

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published during 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.

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore

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

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 **13 May 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 disallowable instruments received between 6 March 2015 and 2 April 2015. All instruments examined in this period are listed on the Senate Disallowable Instruments List.¹

New matters

Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 [F2015L00265]

Purpose	Makes provision for the Federal Circuit Court to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW
Last day to disallow	18 June 2015
Authorising legislation	<i>Federal Circuit Court of Australia Act 1999</i>
Department	Attorney-General's

Issue:

Incorporation of extrinsic material

The *Federal Circuit Court of Australia Act 1999* (the Act) confers jurisdiction on the Federal Circuit Court of Australia to hear and determine Commonwealth tenancy disputes between the parties to a lease, licence or arrangement. This instrument is made under subsection 10AA(3) of the Act, which gives the minister the power, by legislative instrument, to make provision for and in relation to various specified matters in respect of a Commonwealth tenancy dispute. Sections 5, 6, 7 and 8 of the

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

instrument reference the *Residential Tenancies Act 2010* (NSW) in relation to a Commonwealth tenancy dispute involving land in NSW. In this regard, the explanatory statement (ES) for the instrument states:

The Instrument applies the above legislation as in force from time to time. This ensures tenants are not disadvantaged by having their matter heard in the FCC [Federal Circuit Court] compared to the Tribunal as the Tribunal applies the legislation as in force from time to time when determining tenancy disputes, rather than at a particular point in time. Subsection 10AA(3) of the Act authorises the Instrument to make provision in relation to the law to be applied in determining the Commonwealth tenancy dispute and any modifications of the law to be applied.

Subsection 14(1)(a) of the *Legislative Instruments Act 2003* provides that a legislative instrument may incorporate by reference 'the provisions of any Act, or of any disallowable legislative instrument...as in force from time to time'. However, the committee notes that there is nothing in the instrument that expressly provides that the NSW law is applied 'as in force from time to time'. The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument (in addition to the ES). The committee regards this as a best-practice approach that enables persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice or to necessarily consult extrinsic material. **The committee therefore draws this matter to the attention of the Attorney-General.**

Spent and Redundant Instruments Repeal Regulation 2015 (No. 1) [F2015L00297]

Purpose	Repeals instruments that are spent or not otherwise required
Last day to disallow	23 June 2015
Authorising legislation	<i>Legislative Instruments Act 2003</i>
Department	Attorney-General's

Issue:

Mass repeal of redundant instruments under the Legislative Instruments Act 2003

The instrument repeals 160 legislative instruments (and individual provisions or parts of two legislative instruments) that are either spent or not otherwise required. These include amending and repealing instruments that have no further effect because they have fulfilled their purpose. Mass repeal of such instruments was enabled by amendments to the *Legislative Instruments Act 2003* in 2012. **The committee notes the mass repeal of redundant legislative instruments.**

Radiocommunications Licence Conditions (Temporary Community Broadcasting Licence) Determination 2015 [F2015L00286]

Purpose	Sets out conditions that apply to apparatus licensed transmitters. The conditions relate to permitted communications, the exposure of the general public to electromagnetic radiation of emission, and the management of harmful interference caused by transmitters used to provide temporary community broadcasting services
Last day to disallow	22 June 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications

Issue:

Incorporation of extrinsic material

This determination revokes and replaces the Radiocommunications Licence Conditions (Temporary Community Broadcasting Licence) Determination 2003, which was due to 'sunset' (that is, be automatically repealed) on 1 April 2015 by operation of Part 6 of the *Legislative Instruments Act 2003*. The instrument incorporates or otherwise refers to a number of documents, which, in line with the committee's expectation that an ES explain the purpose and operation of the instrument,² are described in the ES.³ However, the committee notes that two documents—AS/NZS 2772.1 (Int):1998 Radiofrequency fields Part 1: Maximum exposure levels—3 kHz to 300 GHz; and AS/NZS 2772.2 Radiofrequency fields Part 2: Principles and methods of measurement and computation—3 kHz to 300 GHz—while listed in the ES, do not appear to be incorporated or otherwise referenced. **The committee therefore draws this matter to the attention of the minister.**

2 See section 26 (1A)(b), *Legislative Instruments Act 2003*.

3 The *Legislative Instruments Act 2003* provides that extrinsic material may be incorporated into instruments of delegated legislation; and that non-legislative material can generally be incorporated as in force at a particular date (as opposed to being incorporated as in force 'from time to time'): see section 14, *Legislative Instruments Act 2003*.

National Health (Price and Special Patient Contribution) Amendment Determination 2015 (No. 2) (PB 27 of 2015) [F2015L00333]

Purpose	Provides for price determinations in relation to brands of pharmaceutical items for which the minister and the responsible person have not been able to make a price agreement. It also provides for the circumstances in which the Commonwealth will pay the special patient contribution resulting from these price determinations
Last day to disallow	13 August 2015
Authorising legislation	<i>National Health Act 1953</i>
Department	Health

Issue:

Description of 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 states:

This determination affects certain responsible persons with medicines listed on the PBS. Before a pharmaceutical benefit is listed on the PBS, and from time to time thereafter, price negotiations occur between the responsible person and the Minister for the purpose of reaching a price agreement for section 85AD of the Act. If the Minister and the responsible person cannot agree on a price, further consultation occurs with the responsible person, and thereafter the Minister determines the price that will be the approved ex-manufacturer price for the brand. The Minister also determines the corresponding price claimed by the responsible person which is used to calculate the special patient contribution that will apply to the brand.

In the committee's view, the statement above describes the process of negotiation between the minister and the responsible person in relation to their commercial interest, as opposed to a process of consultation with persons likely to be affected by the instrument or to draw on relevant expertise. In effect, it appears that consultation (within the general meaning of public consultation or consultation with experts or stakeholders) was unnecessary in this instance because the price determination essentially reflects the outcome of a negotiation over price. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee

considers it would be better for the ES to have explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case. **The committee therefore draws this matter to the attention of the minister.**

Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 [F2015L00335]

Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 [F2015L00336]

Purpose	Declares that a ship or vessel only engaged in intra-state trade will be subject to the work health and safety legislation of the state in which they operate
Last day to disallow	13 August 2015
Authorising legislation	<i>Occupational Health and Safety (Maritime Industry) Act 1993;</i> and <i>Seafarers Rehabilitation and Compensation Act 1992</i>
Department	Employment

Issue:

Relationship of instruments to Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015

The Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 declares that a certain type of ship which is only engaged in intra-state trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992*.

The Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 prescribes ships or vessels only engaged in intra-state trade as non-prescribed ships or units for the purposes of the *Occupational Health and Safety (Maritime Industry) Act 1992*.

The committee notes that key elements of the instruments may be described as 'mirroring' amendments in a bill, being the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill). The bill passed the House of Representatives in February 2015 and passed the Senate with amendments on 13 May 2015. However, the ESs for the instruments provide no information as to their relationship with the bill and, particularly, the reason for introducing these changes via regulation while the bill was still before the Parliament. **The committee therefore requests the advice of the minister in relation to this matter.**

Migration Amendment (2015 Measures No. 1) Regulation 2015 [F2015L00351]

Purpose	Amends the Migration Regulations 1994 in relation to work related conditions for foreign air crew, English language test requirements, character and cancellation, sponsorship obligation timeframes, medical examination requirements and legislative instrument for application requirements
Last day to disallow	13 August 2015
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection

Issue:

Retrospective effect of the instrument

Schedule 2 to the instrument amends the Migration Regulations 1994 (the regulations) to implement changes to English language requirements for multiple visa subclasses.⁴ The ES states that the amendments correct a legislative anomaly and are intended to make the English language requirements more flexible.

Schedule 3 makes a number of consequential amendments to regulation 2.55(1)(b) and Public Interest Criterion (PIC) 4013 of the regulations, related to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and the Migration Amendment (2014 Measures No. 2) Regulation 2014, which came in to effect in 2014.

Schedule 5 to the instrument repeals clause 485.214 of the regulations, which provided that Subclass 485 visa applicants must provide evidence of having made arrangements for a medical examination, for the purpose of their application. The ES explains that this is to remove an inconsistency between that clause and PIC 4005, which sets out circumstances in which a medical assessment would have to be undertaken, but does not require an examination to be arranged in every case.

Schedule 7 of the instrument provides that the amendments made by Schedules 2, 3 and 5 apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (18 April 2015), as well as applications made on or after that day.

The committee notes that, although the instrument is not strictly retrospective, the new criteria prescribe rules for the future based on antecedent facts (that is, the existence of

4 Skilled – Recognised Graduate (subclass 476) visa, the Temporary Graduate (subclass 485) visa, as well as the range of points-tested skilled visa subclasses: Skilled – Independent (Permanent) (subclass 189), Skilled – Nominated (Permanent) (subclass 190) and Skilled – Regional (Provisional) (subclass 489).

an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 18 April 2014 may now be subject to one or more new criteria at the time of the visa decision. The committee's usual approach to such cases is to regard them as being retrospective in effect, and 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 therefore that the statement of compatibility would address the question of the instrument's retrospective effect and provide a justification for this approach (particularly where a person's rights or liberties may be adversely affected). However, in this case the committee notes that the amendments appear to contain appropriate exemptions or to be beneficial in their effect. **The committee therefore draws this matter to the attention of the minister.**

Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015 [F2015L00356]

Purpose	Amends the Autonomous Sanctions Regulations 2011 to implement autonomous sanctions measures announced by the Prime Minister on 1 September 2014 in response to the Russian threat to the sovereignty and territorial integrity of Ukraine
Last day to disallow	13 August 2015
Authorising legislation	<i>Autonomous Sanctions Act 2011</i>
Department	Foreign Affairs and Trade

Issue:

Drafting

The committee notes that the instrument is identified as made under the *Autonomous Sanctions Act 2011*. However, neither the instrument nor the ES appear to identify the specific provision of that Act that is relied on to make the instrument.

The committee's usual expectation is that an instrument or its ES identify the provision of the enabling legislation which authorises the making of the instrument, in the interests of promoting clarity and intelligibility of the instrument to anticipated users. **The committee therefore requests the advice of the minister in relation to this matter.**

Textile, Clothing and Footwear Investment and Innovation Programs Regulation 2015 [F2015L00362]

Purpose	Sets out the types of information that must be included in an identity card issued to an authorised officer
Last day to disallow	13 August 2015
Authorising legislation	<i>Textile, Clothing and Footwear Investment and Innovation Programs Act 1999.</i>
Department	Industry and Science

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 the ES for this instrument states only that 'no consultation has been required in making this Regulation', with no explanation as to why consultation was considered unnecessary or inappropriate in this case. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee's expectations in this regard are set out in the Guideline on consultation in Appendix 2 of this report. **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*.**

National Measurement Amendment (Fee Indexation) Regulation 2015 [F2015L00372]

Purpose	Amends the National Measurement Regulations 1999 to insert an indexation provision to which all fees for activities undertaken in respect of examination and certification of patterns of volume measuring instruments increase each financial year
Last day to disallow	13 August 2015
Authorising legislation	<i>National Measurement Act 1960</i>
Department	Industry and Science

Issue:

Description of 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 states:

The National Measurement Institute will inform stakeholders and industry of these amendments prior to their taking effect by posting an update on their website and writing to stakeholders with a current application.

The National Measurement Institute has also consulted with the Office of Best Practice Regulation and they have advised that a Regulation Impact Statement was not required for these amendments (OBPR ID 16934).

In the committee's view, the statement above does not describe a process of consultation but rather the intention to advise stakeholders and industry of the effect of the amendments subsequent to the making of the instrument. Similarly, the committee does not consider the process of ascertaining the necessity of a Regulatory Impact Statement for an instrument as strictly relevant to the question of consultation under the *Legislative Instruments Act 2003*.

In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have explicitly stated, with a supporting explanation, that consultation was considered unnecessary or

inappropriate in this case. **The committee therefore draws the matter to the minister's attention.**

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370]

Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority in Schedule 1AB for spending activity by the Department of Health
Last day to disallow	13 August 2015
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance

Background:

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

Issue:

Addition of matter to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 – 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 principal rather than delegated legislation).

The instrument adds one new item to Part 3 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Health. Item 6 of the instrument allocates \$15 million over two years (\$7.5 million in 2014-15 and \$7.5 million in 2015-16) to support the construction of a replacement training and administration base for the Gold Coast Suns Australian Football League (AFL) team at Metricon Stadium, so as to enable the site of the team's existing training and administration base to be used in connection with the 2018 Commonwealth Games.

In the committee's view, the item appears to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the item should 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 this 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 construction of a replacement training and administration base for the Gold Coast Suns AFL team.

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.⁵

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

Telecommunications (Section of the Telecommunications Industry – Cabling Service Operators) Determination 2015 [F2015L00291]

Greenhouse and Energy Minimum Standards (Registration Fees) Instrument 2015 [F2015L00302]

Civil Aviation Order 20.18 Amendment Instrument 2015 (No. 1) [F2015L00311]

Social Security (Deeming Threshold Rates) Determination 2015 (No. 1) [F2015L00312]

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

Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No.1) [F2015L00324]

Private Health Insurance (Complying Product) Amendment Rules 2015 (No. 1) [F2015L00325]

Aviation Transport Security (Incident Reporting) Instrument 2015 [F2015L00378]

Manual of Standards Part 173 Amendment Instrument 2015 (No. 1) [F2015L00381]

Telecommunications (Carrier Licence Charges) Act 1997 - Repeal of determinations made under paragraph 15(1)(b) [F2015L00418]

National Health (Claims and under co-payment data) Amendment (Medication Chart Prescriptions) Rule 2015 (PB 19 of 2015) [F2015L00437]

National Health (Payments for prescriber bag supplies) (Repeal) Determination 2015 (PB 25 of 2015) [F2015L00441]

National Health (Pharmaceutical benefits supplied under section 93A(4)) (Repeal) Determination 2015 (PB 21 of 2015) [F2015L00445]

National Health (Residential Medication Chart) (Repeal) Determination 2015 (PB 20 of 2015) [F2015L00446]

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **13 May 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.

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	<i>Corporations Act 2001</i>
Department	Treasury

[The committee first reported on this instrument in *Delegated legislation monitor No. 2 of 2015*]

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 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 requested further information from the minister (as to the justification for this approach)].

MINISTER'S RESPONSE:

The Parliamentary Secretary to the Treasurer advised that the instrument did not have a retrospective effect for the following reasons:

Paragraph Aus4.2 specifies the mandatory application of AASB 15, which is annual reporting periods beginning on or after 1 January 2017. Accordingly, AASB 15 does not have mandatory retrospective application;

Paragraph Aus4.3 states that entities can elect to apply AASB 15 to financial statements for periods beginning before 1 January 2017, provided that those financial statements are not yet completed;

The transition paragraphs C2-C8 relate only to comparative information presented in the financial statements for the period when AASB 15 is first applied by an entity. Thus, paragraph C3 applies mandatorily only to the comparative information presented for an entity's first period beginning on or after 1 January 2017, unless the entity elects to apply AASB 15 earlier, in which case paragraph C3 applies to the comparative information presented in the financial statements for that earlier period.

The specification of these dates is in accordance with section 334(4) and (5) of the *Corporations Act 2001* which address the periods to which an accounting standard may be expressed to apply, and the election by entities for earlier application at their discretion.

Please note that, restating comparative information in financial statements does not require the completed financial statements (if any) for the comparative periods to be altered in any way. Accordingly, requiring the restatement of comparative information in financial statements does not amount to retrospective operation of an accounting standard under the *Corporations Act 2001*.

COMMITTEE RESPONSE:

The committee thanks the Parliamentary Secretary to the Treasurer for her response and has concluded its examination of the instrument.

Appendix 1

Correspondence



THE HON KELLY O'DWYER MP
Parliamentary Secretary to the Treasurer

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House, Canberra

Dear Senator Williams

I refer to your letter of 5 March 2015 to the Assistant Treasurer requesting a response in relation to issues identified in the Senate Standing Committee on Regulations and Ordinances's (the Committee) *Delegated legislation monitor* No. 2 of 2015 regarding **AASB 15 Revenue from Contracts with Customers**.

The Committee drew attention to the possible retrospective application of the proposed standard. In my opinion AASB 15 does not have this effect for the following reasons:

- Paragraph Aus4.2 specifies the mandatory application of AASB 15, which is annual reporting periods beginning on or after 1 January 2017. Accordingly, AASB 15 does not have mandatory retrospective application;
- Paragraph Aus4.3 states that entities can elect to apply AASB 15 to financial statements for periods beginning before 1 January 2017, provided that those financial statements are not yet completed;
- The transition paragraphs C2-C8 relate only to comparative information presented in the financial statements for the period when AASB 15 is first applied by an entity. Thus, paragraph C3 applies mandatorily only to the comparative information presented for an entity's first period beginning on or after 1 January 2017, unless the entity elects to apply AASB 15 earlier, in which case paragraph C3 applies to the comparative information presented in the financial statements for that earlier period.
- The specification of these dates is in accordance with section 334(4) and (5) of the *Corporations Act 2001* which address the periods to which an accounting standard may be expressed to apply, and the election by entities for earlier application at their discretion.

Please note that, restating comparative information in financial statements does not require the completed financial statements (if any) for the comparative periods to be altered in any way. Accordingly, requiring the restatement of comparative information in financial statements does not amount to retrospective operation of an accounting standard under the *Corporations Act 2001*.

I hope this addresses the Committee's concerns. If the Committee requires further information please contact Mr Bruce Donald, Senior Adviser, Treasury on 6263 3148 or by email on bruce.donald@treasury.gov.au.

Yours sincerely

/Kelly O'Dwyer

02 APR 2015

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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