Indeed I again confirmed this approach in a comprehensive statement on improvements to Labor's regulations on 20 June 2014 (attached).

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The Committee should note that parts of the Regulation are designed to only have effect from 1 July 2014 to 31 December 2015. This arrangement appropriately reflects the differential treatment of primary and secondary law. It also demonstrates the bone fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact.

As I indicated in my 13 September 2014 letter to the Committee, the financial impacts of Labor's FOFA reforms compelled an urgent response. Treasury's estimates of the ongoing cost savings of the Government's Regulation to improve FOFA are approximately $190 million per year, with one-off implementation savings of approximately $90 million. These estimates represent just over half of the estimated $375 million ongoing costs to industry—and ultimately to consumers—of complying with Labor's FOFA.

Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014. This provided an interim period where the compliance emphasis was on education and assistance, before the regulator moved to a stricter enforcement approach. This provided additional impetus to ensure industry received certainty through legislative change before businesses incurred substantial costs implementing Labor's FOFA reforms in an unamended form in the 2014-15 financial year. It would be evidently less disruptive for this significant industry and for Australians saving for their retirement and managing financial risks through life, to avoid the costs of implementing short-lived changes and then incur costs to unwind them. Given this urgency, making amendments through regulations provided the most effective mechanism to ensure certainty to industry and to investors alike.

As the Committee previously noted, many of the amendments made in the Regulation are to be reflected in legislation: specifically, the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the FOFA Bill). Those provisions in the FOFA Bill have been—and will continue to be—subject to full parliamentary scrutiny.

Although Senate scrutiny processes for regulations are different to that for principal legislation, the deliberative processes of the Senate have provided for extensive scrutiny of this Regulation. I draw the Committee's attention to the considerable Senate debate on two motions for disallowance of the Regulation: the first was a full disallowance motion, which was resolved in the negative on 15 July 2014; the second was a partial disallowance motion—on items 1 to 27 and 30 of the Regulation—which was resolved in the negative on 1 October 2014. Disallowance had been scheduled for debate and deferred on an almost daily basis for most of the Spring sittings to date.

The FOFA Bill has also been subject to two comprehensive Senate Economics Legislation Committee inquiries, which reported on 16 June 2014 and 22 September 2014 respectively, as well as consideration by the Senate Standing Committee on the Scrutiny of Bills. The Senate Economics Legislation Committee recommended that the Senate pass the FOFA Bill in both its reports. It should be noted that the FOFA Bill, which is endorsed by the Senate Economics Legislation Committee, creates entrenchment of some bridging reforms that are reflected in the Regulation.

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

Having provided clarity and certainty to industry through the Regulation, the Government can now turn its attention to additional efforts to improve the accessibility, affordability and quality of financial advice. This work includes progressing an enhanced public register of financial advisers and supporting efforts to raise professional, ethical and educational standards in the industry.

The Committee has sought further advice on the regulation-making powers in the *Corporations Act 2001* (the Corporations Act) under which the Regulation has been made. In particular, the Committee has queried Regulation 7.7A.3, which removes what is commonly referred to as the "catch-all" provision in the list of steps an advice provider may take to satisfy the best interests obligation.

As identified in paragraph 7.7A.3(1)(a) of the Regulation, Regulation 7.7A.3 has been made pursuant to paragraph 961B(5)(b) in the Corporations Act. Paragraph 961(5)(b) specifies that the regulations may prescribe "that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1)". I can advise the Committee that the relevant prescribed circumstance for the Regulation is when advice is provided in the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015. As the catch-all provision will still apply to advice providers outside of the prescribed time period, Regulation 7.7A.3 does not remove the catch-all provision in its entirety.

The Committee has also requested further information in relation to other regulation-making powers used to support the Regulation. As I outlined in my 20 June 2014 media release (attached), the Government has various powers to make regulations under the Corporations Act; some in "prescribed circumstances"—as is the case with Regulation 7.7A.3—or in "particular situations". In particular:

- Regulation 7.7A.2, which facilitates the provision of scaled advice, is made pursuant to paragraph 961B(5)(a) of the Corporations Act; paragraph 961B(5)(a) states that regulations may prescribe "a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1)". The prescribed circumstance is when advice is provided to a client in the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015.

- Regulations 7.7A.4 and 7.7A.5, which make amendments to the modified best interests duty, are made pursuant to paragraph 961B(5)(b) of the Corporations Act; paragraph 961B(5)(b) states that regulations may prescribe "that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1)".

  - For Regulation 7.7A.4, the prescribed circumstance is determined by reference to the status of the provider and the subject matter of the advice sought by the client.

  - For Regulation 7.7A.5, the prescribed circumstance is where the subject matter of the advice sought by the client is a general insurance product.

- Regulation 7.7A.6, which amends the definition of a basic banking product, is made pursuant to paragraph 961F(e) of the Corporations Act; paragraph 961F(e) states that the definition of a basic banking product will include "any other product prescribed by regulations for the purposes of this paragraph". The product prescribed is a facility for making non-cash payments that is not related to a basic deposit product.

- Regulation 7.7A.7, which removes the opt-in provision, is made pursuant to subsection 962K(3) of the Corporations Act; subsection 962K(3) states that "the regulations may provide that subsection (1) does not apply in a particular situation". The particular situation is if the arrangement is entered into in the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015.

- Regulation 7.7A.8, which removes the requirement to provide an annual fee disclosure statement to pre-1 July 2013 clients, is made pursuant to subsection 962S(2) of the Corporations Act;

subsection 962S(2) states that "the regulations may provide that subsection (1) does not apply in a particular situation". The particular situation is the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015.

- Regulation 7.7A.12FA, which inserts the general advice provision, is made pursuant to paragraph 963B(1)(e) of the Corporations Act; paragraph 963B(1)(e) states that a monetary benefit is not conflicted remuneration where "the benefit is a prescribed benefit or is given in prescribed circumstances". The prescribed circumstance is where the five limbs specified in paragraphs 7.7A.12FA(1)(a) to (e) of the Regulation are satisfied, including that the benefit is not a payment commonly referred to as a commission.

- Regulation 7.7A.15A, which amends benefits for education and training in conducting a financial services business, is made pursuant to paragraph 963C(f) of the Corporations Act; paragraph 963C(f) states that a non-monetary benefit is not conflicted remuneration where "the benefit is a prescribed benefit or is given in prescribed circumstances". The prescribed circumstance is that the benefit: has a genuine education or training purpose; is relevant to the carrying on of a financial services business; and complies with regulations made for the purposes of subparagraph 963C(c)(iii) of the Corporations Act.

- Regulation 7.7A.15B, which amends grandfathering for non-platform operators, is made pursuant to subsection 1528(2) of the Corporations Act; subsection 1528(2) states that "the regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee or a representative of a financial services licensee". The prescribed circumstance is that the benefit would have been given as mentioned in subsection 1528(1) of the Corporations Act had it not been redirected under one or more later arrangements.

Regarding the Committee's request for legal advice from the Australian Government Solicitor, the Government does not generally disclose the content of legal advice received. It is a long-standing bipartisan position for the content of legal advice to not be made public because of its nature and the principles of legal professional privilege. In particular, it is important for any government to be able to make fully informed decisions based on comprehensive and confidential legal advice. This applies whether the legal advice is given in the context of litigation or otherwise.

In the present case, the regulatory framework affects legal and commercial relationships between financial advisers and their clients and is an area that can give rise to legal disagreements—including contractual, equitable and statutory questions. Were it to be made public, internal government advice on the design of laws could misinform industry and community understanding, with a risk of influencing the course of commercial disputes. Financial advice is a commercial product that gives rise to a number of legal issues, so the risk is greater than speculative and the consequences can be significant. The nature of such legal advice to Government, provided for a public policy purpose, could—if taken out of its proper context—fuel misrepresentations about the actual state of the law, notwithstanding that such advice usually precedes legislative drafting work. Although such advice could not be presented as evidence in court cases, it could be used to misinform decision making by parties to disputes.

Having consulted with the Attorney-General, and taking into account the Government's long-standing position regarding disclosing legal advice, I am of the view that disclosing legal advice from the Australian Government Solicitor would potentially prejudice the Commonwealth's interests. I have therefore decided to not provide the legal advice to the Committee on the grounds of public interest immunity. I advise the Committee that the grounds are that the material would disclose Cabinet deliberations, as well as material that is protected by legal professional privilege.

I can assure the Committee that the Government has acted with due care and diligence to ensure that the Regulation has been validly made.

Officials from the Department of the Treasury are available to assist the Committee in their consideration of this matter.

I trust this answers your inquiries.

Kind regards

MATHIAS CORMANN

23 October 2014

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

01 OCT 2014

PDR ID: MC14-003437

Senator John Williams
Chairman
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John

Thank you for your letter dated 25 September 2014 regarding legislative instrument Civil Aviation Order (Flight Crew Licensing) Repeal and Amendment Instrument 2014 (No. 1) and the Committee's concerns regarding retrospectivity.

I am informed that the commencement date of the Civil Aviation Legislation Amendment Regulation 2013 (No. 1), which inserted new Parts 61, 64, 141 and 142 into the Civil Aviation Safety Regulations 1998 (CASR 1998), was originally intended to be 4 December 2013. However this was subsequently amended by the Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 which changed the commencement date of the licensing suite of regulations to 1 September 2014.

For clarification purposes, the Civil Aviation Safety Authority has been asked to amend the explanatory statement to reflect that Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 changed the commencement date of the licensing suite of regulations from 4 December 2013 to 1 September 2014. This wlll carify that Parts 61, 64, 141 and 142 have been incorporated into CASR 1998 by Civil Aviation Legislation Amendment Regulation 2013 (No. 1) and the Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013.

Thank you for raising this matter.

Yours sincerely

WARREN TRUSS

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SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

13 OCT 2014

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

Dear Senator

This letter is in response to the letter of 25 September 2014 from the Secretary of the Standing Committee on Regulations and Ordinances seeking clarification of an issue raised in *Delegated legislation monitor no. 12 of 2014* (the monitor) about the *Work Health and Safety Exemption (Construction Induction Training Card – Workers) (August 2014)* [F2014L01078] (the exemption instrument).

The issue relates to the requirement in section 17 of the *Legislative Instruments Act 2003* that a rule-maker must be satisfied that the appropriate consultation, as is reasonably practicable, has been carried out in relation to a proposed instrument. The Committee has commented that the explanatory statement for the exemption instrument does not describe any consultation carried out in relation to the exemption instrument or explain why there was none.

The exemption instrument applies to workers who perform work on the Department of Foreign Affairs and Trade's present and future construction projects overseas.

Based on information provided by Comcare, as the relevant rule-maker under the *Work Health and Safety Regulations 2011*, the exemption instrument provides that workers carrying out construction work on overseas construction sites do not have to keep available for inspection their construction induction training cards in accordance with sub-regulation 326(1) of the *Work Health and Safety Regulations 2011*. Workers can only qualify for construction induction training cards if they successfully undertake construction induction training.

The exemption was granted following a request made by the Department of Foreign Affairs and Trade and after taking into account the relevant matters outlined in the explanatory statement. Of these matters, it should be noted that:

a) the exemption relates to workers carrying out, or who will carry out, construction work in present and future overseas construction projects for which the Department of Foreign Affairs and Trade has responsibilities;
b) these projects are located in both developed and developing countries (including, for example China, Ethiopia, France, Kenya, New Caledonia, Thailand, Turkey, and Vietnam);
c) the Department of Foreign Affairs and Trade has limited control over the selection of workers on its construction projects;
d) the contingent of workers on Department of Foreign Affairs and Trade's construction sites is constantly changing;
e) construction induction training is not available to workers located outside Australia; and

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Our Ref BR14-003237

f) the costs entailed in sending workers to Australia for training would be prohibitive and could cause the retraction of certain aid projects.

Comcare did not specifically consult with workers or contractors associated with Department of Foreign Affairs and Trade's current overseas construction projects as it would not have been reasonably practicable to do so and would not realistically have achieved a useful work health and safety outcome.

Furthermore, the grant of the exemption to present and future workers on Department of Foreign Affairs and Trade's overseas construction projects was not considered likely to have a direct or substantial indirect effect on business or restrict competition.

In these circumstances, Comcare was able to be satisfied that consultation would be unnecessary or inappropriate (as permitted by section 18 of the *Legislative Instruments Act 2003*).

In accordance with the Committee's request, Comcare has amended the explanatory statement by inserting the following paragraph:

> '**Compliance with consultation requirements of the *Legislative Instruments Act 2003***
>
> As previously indicated, these exemptions apply in relation to present and future construction projects overseas for which Department of Foreign Affairs and Trade has direct or indirect responsibility.
>
> Persons affected by these exemptions are present and future workers subject to the obligations in sub-regulation 326(1) of the *Work Health and Safety Regulations 2011* who work on these construction projects.
>
> In accordance with section 18 of the *Legislative Instruments Act 2003*, Comcare is able to be satisfied that the nature of the exemption instrument is such that consultation would be unnecessary or inappropriate. In reaching this level of satisfaction, Comcare took into account the abovementioned exceptional circumstances and concluded that:
> - consultation would not be reasonably practicable given the ever changing contingent of affected workers and contractors overseas (the administrative complexities alone in arranging for consultation on the scale required would have been untenable);
> - consultation about the proposed exemption would not be likely to achieve any useful work health and safety outcome; and
> - the proposed exemption was unlikely to have a direct or substantial indirect effect on business or competition.'

Please feel free to contact Mr Josh Manuatu in my office if you require further information.

Yours sincerely

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

20 OCT 2014

Senator John Williams
Chair
Senate Standing Committee
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John,

Thank you for your letter of 2 October 2014 from the Secretary of the Senate Standing Committee on Regulations and Ordinances, seeking clarification of an issue raised in *Delegated legislation monitor No. 13 of 2014* about the [*Work Health and Safety Exemption (Construction induction training – ASC AWD Shipbuilder Pty Ltd and overseas technical specialists) (September 2014*] [F2014L01195] (the exemption instrument).

The issue relates to the requirement in section 17 of the *Legislative Instruments Act 2003* that a rule-maker must be satisfied that the appropriate consultation, as is reasonably practicable, has been carried out in relation to a proposed instrument. The Committee has commented that the explanatory statement for the exemption instrument does not describe any consultation carried out in relation to the exemption instrument or explain why there was none.

My response to the Committee's inquiry follows. It is based on information provided by Comcare, as the relevant rule-maker under the *Work Health and Safety Regulations 2011*.

The exemption instrument exempts ASC AWD Shipbuilder Pty Ltd from requirements in the *Work Health and Safety Regulations 2011*. This is to ensure that technical specialists recruited from overseas undertake general construction induction training (and hold a general construction induction training card) before starting work on ships under construction as part of the Air Warfare Destroyer program at the Osborne shipyard, South Australia.

The exemption instrument also exempts the technical specialists from the requirement in the *Work Health and Safety Regulations 2011* to keep available for inspection general construction induction training cards.

The exemptions have been granted on condition that each technical specialist undertakes safety induction training developed by ASC AWD Shipbuilder Pty Ltd and delivered in-house at the Osborne shipyard before starting work.

Comcare consulted extensively with ASC AWD Shipbuilder Pty Ltd before granting the abovementioned exemptions.

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Our Ref MC14-010634

In addition, ASC AWD Shipbuilder Pty Ltd consulted with its Australian-based workers who would be supervising the technical specialists and others carrying out the relevant work on the Air Warfare Destroyer program. Consultation beyond these parties was not carried out.

Comcare has indicated that it was able to be satisfied that further consultation would be unnecessary (as permitted by section 18 of the *Legislative Instruments Act 2003*).

In accordance with the Committee's request, Comcare has amended the explanatory statement by inserting the following paragraphs:

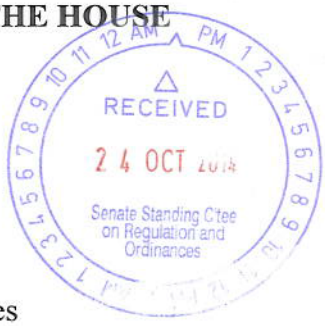
> **'Compliance with consultation requirements of the *Legislative Instruments Act 2003***
>
> As previously indicated, these exemptions apply in relation to ASC AWD Shipbuilder Pty Ltd and technical specialists recruited from overseas to undertake work on the Air Warfare Destroyer program.
>
> Comcare consulted extensively with ASC AWD Shipbuilder Pty Ltd before granting the abovementioned exemptions. Consultations focussed on whether there was a need for the grant of the exemptions and on work health and safety issues, for example, the adequacy of ASC AWD Shipbuilder Pty Ltd.'s in-house safety induction training.
>
> Comcare notes that ASC AWD Shipbuilder Pty Ltd consulted with its Australian-based workers who would be supervising or working with the technical specialists on the Air Warfare Destroyer program. Consultations were about the proposal for the technical specialists to undergo site-specific in-house safety induction training in substitution for general construction induction training, as defined in regulation 5 of the *Work Health and Safety Regulations 2011*.
>
> Apart from the workers mentioned above, consultation was not carried out with the technical specialists themselves or workers or other parties not involved in the technical specialists' work. In accordance with section 18 of the *Legislative Instruments Act 2003*, Comcare was able to be satisfied that the proposed exemptions were such that consultation with these other parties would be unnecessary or inappropriate.'

Please feel free to contact my office if you require further information.

Yours sincerely

ERIC ABETZ

THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE



Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the letter dated 28 August 2014 from Mr Ivan Powell, Secretary of the Senate Standing Committee on Regulations and Ordinances, received by the office of Senator the Hon. Eric Abetz, concerning the Social Security (Administration) (Relocation Assistance) Specification 2014 and accompanying explanatory statement. As the matter raised falls within my portfolio responsibilities as Assistant Minister for Employment, the Committee's letter was referred to me for reply. I apologise for the delay in responding.

I note the Committee's view that the explanatory statement does not sufficiently explain why no consultation was needed for the instrument.

The Department of Employment considered that consultation was unnecessary because the instrument is of a minor or machinery nature and does not substantially change existing arrangements. The department will arrange for the explanatory statement to be amended to make this clear.

Thank you for the letter from your Committee.

Yours sincerely

LUKE HARTSUYKER

23 OCT 2014

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