The Senate

# Standing Committee on Regulations and Ordinances

## Delegated legislation monitor

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# Membership of the committee

## Current members

| | |
|---|---|
| Senator John Williams (Chair) | New South Wales, NAT |
| Senator Gavin Marshall (Deputy Chair) | Victoria, ALP |
| Senator Sam Dastyari | New South Wales, ALP |
| Senator Nova Peris OAM | Northern Territory, ALP |
| Senator Linda Reynolds | Western Australia, LP |
| Senator Zed Seselja | Australian Capital Territory, LP |

## Secretariat

Mr Ivan Powell, Secretary
Ms Jessica Strout, Acting Senior Research Officer

## Committee legal adviser

Mr Stephen Argument

## Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

# Contents

# 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]

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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)**

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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 7 August 2015 and 27 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** | **Corporations Amendment (Financial Services Information Lodgement Periods) Regulation 2015 [F2015L01270]** |
| **Purpose** | Amends the Corporations Regulations 2001 to align information lodgement periods for information required to be notified to the Australian Securities and Investments Commission in relation to the Authorised Representatives Register with the information lodgement periods for the Register of Financial Advisers |
| **Last day to disallow** | 15 October 2015 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |
| **Scrutiny principle** | Standing Order 23(3)(a) |

### 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 explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

> Targeted consultation was conducted on the substance of the porposed Regulation in March 2015 and on an exposure draft of the proposed Regulation in June 2015. Stakeholders did not raise any concerns with the proposed Regulation.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information provided does not describe the nature of the consultation undertaken (such as, for example, the actual names of departments, bodies, agencies, groups et cetera that were consulted).

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** | **Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138][1]** |
| **Purpose** | Amends the Family Law (Fees) Regulation 2012 to update fees in the Family Court of Australia and the Federal Circuit Court of Australia |
| **Last day to disallow** | Disallowed on 11 August 2015 |
| **Authorising legislation** | *Family Law Act 1975; Federal Circuit Court of Australia Act 1999* |
| **Department** | Attorney-General's |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## Whether the instrument is the same in substance as disallowed instrument

Schedule 2 of the Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780] (the first instrument), which was disallowed by the Senate on 25 June 2015, sought to increase family law fees from 1 July 2015, as follows:

1 The committee's consideration of the instrument was deferred from *Monitor No. 9 of 2015*, pending the judgement in *Perrett v Attorney General of the Commonwealth of Australia* [2015] FCA 834 which pertained to the validity of the instrument.

- the full divorce fee in the Federal Circuit Court would have increased from $845 to $1195 ($350 increase);
- the fee for consent orders would have increased from $155 to $235 ($80 increase);
- the fee for issuing subpoenas would have increased from $55 to $120 ($65 increase);
- all other existing family law fee categories (except for the reduced divorce fee) would have increase by an average of 10 per cent; and
- a new fee of $120 would have been established for the filing of amended applications.

Subsequently, on 13 July 2015, the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138] (the second instrument) increased family law fees as follows:

- the full divorce fee in the Federal Circuit Court of Australia increased from $845 to $1200 ($355 increase) and in the Family Court of Australia from $1195 to $1200 ($5 increase);
- the fee for a consent order increased from $155 to $240 ($85 increase);
- the fee for issuing subpoenas increased from $55 to $125 ($70 increase);
- all other existing family law fee categories (except for the reduced divorce fee) increased by an average of 11 per cent; and
- a new fee of $125 was established for the filing of amended applications.

The ES states:

> Family law fee increases that were intended to commence on 1 July 2015 under Schedule 2 of the *Federal Courts Legislation Amendment (Fees) Regulation 2015* were disallowed by the Senate on 25 June 2015. The Government will reintroduce those family law fee increases under the Regulation with an additional $5 increase.

The second instrument was disallowed by the Senate on 11 August 2015.

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 approved the making of the second instrument).

The committee notes that an action was brought in the Federal Court to challenge the second instrument on the basis that it was the same in substance as the first

(disallowed) instrument and had been re-made within six months of its disallowance, contrary to section 48 of the *Legislative Instruments Act 2003*. In a decision given on 13 August 2015, Dowsett J dismissed the application, finding that section 48 'should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure'.[2]

The committee notes that, in a number of material respects, the Federal Court's interpretation of the concept of 'the same in substance' may be regarded as in conflict with the decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347. In that decision, Chief Justice Latham stated that the question of whether an instrument is the same in substance as a disallowed instrument must be determined by applying such tests as the court may think proper, and by seeking 'to determine in each case whether such differences as exist between the disallowed regulation and the new regulation are differences in substance'.[3] Notably, Chief Justice Latham concluded that an equivalent provision to section 48 of the *Legislative Instruments Act 2003* prevented the re-enactment 'within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation *in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*' [emphasis added].[4] The Chief Justice went on to state that this approach 'prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation, would exclude the application of [the equivalent provision to section 48(b) of the *Legislative Instruments Act 2003*]'.[5]

The committee notes that the decision of the Federal Court in relation to the second instrument therefore raises issues central to the committee's function of ensuring that instruments of delegated legislation are made in accordance with statute.

**The committee therefore seeks the Attorney-General's advice as to whether he regards the second instrument as being the same in substance as the first instrument for the purposes of section 48 of the *Legislative Instruments Act 2003*.**

**Further, the committee seeks the Attorney-General's advice as to whether legal advice was provided in relation to the making of the second instrument**

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2 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, paragraph 29. The committee understands that an appeal has been lodged with the Full Court of the Federal Court.

3 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 362.

4 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

5 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

**regarding the question of whether it is the same in substance as the first instrument for the purposes of section 48 of the *Legislative Instruments Act 2003*.**

**In the event that the Attorney-General confirms that legal advice was provided in relation to this question, the committee requests, in accordance with its usual practice, that the Attorney-General provide the committee with a copy of that advice.**

| | |
|---|---|
| **Instrument** | **Migration Amendment (Visa Labels) Regulation 2015 [F2015L01304]** |
| **Purpose** | Amends the Migration Regulations 1994 to remove prescribed forms of evidence of a visa |
| **Last day to disallow** | 12 November 2015 |
| **Authorising legislation** | *Migration Act 1958* |
| **Department** | Immigration and Border Protection |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## 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 the instrument states:

> The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR advises that the changes do not have a regulatory impact on business or the not-for-profit sector. The OBPR consultation reference is 18021.

The committee's guideline on the requirement to address the question of consultation under the *Legislative Instruments Act 2003* states:

> It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the [*Legislative Instruments Act 2003*]…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.

The committee notes that the ES for the instrument provides no information regarding consultation for the purposes of the *Legislative Instruments Act 2003*.

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** | **Military Rehabilitation and Compensation Act Education and Training Scheme 2004 [F2015L01281]** |
| **Purpose** | Sets out the education allowances and other related benefits available to the children of specified members of the Defence Force |
| **Last day to disallow** | 9 November 2015 |
| **Authorising legislation** | *Military Rehabilitation and Compensation Act 2004* |
| **Department** | Veterans' Affairs |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## Sub-delegation

Section 8.1.2 of this instrument provides that the Military Rehabilitation and Compensation Commission may delegate any of its powers under the Military Rehabilitation and Compensation Act Education and Training Scheme (the scheme) to an employee of the Department of Veterans' Affairs.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of powers under the scheme to any employee of that department.

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

| | |
|---|---|
| **Instrument** | **Veterans' Children Education Scheme [F2015L01280]** |
| **Purpose** | Sets out the education allowances and other related benefits available to the children of specified veterans |
| **Last day to disallow** | 9 November 2015 |
| **Authorising legislation** | *Veterans' Entitlements Act 1986* |
| **Department** | Veterans' Affairs |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## Sub-delegation

Section 8.1.2 of this instrument provides that the Repatriation Commission may delegate any of its powers under the Veterans' Children Education Scheme to an employee or officer of the Australian Public Service.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the Commission's powers under the Scheme to any employee or officer of the Australian Public Service.

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

# Further response required

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

Correspondence relating to these matters is included at Appendix 1.

| | |
|---|---|
| **Instrument** | **Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]** |
| **Purpose** | Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training and the Department of Social Services |
| **Last day to disallow** | 14 October 2015 |
| **Authorising legislation** | *Financial Framework (Supplementary Powers) Act 1997* |
| **Department** | Finance |
| **Scrutiny principle** | Standing Order 23(3)(d) |
| **Previously reported in** | *Delegated legislation monitor* No. 6 and 8 |

## Previously unauthorised expenditure

The committee commented as follows: Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 1*,[6] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[7] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES states that the objective of the Mathematics by Inquiry program is:

6 *Williams v Commonwealth* (2012) 248 CLR 156.

7 *Williams v Commonwealth* (2014) 252 CLR 416.

> To create and improve mathematics curriculum resources for primary and secondary school students:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The objective of the Coding Across the Curriculum program is:

> To encourage the introduction of computer coding and programming across different year levels in Australian schools:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The committee notes that the ES identifies the consititutional basis for expenditure in relation to both the Mathematics by Inquiry and the Coding Across the Curriculum programs as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the external affairs power (section 51(xxix))
> - Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Therefore, the instrument appears to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as the relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In relation to the executive nationhood power and the express incidental power, the committee understands that the nationhood power provides the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

***The committee therefore sought the minister's advice as to:***

- ***how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and***

- ***how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.***

**Minister's first response**

The Minister for Finance advised that:

> The Committee may be aware that successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so. The drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective scope of legislation.
>
> The items for Mathematics by Inquiry and Coding across the Curriculum in the Regulation are a case in point. As indicated in the explanatory statement accompanying the Regulation, the objective for each of these items references the external affairs power, the Commonwealth executive power and the express incidental power.
>
> The Government will continue to draft amendments for legislative authority under the section 32B mechanism in the *Financial Framework (Supplementary Powers) Act 1997* having due regard to constitutional limits. Consistent with this approach to law-making more generally, the Government will continue to work on maximising clarity in its approach to drafting.

**Committee's first response**

***The committee thanked the minister for his response.***

However, the minister's response has not addressed the specific questions asked by the committee, namely:

- how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and

- how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

First, the committee notes that these questions are asked of the minister in his capacity as the instrument-maker. In this respect, the committee seeks the minister's advice as to whether he regards the referenced constitutional powers as providing a basis for the making of the instrument.

***The committee therefore sought further advice from the minister in relation to this matter.***

Second, the committee notes that the minister's response suggests that legal advice may have been obtained in relation to the constitutional support for the Mathematics by Inquiry and the Coding Across the Curriculum programs. The minister states:

> …successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so.

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 is identified), the committee does not understand the minister's response to be explicitly advancing a public interest immunity claim on a recognised ground in this case.

In relation to the stated position of governments not to disclose legal advice, the committee has noted previously that it is not aware of any 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 (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.[8] To underline this point, the committee notes that it has been provided with legal advice on a number of occasions.[9]

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

9 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.

***The committee therefore requested from the minister a copy of any legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.***

**Minister's second response**

The Minister for Finance advised that:

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwelalth's legal position.
>
> The formulation of programmes and the drafting of legislation often involved complex issues and is routinely undertaken having regard to a range of constitutional and other legal considerations. In relation to the items for the Mathematics by Inquiry and the Coding Across the Currciculum Programmes, legal advice was obtained and carefully considered, including Australia's international obligations under the Convention on the Rights of the Child, particularly Articles 28 and 29, and under the International Covenant on Economic, Social and Cultural Rights, particularly Article 13.

**Committee's second response**

**The committee thanks the minister for his response.**

However, scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers is done in accordance with the law, including the Constitution of Australia.

In this regard, the committee's request to the minister effectively sought an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, the minster was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee sought that assurance in the context of specific questions pertaining to the character of the powers referenced in the ES for the regulation, being the external affairs power and the executive nationhood power and the express incidental power.

First, while the minister's response advises that legal advice was obtained in relation to articles 28 and 29 of the Convention on the Rights of the Child and article 13 of the International Covenant on Economic, Social and Cultural Rights, the minister does not address the question of how the articles cited are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs.

Second, the minster has not addressed the question of how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are

enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

**In light of the above comments, the committee therefore seeks the minister's further advice as to:**

- **how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and**

- **how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.**

In addition, the committee notes the minister's refusal to provide the committee with the legal advice obtained in relation to the Mathematics by Inquiry and the Coding Across the Curriculum programs:

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.

The committee notes that 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 is clearly identified). However, it is important to note that the Senate's requirements and the process for the making of public interest immunity claims (as set out in an Order of the Senate of 13 May 2009 ('Public interest immunity claims'))[10] do not specify recognised grounds for making such claims. This is because whether any of the grounds are justified in a particular case depends on the circumstances of that case.[11]

The committee notes that the minister's response does not advance a public interest immunity claim that addresses the requirements of the Order of the Senate of 13 May 2009 ('Public interest immunity claims'), particularly in relation to (a) the need to specify the harm to the public interest that could result from the disclosure of the information or document and (b) the need to indicate whether any specified harm to the public interest from the disclosure of the information or document could result equally or in part from the disclosure of the information or document to the committee as in camera evidence.

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10 *Journals of the Senate*, 13 May 2009, 'Public interest immunity claims', p. 1941.

11 Senate Standing Committee on Procedure, *Second report*, June 2015, p. 8.

**The committee therefore reiterates its request to the minister for a copy of the legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.**

## 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** | **Veterans' Children Education Scheme [F2015L01280]**<br>**Military Rehabilitation and Compensation Act Education and Training Scheme 2004 [F2015L01281]** |
| **Purpose** | Sets out the education allowances and other related benefits available to the children of specified veterans or members of the Defence Force |
| **Last day to disallow** | 9 November 2015 |
| **Authorising legislation** | *Veterans' Entitlements Act 1986*; *Military Rehabilitation and Compensation Act 2004* |
| **Department** | Veterans' Affairs |
| **Scrutiny principle** | Standing Order 23(3)(a) |

### Drafting

Sections 7.3.1, 7.4.6, 7.5.6 and 7.5.7 of the Veterans' Children Education Scheme [F2015L01280]; and sections 7.2.6, 7.3.6 and 7.3.7 of the Military Rehabilitation and Compensation Act Education and Training Scheme 2004 [F2015L01281] include a note which states:

> The *Acts Interpretation Act 1901* defines Calendar year (s.22)

The committee notes that the definition of calendar year is contained in section 2B (not section 22) of *Acts Interpretation Act 1901*.

**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** | ASIC Corporations (Amendment and Repeal) Instrument 2015/542 [F2015L01309]<br><br>Asset-test Exempt Income Stream (Lifetime Income Stream Guidelines) Determination 2015 [F2015L01279]<br><br>Family Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01269]<br><br>National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2015 [F2015L01240]<br><br>Paid Parental Leave Amendment Rules 2015 [F2015L01266]<br><br>Private Health Insurance (Prostheses) Rules 2015 (No. 2) [F2015L01310]<br><br>Remuneration Tribunal Determination 2015/11 - Official Travel by Office Holders [F2015L01293]<br><br>Remuneration Tribunal Determination 2015/13 - Remuneration and Allowances for Holders of Public Office and Judicial and Related Offices [F2015L01295]<br><br>Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]<br><br>Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268]<br><br>Torres Strait Fisheries Logbook Instrument 2015 [F2015L01256]<br><br>Veterans' Entitlements (Veterans' Children Education Scheme - Guidance and Counselling Services) Determination 2000 [F2015L01265]<br><br>Veterans' Entitlements (Asset-test Exempt Income Stream (Market-linked) – Payment Factors) Principles 2005 [F2015L01252]<br><br>Veterans' Entitlements (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2015 [F2015L01246] |
| **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.[12]

12 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.

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| **Instrument** | **Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015 [F2015L00870]** |
| **Purpose** | Amends the *Administrative Decisions (Judicial Review) Act 1977* to include three Northern Territory Acts related to the regulation of electricity utilities |
| **Last day to disallow** | 16 September 2015 |
| **Authorising legislation** | *Administrative Decisions (Judicial Review) Act 1977* |
| **Department** | Attorney-General's |
| **Scrutiny principle** | Standing Order 23(3)(a) |

### 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. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (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 therefore requested the advice of the Attorney-General in relation to this matter; and requested that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003.***

### Attorney-General's response

The Attorney-General advised the committee that he had approved an updated ES which, provided details of the consultation undertaken at both the Commonwealth level and with the Northern Territory Government. The updated ES states:

> Before this Regulation was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the LIA. This included consideration of the consultation conducted by the Department of Industry and the NT Government on the substantive legislative changes involved in transferring the administration and enforcement of the three NT Acts to the AER.
>
> Persons likely to be affected by this regulation had an adequate opportunity to comment on its proposed effect through their inclusion in consultation on the substantive changes described above.
>
> At the Commonwealth level, the Department of Industry convened an interdepartmental committee comprising representatives of the Departments of the Prime Minister and Cabinet and Finance, the Treasury, and the Attorney-General's Department. This committee reviewed the draft NT legislation and the need for amendments to Commonwealth legislation (including the Act).
>
> Other parties affected by the NT Government's move to apply the NEL were included in consultation conducted by the NT Government itself: in addition to the usual NT Government Cabinet and Parliamentary processes, the NT Department of Treasury and Finance consulted with the Power and Water Corporation (the only network provider in the Northern Territory) and the Utilities Commission throughout the policy consideration process and provided the draft NT legislation for comment prior to being finalised. Further, it consulted with the Australian Energy Regulator and the COAG Energy Council (comprising Ministers responsible for energy in all jurisdictions).

### Committee response

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

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|---|---|
| **Instrument** | **Aged Care (Subsidy, Fees and Payments) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L00996]**<br>**Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L01019]** |
| **Purpose** | These instruments amend the Aged Care (Subsidy, Fees and Payments) Determination 2014 and the Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014 to increase the amount of subsidies and supplements payable to approved providers of aged care services from 1 July 2015, remove reference to the pre-entry leave subsidy and make consequential changes as a result of the operation of the *Aged Care and Other Legislation Amendment Act 2014* |
| **Last day to disallow** | 17 September 2015 |
| **Authorising legislation** | *Aged Care Act 1997; Aged Care (Transitional Provisions) Act 1997* |
| **Department** | Social Services |
| **Scrutiny principle** | Standing Order 23(3)(d) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

## Relationship of instruments to Social Services Legislation Amendment (No. 2) Bill 2015

The committee commented as follows: The instruments increase the amount of subsidies and supplements payable to approved providers of aged care services; and cease the payment of the residential care subsidy to residential aged care providers for pre-entry leave (which relates to the holding of a place for up to seven days prior to a care recipient entering care) from 1 July 2015.

The committee notes that key elements of the instruments may be described as 'mirroring' and anticipating amendments in the Social Services Legislation Amendment (No. 2) Bill 2015 (the bill). The bill passed the House of Representative on 15 June 2015 but has yet to pass the Senate, where the second reading was moved on 16 June 2015.

The committee notes that in each case the explanatory statements (ESs) for the instruments state:

> The Amending Determination will give effect to the removal of pre-entry leave subsidy from 1 July 2015 in the event that Schedule 2 of the Social Services Legislation Amendment (No. 2) Bill 2015 (the Amending Bill), which also contains provisions to remove pre-entry leave subsidy, does not

> receive Royal Assent by that time. Upon commencement, Schedule 2 of the Social Services Legislation Amendment (No. 2) Bill 2015 (the Amending Bill) will operate to cease the payment of subsidy and supplements during a period of pre-entry leave. If the Amending Bill commences then this Amending Determination will remove unnecessary provisions in the Determination (Schedule 3). If the Amending Bill does not commence by 1 July 2015 then the Amending Determination operates in the alternative to reduce the amount of subsidy paid during pre-entry leave to nil (Schedule 2).
>
> …
>
> The commencement of amendments in Schedule 2 and 3 are dependent on the commencement of Schedule 2 of the Amending Bill. Schedule 2 of this determination commences on 1 July 2015 if Schedule 2 of the Amending Bill has not commenced on 1 July 2015. Schedule 3 of this determination commences immediately after Schedule 2 of the Amending Bill has commenced. If Schedule 2 of the Amending Bill never commences then Schedule 3 of this Amending Determination will never commence.

However, it is unclear to the committee, on the basis of the information provided, what is the reason for introducing these changes via regulation while the bill is still before the Parliament.

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

**Minister's response**

The Assistant Minister for Social Services advised:

> In December 2014, the Australian Government announced this measure in the Mid-Year Economic and Fiscal Outlook (MYEFO) with a clearly announced commencement date of 1 July 2015. The legislative amendments to the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to give effect to this measure were originally introduced under the Bill. The Bill also contains consequential amendments to fully implement the measure.
>
> To give effect to the measure by the commencement date announced in MYEFO the Government had two legislatively valid options. The first involved using the existing Determination power provided to the Minister under the Principal Legislation to set the pre-entry leave subsidy to zero and the second involved making amendments to the Principal Legislation. The Government could have given effect to this measure without making any amendments to the Principal Legislation. It was decided to amend the Principal Legislation as that would allow certain unnecessary references in legislation relating to pre-entry leave to be removed. When it became apparent that the Bill may not receive passage before 1 July 2015 the Government took the decision to utilise the pre-existing and valid Determination power in order to give effect to the already announced commencement date.
>
> The Aged Care Act and the Transitional Provisions Act provide that the Minister may determine the amount of subsidy and supplement payable to an approved provider. Schedule 2 of the *Aged Care (Subsidy, Fees and*

*Payments) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015* and the *Aged Care (Transitional Provisions)(Subsidy and Other Measures) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015* gave effect to the cessation of pre-entry leave subsidy by setting the amount of subsidy to zero on 1 July 2015.

If the Bill receives Royal Assent, approved providers will no longer be eligible for pre-entry leave subsidy. Schedule 3 of the Amending Determinations will then remove references to pre-entry leave in the Determinations as they will be redundant at that time.

**Committee's response**

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

However, the committee notes its previously stated concerns as to the use of delegated legislation to anticipate legislative changes sought to be effected via primary legislation, and particularly the establishing of precedents for this approach on the basis that, due to the inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect interim policy change. In particular, this approach allows for raises the significant possibility that a bill may not be passed in a form which contains all the measures effected by an anticipatory instrument, and thereby allow for the continuance of measures contrary to the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the instrument). This consideration is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d). In this case, however, the committee concludes its interest on the basis that the measure does not appear to make fundamental changes to the residential care subsidy scheme.

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|---|---|
| **Instrument** | **Carbon Credits (Carbon Farming Initiative—Commercial and Public Lighting) Methodology Determination 2015 [F2015L00980]** |
| **Purpose** | Provides for crediting emissions reductions from projects that improve the energy performance of lighting systems in commercial and industrial buildings and public areas |
| **Last day to disallow** | 17 September 2015 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Environment |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

**Incorporation of extrinsic material**

The committee commented as follows: This instrument provides for crediting emissions reductions from projects that improve the energy performance of lighting systems in commercial and industrial buildings and public areas.

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).

Subsection 106(8) of the authorising legislation for the instrument (the *Carbon Credits (Carbon Farming Initiative) Act 2011*) provides that instruments 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' (thereby altering the effect of section 14 of the *Legislative Instruments Act 2003*).

With reference to the above, the committee notes that subsection 5(2) of the instrument incorporates by reference various standards. However, neither the instrument nor the ES expressly state 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 consult extrinsic material.

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

**Minister's response**

The Minister for the Environment advised:

> …the manner in which the specified standards are incorporated into the Determination is set out in section 7 of the Determination. The section prescribes that in applying the definitions in section 5, or a provision of Schedule 1 or 2, to the lighting equipment of a lighting system, a reference in those provisions to a definition in a standard is a reference to the definition in the version of the standard that was inforce on the date the lighting system was commissioned. This prescription of the manner in which the standards are incorporated into the Determination applies to the standards listed in subsection 5(2), which were referred to in the Monitor No. 8. The Explanatory Statement to the Determination explains that: *This is intended to ensure that, if any of these standards change over the life of the project, whether the project meets a project requirement is assessed by reference to the definitions standard that applied at the time the lighting upgrade was first commissioned.*

The minister further explained:

> …this approach is necessary to ensure that the Determination remains up to date with the latest requirements in Australian and international standards but does not risk invalidating project eligibility if past installations do not comply with a revised standard.

**Committee's response**

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

| | |
|---|---|
| **Instrument** | **Finance Minister's Orders (Financial Statements for reporting periods ending on or after 1 July 2011) Repeal Instrument 2015 [F2015L00889]** |
| **Purpose** | Repeals the Finance Minister's Orders (Financial Statements for reporting periods on or after 1 July 2011) |
| **Last day to disallow** | 17 September 2015 |
| **Authorising legislation** | *Aboriginal and Torres Strait Islander Act 2005*; *Defence Service Homes Act 1918*; *High Court of Australia Act 1979*; *Natural Heritage Trust of Australia Act 1997* |
| **Department** | Finance |
| **Scrutiny principle** | Standing Order 23(3)(b) |
| **Previously reported in** | *Delegated legislation monitor No. 8 of 2015* |

**Retrospectivity**

The committee commented as follows: This instrument repeals the Finance Minister's Orders (Financial Statements for reporting periods on or after 1 July 2011) and commences retrospectively on 1 July 2014.

Subsection 12(2) of the *Legislative Instruments Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

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

**Minister's response**

The Minister for Finance advised:

> The purpose of the Instrument is to repeal an instrument that has been superseded and has no operative effect.

> The Instrument repeales the whole of the *Finance Minister's Orders (Financial Statements for reporting periods on or after 1 July 2011)* (the Finance Minister's Orders). This was the final step in the process of replacing the Finance Minister's Orders with the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015.*
>
> The retrospective commencement of the Instrument does not detrimentally affect the rights of any person, nor does it impose additional obligations or liabilities on any person, other than the Commonwealth, in accordance with subsection 12(2) of the *Legislative Instruments Act 2003.*

**Committee's response**

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

| | |
|---|---|
| **Instrument** | **Jervis Bay Territory Emergency Management Ordinance 2015 [F2015L00774]** |
| **Purpose** | Establishes a legislative framework for emergency management in the Jervis Bay Territory |
| **Last day to disallow** | 11 November 2015 |
| **Authorising legislation** | *Jervis Bay Territory Acceptance Act 1915* |
| **Department** | Infrastructure and Regional Development |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor No. 8 of 2015* |

**Sub-delegation**

The committee commented as follows: Section 9 of this Ordinance provides that the minister may, in writing, delegate his or her powers under the Ordinance (other than sections 15 and 48, which respectively empower the minister to declare a state of emergency and to make statutory rules) to 'any person'.

With reference to section 9, the ES states:

> The Minister’s powers and functions under this Ordinance may be delegated to people, for example, to Departmental officers or emergency services officers. The Minister may delegate the majority of his or her powers or functions to any person; however, the Minister cannot delegate the powers to declare a state of emergency, or to make statutory rules under this Ordinance.
>
> The Minister can delegate powers or functions, including the power to delegate, to a member of the Senior Executive Service (SES) within the Department responsible for Territories. The SES employee may then

> sub-delegate the power or function to an emergency services officer, or a member of an emergency services organisation.
>
> The section also states that the *Acts Interpretation Act 1901* sections 34AA, 34AB, and 34A apply to the sub-delegation of powers and functions in the same way as they apply to the delegation of powers and functions. This means that powers which have been sub-delegated cannot be delegated further; that sub-delegations may be made to a position and exercised by whoever is in that position at a particular point in time; and that the person exercising the sub-delegated power or function can do so according to their opinion, belief or state of mind, if this is relevant to the exercise of the power, or the performance of the function or duty.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers (other than the excluded powers) to 'any person'.

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

**Minister's response**

The Minister for Infrastructure and Regional Development advised:

> Emergency services in the Jervis Bay Territory (JBT) are provided by a range of organisations, depending on the nature and complexity of the emergency. These organisations include, but are not limited to, the Australian Federal Police, JBT volunteer fire brigades, NSW Rural Fire Service, Fire and Rescue NSW, the NSW State Emergency Service, the NSW Ambulance Service, the Booderee National Park, the Wreck Bay Aboriginal Community Council and the Department of Defence. Agencies work co-operatively across the common JBT-NSW border in response to emergency situations.
>
> Given the geographical location of the JBT, one of the key objectives of the Ordinance was consistency with emergency management legislation in NSW, to facilitate the seamless provision of emergency services across the JBT-NSW border.
>
> The *State Emergency and Rescue Management Act 1989* (NSW) has a similarly broad delegation power in subsection 10(4), which enables the NSW Minister responsible for Emergency Services to delegate the majority of his or her functions to 'the State Emergency Operations Controller, State Emergency Recovery Controller or other person'.

Further, the minister explained:

> The delegated power in Section 9 of the Ordinance is intended to give the Minister the ability to delegate powers to the most appropriate person to manage an emergency in the JBT, consistent with NSW Practices.
>
> I have requested that the Department ensure that the Explanatory Statement for the Ordinance is updated, to clarify why a broad delegation of powers is necessary to align with NSW practices and to allow for the management of a variety of emergencies in the JBT.

### Committee's response

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

| | |
|---|---|
| **Instrument** | **Parliamentary Entitlements Amendment (Office Budget) Regulation 2015 [F2015L00949]** |
| **Purpose** | Amends the Parliamentary Entitlements Regulations 1997 to amend some entitlements for parliamentarians under Schedule 1 to the *Parliamentary Entitlements Act 1990* and the Parliamentary Entitlements Regulations 1997, to create an office budget to be used for certain existing entitlements |
| **Last day to disallow** | 17 September 2015 |
| **Authorising legislation** | *Parliamentary Entitlements Act 1990* |
| **Department** | Finance |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

### 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. 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 the instrument states:

> In relation to section 17 of the *Legislative Instruments Act 2003*, consultation on the provisions in the Regulation has been undertaken and has bipartisan support.

> The Office of Best Practice Regulation (OBPR) has been consulted and agrees that this proposal will have no regulatory impact on businesses, individuals or organisations and therefore the regulatory costs are nil. OBPR ID Number: 16832.

First, while the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information provided regarding bipartisan support does not describe whether formal consultation was undertaken and, if so, the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation).

Second, the committee does not consider that the process of ascertaining the necessity of a Regulatory Impact Statement for an instrument is strictly relevant to the question of consultation under *the Legislative Instruments Act 2003* (see subsection 17(2)).

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

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

**Minister's response**

The Minister for Veterans' Affairs advised:

> …the Government discussed the entitlement changes with the Opposition ahead of the 2015-16 Budget announcement and that during these discussions, bipartisan support for the changes was reached. In addition, a presentation for all Senators and Members detailing the entitlement changes was held at Parliament House on 26 May 2015 and was subsequently published on the Ministerial and Parliamentary Services website for those who could not attend.

The minister also advised that he had approved a revised ES in accordance with the committee's request.

**Committee's response**

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

| | |
|---|---|
| **Instrument** | **Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) [F2015L00765]** |
| **Purpose** | Amends the Private Health Insurance (Registration) Rules 2009 (No. 2) to remove details of two restricted access groups |
| **Last day to disallow** | 11 November 2015 |
| **Authorising legislation** | *Private Health Insurance Act 2007* |
| **Department** | Health |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

## 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. 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 the instrument states:

> The Office of Best Practice Regulation (OBPR) was consulted. OBPR advised that a Regulation Impact Statement was not required because the amendments are minor.

The committee's guideline on the requirement to address the question of consultation under the *Legislative Instruments Act 2003* states:

> 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.

The committee therefore considers that the ES for the instrument provides no information regarding consultation for the purposes of the *Legislative Instruments Act 2003*.

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

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

**Minister's response**

The Department of Health advised on behalf of the minister that the ES has been updated to include additional information on consultation which occurred for the rule amendment.

The revised ES states:

> Consultation
>
> Consumer consultation was undertaken by Phoenix Health Fund Limited and Transport Health Pty Ltd with their respective memberships about the then proposed changed to their fund type.
>
> The Department of Health did not consult with Phoenix Health Fund Limited and Transport Health Pty Ltd about the repeal of the definitions of their restricted access group, as the repeals were made following the two insurers notifying the Private Health Insurance Administration Council (PHIAC) that they wished to cease holding restricted access status.
>
> Under subsection 126-40(4) of the *Private Health Insurance Act 2007 (the Act)*, a restricted access insurer who notifies PHIAC that it no longer wishes to hold restricted access registration is taken to ceased to do so. In accordance with the Act, PHIAC informed the Department of the change in registration status of Phoenix Health Fund Limited and Transport Health Pty Ltd. This made the continued specification of their restricted access groups redundant and they have been repealed.
>
> The repeal of the definition of the restricted access groups for Phoenix Health Fund Limited and Transport Health Pty Ltd does not affect the registration status of other insurers. However, PIHAC has already notified industry of the changes to the registration status through the release of private health insurance industry circulars.
>
> Phoenix Health Fund Limited and Transport Health Pty Lth notified members of their respective funds via a mail-out and via their websites of the change in registration status.

**Committee's response**

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

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|---|---|
| **Instrument** | **Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR and FaHCSIA) Specifications 2009 (No. 1) – Instrument of Revocation 2015 [F2015L00865]** |
| **Purpose** | Revokes the Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR) Specification (No. 1) 2009 and the Social Security (Satisfaction of the Activity Test – Classes of Persons) (FaHCSIA) Specification (No. 1) 2009 |
| **Last day to disallow** | 16 September 2015 |
| **Authorising legislation** | *Social Security Act 1991* |
| **Department** | Employment |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

## 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. 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 the instrument states:

> The Department of Social Services has been consulted regarding this instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Social Security).

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

***The committee requested 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***.

**Minister's response**

The Assistant Minister for Employment, Deputy Leader of the House explained:

> The Department of Employment consulted with the Department of Social Services regarding the instrument. The Department of Social Services confirmed that the revocation instrument will have no impact on their portfolio. No further consultation was undertaken as the instrument will not impact current policy or procedures and no job seekers or businesses will be affected by the change. In this regard, the instrument is of a minor or machinery nature and does not alter existing arrangements.

Further, the minister advised that the department had amended the ES in accordance with the committee's request.

**Committee's response**

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

# Appendix 1
## Correspondence

**SENATOR THE HON MATHIAS CORMANN**
**Minister for Finance**

REF: MC15-002250

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 13 August 2015 sent to my office seeking further information about items in the *Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015* (the Regulation).

In the *Delegated legislation monitor* No. 8 of 2015, 12 August 2015, the Committee requested further information about the items for the Mathematics by Inquiry and the Coding Across the Curriculum programmes in the Regulation, following my response on 22 July 2015 to the Committee's initial request for information about these items. The Committee has requested information on whether the referenced constitutional powers provide a basis for the making of the instrument and a copy of any legal advice obtained in relation to this matter.

The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.

The formulation of programmes and the drafting of legislation often involves complex issues and is routinely undertaken having regard to a range of constitutional and other legal considerations. In relation to the items for the Mathematics by Inquiry and the Coding Across the Curriculum programmes, legal advice was obtained and carefully considered, including Australia's international obligations under the Convention on the Rights of the Child, particularly Articles 28 and 29, and under the International Covenant on Economic, Social and Cultural Rights, particularly Article 13.

I trust this information addresses the Committee's request. I have copied this letter to the Attorney-General, Senator the Hon George Brandis QC, and the Minister for Education and Training, the Hon Christopher Pyne MP.

Kind regards

Mathias Cormann
**Minister for Finance**

1 September 2015

ATTORNEY-GENERAL

CANBERRA

MS15-000676

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

08 SEP 2015

Dear Senator Williams, John

I refer to the correspondence from Mr Ivan Powell, Committee Secretary, of 13 August 2015, requesting my advice on matters raised in the *Delegated legislation monitor* No. 8 of 2015.

In the monitor the Committee noted that the Explanatory Statement accompanying the Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015 (the Regulation) does not provide information in relation to consultation. As such the Explanatory Statement does not meet the requirements of sections 17 and 26 of the *Legislative Instruments Act 2003* (LIA).

I have approved a Revised Explanatory Statement, which has been updated in accordance with the requirements of the LIA to provide details of the consultation undertaken at both the Commonwealth level and by the Northern Territory Government. I have enclosed a copy of the Revised Explanatory Statement, which in due course will be tabled in both Houses of Parliament, and lodged for registration on the Federal Register of Legislative Instruments.

Thank you for the Committee's correspondence on this matter.

Yours faithfully

(George Brandis)

Encl: Revised Explanatory Statement – Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015

**Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015**

**REVISED EXPLANATORY STATEMENT**

**Select Legislative Instrument No. 80, 2015**

Issued under the Authority of the Attorney-General

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**OUTLINE**

The *Administrative Decisions (Judicial Review) Act 1977* (the Act) provides for review of certain administrative decisions (on questions of law) by either the Federal Court or Federal Circuit Court.

To be reviewable under the Act decisions must be of an administrative character, and include decisions made, proposed to be made or required to be made under specified classes of enactments. This includes decisions made by a Commonwealth authority or officer under an Act of the Northern Territory (NT) that is described in Schedule 3 to the Act.

Section 20 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be so prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Section 19B of the Act provides that the regulations may amend Schedule 3 to (among other things) include an Act of the NT, which has the effect of identifying it as an enactment for the purposes of the Act.

The purpose of the *Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015* (the Regulation) is to amend Schedule 3 to the Act, as allowed under section 19B, to include three NT Acts related to the regulation of electricity utilities.

The National Electricity Law (NEL) is a Commonwealth, State and Territory cooperative legislative scheme in the energy sector providing for matters including the economic regulation of monopoly electricity transmission and distribution businesses (electricity businesses). Among other things, it provides for the Australian Energy Regulator (AER) to make revenue determinations in relation to such energy businesses. The *National Electricity (South Australia) Act 1996 (SA)* sets out the NEL which is then applied as law by legislation in the participating jurisdictions.

The NT Government intends to apply the NEL with full effect from 1 July 2019. From that time, decisions made by the AER under the NEL as applied in the NT will be subject to review under the Act due to existing provisions (paragraph 2(da) in Schedule 3 to the Act).

To enable the AER to undertake necessary preparatory work in the lead up to 1 July 2019, the NT intends to apply the NEL from 1 July 2016, and make transitional arrangements applying from 1 July 2015 for the AER to administer and enforce the existing revenue determination made under the combined authority of three pieces of NT legislation:

a) the *Electricity Networks (Third Party Access) Act (NT)*;

b) the *Electricity Reform Act (NT*); and

c) the *Utilities Commission Act (NT)*.

The Regulation adds these three NT Acts to Schedule 3 of the Act, meaning that federal judicial review of decisions made by the AER in relation to NT electricity businesses will be available under the NT's transitional arrangements from 1 July 2015.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation will commence on the later of:

a) the start of the day after it is registered; and

b) immediately after the commencement of Part 5 of the *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015 (NT)*.

**Regulatory impact analysis**

Before this Regulation was made, its expected impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). That assessment indicated that it will have a minor impact on business, individuals and the economy. That assessment has been confirmed by the OBPR (OBPR reference 18899).

**Consultation**

Before this Regulation was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the LIA. This included consideration of the consultation conducted by the Department of Industry and the NT Government on the substantive legislative changes involved in transferring the administration and enforcement of the three NT Acts to the AER.

Persons likely to be affected by this regulation had an adequate opportunity to comment on its proposed effect through their inclusion in consultation on the substantive changes described above.

At the Commonwealth level, the Department of Industry convened an interdepartmental committee comprising representatives of the Departments of the Prime Minister and Cabinet and Finance, the Treasury, and the Attorney-General's Department. This committee reviewed the draft NT legislation and the need for amendments to Commonwealth legislation (including the Act).

Other parties affected by the NT Government's move to apply the NEL were included in consultation conducted by the NT Government itself: in addition to the usual NT Government Cabinet and Parliamentary processes, the NT Department of Treasury and Finance consulted with the Power and Water Corporation (the only network provider in the Northern Territory) and the Utilities Commission throughout the policy consideration process and provided the draft NT legislation for comment prior to being finalised. Further, it consulted with the Australian Energy Regulator and the COAG Energy Council (comprising Ministers responsible for energy in all jurisdictions).

**Statement of compatibility with human rights obligations**

Before this regulation was made, its impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. This Regulation will make technical amendments to the Act which will have no impact on the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Regulation is compatible with human rights as it does not raise any human rights issues.

**PROCESSES FOR REVIEW OF THIS REGULATION**

This Regulation is subject to tabling and disallowance under Part 5 of the *Legislative Instruments Act 2003*, and will cease as if repealed on the day after the last of its provisions commence.

**OTHER ISSUES**

**Matter incorporated by reference**

This Regulation does not apply, adopt or incorporate other matter by reference.

**More information**

Details of the Regulation are provided in Attachment A.

**Attachment A**

**NOTES ON SECTIONS**

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015.*

Section 2 – Commencement

This section provides that the Regulation commences on the later of:

a) the start of the day after it is registered; and

b) immediately after the commencement of Part 5 of the *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015 (NT)*.

However, the Regulation will not commence at all if Part 5 of the *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015 (NT)* does not commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Administrative Decisions (Judicial Review) Act 1977*.

Section 4 – Repeal

This section provides that the Regulation is repealed on the day after it commences.

Section 5 – Schedules

This section provides that legislation specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

Schedule 1 – Amendments

**Item [1] – Additional paragraphs to be inserted after paragraph (2)(da) of Schedule 3 to the *Administrative Decisions (Judicial Review) Act 1977***

New paragraphs 2(dba), (dbb) and (dbc) respectively provide that the *Electricity Networks (Third Party Access) Act*, the *Electricity Reform Act*, and the *Utilities Commission Act*, all of which are Northern Territory Acts, are enactments for the purposes of the *Administrative Decisions (Judicial Review) Act 1977*.

SENATOR THE HON MITCH FIFIELD

ASSISTANT MINISTER FOR SOCIAL SERVICES

MC15-010347

Mr Mr Ivan Powell
regords.sen@aph.gov.au

PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Powell

Thank you for your letter of 13 August 2015 regarding the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 8 of 2015.

The report notes that the Committee is unclear as to the reason for introducing changes to the *Aged Care (Subsidy, Fees and Payments) Determination 2014* and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* to remove pre-entry leave subsidy from 1 July 2015 while the Social Services Legislation Amendment (No. 2) Bill 2015 (the Bill), which contains provisions to remove pre-entry leave subsidy, is still before the Parliament.

In December 2014, the Australian Government announced this measure in the Mid-Year Economic and Fiscal Outlook (MYEFO) with a clearly announced commencement date of 1 July 2015. The legislative amendments to the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to give effect to this measure were originally introduced under the Bill. The Bill also contains consequential amendments to fully implement the measure.

To give effect to the measure by the commencement date announced in MYEFO the Government had two legislatively valid options. The first involved using the existing Determination power provided to the Minister under the Principal Legislation to set the pre-entry leave subsidy to zero and the second involved making amendments to the Principal Legislation. The Government could have given effect to this measure without making any amendments to the Principal Legislation. It was decided to amend the Principal Legislation as that would allow certain unnecessary references in legislation relating to pre-entry leave to be removed. When it became apparent that the Bill may not receive passage before 1 July 2015 the Government took the decision to utilise the pre-existing and valid Determination power in order to give effect to the already announced commencement date.

The Aged Care Act and the Transitional Provisions Act provide that the Minister may determine the amount of subsidy and supplement payable to an approved provider. Schedule 2 of the *Aged Care (Subsidy, Fees and Payments) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015* and the *Aged Care (Transitional Provisions)(Subsidy and Other Measures) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015* gave effect to the cessation of pre-entry leave subsidy by setting the amount of subsidy to zero on 1 July 2015.

If the Bill receives Royal Assent, approved providers will no longer be eligible for pre-entry leave subsidy. Schedule 3 of the Amending Determinations will then remove references to pre-entry leave in the Determinations as they will be redundant at that time.

I trust this clarifies for the Committee the Government's reasons for making these amendments.

Thank you again for writing.

Yours sincerely

**MITCH FIFIELD**

25/8/15

**The Hon Greg Hunt MP**

**Minister for the Environment**

PDR: MC15-030954

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

1 SEP 2015

Dear Senator John

I refer to a request from Secretary of the Senate Standing Committee on Regulations and Ordinances conveyed to my Office on 13 August 2015 seeking advice in relation to the incorporation of extrinsic material by reference under the *Carbon Credits (Carbon Farming Initiative—Commercial and Public Lighting) Methodology Determination 2015* (the Determination).

In its *Delegated Legislation Monitor No. 8 of 2015* (the Monitor No. 8), the Committee notes that subsection 106(8) of the authorising legislation for the Determination (the *Carbon Credits(Carbon Farming Initiative) Act 2011*) provides that determinations made under this Act may apply, adopt or incorporate (with or without modifications) matters 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'. The Monitor No. 8 also notes that subsection 5(2) of the Determination incorporates by reference various standards; and further comments that neither the Determination nor the Explanatory Statement expressly state the manner in which the specified standards are incorporated.

Please be advised that the manner in which the specified standards are incorporated into the Determination is set out in section 7 of the Determination. The section prescribes that in applying the definitions in section 5, or a provision of Schedule 1 or 2, to the lighting equipment of a lighting system, a reference in those provisions to a definition in a standard is a reference to the definition in the version of the standard that was in force on the date the lighting system was commissioned. This prescription of the manner in which the standards are incorporated into the Determination applies to the standards listed in subsection 5(2), which were referred to in the Monitor No. 8. The Explanatory Statement to the Determination explains that:

> *This is intended to ensure that, if any of these standards change over the life of the project, whether the project meets a project requirement is assessed by reference to the definitions in standards that applied at the time the lighting upgrade was first commissioned.*

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7920 Greg.Hunt.MP@environment.gov.au

Accordingly, this approach is necessary to ensure that the Determination remains up to date with the latest requirements in Australian and international standards but does not risk invalidating project eligibility if past installations do not comply with a revised standard.

I have copied this letter to the Committee Secretary, Mr Ivan Powell.

Yours sincerely

Greg Hunt

**SENATOR THE HON MATHIAS CORMANN**
**Minister for Finance**

REF: MS15-001477

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

Dear Senator

I write in response to your letter dated 13 August 2015, regarding the retrospective commencement of the *Finance Minister's Orders (Financial Statements for reporting periods ending on or after1 July 2011) Repeal Instrument 2015* identified in the *Delegated legislation monitor* No. 8 of 2015.

The purpose of the Instrument is to repeal an instrument that has been superseded and has no operative effect.

The Instrument repealed the whole of the *Finance Minister's Orders (Financial Statements for reporting periods ending on or after 1 July 2011)* (the Finance Minister's Orders). This was the final step in the process of replacing the Finance Minister's Orders with the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015*.

The retrospective commencement of the Instrument does not detrimentally affect the rights of any person, nor does it impose additional obligations or liabilities on any person, other than the Commonwealth, in accordance with subsection 12(2) of the *Legislative Instruments Act 2003*.

The contact in my Department is Kim-Louise Benning, Acting Assistant Secretary, Governance and Public Management Taskforce, phone 6215 3657.

Kind regards

Mathias Cormann
**Minister for Finance**

31 August 2015

Parliament House, Canberra ACT 2600 Telephone: (02) 6277 7400 ~ Facsimile: (02) 6273 4110

**The Hon Jamie Briggs MP**
Assistant Minister for Infrastructure
and Regional Development
Member for Mayo

*PDR ID: MC15-004096*

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Thank you for the Committee's letter dated 13 August 2015 about the *Jervis Bay Territory Emergency Management Ordinance 2015* (the Ordinance).

The Committee expressed a concern in the *Delegated Legislation Monitor* No. 8 of 2015 that the Explanatory Statement for the Ordinance, in relation to Section 9, did not provide justification for the broad delegation of the Minister's powers (other than excluded powers) to 'any person'.

Emergency services in the Jervis Bay Territory (JBT) are provided by a range of organisations, depending on the nature and complexity of the emergency. These organisations include, but are not limited to, the Australian Federal Police, JBT volunteer fire brigades, NSW Rural Fire Service, Fire and Rescue NSW, the NSW State Emergency Service, the NSW Ambulance Service, the Booderee National Park, the Wreck Bay Aboriginal Community Council and the Department of Defence. Agencies work co-operatively across the common JBT-NSW border in response to emergency situations.

Given the geographical location of the JBT, one of the key objectives of the Ordinance was consistency with emergency management legislation in NSW, to facilitate the seamless provision of emergency services across the JBT-NSW border.

Parliament House, Canberra ACT 2600
Telephone: 02 6277 7020
Facsimile: 02 6273 4126
www.minister.infrastructure.gov.au

The *State Emergency and Rescue Management Act 1989* (NSW) has a similarly broad delegation power in subsection 10(4), which enables the NSW Minister responsible for Emergency Services to delegate the majority of his or her functions to 'the State Emergency Operations Controller, State Emergency Recovery Controller or other person'.

The delegation power in Section 9 of the Ordinance is intended to give the responsible Minister the ability to delegate powers to the most appropriate person to manage an emergency in the JBT, consistent with NSW practices.

I have requested that the Department ensure that the Explanatory Statement for the Ordinance is updated, to clarify why a broad delegation of powers is necessary to align with NSW practices and to allow for the management of a variety of emergencies in the JBT.

The updated Explanatory Statement will be made available to the Committee.

I trust this information will be of assistance to the Committee.

Yours sincerely

**Jamie Briggs**

27 AUG 2015

# Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State


Ref: MC15-002182

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Williams,

On 13 August 2015, the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee), Mr Ivan Powell, wrote seeking my advice on the consultation undertaken on the entitlement changes contained in the *Parliamentary Entitlements Amendment (Office Budget) Regulation 2015* [F2015L00949]. Mr Powell's correspondence noted that the Committee *considers that an overly bare or general description* [of the consultation undertaken] *is insufficient to satisfy the requirements of the Legislative Instruments Act 2003*. The Committee also *requests that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003*.

I can confirm that the Government discussed the entitlement changes with the Opposition ahead of the 2015-16 Budget announcement and that during these discussions, bipartisan support for the changes was reached. In addition, a presentation for all Senators and Members detailing the entitlement changes was held at Parliament House on 26 May 2015 and was subsequently published on the Ministerial and Parliamentary Services website for those who could not attend.

I have approved a revised Explanatory Statement to the *Parliamentary Entitlements Amendment (Office Budget) Regulation 2015* to reflect the consultation that was undertaken. A copy of the revised Explanatory Statement is attached for your information, and will be published shortly on the Federal Register of Legislative Instruments and tabled in both Houses of the Parliament.

Thank you for your assistance with this matter.

Yours sincerely,

**SENATOR THE HON. MICHAEL RONALDSON**

27 AUG 2015


Parliament House, Canberra ACT 2600 Tel: (02) 6277 7820 Fax: (02) 6273 4140

# EXPLANATORY STATEMENT

## Select Legislative Instrument 2015 No.

Issued by the authority of the Special Minister of State

*Parliamentary Entitlements Act 1990*

*Parliamentary Entitlements Amendment (Office Budget) Regulation 2015*

The *Parliamentary Entitlements Act 1990* (the Act) provides members of each House of Parliament (members) with a range of benefits. These benefits are set out in Schedule 1 to the Act (section 4), and additional benefits may be prescribed by regulations made by the Governor-General (paragraph 5(1)(b)).

Section 12 of the Act provides that the Governor-General may make regulations for the purposes of paragraph 5(1)(b) and section 9 of the Act. Subsection 9(2) of the Act provides that benefits set out in Schedule 1 to the Act may be varied or omitted by the regulations.

The *Parliamentary Entitlements Regulations 1997* (the Principal Regulations) currently prescribe a range of additional benefits (Parts 1 to 3), and vary or omit benefits in Schedule 1 to the Act (Schedule 1 to the Principal Regulations).

This Regulation makes changes to members' entitlements through:

- an amendment to the Regulations pursuant to subsection 5(1)(b) of the Act; and
- variation of Schedule 1 to the Act, via an amendment to the Principal Regulations, pursuant to subsection 9(2) of the Act.

Members have various entitlements to office resources under Division 1 of the Principal Regulations and Schedule 1 to the Act. This Regulation amends the Principal Regulations to simplify the existing arrangements by establishing an office budget, which includes the following entitlements:

- publications;
- office requisites and stationery;
- flags for presentation to constituents;
- printing and communications; and
- software.

The office budget is the equivalent of the combined value of the publications, office requisites and stationery, printing and communications, and software entitlements, plus an amount of $10,000 per financial year for the cost of Australian flags. Part of the office budget would be indexed in accordance with current legislative and administrative arrangements, with the portion for the printing and communications budget for Senators now included in the indexation provisions

This Regulation also makes consequential amendments to the supplement of capped entitlements in exceptional circumstances in regulation 3EA of the Principal Regulations, to reflect the amendments made in relation to the entitlements included in the office budget, and separate changes to be made in relation to determinations under the *Members of Parliament (Staff) Act 1984*.

A Statement of Compatibility with Human Rights is included in Attachment A. Details of the Regulation are included in Attachment B.

The Act does not impose any conditions that need to be satisfied before the power to make the Regulation may be exercised. This Regulation commences on 1 July 2015 and is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**Consultation and Regulatory Impact**

In relation to section 17 of the *Legislative Instruments Act 2003*, the Government discussed the provisions in the Regulation with the Opposition ahead of the 2015-16 Budget announcement. Bipartisan support for the entitlement changes was reached during those discussions. In addition, a presentation for all Senators and Members detailing the entitlement changes was held at Parliament House on 26 May 2015 and was subsequently published on the Ministerial and Parliamentary Services website for those who could not attend. Futher consultation was considered unnecessary as the amendments are machinery in nature and do not substantially alter existing arrangements, in accordance with section 18 of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation (OBPR) has been consulted and agrees that this proposal will have no regulatory impact on businesses, individuals or organisations and therefore the regulatory costs are nil. OBPR ID Number: 16832.

Authority: Section 12 of the
*Parliamentary Entitlements Act 1990*

**Attachment A**

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

***Parliamentary Entitlements Amendment (Office Budget) Regulation 2015***

This Regulation 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*.

### Overview of the Legislative Instrument

This Legislative Instrument amends some the entitlements for parliamentarians under Schedule 1 to the *Parliamentary Entitlements Act 1990* (the Act) and the *Parliamentary Entitlements Regulations 1997*, to create an office budget to be used for certain existing entitlements (publications, office requisites and stationery, printing and communications, software, and Australian flags). This creates greater flexibility and limits the administrative burden on members accessing these entitlements.

### Human rights implications

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

### Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Michael Ronaldson**

**Special Minister of State**

**Attachment B**

**Details of the *Parliamentary Entitlements Amendment (Office Budget) Regulation 2015***

Section 1- Name

This section provides that the title of the Regulation is the *Parliamentary Entitlements Amendment (Office Budget) Regulation 2015* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on 1 July 2015.

Section 3 – Authority

This section states that the Regulation is made under the *Parliamentary Entitlements Act 1990* (the Act).

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulation is amended or repealed as set out in the Schedule, and that any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

**Item [1]** inserts a number of definitions into regulation 2 of the *Parliamentary Entitlements Regulations 1997* (Principal Regulations). The terms defined (*office budget, office budget benefit* and *remainder of the office budget*) are used in new Part 2AA, which is inserted by item [11] of the Regulation (see below). This item also inserts a definition of *standard rate of postage* into regulation 2 on the same terms as the definition previously contained in regulation 3AB, which is repealed and substituted by other provisions in the Regulation (see item [2] below).

**Item [2]** repeals regulations 3AB and 3AC of the Principal Regulations, which set out the value of the printing and communications entitlement for members of the House of Representatives and Senators, respectively. The item substitutes a new regulation 3AB that provides that the cost of the printing and communications entitlement under regulation 3AA cannot exceed the remainder of the office budget. The office budget is set out in new Part 2AA (see item [11] below).

**Items [3], [4] and [5]** make amendments to regulation 3EA to remove references to 'relevant determinations'. Relevant determinations were previously prescribed as certain determinations under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act) (relating to the Electorate Staff Travel Budget (ESTB) and the Relief Staff Budget (RSB)), however this is now being removed from the Principal Regulations. The Electorate Support Budget (which replaces the ESTB and RSB) will still be available to be supplemented, however this will be dealt with separately under the relevant determination under the MOP(S) Act

**Item [6]** omits the reference to *Determination 2011/12, Supplement – Relief Staff Budget and Electorate Staff Travel Budget* in subregulation 3EA(5), and is consequential to the removal of the references to relevant determinations (see item [3] above).

**Item [7]** repeals the note under subregulation 3EA(5), which is no longer relevant with the removal of references to relevant determination.

**Item [8]** repeals and replaces subregulation 3EA(7). This amendment is consequential to the establishment of the office budget that certain entitlements are now subject to (under other amendments in the Regulation), to clarify how the supplement provisions apply to these entitlements. New subregulation 3EA(7) provides that a supplement approved for a purpose related to capped entitlement that is an office budget benefit may only be used if the member has fully expended the office budget in the relevant financial year. The provision in relation to other capped entitlements that may be supplemented is unchanged, so that these entitlements may only be supplemented where a member has fully expended that capped entitlement in the relevant financial year.

This item also makes consequential amendments to subregulation 3EA(8) to remove reference to determinations made under the *Members of Parliament (Staff) Act 1984*. This is consequential to the removal of references to relevant determination (see item [3] above).

This item also repeals subregulations 3EA(7A) and (7B), as these provisions relate to previous financial years and are therefore spent.

**Item [9]** repeals and substitutes the definition of *capped entitlement* to reflect the amendment to subregulation (8). See item [8] above.

**Item [10]** repeals the definition of *relevant determination*. This is consequential to the removal of relevant determination from regulation 3EA (see item [3] above).

**Item [11]** inserts a new Part 2AA into the Principal Regulations, which sets out the total amount that is available to members for expenditure (the office budget) on office budget benefits (flags, office requisites and stationery, software, publications, and printing and communications).

New regulation 3ED sets out the calculation of the office budget for Senators (subregulation (1)) and members of the House of Representatives (subregulation (2)) for a financial year. The office budget is available for expenditure on office budget benefits. Members have discretion on their use of these entitlements, which must not exceed the total of the office budget in a year (with office requisites and stationery limited to $50,000 in a year, from the office budget, see item [15] below).

Subregulation (1) provides that the office budget for a Senator is the sum of $11,500; and $86,271 indexed annually in accordance with the Consumer Price Index.

Subregulation (2) provides that the office budget for a member of the House of Representatives is calculated as the sum of a fixed amount ($86,500); an amount worked out based on the number of enrolled voters in the member's electorate and the standard rate of postage (as set out in subregulations (3) and (4)); and an amount based on whether the member's electorate is inner or outer metropolitan ($44,416) or otherwise ($45,751), indexed annually in accordance with the Consumer Price Index.

The office budget is the equivalent to the sum of the previous individual amounts for the entitlements that are now office budget benefits, with a component of $10,000 in relation to Australian flags (flags and software did not previously have an express cap in the legislation, however were subject to an administrative cap, as approved by the Special Minister of State under the relevant entitlement).

Under new subregulations (5) and (6), the office budget is reduced by the amount of a supplement under regulation 3EA that is spent in relation to an office budget benefit, unless the Special Minister of State decides that this should not apply. This is equivalent to the provisions previously applying to the supplemented capped entitlements that are now office budget benefits (Australian flags, office requisites and stationery, and printing and communications).

**Item [12]** inserts a new Part 4 into the Principal Regulations which provides for transitional arrangements for the office budget for the 2015-16 financial year. This provision applies in circumstances where a member used a supplement under regulation 3EA in 2014-15 financial year, in relation to a capped entitlement that is now an office budget benefit. The effect of this provision is that the office budget for the 2015-16 financial year will be reduced by any amount of supplement spent for a purpose connected with printing and communications, office requisites and stationery or Australian flags, in the 2014-15 financial year, unless the Special Minister of State has decided that this should not apply.

**Item [13]** inserts (1) after '2.' in item 2 of Part 1, Schedule 1 to the Act (via the insertion of item [100AAA] into Part 1, Schedule 1 to the Principal Regulations), to change existing item 2 into subitem 2(1). This is consequential to the insertion of new subitem 2(2), see item [14] below.

**Item [14]** inserts subitem (2) after subitem 2(1) of Part 1, Schedule 1 to the Act (via the insertion of item [100AB] into Part 1, Schedule 1 to the Principal Regulations). This subitem provides that the cost of Australian flags to which a member is entitled cannot exceed the reminder of the office budget (the value of the office budget is set out in new Part 2AA, see item [11] above).

**Item [15]** repeals subitems 7(2), (3), (4), (5) and (6) of Part 1, Schedule 1 to the Act (via an amendment to item [104] of Part 1, Schedule 1 to the Principal Regulations), and substitutes new subitems (2) and (3).

New subitem (2) replaces the previous budget provision for the office requisites and stationery entitlement in subitem (1), making this entitlement subject to the office budget in new Part 2AA (see item [11] above). The amount that may be spent on this entitlement is subject to the remainder of the office budget, but must not exceed $50,000.

New subitem (3) provides that the cost of software that a member is entitled to under subitem (1) cannot exceed the remainder of the office budget (the value of the office budget is set out in new Part 2AA, see item [11] above). Software is not specifically identified as an entitlement under subitem (1), however has historically been approved by the Special Minister of State as an office facility provided as a benefit under this subitem.

Previous subitems (3) to (6) are not substituted under the amendments in this item, as they related to the recovery of a supplement amount spent in relation to office requisites and stationery. These subitems have been replicated in new Part 2AA in relation to the office budget (see item [11] above).

**Item [16]** repeals subitems 7A(2) and (3) of Part 1, Schedule 1 to the Act (via an amendment to item [104A] of Part 1, Schedule 1 to the Principal Regulations) and substitutes new subitem (2).

New subitem (2) replaces the previous budget provisions for the publications entitlement, and provides that the cost of publications to which a member is entitled under subitem (1) cannot exceed the remainder of the office budget (the value of the office budget is set out in new Part 2AA, see item [11] above).

Australian Government

Department of Health

19 August 2015

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

Dear Senator Williams

**Private Health Insurance (Registration) Amendment Rules 2015 (No.1)**

I write in response to your correspondence dated 13 August 2015 regarding the Senate Standing Committee on Regulations and Ordinances'comments contained in the *Delegated legislation monitor No 8 of 2015*, concerning the Private Health Insurance (Registration) Amendment Rules 2015 (No.1). I am responding on behalf of the Minister for Health, the Hon Sussan Ley MP.

The monitor requests that the Explanatory Statement be updated in accordance with the requirements of the Legislative Instruments Act 2003. Specifically to provide further information regarding consultation for the rule amendment which repeals the definition of the restricted access groups for Phoenix Health Fund Limited and Transport Health Pty Ltd to reflect the change of their registration statuses from restricted access insurers to open access insurers.

The attached Explanatory Statement has been updated to include additional information on consultation which occurred for the rule amendment.

Yours sincerely

Catherine Rule
First Assistant Secretary
Medical Benefits Division

# EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Private Health Insurance Act 2007*

*Private Health Insurance (Registration) Amendment Rules 2015 (No. 1)*

Authority

Section 333-20 of the *Private Health Insurance Act 2007* (the Act) provides that the Minister may make Private Health Insurance (Registration) Rules providing for matters required or permitted by Part 4-3 of the Act, or necessary or convenient in order to carry out or give effect to Part 4-3 of the Act.

The Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) (the Amendment Rules) amend the Private Health Insurance (Registration) Rules 2009 (No. 2) (the Principal Rules), which commenced on 22 July 2009.

Purpose

The purpose of the Amendment Rules is to repeal the definitions of two restricted access groups in the Schedule.

Background

The Act enables private health insurers to be registered with the Private Health Insurance Administration Council as a 'restricted access insurer'. A restricted access insurer may only offer complying health insurance policies to a particular group of people, for example members of a professional association (a 'restricted access group').

Paragraph 126-20(7)(e) of the Act provides that a restricted access group includes a group of people who all belong to a particular group, based on whether they are or were part of any group described in the Principal Rules.

Subsection 126-20(8) of the Act clarifies that the Principal Rules may describe a group as consisting of one or more classes of people, whether or not the class or classes are described by reference to the matters referred to in paragraphs 126-7(a) – (d) of the Act (for example, membership of a particular industry or union or employment by a particular employer).

The Amendment Rules repeal the definition of the restricted access groups for Phoenix Health Fund Limited and Transport Health Pty Ltd to reflect the change of their registration statuses from restricted access insurers to open access insurers.

Details

Details of the Amendment Rules are set out in the **Attachment**.

Consultation

Consumer consultation was undertaken by Phoenix Health Fund Limited and Transport Health Pty Ltd with their respective memberships about the then proposed changes to their fund type.

The Department of Health did not consult with Phoenix Health Fund Limited and Transport Health Pty Ltd about the repeal of the definitions of their restricted access groups, as the

repeals were made following the two insurers notifying the Private Health Insurance Administration Council (PHIAC) that they wished to cease holding restricted access status.

Under subsection 126-40(4) of the *Private Health Insurance Act 2007 (the Act),* a restricted access insurer who notifies PHIAC that it no longer wishes to hold restricted access registration is taken to cease to do so. In accordance with the Act, PHIAC informed the Department of the change in registration status of Phoenix Health Fund Limited and Transport Health Pty Ltd. This made the continued specification of their restricted access groups redundant and they have been repealed.

The repeal of the definition of the restricted access groups for Phoenix Health Fund Limited and Transport Health Pty Ltd does not affect the registration status of other insurers. However, PHIAC has already notified industry of the changes to the registration status through the release of private health insurance industry circulars.

Phoenix Health Fund Limited and Transport Health Pty Ltd notified members of their respective funds via a mail-out and via their websites of the change in registration status.

The Office of Best Practice Regulation (OBPR) was consulted. OBPR advised that a Regulation Impact Statement was not required because the amendments are minor.

The Amendment Rules commence on the day after registration.

The Amendment Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Authority: Section 333-20 of the *Private Health Insurance Act 2007*

**ATTACHMENT**

## DETAILS OF THE PRIVATE HEALTH INSURANCE (REGISTRATION) AMENDMENT RULES 2015 (No. 1)

**Section 1 Name of Rules**
Section 1 provides that the title of the Amendment Rules is the Private Health Insurance (Registration) Amendment Rules 2015 (No. 1).

**Section 2 Commencement**
Section 2 provides that the Amendment Rules are to commence on the day after registration.

**Section 3 Authority**
Section 3 provides that the Amendment Rules are made under the *Private Health Insurance Act 2007*.

**Section 4 Schedule**
Section 4 provides that the an instrument specified in a Schedule to the Amendment Rules is amended or repealed as set out in the applicable items and any other item in a Schedule takes effect according to its term.

**Schedule – Amendments**

The Schedule amends the Private Health Insurance (Registration) Rules 2009 (No. 2) (the Principal Rules).

**Item 1 –Schedule – Restricted access groups for certain insurers – table item 4**

Item 4 of the Amendment Rules omits the entirety of item 4 of the Principal Rules, as Phoenix Health Fund Limited has ceased to be a restricted access insurer.

**Item 2 – Schedule – Restricted access groups for certain insurers – table item 12**

Item 12 of the Amendment Rules omits the entirety of item 12 of the Principal Rules, as Transport Health Pty Ltd has ceased to be a restricted access insurer.

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Private Health Insurance (Registration) Amendment Rules 2015 (No. 1)**

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*.

**Overview of the Legislative Instrument**

The *Private Health Insurance Act 2007* enables private health insurers to be registered with the Private Health Insurance Administration Council as a 'restricted access insurer'. A restricted access insurer may only offer complying health insurance policies to a particular group of people, for example members of a professional association (a 'restricted access group').

Paragraph 126-20(7)(e) of the Act provides that a restricted access group includes a group of people who all belong to a particular group, based on whether they are or were part of any group described in the *Private Health Insurance (Registration) Rules*.

Subsection 126-20(8) of the Act clarifies that the Principal Rules may describe a group as consisting of one or more classes of people, whether or not the class or classes are described by reference to the matters referred to in paragraphs 126-7(a) – (d) of the Act (for example, membership of a particular industry or union or employment by a particular employer).

The Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) amends the Schedule to the Private Health Insurance (Registration) Rules 2009 (No. 2) to repeal the definitions of the restricted access groups for Phoenix Health Fund Limited and Transport Health Pty Ltd to reflect the change of their registration statuses from restricted access insurers to open access insurers.

**Human rights implications**

This legislative instrument engages Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights by assisting with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Private health insurance regulation assists with the advancement of these human rights by improving the governing framework for private health insurance in the interests of consumers. Private health insurance regulation aims to encourage insurers and providers of private health goods and services to provide better value for money to consumers, improve information provided to consumers of private health services, and to allow consumers to make informed choices when purchasing services. Private health insurance regulation also restricts insurers from differentiating the premiums they charge according to individual health characteristics such as poor health.

**Conclusion**

This legislative instrument is compatible with human rights because it advances the protection of human rights.

**Mr Shane Porter**

**Acting First Assistant Secretary**

**Medical Benefits Division**

**Department of Health**

**THE HON. LUKE HARTSUYKER MP**
**ASSISTANT MINISTER FOR EMPLOYMENT**
**DEPUTY LEADER OF THE HOUSE**

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

Dear Senator

Thank you for the letter of 13 August 2015 from the Committee Secretariat to Senator the Hon. Eric Abetz, Minister for Employment, concerning issues identified in the Delegated Legislation Monitor No. 8 of 2015 regarding the section on consultation in the explanatory statement for the *Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR and FaHCSIA) Specifications 2009 (No.1) – Instrument of Revocation 2015*. As the issue raised falls within my portfolio responsibilities as Assistant Minister for Employment, the letter was referred to me for reply.

The Committee asked for further details on the consultation process for the instrument. The Department of Employment consulted with the Department of Social Services regarding the instrument. The Department of Social Services confirmed that the revocation of the instrument will not have an impact on their portfolio. No further consultation was undertaken as the instrument will not impact current policy or procedures and no job seekers or businesses will be affected by the change. In this regard, the instrument is of a minor or machinery nature and does not alter existing arrangements.

I will ensure that the Department of Employment registers an amended version of the explanatory statement for the instrument that fully addresses the Committee's concerns.

Yours sincerely

LUKE HARTSUYKER

03 SEP 2015

CANBERRA: M1 48, Parliament House, Canberra ACT 2600. Phone: 02 6277 7540 Fax: 02 6273 0207
COFFS HARBOUR: 39 Little Street, Coffs Harbour NSW 2450 Phone: 02 6652 6233 Fax: 02 6651 4346
assistant_minister@employment.gov.au http://lukehartsuyker.com.au

# 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:

Committee Secretary
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3066
Fax: +61 2 6277 5881
Email: RegOrds.Sen@aph.gov.au