The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor No. 2 of 2015

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Membership of the committee

Current members

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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
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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 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

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 **4 March 2015**, 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 January 2015 and 19 February 2015. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

AASB 15 — Revenue from Contracts with Customers — December 2014 [F2015L00115]

Purpose	Establishes the principles that an entity shall apply to report useful information to users of financial statements about the nature, amount, timing and uncertainty of revenue and cash flows arising from a contract with a customer. This standard applies to annual reporting periods beginning on or after 1 January 2017
Last day to disallow	12 May 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury

Issue:

Retrospective effect

Paragraph Aus4.2 of the instrument provides that it applies to 'annual reporting periods beginning on or after 1 January 2017'. Paragraph Aus4.3 provides the instrument 'may be applied to annual reporting periods beginning on or after 1 January

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

2005 but before 1 January 2017'. Paragraph C3 of Appendix C of the instrument (which deals with 'effective date and transition') provides:

> C3 An entity shall apply this Standard using one of the following two methods:
>
> (a) retrospectively to each prior reporting period presented in accordance with AASB 108 Accounting Policies, Changes in Accounting Estimates and Errors, subject to the expedients in paragraph C5; or
>
> (b) retrospectively with the cumulative effect of initially applying this Standard recognised at the date of initial application in accordance with paragraphs C7–C8.

The two methods for applying the standard indicate that the instrument only has a retrospective operation. The committee's usual approach is to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the explanatory statement (ES). **The committee therefore requests further information from the minister (as to the justification for this approach).**

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.[2]

2 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:

AASB 2014-10 Amendments to Australian Accounting Standards – Sale or Contribution of Assets between an Investor and its Associate or Joint Venture [F2015L00138]

AASB 2014-5 Amendments to Australian Accounting Standards arising from AASB 15 [F2015L00107]

AASB 2014-6 - Amendments to Australian Accounting Standards – Agriculture: Bearer Plants [F2015L00106]

AASB 2014-7 Amendments to Australian Accounting Standards arising from AASB 9 (December 2014) [F2015L00135]

AASB 2014-8 Amendments to Australian Accounting Standards arising from AASB 9 (December 2014) – Application of AASB 9 (December 2009) and AASB 9 (December 2010) [F2015L00136]

AASB 2014-9 Amendments to Australian Accounting Standards – Equity Method in Separate Financial Statements [F2015L00137]

AASB 2015-1 Amendments to Australian Accounting Standards – Annual Improvements to Australian Accounting Standards 2012–2014 Cycle [F2015L00139]

AASB 2015-2 Amendments to Australian Accounting Standards – Disclosure Initiative: Amendments to AASB 101 [F2015L00141]

AASB 2015-3 - Amendments to Australian Accounting Standards arising from the Withdrawal of AASB 1031 Materiality - January 2015 [F2015L00134]

AASB 2015-4 - Amendments to Australian Accounting Standards – Financial Reporting Requirements for Australian Groups with a Foreign Parent - January 2015 [F2015L00140]

ASIC Derivative Transaction Rules (Nexus Derivatives) Class Exemption 2015 [F2015L00100]

Australian Passports Amendment Determination 2015 (No. 1) [F2015L00129]

Customs Act 1901 - CEO Directions No. 1 of 2015 [F2015L00099]

Customs Act 1901 - CEO Directions No. 2 of 2015 [F2015L00101]

Migration Regulations 1994 - Specification of Access to Movement Records 2015 - IMMI 15/011 [F2015L00114]

National Health (Pharmaceutical Benefits (Application to supply pharmaceutical benefits following the death of approved pharmacist — documentary evidence) Determination 2015 (PB 5 of 2015) [F2015L00094]

Public Governance, Performance and Accountability Legislation Amendment (Office of the Fair Work Building Industry Inspectorate) Rule 2015 [F2015L00086]

Therapeutic Goods Information Specification 2009 Revocation Specification 2015 [F2015L00090]

Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2014-2015 Amendment [F2015L00097]

Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2014 - 2015 Amendment No. 2 [F2015L00155]

Chapter 2
Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **4 March 2015**. 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 1.

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

Purpose	Amends the ASIC Class Order [CO 12/749] by extending the relief from the shorter Product Disclosure Statement (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

[The committee first reported on this instrument in *Delegated legislation monitor* No. 17 of 2014]

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,[1] the committee sought 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].

MINISTER'S RESPONSE:

The Assistant Treasurer advised that the Class Order, in providing extended relief from the Corporations Regulations 2001, effectively restored the operation of the primary legislation pending the outcome of the government's response to the Financial System Inquiry:

> ASIC Class Order [C014/1118] extends regulatory relief from the shorter Product Disclosure Statement (PDS) regime, originally granted in ASIC Class Order [C012/749], by a year to 30 June 2016. The shorter PDS regime is contained in a legislative instrument, the Corporations Regulations 2001, and acts as an alternative regime to the PDS requirements in the primary legislation, the Corporations Act 2001.
>
> The shorter PDS regime applies to simple managed investment schemes (MIS). Whether a MIS is simple depends on whether it meets one of the liquidity tests, for example, whether 80 per cent of its assets in investments could be realised at market value within ten days.
>
> As presently defined, the term 'simple MIS' inadvertently captures MIS which are liquid but would not be considered simple. This includes some superannuation platforms, multi-funds and hedge funds. The shorter PDS regime may be inappropriate for these more complex MIS and further work is required to determine whether and how the shorter PDS regime should apply. For this reason, the former Government provided exemptions for each of these categories of MIS from the shorter PDS regime in 2012.
>
> I note the Committee's request for advice as to the progress of the Governments work on application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds, and on the appropriateness of continuing to provide relief from the shorter PDS regime via legislative instrument.
>
> For the reasons which follow, I consider that it is appropriate to continue providing relief from the shorter PDS regime through ASIC Class Order [CO14/1118].

1 Commonwealth of Australia, Financial system inquiry, Terms of reference, http://fsi.gov.au/terms-of-reference/ (accessed 26 November 2014).

As the Committee notes in its *Delegated legislation monitor* No 17 of 2014, the regulatory relief provided in Class Order [C014/1118] was extended pending the outcome of the Financial System Inquiry (the Inquiry), and the Government's work on application of the shorter PDS regime to more complex MIS.

The Government was unable to progress this work whilst the Inquiry was ongoing as the Inquiry may have recommended significant changes to the existing disclosure regime. The Inquiry's Final Report was released on 7 December 2014. The Government announced that it intends to consult on the Inquiry's final report before making any decisions on the recommendations. Written submissions will be accepted until 31 March 2015.

I understand the Committee's preference that relief from compliance with an Act which is effected via legislative instrument does not operate as a de facto amendment to primary legislation. In this case, ASIC Class Order [C014/1118] effectively restores the operation of the primary legislation, the *Corporations Act 2001*, providing relief from the alternative regime provided for in the Corporations Regulations 2001.

COMMITTEE RESPONSE:

The committee thanks the Assistant Treasurer for his response and has concluded its examination of the instrument.

Fair Work (Registered Organisations) Act 2009 - Reporting guidelines for the purposes of section 253 [F2014L01755]

Purpose	Provides for reporting guidelines for the purposes of section 253 of the *Fair Work (Registered Organisations) Act 2009*
Last day to disallow	26 March 2015
Authorising legislation	*Fair Work (Registered Organisations) Act 2009*
Department	Fair Work Commission

[The committee first reported on this instrument in *Delegated legislation monitor* No. 1 of 2015]

Issue:

Retrospective effect of instrument

The instrument determines reporting obligations for 'reporting units' to which the *Fair Work (Registered Organisations) Act 2009* applies. Section 4 of the instrument provides that the 'operative date' for the instrument is 'each financial year of a reporting unit that ends on or after 30 June 2014'. The instrument therefore applies in relation to the 2013-14 financial year and has the effect of altering the reporting obligations that existed at the start of that financial year. Although the instrument is

not strictly retrospective, the altering of the prior reporting obligations for 2013-14 may be regarded as being retrospective in effect. The committee's usual approach is to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee notes that the General Manager of the Fair Work Commission consulted prior to 30 June 2014 with persons (or their representatives) likely to be affected by the instrument. However, the committee's usual expectation is that the matter of the retrospective effect of the instrument would be specifically addressed in the explanatory statement (ES).

[The committee therefore requested further information from the General Manager (as to the justification for this approach)].

GENERAL MANAGER'S RESPONSE:

The General Manager of the Fair Work Commission advised that the effect of the instrument was prospective rather than retrospective:

> The instrument sets out specific disclosures that must be made in the General Purpose Financial Report (GPFR) of reporting units. Section 253 of the Act [*Fair Work (Registered Organisations) Act 2009*] requires a reporting unit to prepare a GPFR as soon as practicable after the end of the financial year. Although a GPFR prepared for a financial year ending 30 June 2014 contains information about financial transactions that occurred prior to 30 June 2014, the GPFR cannot be prepared until after 30 June 2014. The instrument therefore imposes obligations on reporting units that have no effect until after 30 June 2014.
>
> The Commission consulted with all registered organisations in the development of the instrument and most comments of the reporting units have been included. The Commission has also advised every reporting unit of the requirements, and provided a model set of financial statements to all reporting units to ensure that the requirements of the instrument are satisfied. Of the 274 reporting units with a financial year ending 30 June 2014, all but eight have lodged their financial report with the Commission, or have sought an exemption. Our assessment of the GPFR's lodged is that most reporting units have satisfied the requirements of the instrument. This illustrates that there is significant acceptance of and support for the requirements of the instruments.

COMMITTEE RESPONSE:

The committee thanks the General Manager for her response.

However, the committee notes the instrument was not registered until 18 December 2014. Therefore, under section 31 of the *Legislative Instruments Act 2003*, the instrument was not enforceable until that date. Given this, the committee regards it as correct to identify the character of the instrument as retrospective in effect. However, the committee notes that the information provided regarding the GPFR process and the high compliance rate of reporting units have addressed the substance of the committee's inquiry. **The committee therefore draws to the attention of the General Manager the provisions of the *Legislative Instruments Act 2003* with**

regard to the registration of legislative instruments and has concluded its examination of the instrument.

Competition and Consumer (Monitoring of Prices, Costs and Profits) Repeal Direction 2014 [F2014L01749]

Purpose	Revokes the direction given to the Australian Competition and Consumer Commission under section 95ZE of *the Competition and Consumer Act 2010* to monitor the prices, costs and profits relating to the supply of regulated goods by corporations and the supply of goods by liable entities to assess the general effect of the carbon tax scheme in Australia
Last day to disallow	26 March 2015
Authorising legislation	*Competition and Consumer Act 2010*
Department	Treasury

[The committee first reported on this instrument in *Delegated legislation monitor* No. 1 of 2015]

Issue:

Insufficient information regarding consultation

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

> For the purposes of section 17 of the *Legislative Instruments Act 2003*, consultation on the revocation of the price monitoring Direction has been undertaken.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it usually considers that an overly bare or general description, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report.

[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 Small Business advised that the instrument revoked the previous direction that had provided for price monitoring related to the Carbon Tax Repeal Bill. The minister advised that extensive public consultation occurred as part of the Carbon Tax Repeal Bill:

> The Repeal Direction revoked the price monitoring Direction made on 18 February 2014 under section 95ZE of the *Competition and Consumer Act 2010* (CCA).
>
> The price monitoring Direction, which commenced on 1 March 2014, was introduced given delays in the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (the Carbon Tax Repeal Act). It directed the Australian Competition and Consumer Commission (ACCC) to undertake formal monitoring of the prices, costs and profits relating to the supply of regulated goods by corporations and the supply of goods by liable entities, to assess the general effect of the carbon tax scheme in Australia prior to its repeal (Federal Register of Legislative Instruments No.F2014L00180).
>
> The price monitoring Direction was drafted to largely mirror the price monitoring provisions of the Carbon Tax Repeal Bill. As outlined in the Explanatory Statement to the price monitoring Direction, consultation on these arrangements occurred as part of extensive public consultation on the Exposure Draft of the Bill from 15 October 2013 to 4 November 2014. The provisions of the Bill were also examined by the Environment and Communications Legislation Committee Inquiry following referral by the Senate on 14 November 2014.
>
> The Carbon Tax Repeal Act, which took effect from 1 July 2014, introduced new powers for the ACCC to monitor the prices of certain goods to assess the general effect of the carbon tax scheme and its repeal. This included powers to monitor prices to assess the effect of the carbon tax repeal on prices charged by entities for supplies in the carbon tax repeal transition period (from 1 July 2014 to 30 June 2015) and to assist in considering whether an entity has engaged, is or may engage in price exploitation (section 60G of the CCA).
>
> In effect, the repeal of the carbon tax scheme made the price monitoring Direction redundant. Its revocation by the Repeal Direction imposes no regulatory change on affected businesses as the reporting obligations have continued through the introduction of section 60G, while any perceived regulatory burden by having two monitoring regimes in place has been reduced.

The minister advised that further public consultation was therefore considered unnecessary 'as the revocation of the instrument did not substantially alter existing arrangements for which there was extensive public consultation through the Exposure Draft of the Carbon Tax Repeal Bill'.

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

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its examination of the instrument.

Fair Work (Building Industry—Accreditation Scheme) Amendment Regulation 2014 [F2014L01736]

Purpose	Amends the Fair Work (Building Industry—Accreditation Scheme) Regulations 2005 to implement the Australian Government's decision to accept all recommendations of a recent review of the Scheme, with two minor adjustments and makes a number of amendments that have been identified by the Federal Safety Commissioner to improve the clarity and effectiveness of the Scheme
Last day to disallow	26 March 2015
Authorising legislation	*Fair Work (Building Industry) Act 2012*
Department	Employment

[The committee first reported on this instrument in *Delegated legislation monitor* No. 1 of 2015]

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 this instrument provides no description of the nature of the consultation undertaken. The committee's expectations in this regard are set out in the 'Guideline on consultation' in Appendix 2 of this report.

[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 extensive consultation had occurred during the review of the Building and Construction Work Health Safety Accreditation Scheme (the review), and therefore further consultation was considered unnecessary:

> As noted in the explanatory statement, the Regulation implements the Australian Government's decision to accept all recommendations of a recent review of the Australian Government Building and Construction Work Health Safety Accreditation Scheme, with two minor adjustments. 'A review to modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme' identified options for streamlining and modernising the Scheme and to reduce any unnecessary regulatory burdens on builders.
>
> The Review was conducted by the Department of Employment supported by an advisory panel of industry groups, unions and interested parties including Master Builders Australia, the Australian Constructors Association, the Australian Industry Group, the Civil Contractors Federation, and the Australian Council of Trade Unions.
>
> The Review was also informed by public submissions provided in response to a discussion paper that was published on the Department of Employment's website. Emails inviting submissions were sent to all companies accredited under the Accreditation Scheme, state and territory work health and safety regulators, Safe Work Australia and a range of industry representatives.
>
> …
>
> Because the Regulation implements recommendations from the Review and extensive consultation occurred throughout the Review process, it was reasonably considered that any further consultation on the draft Regulation would be unnecessary if not excessive in the circumstances.

The minister also provided a copy of the review and a link to the review webpage including access to the full list of submissions.

The minister further advised that the ES would be updated in accordance with the committee's request.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its examination of the instrument.

Appendix 1
Correspondence

Assistant Treasurer

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House, Canberra
copy to: regords.sen@aph.gov.au

Dear Senator Williams

Thank you for the Senate Standing Committee on Regulations and Ordinances (the Committee)'s letter of 4 December 2014 concerning *Delegated legislation monitor No 17* of 2014, which raises concerns about ASIC Class Order [CO14/1118].

Shorter PDS regime

ASIC Class Order [CO14/1118] extends regulatory relief from the shorter Product Disclosure Statement (PDS) regime, originally granted in ASIC Class Order [CO12/749], by a year to 30 June 2016. The shorter PDS regime is contained in a legislative instrument, the *Corporations Regulations 2001*, and acts as an alternative regime to the PDS requirements in the primary legislation, the *Corporations Act 2001*.

The shorter PDS regime applies to simple managed investment schemes (MIS). Whether a MIS is simple depends on whether it meets one of the liquidity tests, for example, whether 80 per cent of its assets in investments could be realised at market value within ten days.

As presently defined, the term 'simple MIS' inadvertently captures MIS which are liquid but would not be considered simple. This includes some superannuation platforms, multi-funds and hedge funds. The shorter PDS regime may be inappropriate for these more complex MIS and further work is required to determine whether and how the shorter PDS regime should apply. For this reason, the former Government provided exemptions for each of these categories of MIS from the shorter PDS regime in 2012.

I note the Committee's request for advice as to the progress of the Governments work on application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds, and on the appropriateness of continuing to provide relief from the shorter PDS regime via legislative instrument.

Response to the Committee's request

For the reasons which follow, I consider that it is appropriate to continue providing relief from the shorter PDS regime through ASIC Class Order [CO14/1118].

Parliament House Canberra ACT 2600
Australia
Telephone: 02 6277 7360 Facsimile: 02 6273 4125

As the Committee notes in its *Delegated legislation monitor No 17* of 2014, the regulatory relief provided in Class Order [CO14/1118] was extended pending the outcome of the Financial System Inquiry (the Inquiry), and the Government's work on application of the shorter PDS regime to more complex MIS.

The Government was unable to progress this work whilst the Inquiry was ongoing as the Inquiry may have recommended significant changes to the existing disclosure regime. The Inquiry's Final Report was released on 7 December 2014. The Government announced that it intends to consult on the Inquiry's final report before making any decisions on the recommendations. Written submissions will be accepted until 31 March 2015.

I understand the Committee's preference that relief from compliance with an Act which is effected via legislative instrument does not operate as a de facto amendment to primary legislation. In this case, ASIC Class Order [CO14/1118] effectively restores the operation of the primary legislation, the *Corporations Act 2001*, providing relief from the alternative regime provided for in the *Corporations Regulations 2001*.

I hope this answers your enquiries. Should you require further information in relation to this matter, please contact my office.

Kind regards

JOSH FRYDENBERG

FairWork Commission

24 February 2015

Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Powell

Fair Work Commission Reporting Guidelines for the purposes of section 253 of the *Fair Work (Registered Organisations) Act 2009* [F2014L01755]

I refer to your correspondence of 12 February 2015 regarding the Fair Work Commission Reporting Guidelines (the instrument) for the purposes of section 253 of the *Fair Work (Registered Organisations) Act 2009* (the Act) and thank-you for the opportunity to provide further information.

As explained in Monitor No.1 of 2015 of the Delegated Legislation Monitor, the instrument determines reporting obligations for reporting units to which the Act applies, and it applies to each financial year of a reporting unit that ends on or after 30 June 2014. The monitor suggests that the instrument applies to the 2013-14 financial year and therefore may be regarded as being retrospective in effect. While I acknowledge that the instrument may appear to be retrospective, its actual effect is prospective, as explained below.

The instrument sets out specific disclosures that must be made in the General Purpose Financial Report (GPFR) of reporting units. Section 253 of the Act requires a reporting unit to prepare a GPFR as soon as practicable after the end of the financial year. Although a GPFR prepared for a financial year ending 30 June 2014 contains information about financial transactions that occurred prior to 30 June 2014, the GPFR cannot be prepared until after 30 June 2014. The instrument therefore imposes obligations on reporting units that have no effect until after 30 June 2014.

The Commission consulted with all registered organisations in the development of the instrument and most comments of the reporting units have been included. The Commission has also advised every reporting unit of the requirements, and provided a model set of financial statements to all reporting units to ensure that the requirements of the instrument are satisfied. Of the 274 reporting units with a financial year ending 30 June 2014, all but eight have lodged their financial report with the Commission, or have sought an exemption. Our assessment of the GPFR's lodged is that most reporting units have satisfied the requirements of the instrument. This illustrates that there is significant acceptance of and support for the requirements of the instruments.

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In summary the effect of the reporting guidelines is prospective, applying to GPFRs prepared after 30 June 2014. Also, our consultative and educative mechanisms as well as the reports already lodged with the Commission indicate significant acceptance of and support for the requirements of the instrument.

Yours sincerely

Bernadette O'Neill
General Manager

Minister for Small Business

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

Dear Senator John,

I refer to the letter of 12 February 2015 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding the Competition and Consumer (Monitoring of Prices, Costs and Profits) Repeal Direction 2014 (the Repeal Direction).

I note the Committee's comments contained in the report, *Delegated legislation monitor* No. 1 of 2015, that the information regarding consultation in the Explanatory Statement to the Repeal Direction is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2013* (LIA). I understand that you have requested further information on this issue and that the Explanatory Statement be updated accordingly to satisfy the requirements of the LIA.

As outlined below, I considered that public consultation was unnecessary as the Repeal Direction does not substantially alter existing arrangements.

The *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* and the price monitoring Direction under s95ZE of the *Competition and Consumer Act 2010*

The Repeal Direction revoked the price monitoring Direction made on 18 February 2014 under section 95ZE of the *Competition and Consumer Act 2010* (CCA).

The price monitoring Direction, which commenced on 1 March 2014, was introduced given delays in the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (the Carbon Tax Repeal Act). It directed the Australian Competition and Consumer Commission (ACCC) to undertake formal monitoring of the prices, costs and profits relating to the supply of regulated goods by corporations and the supply of goods by liable entities, to assess the general effect of the carbon tax scheme in Australia prior to its repeal (*Federal Register of Legislative Instruments No.F2014L00180*).

The price monitoring Direction was drafted to largely mirror the price monitoring provisions of the Carbon Tax Repeal Bill. As outlined in the Explanatory Statement to the price monitoring Direction, consultation on these arrangements occurred as part of extensive public consultation on the Exposure Draft of the Bill from 15 October 2013 to 4 November 2014. The provisions of the Bill were also examined by the Environment and Communications Legislation Committee Inquiry following referral by the Senate on 14 November 2014.

Parliament House CANBERRA ACT 2600
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The Carbon Tax Repeal Act, which took effect from 1 July 2014, introduced new powers for the ACCC to monitor the prices of certain goods to assess the general effect of the carbon tax scheme and its repeal. This included powers to monitor prices to assess the effect of the carbon tax repeal on prices charged by entities for supplies in the carbon tax repeal transition period (from 1 July 2014 to 30 June 2015) and to assist in considering whether an entity has engaged, is or may engage in price exploitation (section 60G of the CCA).

In effect, the repeal of the carbon tax scheme made the price monitoring Direction redundant. Its revocation by the Repeal Direction imposes no regulatory change on affected businesses as the reporting obligations have continued through the introduction of section 60G, while any perceived regulatory burden by having two monitoring regimes in place has been reduced.

Consultation on the Competition and Consumer (Monitoring of Prices, Costs and Profits) Repeal Direction 2014

I note that section 17 of the LIA 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, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate', including when the instrument is of a minor or machinery nature or does not substantially alter existing arrangements.

While there was consultation with the ACCC on the Repeal Direction, I considered that public consultation was unnecessary as the revocation of the instrument did not substantially alter existing arrangements for which there was extensive public consultation through the Exposure Draft of the Carbon Tax Repeal Bill.

The Explanatory Statement to the Repeal Direction has been updated accordingly in line with the requirements of the LIA.

Thank you for bringing this issue to my attention. I trust that the Committee's concerns have been fully addressed.

Yours sincerely

BRUCE BILLSON

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

25 FEB 2015

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

Dear Chair John,

Thank you for your letter of 12 February 2015 concerning consultation on the Fair Work (Building Industry—Accreditation Scheme) Amendment Regulation 2014. You requested that I provide further information regarding the nature of consultation that was carried out before the making of the Regulation.

As noted in the explanatory statement, the Regulation implements the Australian Government's decision to accept all recommendations of a recent review of the Australian Government Building and Construction Work Health Safety Accreditation Scheme, with two minor adjustments. 'A review to modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme' identified options for streamlining and modernising the Scheme and to reduce any unnecessary regulatory burdens on builders.

The Review was conducted by the Department of Employment supported by an advisory panel of industry groups, unions and interested parties including Master Builders Australia, the Australian Constructors Association, the Australian Industry Group, the Civil Contractors Federation, and the Australian Council of Trade Unions.

The Review was also informed by public submissions provided in response to a discussion paper that was published on the Department of Employment's website. Emails inviting submissions were sent to all companies accredited under the Accreditation Scheme, state and territory work health and safety regulators, Safe Work Australia and a range of industry representatives.

A full list of submissions and further information on the process of the Review may be accessed in the Review document at www.fsc.gov.au/sites/fsc/resources/az/pages/scheme-review-2014-documents.

For the Committee's convenience, please find attached a copy of the Review.

CANBERRA: MG 68, Parliament House, Canberra ACT 2600. Phone: 02 6277 7320 Fax: 02 6273 4115
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minister@employment.gov.au http://abetz.com.au

Because the Regulation implements recommendations from the Review and extensive consultation occurred throughout the Review process, it was reasonably considered that any further consultation on the draft Regulation would be unnecessary if not excessive in the circumstances. I note the Committee's request that this be made clearer in an updated explanatory statement and assure the Committee that this will occur as a matter of priority.

Thank you for your consideration of the Regulation and for sharing concerns about the explanatory statement. I trust the information provided is helpful.

Yours sincerely

ERIC ABETZ

Encl.

Australian Government

Department of Employment

A REVIEW TO MODERNISE THE OFFICE OF THE FEDERAL SAFETY COMMISSIONER AND THE AUSTRALIAN GOVERNMENT BUILDING AND CONSTRUCTION OHS ACCREDITATION SCHEME

June 2014

Executive Summary

Background

The Australian Government Building and Construction OHS Accreditation Scheme (the Scheme) was established by the Australian Government (the Government) in 2006 in response to the Cole Royal Commission's conclusion that the safety record in the building and construction industry was unacceptable. It recommended that the Government use its influence as a client and provider of capital to foster improved performance.

The Government established the Office of the Federal Safety Commissioner (OFSC) to develop, implement and administer the Scheme to apply to Government building and construction work. Only companies accredited under the Scheme are eligible to undertake Commonwealth Government funded building projects above certain financial thresholds (outlined in the section titled 'Current Thresholds'). The 321 currently accredited companies are estimated to account for 30 to 50 per cent of annual financial turnover in the building industry.

In October 2013, the Government, while strongly supporting the Scheme, asked the Department of Employment (the Department) to undertake a review to identify options for streamlining and modernising the Scheme, and to reduce any unnecessary regulatory or compliance burdens on building firms. Importantly, these factors have been considered with a view to at least maintaining the safety outcomes fostered by the Scheme. Terms of Reference of the Review are at Attachment A.

The Review, the most comprehensive undertaken since the Scheme commenced, was informed by an Advisory Panel comprising representatives of key industry associations, unions, government agencies and the Federal Safety Commissioner (FSC). Advisory Panel members consulted within their organisations and consolidated their members' views to provide feedback and advice on possible options for change.

Submissions were sought (with 47 received) in response to a Discussion Paper released on 28 February 2014. A survey of all accredited companies (the Survey) was also undertaken, with more than 40 per cent responding (126 companies), which provided the Department and the Advisory Panel with valuable insights into the experience of companies in gaining and maintaining accreditation.

Findings

There was general agreement that the Scheme sets the highest standards for safety in the industry in Australia, but concerns were raised about costs and value for money, particularly for small and medium-sized companies.

On the benefits side, more than 80 per cent of accredited companies that responded to the Survey stated that the Scheme has improved their safety standards beyond the level they would otherwise have been, with more than 94 per cent of small companies having that view. Fewer than 14 per cent of respondents thought that the Scheme had not improved safety across the industry more broadly.

However, the majority of industry associations and many companies consider that more can be done to address barriers and costs (both actual and perceived) of participating in the Scheme. Overall, 60 per cent of accredited companies thought the Scheme represented value for money, with this figure rising to 80 per cent for companies that have achieved accreditation since streamlined application processes were introduced in early 2013.

In order for the Scheme to remain relevant and effective in driving safety improvements in the industry, it is important that the administrative procedures and practices, and the coverage of

the Scheme, be re-assessed. This is particularly important in the context of the Government's deregulation agenda, the economic imperative of increased industry productivity and consideration of improved regulatory approaches such as those canvassed recently by the Productivity Commission[1].

A further fiscal imperative is to ensure resources for the administration of the Scheme by the OFSC are applied to maximum effect. The current "one size fits all" standard approach to compliance monitoring is neither sustainable (as more companies become accredited) nor effective in targeting the resources of the OFSC to areas of greatest need and potential benefit.

Regulatory burdens and compliance costs could be addressed in three main ways:

- The coverage of the Scheme could be changed.
- Some current paperwork and compliance requirements could be removed or streamlined, which could be done in conjunction with a more targeted, risk-based approach.
- Actual and perceived barriers to achieving accreditation could be reduced by ensuring the Scheme is more accessible and scalable for any building company (for example, regardless of size).

The coverage of the Scheme, while considered "about right" by most stakeholders, could be amended in two main ways:

- Changing the financial thresholds to which it applies
- Changing the definition of building work that it covers.

On balance, given that most industry associations and other stakeholders think the thresholds are "about right", it is recommended that they only be indexed to take account of price movements since they were established. In this way the coverage of the Scheme would not be expanded in real terms.

Some changes to the definition of building work covered by the Scheme are also recommended; specifically in relation to the construction of individual domestic houses (ie. not multi-unit or townhouse developments etc.). This balances the competing social and other objectives of Government programmes in the residential sector (such as in Indigenous communities) with the need to maintain the integrity of the Scheme and equity for accredited builders.

This report identifies a number of opportunities to reduce barriers to entry and unnecessary regulatory impacts on businesses in achieving accreditation, while maintaining or improving safety standards and outcomes across the industry. These include removing the duplicative, costly and time-consuming requirement for AS/NZS 4801:2001, which is seen by many as creating a significant barrier for small builders.

It is proposed that unaccredited companies be permitted to tender for Commonwealth Government funded work where they are in a joint venture with an accredited company, and work under the accredited company's safety systems.
The Review also responds to the strong feedback that a range of improvements in communication and guidance for companies (particularly smaller companies) seeking first time accreditation should be introduced.
The Review proposes that the reaccreditation process be removed entirely and a targeted risk-based approach be introduced to manage ongoing accredited company audits and compliance,

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[1] Productivity Commission, Regulator Audit Framework, May 2014

all the while maintaining an appropriate balance between reducing red tape and not reducing safety outcomes. Resource constraints in recent years have meant that some companies go through a three year accreditation period without any periodic maintenance audit check but are then subjected to multiple audits within a short timeframe at the reaccreditation stage. A targeted risk-based approach will provide the certainty of regular, periodic maintenance audits for good performers and allow an increased focus (including more regular auditing) for those companies not meeting Scheme requirements. This will lead to an increased focus on those companies not performing well, while benefitting those companies with a good track record, by directing greater audit resources to higher-risk companies.

These proposals address all five key areas recommended by the Productivity Commission[2], namely

- clear and effective communication
- risk-based requirements and proportionate actions
- consistency in decision making, the application of rules, and engagement with clients or stakeholder
- accountability and transparency in actions
- a commitment to continuous improvement, including acting on findings in regard to the need for and effectiveness of the regulation.

Furthermore, they will improve safety outcomes by increasing the auditing resources that can be applied to those companies most needing support, while reducing the burden on companies with a strong record of safety and adherence to Scheme requirements. Importantly, the recommendations will not reduce the high level of safety standards required by the Scheme.

Recommendations

The Review makes the following recommendations:

Coverage of Scheme

1. The thresholds applying to the Scheme for directly and indirectly funded building work be increased from $3 million and $5 million to $4 million and $6 million respectively.

2. The thresholds applying to the Scheme be adjusted for price movements in the building industry every three years.

3. The Scheme not be applied to the pre-fabrication of made-to-order components carried out off site, nor to the transport and supply of goods directly to building sites for the purposes of building work.

4. For residential projects, the Scheme only be applied to those projects comprising the construction of 10 or more single dwellings, regardless of contract value.

5. The Scheme not be applied to the refurbishment of, nor extensions or alterations to, single dwellings regardless of the number of dwellings or the contract value (so long as they remain single dwellings).

6. The Scheme continues to apply consistently with no individual exemptions for particular agencies, industry sectors, projects or regions.

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[2] Productivity Commission, Regulator Audit Framework, May 2014

Costs

7. The Government continues to meet OFSC costs, including for accreditation and compliance audits, with no charge to companies.

Becoming Accredited

8. Certification to AS/NZS 4801:2001 or OHSAS 18001:2007 ceases to be a prerequisite for companies applying for accreditation.

9. The OFSC streamlines the application process and improves ease of access for companies seeking accreditation, including the development of an online application and self-assessment tools.

10. The OFSC, in consultation with stakeholders, investigates and develops an approach that would allow unaccredited companies to tender for Scheme projects where they are in a joint venture with an accredited company and operate under the partner's accredited safety system.

11. The OFSC, in consultation with stakeholders, undertakes a review of the audit criteria and associated guidance, including the clarification of Safe Work Method Statements (SWMS) requirements.

Maintaining Accreditation

12. The current reaccreditation process be abolished, including all associated paperwork and other red tape requirements. Companies' accreditations to continue indefinitely, subject to satisfactory compliance with Scheme requirements.

13. The OFSC, in consultation with relevant stakeholders, develops a risk-based approach to maintaining accreditation that tailors ongoing frequency and scope of audits for accredited companies to ensure ongoing compliance with Scheme requirements.

14. The OFSC review its reporting requirements to identify ways in which data collected can be compared with wider industry data. That the data collected be published in a way that assists companies to benchmark their own performance with other accredited companies and the industry more broadly. The OFSC supplies data analysis directly to accredited companies.

15. The OFSC, in consultation with stakeholders, develops and publishes case studies that provide practical examples of best practice initiatives to assist companies to self-educate for WHS improvements.

OFSC Performance

16. The OFSC sets and publishes its performance against KPIs for its processes.

17. The OFSC, in consultation with stakeholders, identifies means by which companies' concerns can be raised through a third party mechanism, such as an industry association, so that the concerns can be addressed by the OFSC.

18. The OFSC implements and publishes an annual survey of accredited companies that gathers Scheme-related safety and cost-benefit data, and feedback on FSO/OFSC performance.

19. The OFSC, in conjunction with stakeholders, implements enhanced arrangements to further monitor and improve the quality and consistency of FSO auditing performance, including the way in which FSOs are engaged by the Department.

20. The Scheme be reviewed at least every five years.

Australian Government Agencies

21. The OFSC works with Government agencies to identify ways in which they are able to provide advice to the OFSC of (a) the nature and location of upcoming Scheme tender processes - at least 3 months in advance, (b) commencement of tender processes and (c) signing of contracts.

22. The Government identifies and progresses further opportunities that exist at Commonwealth, state and territory levels to recognise the Scheme in lieu of other prequalification requirements.

23. The Government considers ways in which there can be greater clarity across funding agencies around construction industry procurement requirements.

Subcontractors

24. The OFSC facilitates the development of information to assist Scheme-accredited principal contractors to provide consistent communication with subcontractors in relation to the subcontractor management elements of the Scheme.

International Companies

25. The OFSC discusses with Austrade and the Department of Infrastructure (and other relevant agencies) whether further changes should be made to the Scheme's arrangements for international companies, while ensuring competitive neutrality for local companies.

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 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:

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