

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

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

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

The committee's terms of reference

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

- (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.

The committee shall scrutinise each instrument to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal;
and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

Work of the committee

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

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; and
- 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 **24 June 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 received between 1 May 2015 and 28 May 2015. All instruments examined in this period are listed on the Senate Disallowable Instruments List.¹

New matters

Marine Order 11 (Living and working conditions on vessels) 2015 [F2015L00609]

Purpose	Gives effect to the International Labour Organization's Maritime Labour Convention 2006 and the International Marine Organization's Code on noise levels on board ships; and also prescribes additional requirements for living and working conditions on regulated Australian vessels
Last day to disallow	13 August 2015
Authorising legislation	<i>Navigation Act 2012</i>
Department	Infrastructure and Regional Development

Issue:

Incorporation of extrinsic material

This order repeals and replaces Marine Order 11 (living and working conditions) on vessels 2013, which was due to 'sunset' (that is, be automatically repealed) on 1 May 2015. The instrument incorporates a number of documents, which, in line with the committee's expectation that an explanatory statement (ES) explain the purpose and operation of the instrument, are listed in the ES as documents incorporated by reference.

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

First, the committee notes that the document, Marine Order 15 (construction – fire protection, fire detection and fire extinction) 2014 is included in the list of incorporated documents in the ES. However, this differs to the date of Marine Order 15 referenced in the instrument at schedule 4, item 5(a), which refers to Marine Order 15 (construction – fire protection, fire detection and fire extinction) 2009. While it appears likely that the latter document is intended to be incorporated, it is unclear to the committee on a reading of the instrument and the ES what the intention of the rule-maker was in this regard.

Second, section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14). In this regard, the committee notes that neither the instrument nor the ES expressly states the manner of incorporation of Marine Order 15. 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 and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or 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 requests the advice of the minister in relation to this matter.

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 4) Regulation 2015 [F2015L00634]

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

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 five new items to part 4 of schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities. However, two items appear to be expenditure not previously authorised by legislation:

- New table item 79 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to provide a contribution to the Bathurst 200 Commemorative Flagstaff Project. Funding of \$250 000 has been allocated to the project in 2014-15, and it is to be administered by the Department of Infrastructure and Regional Development.
- New table item 82 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to provide funding to the Australian Research Alliance for Children and Youth Limited (ARACY). Funding of \$1.0 million per annum for four years from 2014-15 has been allocated to ARACY, and it is to be administered by the Department of Education and Training.

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

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Bathurst 200 Commemorative Flagstaff Project and Australian Research Alliance for Children and Youth Limited.

Private Health Insurance (Data Provision) Rules 2015 [F2015L00665]

Purpose	Revokes and remakes the Private Health Insurance (Data Provision) Rules 2013, and specifies the kinds of information about the treatment of insured persons that private health insurers are to give to the Secretary of the Department of Health
Last day to disallow	18 August 2015
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health

Issue:*Drafting*

The committee notes that paragraph 4 of the ES to this instrument states:

The kinds of information specified by the Rules are those set out in the following documents, which were approved on XX April 2015 by the First Assistant Secretary of the Acute Care Division of the Department:

Private Hospital Data Bureau (PHDB) (from Hospitals to the Department);

HCP Data (from Insurers to the Department); and

HCP1 Data (from Insurers to the Department).

The committee also notes that paragraph 3 of the Statement of Compatibility with Human Rights to this instrument states:

The Rules specify that the kinds of information that are required to be provided are set out in the following documents, each of which was approved on April 2015 by the First Assistant Secretary of the Acute Care Division of the Department:

Private Hospital Data Bureau (PHDB) (from Hospitals to the Department);

HCP Data (from Insurers to the Department); and

HCP1 Data (from Insurers to the Department).

While there appears to be a number of dates missing in each of the paragraphs above, the committee notes that the relevant date of approval of the documents is provided in the instrument itself as '25 April 2015'. However, the committee notes generally the importance of ensuring that ESs are drafted as carefully as possible, in the interests of promoting their effectiveness in contributing to the clarity and intelligibility of instruments to anticipated users.

The committee therefore draws this matter to the minister's attention.

Radiocommunications (Digital Radio Channels — NSW/ACT) Plan Variation 2015 (No. 1) [F2015L00666]

Radiocommunications (Digital Radio Channels — Queensland) Plan Variation 2015 (No. 1) [F2015L00668]

Radiocommunications (Digital Radio Channels — South Australia) Plan Variation 2015 (No. 1) [F2015L00669]

Radiocommunications (Digital Radio Channels — Tasmania) Plan Variation 2015 (No. 1) [F2015L00670]

Radiocommunications (Digital Radio Channels — Victoria) Plan Variation 2015 (No. 1) [F2015L00671]

Radiocommunications (Digital Radio Channels — Western Australia) Plan Variation 2015 (No. 1) [F2015L00674]

Purpose	Provide that the technical specifications for a co-channel transmitter licensed under a relevant digital radio multiplex transmitter licence are those determined by the technical planning guidelines developed by the Australian Communications and Media Authority under section 33 of the <i>Broadcasting Services Act 1992</i>
Last day to disallow	19 August 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications

Issue:

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

In this regard, the committee notes that each of these instruments incorporates by reference the Broadcasting Services (Technical Planning) Guidelines 2007. The Radiocommunications (Digital Radio Channels — NSW/ACT) Plan Variation 2015 (No. 1) [F2015L00666] also incorporates standards ETSI EN 300 401 V1.4.1, issued by the European Telecommunications Standard Institute.

Section 314A(2) of the enabling legislation (the *Radiocommunications Act 1992*), provides that instruments made under the Act may apply, adopt or incorporate (with or without modifications) matter contained in any other instrument or writing 'as in force or existing at a particular time' or 'as in force or existing from time to time'.

However, the committee notes that there is nothing in the instrument that expressly provides the manner in which the specified documents are incorporated. 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 and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or 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 minister.

**Public Lending Right Scheme 1997 (Modification No. 1 of 2015)
[F2015L00694]**

Purpose	Modifies the Public Lending Right Scheme 1997 to increase the creator of books rate of payment for 2014–15 from \$2.00 to \$2.02 and the publisher of books rate of payment from 50 cents to 50.5 cents
Last day to disallow	20 August 2015
Authorising legislation	<i>Public Lending Right Act 1985</i>
Department	Attorney-General's

Issue:

No 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 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 requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Issue:*Unclear basis for determining rates*

This instrument increases the creator of books rate of payment for 2014-15 from \$2.00 to \$2.02 and the publisher of books rate of payment from 50 cents to 50.5 cents. However, the ES does not explain the basis on which the new rates have been calculated or set. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the basis on which the imposition or change has been calculated.

The committee therefore requests the advice of the minister in relation to this matter.

Amendment of List of Exempt Native Specimens - South Australian Scallop and Turbo Fisheries (05/05/2015) [F2015L00684]

Purpose	Amends the List of Exempt Native Specimens (29/11/2001) by revoking the conditions to which the inclusion of the South Australian Scallop and Turbo Fisheries is subject
Last day to disallow	20 August 2015
Authorising legislation	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Department	Environment

Issue:*Drafting*

The effect of this instrument is to revoke the conditions to which the inclusion of the South Australian Scallop and Turbo Fisheries in the list of exempt native specimens on 29 August 2014 is subject, and impose the following conditions to which the inclusion of the specimens in the list is subject: the specimen, or the fish or invertebrate from which it is derived, was taken lawfully; and the specimens are included in the list until 13 November 2015.

However, the committee notes that paragraph 3 of the ES to this instrument states:

Revoking the conditions and imposing the above conditions to which the inclusion of the specimens in the list of exempt native specimens is subject will allow continued export of these specimens until 13 November 2013. The only effect of this amendment is to extend this date.

While the paragraph above appears to provide the wrong year to which the specimens are to be included in the list, the instrument itself (and elsewhere in the ES) make it clear that the specimens are to be included in the list until 13 November 2015 and not 13 November 2013. However, the committee notes generally the importance of

ensuring that ESs are drafted as carefully as possible, in the interests of promoting their effectiveness in contributing to the clarity and intelligibility of instruments to anticipated users.

The committee therefore draws this matter to the minister's attention.

Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers — 2 GHz Band) 2015[F2015L00721]

Purpose	Sets guidelines to manage interference by providing for the protection of receivers of apparatus-licensed and class-licensed services operating in or adjacent to the 2 GHz band
Last day to disallow	20 August 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications

Issue:

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

This instrument revokes and replaces the Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers – 2 GHz Band) 2000 which was due to 'sunset' (that is, be automatically repealed) on 1 October 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 expectations, are described in the instrument and the ES.

However, the committee notes that the following four documents, while listed in the ES, do not appear to be incorporated or otherwise referenced:

- Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers – 2 GHz Band) 2000;
- ECC Report 096 – Compatibility between UMTS 900/1800 and systems operating in adjacent bands (available at www.cept.org/ecc);
- ECC Report 146 - Compatibility between GSM MCBTS and other services (TRR, RSBN/PRMG, HC-SDMA, GSM-R, DME, MIDS, DECT) operating

in the 900 and 1800 MHz frequency bands (available at www.cept.org/ecc); and

- CEPT Report 041 - Report from CEPT to European Commission in response to Task 2 of the Mandate to CEPT on the 900/1800 MHz bands - Compatibility between LTE and WiMAX operating within the bands 880-915 MHz / 925-960 MHz and 1710-1785 MHz / 1805-1880 MHz (900/1800 MHz bands) and systems operating in adjacent bands (available at www.cept.org/cept).

It is unclear to the committee, on the face of the instrument and the accompanying ES, whether it was the rule-maker's intention that the documents listed above be incorporated by reference in the instrument or whether they have been unintentionally listed in the ES.

The committee therefore requests the advice of the minister in relation to this matter.

Continuing matters

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

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

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.²

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

ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2015 (No. 1)
[F2015L00620]

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

ASIC Market Integrity Rules (ASX Market) Amendment 2015 (No. 1) [F2015L00622]

ASIC Market Integrity Rules (APX Market) Amendment 2015 (No. 1) [F2015L00624]

ASIC Market Integrity Rules (NSXA Market) Amendment 2015 (No. 1) [F2015L00625]

ASIC Market Integrity Rules (SIM VSE Market) Amendment 2015 (No. 1) [F2015L00627]

ASIC Class Rule Waiver [15/0384] [F2015L00635]

Private Health Insurance (Health Insurance Business) Rules 2015 [F2015L00664]

Private Health Insurance (Data Provision) Rules 2015 [F2015L00665]

Defence Force (Superannuation) (Productivity Benefit) Amendment (Interest Factor and Other Measures) Determination 2015 [F2015L00667]

Bankruptcy (Estate Charges) (Amount of Charge Payable) Determination 2015 [F2015L00678]

Personal Property Securities (Fees) Determination 2015 [F2015L00679]

Bankruptcy (Fees and Remuneration) Determination 2015 [F2015L00680]

Prescription — type ratings for CASR Part 142 flight training (Edition 1) Amendment Instrument 2015 (No. 1) [F2015L00705]

Medicines Advisory Statements Amendment Specification 2015 (No.1) [F2015L00699]

Remuneration Tribunal Determination 2015/03 - Specified Statutory Offices - Remuneration and Allowances [F2015L00681]

Remuneration Tribunal Determination 2015/08 - Remuneration and Allowances for Holders of Part-Time Public Office [F2015L00683]

Remuneration Tribunal Determination 2015/07 - Remuneration and Allowances for Holders of Full-Time Public Office [F2015L00685]

Remuneration Tribunal Determination 2015/05 - Judicial and Related Offices - Remuneration and Allowances [F2015L00687]

Chapter 2

Concluded matters

There are no concluded matters arising from the committee's meeting on **24 June 2014**.

Appendix 1

Correspondence

Nil correspondence

Appendix 2

Guideline on consultation

Standing Committee on Regulations and Ordinances

Addressing consultation in explanatory statements

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](#) 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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