The Senate

Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor No. 17 of 2014

3 December 2014

© Commonwealth of Australia 2014

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

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

# Membership of the committee

**Current members**

Senator John Williams (Chair) New South Wales, NAT

Senator Gavin Marshall (Deputy Chair) Victoria, ALP

Senator Sam Dastyari New South Wales, ALP

Senator Nova Peris OAM Northern Territory, ALP

Senator Linda Reynolds Western Australia, LP

Senator Zed Seselja Australian Capital Territory, LP

**Secretariat**

Mr Ivan Powell, Secretary

Dr Patrick Hodder, Senior Research Officer

**Committee legal adviser**

Mr Stephen Argument

**Committee contacts**

PO Box 6100

Parliament House

Canberra ACT 2600

Ph: 02 6277 3066

Email: regords.sen@aph.gov.au

Website: <http://www.aph.gov.au/senate_regord_ctte>

# Contents

Membership of the committee *iii*

Introduction *vii*

Chapter 1 – New and continuing matters

New matters

Financial Framework (Supplementary Powers) Amendment (2014 Measures  
No. 1) Regulation 2014 [F2014L01464] 1

Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014 [F2014L01453] 4

Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014 [F2014L01475] 5

ASIC Class Order [CO 14/1118] [F2014L01484] 5

Continuing matters

Implementation of a general instrument-making power (previously  
'Prescribing of matters by legislative rules') 6

Multiple instruments that appear to rely on subsection 33(3) of the  
*Acts Interpretation Act 1901* 24

Chapter 2 – Concluded matters 27

Appendix 1 - Correspondence 29

Appendix 2 – Guideline on consultation 83

# Introduction

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

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

### The committee's terms of reference

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

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

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

### Structure of the report

The report is comprised of the following parts:

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

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

Appendix 1 contains correspondence relating to concluded matters.

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

### Acknowledgement

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

**Senator John Williams**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **3 December 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 30 October 2014 and 6 November 2014. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[[3]](#footnote-3)

## New matters

### Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01464]

|  |  |
| --- | --- |
| **Purpose** | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on certain activities administered by the Australian Customs and Border Protection Service, the Department of Education and the Department of Industry |
| **Last day to disallow[[4]](#footnote-4)** | 2 March 2015 |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |

**Background:**

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[[5]](#footnote-5)

**Issue:**

*Addition of matters to Schedule 1AB of the FF(SP) Regulations—previously unauthorised expenditure*

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).

The instrument adds two items to Part 3 (Grants of financial assistance to persons other than a State or Territory) of Schedule 1AB and one item to Part 4 (Programs) of Schedule 1AB, to establish legislative authority for three activities across three portfolios.

The committee has examined the three items in the regulation. The first two items appear to authorise the redirection of existing funding to new programs. The third item appears to be expenditure not previously authorised by legislation:

New table item 4 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to contribute towards the financing of the Information Sharing Centre established by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. The program is to be administered by the Australian Customs and Border Protection Service as part of the Immigration and Border Protection portfolio. There is currently no assessed financial contribution, and future contributions will be assessed annually on an 'as needs' basis.

New table item 5 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the operational costs of the National Office of Life Education Australia associated with the ongoing development and implementation of school-based student resilience and wellbeing programs and resources for schools. The program is to be administered by the Department of Education. The funding amount is not specified in the explanatory statement (ES).

New table item 63 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to establish and fund the Australian Government Innovation and Investment Fund—Tasmania to support new projects that create sustainable business growth and job opportunities in Tasmania. The program is to be administered by AusIndustry, a division of the Department of Industry. Funding of $11.0 million for three years from 2014–15 to 2016–17 is outlined in the *Portfolio Budget Statements 2014-15*, Industry Portfolio, at page 54.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the schemes outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

**The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the schemes listed below:**

**Information Sharing Centre;**

**Grants to Life Education Australia; and**

**Australian Government Innovation and Investment Fund.**

**Issue:**

*Addition of matters to Schedule 1AB of the FF(SP) Regulations—authority for expenditure*

Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with 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 committee notes that in *Williams No. 1*,[[6]](#footnote-6) the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. The committee further notes that, as a result of the High Court decision in *Williams No. 2*,[[7]](#footnote-7) a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under the Constitution. The committee considers that, in light of *Williams No.2*, the ES for all instruments specifying programs for the purposes of section 32B of the FF(SP) Act should explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES identifies the constitutional basis for expenditure in relation to the Information Sharing Centre (being the treaty-making power under Chapter II of the Constitution with respect to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia).

**The committee therefore requests further information from the minister in relation to the constitutional authority for Life Education Australia and the Australian Government Innovation and Investment Fund.**

### Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014 [F2014L01453]

|  |  |
| --- | --- |
| **Purpose** | Amends the Health Insurance (General Medical Services Table) Regulation 2014 to restrict certain consultation items from being claimed with certain chronic disease management items by the same provider, for the same patient, on the same day |
| **Last day to disallow** | 2 March 2015 |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Department** | Health |

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

### Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014 [F2014L01475]

|  |  |
| --- | --- |
| **Purpose** | Amends the Renewable Energy (Electricity) Regulations 2001 to update solar zones and update references to documentation and definitions following the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* |
| **Last day to disallow** | 2 March 2015 |
| **Authorising legislation** | *Renewable Energy (Electricity) Act 2000* |
| **Department** | Environment |

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

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

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

**Issue:**

*Timetable for making of substantive amendments to principal legislation*

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

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

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

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

**Noting the final report of the Financial System Inquiry was to be provided to the Treasurer by November 2014,[[8]](#footnote-8) the committee therefore seeks the minister's advice as to the progress of the further work by government on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds; and the appropriateness of continuing to provide relief via legislative instrument in this case.**

## Continuing matters

### Implementation of a general instrument-making power (previously 'Prescribing of matters by legislative rules')

#### Introduction

The appropriateness and consequences of prescribing matters by instruments under a general instrument-making power recently introduced by the Office of Parliamentary Counsel (OPC) goes to the heart of the committee's institutional role and the principles which inform its operation.

As noted in *Odgers' Australian Senate Practice*, the delegation of the Parliament's legislative power to executive government 'has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.[[9]](#footnote-9) This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the Parliament's power to disallow delegated legislation.

In accordance with this critical role, the committee interprets its scrutiny principles 'broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.[[10]](#footnote-10)

The matters raised by the general instrument-making power are significant and the scope of the change is likely to involve a wide range of legislative instruments. It is important to note therefore that, any one instrument aside, it is the principles engaged by the new power that are of concern to the committee. The issues raised so far have been canvassed through a series of instrument-based entries spread over numerous committee reports, and were also discussed at a private briefing with OPC (see the next section on 'background').

#### Background

The committee first raised concerns about prescribing matters by instruments under a general instrument-making power in relation to the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] (industry rules) in *Delegated legislation monitor* No. 2 of 2014.[[11]](#footnote-11) The committee noted the instrument relied on section 128 of the *Australian Jobs Act 2013*, which allowed for various matters in relation to that Act to be prescribed, by the minister, by legislative rules.

In its initial comment, the committee noted the industry rules were made on the basis of a general instrument-making power not previously seen by the committee. Subsequent inquiries to the Minister for Industry and First Parliamentary Counsel (FPC) established that OPC had been implementing the general instrument-making power in Acts since 2013.[[12]](#footnote-12) As other delegated legislation made under the general instrument-making power came to light, the committee reported on a range of matters arising from the introduction of the general instrument-making power in *Delegated legislation monitors* Nos 5, 6, 8, 9 10, 12 and 13 of 2014.[[13]](#footnote-13)

To support consideration of the matter, the committee, in collaboration with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), convened a briefing on 3 September with two officers from OPC, Mr Peter Quiggin PSM, FPC, and Mr John Leahy SC PSM, Principal Legislative Counsel. Matters still outstanding from the briefing were placed as questions on notice by the committees.[[14]](#footnote-14)

#### The general instrument-making power

Prior to 2013, the general instrument-making power under an Act was usually confined to regulations. The general power to make regulations is a broad delegation of the Parliament's law-making power. For example, section 62 of the *Legislative Instruments Act 2003* provides:

The Governor-General may make regulations prescribing all matters:

1. required or permitted by this Act to be prescribed; or
2. necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Since 2013, however, a new general instrument-making power has been introduced that allows the instrument-maker to make instruments in relation to any matter as long as that matter is 'required or permitted' by the relevant provisions in the Act, or 'necessary or convenient' for carrying out or giving effect to the Act. For example, section 128 of the *Australian Jobs Act 2013* provides:

The Minister may, by legislative instrument, make rules (***legislative rules***) prescribing matters:

1. required or permitted by this Act to be prescribed by the legislative rules; or
2. necessary or convenient to be prescribed for carrying out or giving effect to this Act.

It can be seen, therefore, that the general instrument-making power was created by simply substituting the making of 'rules' rather than 'regulations' within the standard form of the general power.

#### General instrument-making power as a new form of delegated legislation

In light of the above, the committee sought the advice of the minister as to the use of the general instrument-making power, noting that it appeared to be a new or 'novel' type of delegated legislation.

In correspondence on 13 March 2014, FPC stated that 'the approach taken in section 128 of the *Australian Jobs Act 2013* is not novel'. FPC provided several examples to support the claim that 'Commonwealth Acts have provided for the making of instruments rather than regulations for many years'.[[15]](#footnote-15)

However, FPC's response appeared to misunderstand the essential distinction in classifying the general power to make 'legislative rules' as 'novel', insofar as it addressed generally the ability to make instruments other than regulations under Acts, rather than the particular case of providing for general instrument-making powers other than as a general power to make regulations. The committee noted that the examples cited by FPC in fact confirmed that the general instrument-making power was an innovation implemented only since 2013. This was also confirmed by revised Drafting Direction 3.8 (circulated on 6 March 2014 subsequent to the committee's inquiry), which stated:

It has long been the practice to include general regulation making powers in Acts.

More recently, an approach has been taken to adapt that practice for other legislative instruments.[[16]](#footnote-16)

A further essential distinction in relation to the committee's inquiries on the matter is between this general power to make instruments (previously as regulations and now as rules) and the longstanding use of powers to make legislative instruments under Acts (usually) for more narrow specified purposes. The following are examples of such specific powers:

The Minister may, by legislative instrument, determine vehicle standards for road vehicles or vehicle components;[[17]](#footnote-17)

The respite supplement for a particular day is the amount determined by the Minister by legislative instrument;[[18]](#footnote-18)

The Minister may, by legislative instrument, determine the weighted average disclosed price of a brand of a pharmaceutical item in accordance with the regulations.[[19]](#footnote-19)

The general power to make instruments may also be distinguished from powers to make legislative instruments in relation to a subdivision or a part of an Act:

The Minister may, by legislative instrument, make rules (the infrastructure project designation rules) prescribing matters:

required or permitted by this Subdivision to be prescribed by the rules; or

necessary or convenient to be prescribed for carrying out or giving effect to this Subdivision.[[20]](#footnote-20)

The Minister may, by legislative instrument, make Orders prescribing matters required or permitted by this Part to be prescribed.[[21]](#footnote-21)

#### Consequences of providing for a general instrument-making power

The committee notes that regulations are subject to a number of requirements which effectively provide a higher level of executive oversight than applies to the making of other types of delegated legislation. These are:

regulations must be made by the Governor-General;

regulations must be approved by the Executive Council (ExCo); and

regulations must be drafted cost-free by the OPC (referred to as 'tied work').

These requirements do not apply to the making of rules and other types of delegated legislation, including any that are made under the new general instrument-making power, which means:

such instruments may be made by ministers, secretaries and other designated persons;

such instruments do not need to be approved by ExCo (or any other body); and

departments and agencies have responsibility for drafting such instruments (and may choose to draft them in-house or pay to have them drafted by OPC or another professional drafter).

In answer to the committee's specific inquiries as to the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General, FPC responded as follows:

The reason that the drafting of these instruments is tied to OPC under the Legal Services Direction is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.[[22]](#footnote-22)

By contrast, the committee considers that, given the broad delegation on which the general regulation-making is usually based, and the critical role of regulations in fleshing out the operation of primary legislation, the longstanding procedural and drafting arrangements that apply to regulations may be seen (from a parliamentary scrutiny perspective) as a necessary accompaniment to the exercise of Parliament's broadly delegated legislative power.

The committee regards it as significant that, up until the implementation of a general instrument-making power in 2013, the executive exercise of the Parliament's delegated legislative power via a broadly expressed regulation-making power has been accompanied by the concomitant responsibility of close executive oversight. The requirements for such instruments to be made by the Governor-General, and the tying of the drafting of such instruments to OPC, may be seen as a necessary accompaniment to the exercise of a broadly expressed delegated power to make legislation, taking into account its nature, critical role in informing the operation of primary legislation and potential to include material that of itself or cumulatively may be both important and complex.

The committee's view stands in contrast to the proposition that the requirement for OPC to draft regulations is a mere consequence of their being made by the Governor-General.

#### Reasons for implementing the general instrument-making power

In simple terms, the general instrument-making power has been implemented to be used in place of regulations, so that OPC is required to draft fewer regulations. FPC provided the following justifications for implementing the general instrument-making power:

OPC does not have the resources to draft all Commonwealth legislation, nor is it appropriate to do so; OPC should therefore concentrate its resources on drafting only a narrow band of regulations, being those with (a) particular sensitivities or risks and (b) that are especially 'bound to the work of the executive'; and

the general instrument-making power will enable a rationalisation of the many different types of delegated legislation made under Acts.[[23]](#footnote-23)

In correspondence to the committee dated 2 July 2014, FPC noted his view that the use of regulations for the prescribing of matters has previously been done without consideration of the nature of the material itself, with the result that OPC has been required to draft regulations dealing with 'less important matters':

In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments.[[24]](#footnote-24)

#### Issues

The committee's inquiries into the use of the general instrument-making power have focused on the following general and more specific issues:

scope of the general power;

consequences of the general instrument-making power for the quality of drafting;

assessing whether instruments contain matters more appropriate for regulations;

regulations to prevail in the event of conflict;

delegation of the general instrument-making power; and

consultation over the implementation of the general instrument-making power.

##### Scope of the general power

In his responses, FPC generally characterised the general instrument-making power as typically constrained in its application by the authorising provisions in the Act.

In particular, FPC observed that the ''required or permitted' instrument-making power in an Act gives no power to make rules beyond that authorised by the other provisions of the Act', and therefore it 'does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers'.[[25]](#footnote-25)

Regarding the 'necessary or convenient' limb of the general power, FPC observed:

A 'necessary or convenient' power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a 'necessary or convenient' power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot *supplement* the Act. It can only *complement* the Act and prescribe matters that are confined to the same field of operation of the Act.[[26]](#footnote-26)

FPC noted that only a very small percentage of delegated legislation (less than one per cent) relies on the 'necessary or convenient' limb of the broadly expressed power.[[27]](#footnote-27) By extension, this means that the vast majority of the prescribing of matters relies on the 'required or permitted' limb of the power, which operates in conjunction with the provisions in the enabling Act. He concluded:

It follows that I do not agree there is anything intrinsic in the standard general rulemaking power that represents a real threat to the quality of Commonwealth subordinate legislation.

However, the committee considers that by making provision for non-professional drafters to draft instruments in reliance on the 'necessary or convenient' power represents a risk that misjudgements about whether matters specified in an instrument are in fact complementary and confined to the same field of operation as the Act under which they are made. The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate where an instrument is made in reliance on the 'necessary or convenient' power.

In this respect, the committee notes OPC's view that:

…it would be appropriate for the Regulations and Ordinances Committee to require that the explanatory statement should state when the necessary or convenient power has been relied on for the making of an instrument.[[28]](#footnote-28)

**The committee therefore notes its expectation that ESs indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.**

##### Consequences of the general instrument-making power for the quality of drafting

The committee's key concern throughout its inquiries has been the potential for the general instrument-making power to adversely impact on drafting quality, due to the lower level of executive oversight (compared to regulations), and the absence of a requirement that such instruments be drafted by OPC (meaning that departments and agencies may elect to have drafting performed by non-expert drafters).

The committee's concern arises from the fact that, as with regulations previously, the general instrument-making power will be used to provide much of the legislative detail for the operation of Acts. Such instruments may therefore be lengthy and complex, covering all manner of subject matter within the field of operation of an Act (for example, Acts often provide the skeleton of a legislative scheme that is then substantially 'fleshed out' by regulations)

Any appreciable lowering of drafting standards arising from more widespread non-expert drafting of instruments could impact adversely on the committee, particularly to the extent that this would effectively transfer the task of policing drafting standards from OPC to the committee (in respect of those instruments). In this regard, the committee does not have sufficient expertise and resources to perform this task as effectively as the expert and professional drafters and officers in OPC.

Further, because the committee only examines instruments that are already in force, the committee has only limited options for dealing with problematic instruments, which is to either request they be remade or to disallow them.

Given the above, the committee regards it as unclear whether and how the high standards achieved by OPC drafters will be maintained in the drafting of instruments based on the general power, where departments and agencies elect to draft these in-house.

In response to the committee's concerns regarding drafting quality, FPC submitted that OPC did not foresee particular risks in legislative schemes being filled out by rules rather than regulations.[[29]](#footnote-29) In his letter of 23 May 2014, FPC stated that the innovation would 'contribute to raise the standards of legislative instruments overall' through departments and agencies recognising the quality of OPC's drafting work, and therefore electing to pay OPC for the drafting of work that would previously have been included in regulations (and thus drafted by OPC on a cost-free basis).

FPC further submitted that the anticipated increase in billable work would put 'OPC…in a better position to increase its overall drafting resources and to take further steps to raise the standards of instruments that it does not draft'.[[30]](#footnote-30)

Beyond this, the committee notes OPC's advice that it was 'not planning to systematically monitor the quality of rules drafted by departments or agencies' to assess the impacts of the general instrument-making power.

However, OPC submitted that it had 'commenced substantial work to try to improve the general standard of legislative instruments',[[31]](#footnote-31) including the reissued Legislative Instruments Handbook, an increase in billable settling services provided on request to agencies, and an increase in the drafting of untied instruments (including rules) for other agencies.[[32]](#footnote-32) In a document provided subsequent to the briefing, FPC listed the following measures taken to enhance the quality of legislative instruments and the Commonwealth statute book generally:

harmonisation of drafting standards and style;

development of broader instrument drafting expertise and active engagement with agencies in relation to untied instruments;

development of further guidance to agencies in relation to managing and drafting legislative instruments;

rationalisation of legislative instrument making powers and limiting the proliferation of the types of legislative instruments;

rationalisation of legislative instruments and working with agencies to manage sunsetting; and

legislative instrument framework reform.[[33]](#footnote-33)

In the committee's view, the question of OPC's efforts to monitor the impact of the general instrument-making power on the quality of drafting of instruments, and more generally to promote higher standards of drafting in instruments, is best viewed through the prism of FPC's responsibility under section 16 of the *Legislative Instruments Act 2003*,[[34]](#footnote-34) which provides:

To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.

In light of FPC's obligations in this regard, the committee is concerned that it is unable, on the basis of the information provided, to properly assess what impacts the general instrument-making power may have on drafting quality overall. In particular, the committee notes that the apparent mechanism by which OPC hopes for increased billable work to fund its drafting and drafting support services will fundamentally rely on decisions of departments and agencies as to whether to use OPC's drafting services. Given that such decisions may be influenced by factors outside of OPC's control (such as budgetary considerations), the committee remains concerned that drafting standards will suffer under the move to the general instrument-making power.

More generally, the committee notes that the furtherance of FPC's obligations under section 16 of the LIA is important to ensure that any potential adverse impacts on implementing the general instrument-making power are avoided.

**The committee therefore recommends that OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*.**

The committee considers that the effectiveness of OPC's intended mechanism for achieving higher drafting standards following the implementation of the general instrument making power is likely to be highly contingent on the effectiveness of OPC in presenting itself as an engaged, responsive and competitive provider of drafting services. The committee's remarks below in relation to consultation are relevant in this regard.

##### Assessing whether instruments contain matters more appropriate for regulations

As noted above, FPC's justification for the implementation of the general instrument-making power includes the view that, as many regulations contain matters that do not have particular sensitivities or risks, they should not be required to be drafted by OPC (known as 'tied work').

The committee's inquiries have clarified that the use of the general instrument-making power is dependent on the initial assessment of the character or quality of matters to be prescribed. This is because, as confirmed by FPC in his letter of 13 March 2014, certain matters are not, without 'strong justification', regarded as appropriate for inclusion in instruments and should therefore be included in regulations and drafted by OPC (that is, should be subject to the higher level of executive oversight). These matters were set out as follows in Drafting Direction 3.8 (dated 6 March 2014):

offence provisions;

powers of arrest or detention;

entry provisions;

search provisions; and

seizure provisions.[[35]](#footnote-35)

In addition, Drafting Direction 3.8 advises that drafters should 'see FPC to discuss whether any of the following matters should also be dealt with by regulation or another type of instrument':

civil penalties;

imposition of taxes;

setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount; and

politically sensitive provisions.[[36]](#footnote-36)

In this regard, it is important to note that Drafting Direction 3.8 is a policy statement and not a mandatory requirement. The committee therefore sought clarification from OPC as to who will make decisions about whether there is a 'strong justification' to include such matters in rules; whether consultation with OPC will be mandatory or at the discretion of departments; and whether OPC's view in such cases will be decisive or merely advisory.

In response, FPC advised that OPC will initially make the decision about the inclusion of significant matters in regulations. Further, 'OPC would be closely involved' given that the matter would generally 'be determined at the time of drafting the Bill'.[[37]](#footnote-37) However, in the event of an unresolved difference of view between a department or agency and OPC as to whether there is a 'strong justification' for including significant matters in rules, 'the Government (generally through the Prime Minister) would need to decide the matter'.[[38]](#footnote-38)

In light of FPC's advice that certain provisions (noted above) should be included in regulations and drafted by OPC unless there is a strong justification for prescribing those provisions in another type of instrument, the committee questioned how those provisions would be introduced in the absence of a regulation-making power. This question appears particularly pertinent given that several recent Acts that have the general instrument-making power do not actually contain a regulation-making power. FPC advised:

If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.[[39]](#footnote-39)

In light of these matters, the committee's consideration of the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and the Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] is instructive.[[40]](#footnote-40) The ordinance contained the standard form of the new general instrument-making power (in this case, 'rules'), and provided for the prescribing of offences by rule in subsection 98(3). Noting that the ESs for the ordinance and the rule contained no justification for the authorising of offence provisions via rules rather than regulation, the committee sought further information from the minister.[[41]](#footnote-41) The Assistant Minister for Infrastructure and Regional Development subsequently advised that the drafting of the ordinance:

…ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.[[42]](#footnote-42)

The committee concluded its examination of the instruments on the basis of the information provided. However, the committee noted that the assistant minister's advice raised a number of questions in relation to the committee's inquiries into the new approach:

In particular, the committee notes the assistant minister's advice that the drafting of the Ordinance, and the inclusion of offences in the rules (authorised by express provision), ran 'in parallel' to OPC's development of its formal policy on the appropriateness of offence provisions to be included under a rule-making power.

As the committee has previously noted, on 6 March 2014 (subsequent to the committee's initial comments on the matter), OPC circulated revised Drafting Direction No. 3.8, which included the addition of extensive instruction on the use of 'general instrument-making powers' of this kind. The direction included the guidance that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. The committee understood this to be a settled statement of the policy on the use of the general rule-making power.

With reference to these points, the committee notes that the assistant minister's undertaking appears to suggest that, while the inclusion of offence provisions in the rules satisfied legal criteria for validity, there was not a sufficiently 'strong justification' for making provision for the prescribing of offences by rules in this case. This is of particular interest to the committee because, as noted above, the committee's inquiries to date have shed little light on what would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

The assistant minister's advice also gives rise to questions regarding the policy development process in relation to the general-rule making power, and whether the implementation of the power has been done on the basis of a sufficiently well developed and articulated policy on its use.[[43]](#footnote-43)

FPC also responded to this particular matter in his letter of 6 August 2014:

Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.[[44]](#footnote-44)

The committee thanked FPC for his response and concluded its interest in the ordinance and the rule subject to the undertakings given by the assistant minister.[[45]](#footnote-45)

In response to the committee's further inquiries as to whether other Acts should be amended to reflect the policy statement that certain provisions (such as civil penalties) should not be included in instruments other than regulations without strong justification, FPC advised:

As Drafting Direction 3.8 states, OPC believes that this part of the Drafting Direction reflects the law. That is, without an explicit power to include such provisions, they could not be included in a legislative instrument (including a rule or a regulation).

OPC is currently working with the Attorney-General's Department on the best way of implementing the position set out in the Drafting Direction.

As mentioned above, it is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.[[46]](#footnote-46)

The committee acknowledges that any new policy may have unintended consequences. Nevertheless, in light of the above, the committee is concerned that it has been unable, on the basis of the information provided, to reach a definitive understanding of the basis on which matters which would otherwise be considered suitable only for regulations are able to be included in other types of instruments—that is, what factors or criteria are or may be relevant to establishing that there is a 'strong justification' for not prescribing certain matters in regulations.

The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate what is considered to be the 'strong justification' in support of such an approach.

**The committee therefore notes its expectation that ESs identify a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification.**

The committee's consideration of this aspect of the implementation of the general instrument-making power draws into particular focus significant concerns over the timing and implementation of the new policy direction, and particularly the apparent implantation of the general instrument-making power in the absence of any policy statement governing its use.

As noted above, revised Drafting Direction 3.8 (containing guidance on the new general instrument-making power) was reissued in March 2014 subsequent to the committee's initial inquiries on the matter,[[47]](#footnote-47) and approximately 12 months after the new general instrument-making power had already been implemented in numerous Acts made in 2013.

Indeed, notwithstanding the committee's inquiries, the committee notes that the policy guidance on the use of the general instrument-making power remains unsettled nearly two years since OPC commenced its implementation.

The committee's concerns about the implementation of an innovation of this kind in the absence of any settled policy or policy guidance aside, the committee has significant concerns about whether and how Acts containing the general instrument-making power will be reviewed to ensure consistency with the policy guidance once it is settled. Where Acts or instruments (such as the Jervis Bay Territory Rural Fires Ordinance 2014 discussed above) are not in accordance with the policy guidance (once settled), the committee considers that such Acts and instruments should be brought into conformity with that guidance.

**The committee therefore recommends that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.**

##### Regulations to prevail in the event of conflict

The Scrutiny of Bills committee raised a question as to which instrument would prevail in the event of a conflict between a rule and an instrument made on the basis of the general instrument-making power. The committee notes that FPC indicated at the briefing that OPC was considering whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.

**The committee seeks the advice of FPC as to the progress of consideration of whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.**

##### Delegation of the general instrument-making power

In *Delegated legislation monitor* No. 8 of 2014 the committee drew attention to a potential delegation of the general instrument-making power (in this case a general power to make 'rules') with regard to the Farm Household Support Secretary's Rule 2014 [F2014L00614].

The committee noted that section 101 of the *Farm Household Support Act 2014* provided for the secretary to delegate their powers to officers below the Senior Executive Officer level. The committee also noted that the EM for the Farm Household Support Bill 2014 stated that the delegation powers were 'intentionally broad' for operational reasons. Noting the operational reasons cited in the EM, the committee questioned whether the secretary's general rule-making powers under section 106(2) may be delegated under section 101 and, if so, what considerations might apply in that case.[[48]](#footnote-48)

The Minister for Agriculture confirmed there was 'no legal impediment' to the secretary delegating their general rule-making power, but noted that he did not 'foresee any circumstances' where this might be necessary.[[49]](#footnote-49)

The Minister for Infrastructure and Regional Development subsequently advised that the departmental secretary had 'no intention of delegating his rule making powers' and did not consider it to be necessary at present.[[50]](#footnote-50)

The committee noted the minister's advice that the delegation of the general rule-making power was neither intended nor necessary. The committee also pointed to the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required. The committee therefore requested that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power.[[51]](#footnote-51)

The Minister for Agriculture advised that the *Farm Household Support Act 2014* would be amended 'as the opportunity arises' to specifically exclude the delegation of the secretary's general rule-making power.[[52]](#footnote-52) The committee thanked the minister for his undertaking to amend the legislation[[53]](#footnote-53) (and accordingly withdrew the notice of motion to disallow the instrument).[[54]](#footnote-54)

The committee notes that other recent Acts might have unnecessarily authorised the broad delegation of the general instrument-making power. Accordingly, the committee sought clarification as to whether those Acts should also be amended. FPC advised:

It is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.

It is however noted that there are a very large number of existing Acts, many of which have been in force for many years, which provide for the making of instruments and provisions in these limiting delegation are rare (assuming that there are any). It is not proposed to address this at this time.[[55]](#footnote-55)

The committee is concerned by this response because it appears recent Acts may have been drafted in a manner that does not prevent the inappropriate delegation of the general rule-making power, thereby offending against the scrutiny principle that the delegation of power be only as broad as strictly required.

**The committee therefore notes its expectation that the delegation of power provided for in instruments be only as broad as strictly required.**

The committee notes that the above recommendation is also relevant to addressing this concern, insofar as it asks the Attorney-General to take steps to ensure that Drafting Direction 3.8 be settled as soon as possible, and to subsequently identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.

##### Consultation over the implementation of the general instrument-making power

The committee thanks FPC and the responsible ministers for their engagement and cooperation on this issue, and notes the various ministerial undertakings to amend Acts, ordinances and rules. These positive developments are to be understood as, in one sense, a corrective to the severe shortcomings of the policy development and implementation process of the general instrument-making power.

The committee considers that significant changes in agency policy regarding the making of primary and delegated legislation should be the subject of substantial consultation with the Parliament. In this regard, the committee notes that consultation did not occur in this instance and, further, that the treatment of the legislative changes in various EMs was either absent or inadequate.[[56]](#footnote-56)

The committee's inquiries into this matter have revealed the apparently inappropriate inclusion of significant matters in rules, and the potential for the inappropriate delegation of a broad power, and both cases strongly suggest that the general instrument-making power was implemented at a time prior to the settling of established policy guidance on the new power. The committee considers that, had appropriate consultation been undertaken early in the development of the new policy, matters of particular concern could have been discussed, and potentially inconsistent practices could have been avoided.

**In light of the outstanding matters of concern identified above, the committee notes its intention to continue to monitor the general instrument-making power and the settling of the policy guidance on its use.**

### 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.[[57]](#footnote-57)

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

|  |
| --- |
| 1. ASIC Class Order [CO 14/1106] [F2014L01483] |
| 1. ASIC Class Order [CO 14/1118] [F2014L01484] |
| 1. ASIC Class Order [CO 14/977] [F2014L01442] |
| 1. Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] |
| 1. Health Insurance (Allied Health Services) Amendment Determination 2014 (No. 2) [F2014L01447] |
| 1. Health Insurance (Cone Beam Computed Tomography) Revocation Determination 2014 F2014L01435] |
| 1. Health Insurance (Gippsland, Rockhampton and Gladstone Mobile MRI Service) Amendment Determination 2014 [F2014L01454] |
| 1. Health Insurance (Pathologist-determinable Services) Amendment Determination 2014 (No. 2) [F2014L01437] |
| 1. Health Insurance (Pharmacogenetic Testing - Epidermal Growth Factor Receptor) Revocation Determination 2014 [F2014L01438] |
| 1. Health Insurance (Pharmacogenetic Testing) Revocation Determination 2014 [F2014L01436] |
| 1. Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 5) [F2014L01434] |
| 1. Water and Sewerage Services Fees and Charges (Christmas Island) Determination No 2 No 2 [F2014L01459] |
| 1. Water and Sewerage Services Fees and Charges (Cocos (Keeling) Islands) Determination 2014 No 2 No 2 [F2014L01458] |

# Chapter 2

## Concluded matters

There are no concluded matters arising from the committee's meeting on **3 December 2014**.

# Appendix 1

## Correspondence

# Appendix 2

## Guideline on consultation

**Standing Committee on Regulations and Ordinances**

**Addressing consultation in explanatory statements**

***Role of the committee***

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

***Purpose of guideline***

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

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

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

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

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

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

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

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

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

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

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

***Describing the nature of consultation***

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

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

*Method and purpose of consultation*

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

*Bodies/groups/individuals consulted*

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

*Issues raised in consultations and outcomes*

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

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

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

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

*Specific examples listed in the Act*

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

*Timing of consultation*

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

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

***Seeking further advice or information***

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

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](mailto:RegOrds.Sen@aph.gov.au)

1. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at [www.comlaw.gov.au](http://www.comlaw.gov.au) [↑](#footnote-ref-1)
2. For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15. [↑](#footnote-ref-2)
3. Senate Disallowable Instruments List, available at <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List> [↑](#footnote-ref-3)
4. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-4)
5. For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16–17. [↑](#footnote-ref-5)
6. *Williams v Commonwealth* [2012] 248 CLR 156. [↑](#footnote-ref-6)
7. *Williams v Commonwealth* [2014] HCA 23 (19 June 2014). [↑](#footnote-ref-7)
8. Commonwealth of Australia, Financial system inquiry, Terms of reference, <http://fsi.gov.au/terms-of-reference/> (accessed 26 November 2014). [↑](#footnote-ref-8)
9. *Odgers' Australian Senate Practice*, 13th edn (2012) 413. [↑](#footnote-ref-9)
10. *Odgers' Australian Senate Practice*, 13th edn (2012) 438. [↑](#footnote-ref-10)
11. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 2 of 2014 (5 March 2014) 1–2. [↑](#footnote-ref-11)
12. The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of delegated legislation. [↑](#footnote-ref-12)
13. In the course of its inquiries into the general instrument-making power, the committee has twice given notices of motion to disallow an instrument (see Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] and Farm Household Support Secretary's Rule 2014, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts> (accessed 20 October 2014)). Giving such a notice within the prescribed period for disallowance indicates committee concern about the instrument and is commonly referred to as a 'protective' notice. It preserves the right of the committee to move disallowance if the committee subsequently decides this is appropriate, and extends for a further 15 sitting days the period during which the committee has to resolve outstanding matters to its satisfaction (see *Odgers' Australian Senate Practice*,13th edn (2012) 432). [↑](#footnote-ref-13)
14. Correspondence from FPC including letters and answers to questions on notice is included in Appendix 1. [↑](#footnote-ref-14)
15. First Parliamentary Counsel, letter (13 March 2014). [↑](#footnote-ref-15)
16. Office of Parliamentary Counsel, Drafting Direction No. 3.8 (6 March 2014) 4, <http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf> (accessed 14 November 2014). [↑](#footnote-ref-16)
17. *Motor Vehicle Standards Act 1989*,section 7. [↑](#footnote-ref-17)
18. *Aged* *Care Act 1997*,subsection 44-12(3). [↑](#footnote-ref-18)
19. *National Health Act 1953*, subsection 99ADB(4). [↑](#footnote-ref-19)
20. *Income Tax Assessment Act 1997*, section 415-100. [↑](#footnote-ref-20)
21. *Superannuation Act 1976*, section 146MH. [↑](#footnote-ref-21)
22. First Parliamentary Counsel, letter (23 May 2014) 3. [↑](#footnote-ref-22)
23. First Parliamentary Counsel, letters (13 March 2014) 3 and (23 May 2014) 3. [↑](#footnote-ref-23)
24. First Parliamentary Counsel, letter (2 July 2014) 3. [↑](#footnote-ref-24)
25. First Parliamentary Counsel, letter (6 August 2014) 3. [↑](#footnote-ref-25)
26. First Parliamentary Counsel, letter (6 August 2014) 3. [↑](#footnote-ref-26)
27. First Parliamentary Counsel, answer to question on notice no. 21 (23 September 2014). [↑](#footnote-ref-27)
28. First Parliamentary Counsel, answer to question on notice no. 22 (23 September 2014). [↑](#footnote-ref-28)
29. First Parliamentary Counsel, answer to question on notice no. 3 (23 September 2014). [↑](#footnote-ref-29)
30. First Parliamentary Counsel, letter (23 May 2014) 4. [↑](#footnote-ref-30)
31. First Parliamentary Counsel, answers to questions on notice, nos 9 and 23 (23 September 2014). [↑](#footnote-ref-31)
32. First Parliamentary Counsel, answers to questions on notice, nos 23 and 24 (23 September 2014). [↑](#footnote-ref-32)
33. Office of Parliamentary Counsel, Measures taken to enhance the quality of legislative instruments (23 September 2014). [↑](#footnote-ref-33)
34. These responsibilities remain effectively unchanged by the Acts and Instruments (Framework Reform) Bill 2014. [↑](#footnote-ref-34)
35. Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3. [↑](#footnote-ref-35)
36. Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3–4. [↑](#footnote-ref-36)
37. First Parliamentary Counsel, answer to question on notice no. 13 (23 September 2014). [↑](#footnote-ref-37)
38. First Parliamentary Counsel, answer to question on notice no. 14 (23 September 2014). [↑](#footnote-ref-38)
39. First Parliamentary Counsel, letter (23 May 2014) 7. [↑](#footnote-ref-39)
40. See *Delegated legislation monitor* No. 6 of 2014. [↑](#footnote-ref-40)
41. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 6 of 2014 (18 June 2014) 22–24. [↑](#footnote-ref-41)
42. The Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, letter (2 July 2014). [↑](#footnote-ref-42)
43. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 9 of 2014 (16 July 2014) 26–27. [↑](#footnote-ref-43)
44. First Parliamentary Counsel, letter (6 August 2014) 5. [↑](#footnote-ref-44)
45. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) 55–60. [↑](#footnote-ref-45)
46. First Parliamentary Counsel, answer to question on notice no. 20 (23 September 2014). [↑](#footnote-ref-46)
47. First Parliamentary Counsel, letter (6 August 2014) 5. [↑](#footnote-ref-47)
48. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 8 of 2014 (9 July 2014) 1–4. [↑](#footnote-ref-48)
49. The Hon Barnaby Joyce MP, Minister for Agriculture, letter (5 August 2014) 3. [↑](#footnote-ref-49)
50. The Hon Warren Truss MP, Minister for Infrastructure and Regional Development, letter (16 September 2014) 2. [↑](#footnote-ref-50)
51. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 12 of 2014 (24 September 2014) 16. [↑](#footnote-ref-51)
52. The Hon Barnaby Joyce MP, Minister for Agriculture, letter (30 September) 1. [↑](#footnote-ref-52)
53. Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 13 of 2014 (1 October 2014) 6–14. [↑](#footnote-ref-53)
54. Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Farm Household Support Secretary's Rule 2014, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts> (accessed 20 October 2014). [↑](#footnote-ref-54)
55. First Parliamentary Counsel, answer to question on notice no. 18 (23 September 2014). [↑](#footnote-ref-55)
56. For a full discussion of the identification of the general instrument-making power in EMs, see Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) 4. [↑](#footnote-ref-56)
57. For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-57)