

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it 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.

Nature of the committee's scrutiny

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 under the *Legislative Instruments Act 2003*.¹

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.²

1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters:** identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
 - (a) seeking an explanation/information; or
 - (b) seeking further explanation/information subsequent to a response; or
 - (c) on an advice only basis.
- **Chapter 2 Concluded matters:** sets out 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 Correspondence:** contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation:** includes 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 monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.³

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.⁴

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.⁵

Senator John Williams (Chair)

3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, <https://www.comlaw.gov.au/>.

4 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 3 July 2015 and 6 August 2015 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

The committee requests an explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Instrument	ASIC Corporations (Amendment) Instrument 2015/624 [F2015L01158]
Purpose	Amends the ASIC Class Order [CO 08/1] to extend the transitional period for compliance with the breach reporting conditions
Last day to disallow	17 September 2015
Authorising legislation	<i>Corporations Act 2001</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(d)

Extension of exemption

This instrument amends ASIC Class Order [CO 08/1] Group purchasing bodies [F2011C00298] (principal instrument). The principal instrument gives conditional relief from the Australian Financial Services licensing regime and Chapter 5C of the *Corporations Act 2001* to certain group purchasing bodies (GPBs) who arrange or hold risk management products (such as insurance) for the benefit of third parties. GPBs include sporting and other not-for-profit organisations which arrange insurance for third parties (such as players or volunteers).

The explanatory statement (ES) for the instrument states:

[CO 08/1] provides conditional relief to a limited class of GPBs that organise insurance on a non-commercial basis. It contains a condition that requires a GPB who rely on the relief to report to ASIC breaches of

conditions of the relief. The requirement to comply with the breach reporting condition was subject to a delayed start to allow for transition. Based on the current wording of [CO 08/1], the transitional period for compliance with the breach reporting condition in [CO 08/1] ended on 30 June 2015.

This instrument amends the principal instrument to extend the transitional period until 30 June 2016 ‘while the Government and ASIC consider the issue’. The ES goes on to state:

This extension will enable the Government and ASIC to consider how the issues raised by GPBs can be addressed by amendments to the Corporations Regulations 2001 and to consult with stakeholders in the development of the regulations.

However, the committee notes that the transitional period was originally set, by the principal instrument (made in 2010), to end on 30 June 2011. A series of nine amendments to the principal instrument have since extended that date, initially in increments of six months and more recently in increments of 12 months.

While the committee appreciates that these exemptions have been effected to allow for consultation over, and consideration of, amendments to the regulations, the committee would appreciate further advice on the current status and progress of consultations in relation to this matter.

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

Instrument	Australian Passports (Application Fees) Determination 2015 [F2015L01222]
Purpose	Amends and remakes sections of the Australian Passports Determination 2005 that relate to fees/taxes into a separate, new determination
Last day to disallow	17 September 2015
Authorising legislation	<i>Australian Passports (Application Fees) Act 2005</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The committee notes that the instrument is identified as made under the *Australian Passports (Application Fees) Act 2005*. 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 requests the advice of the minister in relation to this matter.

Instrument	Foreign Passports (Law Enforcement and Security) Determination 2015 [F2015L01224]
Purpose	Remakes the Foreign Passports Determination 2005
Last day to disallow	17 September 2015
Authorising legislation	<i>Foreign Passports (Law Enforcement and Security) Act 2005</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The committee notes that the instrument is identified as made under the *Foreign Passports (Law Enforcement and Security) Act 2005*. 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 requests the advice of the minister in relation to this matter.

Instrument	Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries 2015 - IMMI 15/108 [F2015L01147]
Purpose	Updates the occupations listed as eligible occupations for nominations for Subclass 187 (Regional Sponsored Migration Scheme) visa in the Direct Entry stream
Last day to disallow	17 September 2015
Authorising legislation	<i>Migration Regulations 1994</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

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. However, section 18 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 information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Instrument	Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]
Purpose	Revokes the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2008 to limit amateur access to the relevant frequency ranges
Last day to disallow	17 September 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)

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).

The instrument incorporates or 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, are listed in the ES as in force from time to time (as permitted by section 314A of the *Radiocommunications Act 1992*) or as in existence from time to time.

However, the committee notes that Australian Geodetic Datum (AGD66) is referenced at section 3(3) of the instrument as gazetted on 6 October 1966, but in the ES 'as in existence from time to time' followed by the statement 'AGD66 was gazetted...on 6 October 1966; more information about it is available from the Geoscience Australia website at <http://www.ga.gov.au>'. However, that website suggests that there exists a 1984 version of AGD66, which was subsequently replaced by Geocentric Datum of Australia (GDA94). It is therefore unclear to the committee on a reading of the instrument and the ES what the intention of the rule-maker was in relation to the incorporation of the document.

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

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis. These comments do not require a response.

Instrument	Building Energy Efficiency Disclosure Determination 2015 [F2015L01074]
Purpose	Specifies the manner in which energy efficiency ratings must be expressed in advertisements, the assessment methods and standards to be applied in calculating energy efficiency ratings for buildings, and the information set out in a building energy efficiency certificate
Last day to disallow	17 September 2015
Authorising legislation	<i>Building Energy Efficiency Disclosure Act 2010</i>
Department	Industry and Science
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument was made on 24 June 2015 in reliance on sections 13, 13A, 15 and 21 of the *Building Energy Efficiency Disclosure Act 2010*. These sections were amended by the *Building Energy Efficiency Disclosure Amendment Act 2015*, and did not commence until 1 July 2015.

Notwithstanding the fact that those amendments commenced on 1 July 2015, the instrument was made on 24 June 2015; the instrument was therefore made in reliance on empowering provisions that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ES.

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

Instrument	Levy Amount Formula Modification Determination 2015 [F2015L01118]
Purpose	Modifies the general formula by which a levy amount imposed under the <i>Telecommunications (Industry Levy) Act 2012</i> is calculated for a participating person in an eligible levy period, by allowing the calculation of that levy amount to be adjusted in the event that a participating person goes into receivership, liquidation, administration or ceases to exist before the date the levy is assessed for that eligible levy period, and/or if a shortfall exists in the levy amount collected in a previous period
Last day to disallow	17 September 2015
Authorising legislation	<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument was made on 30 June 2015 in reliance on subsection 50(2) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This section was amended by the *Telecommunications Legislation Amendment (Deregulation) Act 2015*, with that amendment commencing on 1 July 2015.

Notwithstanding the fact that the amendment commenced on 1 July 2015, the instrument was made on 30 June 2015; the instrument was therefore made in reliance on an empowering provision that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ES.

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

Instrument	Telecommunications (Participating Persons) Determination 2015 [F2015L01117]
Purpose	Exempts certain persons from being a ‘participating person’, such that they will not have to lodge an eligible revenue return with the Australian Communications and Media Authority, and so are relieved from liability to pay the levy amount in relation to the subsequent eligible levy period
Last day to disallow	17 September 2015
Authorising legislation	<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument was made on 30 June 2015 in reliance on subsection 44(2) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This section was amended by the *Telecommunications Legislation Amendment (Deregulation) Act 2015*, with that amendment commencing on 1 July 2015.

Notwithstanding the fact that the amendment commenced on 1 July 2015, the instrument was made on 30 June 2015; the instrument was therefore made in reliance on an empowering provision that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ES.

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

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

Instruments	
	AASB 2015-7 - Amendments to Australian Accounting Standards – Fair Value Disclosures of Not-for-Profit Public Sector Entities [F2015L01167]
	ASIC Corporations (Amendment) Instrument 2015/624 [F2015L01158]
	ASIC Corporations (Repeal) Instrument 2015/684 [F2015L01181]
	Australian Citizenship Act 2007 - Instrument of Authorisation (Subsections 40(3), 40(4), 42(3) and 42(4)) 2015 - IMMI 15/063 [F2015L01071]
	Australian National Audit Office (ANAO) Auditing Standards (15/07/2015) [F2015L01162]
	Australian Passports Determination 2015 [F2015L01223]
	Australian Prudential Regulation Authority (Commonwealth Costs) Determination 2015 [F2015L01101]
	Authorised Deposit-taking Institutions Supervisory Levy Imposition Determination 2015 [F2015L01106]
	Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 2015 [F2015L01107]
	Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2015 [F2015L01070]
	Building Energy Efficiency Disclosure Determination 2015 [F2015L01074]
	First Home Saver Account Providers Supervisory Levy Imposition Determination 2015 [F2015L01105]
	Foreign Passports (Law Enforcement and Security) Determination 2015 [F2015L01224]
	General Insurance Supervisory Levy Imposition Determination 2015 [F2015L01108]
	Life Insurance Supervisory Levy Imposition Determination 2015 [F2015L01109]

Instruments	<p>Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries 2015 - IMMI 15/108 [F2015L01147]</p> <p>National Health (Pharmaceutical benefits supplied by private hospitals) Amendment Determination 2015 (No. 1) (No. PB 66 of 2015) [F2015L01064]</p> <p>National Health (Subsection 84C(7)) Amendment Determination 2015 (No. 1) [F2015L01063]</p> <p>National Health Act 1953 – Determination under subsection 99(4) Amendment Determination 2015 (No. 1) [F2015L01066]</p> <p>Private Health Insurance (Prostheses) Amendment Rules 2015 (No. 2) [F2015L01111]</p> <p>Retirement Savings Account Providers Supervisory Levy Imposition Determination 2015 [F2015L01103]</p> <p>Social Security (Special Disability Trust - Discretionary Spending) Determination 2015 [F2015L01168]</p> <p>Social Security Exempt Lump Sum (Certain Commonwealth Discretionary Payments) Determination 2015 [F2015L01092]</p> <p>Social Security Exempt Lump Sum (F-111 Deseal/Reseal Lump Sum Payment) Determination 2015 [F2015L01088]</p> <p>Superannuation Supervisory Levy Imposition Determination 2015 [F2015L01102]</p> <p>Therapeutic Goods (Listing) Notice 2015 (No. 2) [F2015L01121]</p> <p>Veterans' Entitlements (Special Disability Trust — Discretionary Spending) Determination 2015 [F2015L01188]</p> <p>Water and Sewerage Services Fees and Charges (Christmas Island) Determination 2015 [F2015L01080]</p> <p>Water and Sewerage Services Fees and Charges (Cocos (Keeling) Islands) Determination 2015 [F2015L01076]</p>
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above 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.¹

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

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013SLI 2013 No. 280 [F2013L02104]
Purpose	Sought to amend the Migration Regulations 1994 to implement the Government's intention to ensure that persons who arrive in Australia without visas are not granted permanent protection via a Subclass 866 (Protection) visa
Last day to disallow	Disallowed 27 March 2014
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> No. 6 of 2014

Same in substance

The committee commented as follows: This instrument introduced a new visa criterion, such that a Subclass 866 (Protection) visa can only be granted to a person who:

- held a visa that was in effect on their last entry to Australia; and
- is not an unauthorised maritime arrival (UMA); and
- was immigration cleared on the applicant's last entry into Australia.

The explanatory statement (ES) states that the instrument was made in response to the Senate's disallowance of the Migration Amendment (Temporary Protection Visa) Regulation 2013 (on 2 December 2013), which had reintroduced Temporary Protection Visas (TPVs).

Whereas the previous instrument introduced TPVs as the visa to be granted to all UMAs, with a condition that they could not access the Subclass 866 (Protection) visas, the new instrument instead placed that condition on the Subclass 866 (Protection) visas.

Section 48 of the *Legislative Instruments Act 2003* places limitations on the remaking of instruments after disallowance, including that an instrument that is 'the same in substance' as a disallowed instrument may not be remade within six months after that disallowance (unless the House that disallowed the instrument rescinds the disallowance resolution or otherwise approved the making of the second instrument).

Noting the minister's advice that legal advice was obtained on this issue, the committee requested further advice from the minister as to whether the UMA Regulation was the same in substance as the disallowed Migration Amendment (Temporary Protection Visa) Regulation 2013.

Minister's response

The Minister for Immigration and Border Protection advised:

As previously indicated, legal advice was obtained on the issue of whether the UMA Regulation was the same in substance as the disallowed regulation and the instrument was prepared in full cognisance of section 48 of the *Legislative Instruments Act 2003*.

Consistent with the usual and long-established practice, I decline to give the Committee a copy of the legal advice.

Committee's response

The committee thanks the minister for his response. Noting that the instrument was disallowed by the Senate on 27 March 2014, the committee has concluded its examination of the instrument.

However, as the committee has noted on previous occasions, there exists no general government policy or practice which prevents ministers or departments from providing information containing legal (or any other) advice to the Senate and its committees.

While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm to the public interest is identified), it has consistently rejected any such refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.¹

Further, the committee notes past occasions where it has sought and been provided with legal advice on matters of relevance to the application of the committee's scrutiny principles.²

1 A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.), pp 595–625.

2 See for example *Delegated legislation monitor* No. 2 of 2014, entries on Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671] and Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670], pp 6–9.

Instrument	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
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> No. 7 of 2015

No description of consultation

The committee commented as follows: 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 Attorney-General advised:

Changes to the rates of payment are of a minor or machinery nature and they do not substantially alter the current arrangements for the Public Lending Right program. I was satisfied that in these circumstances consultation prior to my decision was not necessary.

The Attorney-General also provided an amended ES to the instrument that provides:

No further consultation was required as the *Public Lending Right Scheme 1997 (Modification No. 1 of 2015)* is of a minor or machinery nature and does not substantially alter existing arrangements.

Unclear basis for determining rates

The committee commented as follows: 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 requested the advice of the minister in relation to this matter.

Minister's response

The Attorney-General advised:

The Public Lending rates of payment are reviewed annually by my department in light of the available budget and the results of annual library surveys, which provide the estimated number of books held in public lending libraries. The results of my department's calculations indicated the opportunity for a modest rise in the payment rates for 2014-15 from those I approved for the 2013-14 Public Lending Right payments.

Committee's response

The committee thanks the Attorney-General for his response and has concluded its examination of the instrument.

Appendix 1

Correspondence



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS15-020119

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

John.
Dear Senator Williams

I thank the Senate Standing Committee on Regulations and Ordinances for bringing to my attention that its letter of 20 June 2014 concerning Delegated legislation monitor No. 6 of 2014 had an outstanding request for a response. In the Delegated legislation monitor, the Committee requested a response regarding the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*. The response in relation to this legislative instrument is attached.

I apologise for the delay in providing a response. This was an administrative error in the Department, as an erroneous assessment was made that no further action was required after addressing the Committee's earlier correspondence.

Thank you again for bringing this matter to my attention. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON

12/8/15

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013
SLI 2013 No.280 [F2015L00542]

The Committee has enquired about *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (the UMA Regulation) which commenced on 14 December 2013.

The Committee seeks further information in relation to whether the UMA Regulation is the same in substance as the *Migration Amendment (Temporary Protection Visa) Regulation 2013* which was disallowed on 2 December 2013 and requests a copy of the legal advice obtained in relation to this matter.

As previously indicated, legal advice was obtained on the issue of whether the UMA Regulation was the same in substance as the disallowed regulation and the instrument was prepared in full cognisance of section 48 of the *Legislative Instruments Act 2003*.

Consistent with the usual and long-established practice, I decline to give the Committee a copy of the legal advice.

Thank you for the opportunity to provide a response.



ATTORNEY-GENERAL

CANBERRA

MC15-002655

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

Dear Senator Williams

A handwritten signature in black ink that reads 'John'.

Thank you for your letter of 25 June 2015 regarding the Public Lending Right Scheme 1997 (Modification No. 1 of 2015). The Senate Standing Committee of Regulations and Ordinances has examined this legislative instrument and its Explanatory Statement and now seeks my advice regarding two aspects of the Explanatory Statement: description of consultation prior to my decision to raise the rates of Public Lending Right payments for 2014-15 and the basis for determining the new rates.

The Public Lending Right rates of payment are reviewed annually by my department in light of the available budget and the results of annual library surveys, which provide the estimated number of books held in public lending libraries. The results of my department's calculations indicated an opportunity for a modest rise in the payment rates for 2014-15 from those I approved for the 2013-14 Public Lending Right payments. Changes to the rates of payment are of a minor or machinery nature and they do not substantially alter the current arrangements for the Public Lending Right program. I was satisfied that in these circumstances consultation prior to my decision was not necessary.

An amended Explanatory Statement for the Public Lending Right Scheme 1997 (Modification No. 1 of 2015) is enclosed with this letter for your consideration.

Yours faithfully

(George Brandis)

Encl: Revised Explanatory Statement

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the Arts

Subject – Public Lending Right Act 1985

Public Lending Right Scheme 1997 (Modification No. 1 of 2015)

The *Public Lending Right Act 1985* (the Act) provides the legislative framework for a Public Lending Right scheme to, amongst other things, recognise the loss of income by Australian creators and publishers of books held in public lending libraries. In 2013-14, payments totalling \$9.563 million were made to 7,852 claimants.

The *Public Lending Right Scheme 1997* (the Scheme) provides for the annual rates of payment to eligible creators and publishers. These annual rates may be adjusted through a modification to the Scheme made by the Minister pursuant to paragraph 5(1)(b) of the Act.

Taking into account the advice of his department, the Minister has determined to modify the rates of payment. The increase in the annual rates of payment was calculated taking into account the results of lending library surveys, which provide the estimated number of eligible books held in public lending libraries, and the funds made available to the Arts portfolio for Public Lending Right payments in 2014-15. No further consultation was required as the *Public Lending Right Scheme 1997* (Modification No. 1 of 2015) is of a minor or machinery nature that does not substantially alter existing arrangements.

The *Public Lending Right Scheme 1997* (Modification No. 1 of 2015) increases the creator rate of payment for 2014–15 from \$2.00 to \$2.02 and the publisher rate of payment from 50 cents to 50.5 cents.

The modification is a legislative instrument within the meaning of the *Legislative Instruments Act 2003* (LIA Act). The gazettal requirement in subsection 5(1) of the LIA Act is taken to be satisfied if the instrument is registered in the *Federal Register of Legislative Instruments* (subsection 56(1) of the *Legislative Instruments Act 2003*).

A Regulatory Impact Statement is not required for this type of modification to the Scheme.

Statement of Compatibility with Human Rights

This Legislative Instrument does not engage any of the applicable rights or freedoms.

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Appendix 2

Guideline on consultation

Purpose

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 or instrument-maker 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 or instrument-maker 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 instrument-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 ESs 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/Regulations_and_Ordinances or by contacting the committee secretariat at:

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