The Senate

# Standing Committee on Regulations and Ordinances

## Delegated legislation monitor

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# Membership of the committee

## Current members

| | |
|---|---|
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| Senator Gavin Marshall (Deputy Chair) | Victoria, ALP |
| Senator Sam Dastyari | New South Wales, ALP |
| Senator Nova Peris OAM | Northern Territory, ALP |
| Senator Linda Reynolds | Western Australia, LP |
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# 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 4 September 2015 and 17 September 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.

| | |
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| **Instrument** | **Carbon Credits (Carbon Farming Initiative—Beef Cattle Herd Management) Methodology Determination 2015 [F2015L01434]** |
| **Purpose** | Sets the rules for implementing and monitoring offsets projects that would reduce emissions of greenhouse gases from grazing beef cattle through improvement in production efficiency of beef cattle herds |
| **Last day to disallow** | 2 December 2015 |
| **Authorising legislation** | *Carbon Credits (Carbon Farming Initiative) Act 2011* |
| **Department** | Environment |
| **Scrutiny principle** | Standing Order 23(3)(a) |

### Incorporation of extrinsic material

This instrument provides for crediting emissions reductions from projects that improve the production efficiency of pasture-fed beef cattle herds.

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(1) of the instrument refers to the *Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006*; and note 1 to subsection 25(1) of the instrument refers to Accounting Standard AASB 141—*Agriculture*. However, neither the instrument nor the explanatory statement (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 requests the advice of the minister in relation to this matter.**

| | |
|---|---|
| **Instrument** | **Fair Work (Building Industry) Regulation 2015 [F2015L01399]** |
| **Purpose** | Repeals and replaces the Fair Work (Building Industry) Regulations 2005, which prescribe matters that support the operation of the *Fair Work (Building Industry) Act 2012* |
| **Last day to disallow** | 23 November 2015 |
| **Authorising legislation** | *Fair Work (Building Industry) Act 2012* |
| **Department** | Employment |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## Sub-delegation

Section 6 of this instrument provides that the Federal Safety Commissioner may delegate his or her powers under the *Fair Work (Building Industry) Act 2012* to an Australian Public Service (APS) employee who is engaged for the purposes of the Office of the Federal Safety Commissioner.

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 Federal Safety Commissioner's powers to 'an APS employee who is engaged for the purposes of the Office of the Federal Safety Commissioner', other than to state briefly that this will 'support the effective administration of the Accreditation Scheme'.

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

| | |
|---|---|
| **Instrument** | **Radiocommunications Licence Conditions (Outpost Licence) Determination 2015 [F2015L01433]** |
| **Purpose** | Revokes and replaces the Radiocommunications Licence Conditions (Outpost Licence) Determination 1997 |
| **Last day to disallow** | 2 December 2015 |
| **Authorising legislation** | *Radiocommunications Act 1992* |
| **Department** | Communications |
| **Scrutiny principle** | Standing Order 23(3)(a) |

## Incorporation of extrinsic material

This instrument determines the conditions applicable to outpost licences.

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 314A(2) of the authorising legislation for this instrument (the *Radiocommunications Act 1992*) 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 of the instrument refers to the *Radiocommunications (Interpretation) Determination 201*5. However, neither the instrument nor the ES expressly state the manner in which the specified document is 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 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)(a) |
| **Previously reported in** | *Delegated legislation monitors* No. 6, 8 and 10 of 2015 |

### 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*,[1] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally

[1] *Williams v Commonwealth* (2012) 248 CLR 156.

requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[2] 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:

> 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).

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[2] *Williams v Commonwealth* (2014) 252 CLR 416.

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 commented as follows: ***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.[3] To underline this point, the committee notes that it has been provided with legal advice on a number of occasions.[4]

***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 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 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 commented as follows: ***The committee thanked 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 minister 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

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

4 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.

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 minister 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 sought 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'))[5] do not specify recognised grounds for making such claims. This is because

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

whether any of the grounds are justified in a particular case depends on the circumstances of that case.[6]

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.

***The committee therefore reiterated 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.***

**Minister's third response**

The Minister for Finance advised that:

> I can assure the Committee that the Government has obtained legal advice and has considered the constitutional position very carefully. This has included consideration of the constitutional powers identified in the explanatory statement accompanying the Regulation and the provisions of international instruments as advised in my letter to the Committee of 1 September 2015.
>
> Access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. It is important to note the long-standing practice of successive governments not to publish or provide legal advice obtained in the course of developing policy and legislation. The Government considers that it is not in the public interest to depart from a position established and maintained over many years in the interests of conserving the Commonwealth's broader legal and constitutional interests.
>
> This practice was most recently outlined by the Attorney-General, Senator the Hon George Brandis QC, in his letter of 27 August 2015 to the Joint Intelligence and Security Committee (see Appendix D of the *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*):
>
> It has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation.
>
> It has been stated on other occasions previous to that. As outlined by the Hon Gareth Evans QC:

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

> ... [n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle ... (*Senate Hansard*, 28 August 1995, page 466);
>
> the Hon Daryl Williams QC:
>
> ... I am going to offer the traditional response. I am not going to speculate about advice that the government may or may not have received nor am I going to provide any of that advice ... (*House of Representatives Hansard*, 25 November 1997, page 11165);
>
> the Hon Philip Ruddock MP:
>
> ... It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government ... (*House of Representatives Hansard*, 29 March 2004, page 27405); and
>
> Senator the Hon Joe Ludwig:
>
> To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, *Hansard* of Estimates hearing, 26 May 2011, page 161).

**Committee's third response**

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

First, the committee notes the minister's advice that the Government 'has considered the constitutional position carefully'. The minister also reiterates his previous advice that legal advice was obtained; and that the government considers that it is not in the public interest to depart from the 'longstanding practice' of successive governments not to provide legal advice obtained in the course of developing policy and legislation 'in the interests of conserving the Commonwealth's broader legal and constitutional interests'.

However, the committee again notes 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.

In this respect, the committee notes that the minister has not advanced 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.

Similarly, the examples cited by the minister do not accord with the procedure for making public interest immunity claims as set out in the Order of the Senate of 13 May 2009. The committee notes that such assertions of a general government practice in relation to legal advice reflect a lack of understanding of 'the principle that claims to withhold information from Senate committees require a statement of public interest grounds that can be considered by the committee and the Senate'.[7] On this point, *Odgers' Australian Senate Practice* states:

> Although governments have generally abandoned claims that documents should not be produced simply because they belong to a class of documents, this claim has continued in residual forms.
>
> …Governments have also claimed that there is a long-established practice of not disclosing their advice, or of not doing so except in exceptional circumstances. These claims are contradicted by the occasions on which advice is voluntarily disclosed when it supports a government position. The actual position was stated in a letter produced in 2008 by the Secretary of the Department of Prime Minister and Cabinet: the government discloses its legal advice when it chooses to do so [references omitted].[8]

In light of the above, the committee notes that the minister has failed to advance a public interest immunity claim in accordance with the Order of the Senate of 13 May 2009 ('Public interest immunity claims') so as to allow the committee and the Senate to judge whether the refusal to provide the legal advice in question is justified in this case.

Second, the committee notes that the minister has not provided an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, he 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.

The committee notes that Standing Order 23(3)(a) requires the committee to '*ensure* that…[an instrument of delegated legislation] is in accordance with statute', which includes the question of whether an instrument is constitutionally valid [emphasis added]. In this regard, the committee considers that there is no more fundamental issue than the question of whether the purported making of an instrument is supported by a

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7 *Odgers' Australian Senate Practice* (13th ed.) pp 621-622.

8 *Odgers' Australian Senate Practice* (13th ed.) p. 622.

constitutional head of power. It is therefore incumbent on the minister to provide an assurance to the committee and the Parliament of his satisfaction that such authority exists for his purported exercise of the Parliament's delegated power to make legislation.

In this respect, the committee notes that the minister's responses have failed to provide any assurance that the specifying of the programs in question for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* is in fact supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power). Further, the minister has responded in only general terms that do not address the committee's specific questions regarding the basis on which it is claimed these powers support the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B.

**Noting that the last day for disallowance is 14 October 2015, and in light of the minister's failure to provide supporting legal advice or positive assurance that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power), the committee again requests that the minister provide:**

- **legal advice received on the question of whether the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power); or**

- **in the event that a valid public interest immunity claim is advanced in relation to the requested legal advice, *positive assurance to the committee* that the minister regards the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* as authorised by the external affairs power and/or the executive nationhood power (coupled with the express incidental power).**

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|---|---|
| **Instrument** | **Taxation Administration Act 1953 - Pay as you go withholding - PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047]** |
| **Purpose** | Repeals the Taxation Administration Act 1953 - PAYG Withholding - PAYG Withholding Variation: Allowances; and adjusts the cents per kilometre car expense payments |
| **Last day to disallow** | 1 December 2015 |
| **Authorising legislation** | *Taxation Administration Act 1953* |
| **Department** | Treasury |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 8 of 2015 |

## Drafting

The committee commented as follows: This instrument effects certain changes to tax arrangements, and appears to apply from 1 July 2015. The ES for the instrument states:

> The variation for cents per kilometre car expense payments has been adjusted because of a proposed change to calculation rules announced in the federal budget on 12 May 2015. If passed, the change is to take effect from 1 July 2015.

The committee understands this statement to mean that the measure will subsequently be confirmed by primary legislation. If this is correct, it is unclear to the committee how the instrument operates in the period prior to the passage of the primary legislation, and in the event that measure is not ultimately confirmed by primary legislation.

***The committee requested the advice of the Treasurer on this matter.***

The former Treasurer advised:

> Section 15-15 of *Taxation Administration Act 1953* gives the Commissioner the discretion to vary the amounts withheld (including to nil) for a class of taxpayers to meet the special circumstances of that class. It has been long standing Australian Taxation Office practice to vary to nil the withholding rates for allowances subject to exceptions under the substantiation rules for employees claiming deductions.

In exercising the discretion under section 15-15, the Commissioner takes into account whether the final tax liability on the allowance will not accord with the withholding schedule rate.

Employers are able to pay car allowances at a rate that is less than or greater than the cents per kilometre rate. The effect of the variation is that if the rate of allowance paid exceeds 66 cents per kilometre, the employer is required to withhold at the scheduled rates. The employee will need to declare the amount of the allowance and can also claim a deduction for expenses incurred. If the employee claims an amount in their tax return equal to or less than the statutory cents per kilometre rates substantiation is not required.

**Committee's response**

**The committee thanks the former Treasurer for his response.**

The committee notes the former Treasurer's advice as to the effect of the instrument prior to the passage of confirming primary legislation. However, it remains unclear to the committee as to whether the instrument would continue to operate in the event that the measure is not ultimately confirmed by primary legislation.

**The committee therefore seeks further advice from the Treasurer in relation to this matter.**

## Advice only

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

| | |
|---|---|
| **Instrument** | **ASIC Redundant Class Orders (Amendment and Repeal) Instrument 2015/826 [F2015L01432]** |
| **Purpose** | Amends ASIC Class Order [CO 05/1270] and repeals 60 ASIC Class Orders that are no longer required |
| **Last day to disallow** | 30 November 2015 |
| **Authorising legislation** | *Corporations Act 2001*; *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*; *National Consumer Credit Protection Act 2009* |
| **Department** | Treasury |
| **Scrutiny principle** | Standing Order 23(3)(a) |

**Mass repeal of redundant instruments**

This instrument repeals 60 legislative instruments that are either spent or not otherwise required. These include amending and repealing instruments that have no further effect because they have fulfilled their purpose. Mass repeal of such instruments was enabled by amendments to the *Legislative Instruments Act 2003* in 2012.

**The committee notes the mass repeal of redundant legislative instruments.**

| | |
|---|---|
| **Instrument** | **CASA 139/15 - Authorisation and permission — helicopter winching operations (CHC Helicopters) [F2015L01445]** |
| **Purpose** | Enables the conduct of helicopter winching operations conducted by Lloyd Helicopters Pty Ltd, trading as CHC Helicopters (Australia); and allows maintenance personnel and equipment to be winched by helicopter on or off an offshore platform or vessel |
| **Last day to disallow** | 15 days after tabling |
| **Authorising legislation** | *Civil Aviation Regulations 1988* |
| **Department** | Infrastructure and Regional Development |
| **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 the ES for this instrument states under the heading 'Consultation':

> Consultation under section 17 of the LIA [*Legislative Instruments Act 2003*] has not been undertaken in this case. The instrument is similar to other instruments issued to other operators who met the safety requirements.

While it is clear from this explanation that consultation was not undertaken in this case, no explicit explanation is provided as to why consultation was not undertaken,

such that it was considered either unnecessary or inappropriate (as the case may be). In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have explicitly stated, with a supporting explanation, that consultation was not undertaken as it was considered unnecessary or inappropriate in this case.

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

**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 Redundant Class Orders (Amendment and Repeal) Instrument 2015/826 [F2015L01432]<br><br>Asset-test Exempt Income Stream (Lifetime Income Stream Guidelines) (Social Security) Determination 2015 [F2015L01444]<br><br>Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422] |
| **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.[9]

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

# Chapter 2
## Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

| | |
|---|---|
| **Instrument** | **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) |
| **Previously reported in** | *Delegated legislation monitor* No. 10 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 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 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 Assistant Treasurer advised:

> Two periods of targeted consultation were undertaken. Both consultation periods were conducted with the key industry and consumer groups in the financial services sector, namely, the Australian Bankers' Association, Industry Superfunds Australia, the Financial Services Council, the Financial Planning Association of Australia, the Association of Financial Advisers and CHOICE. The Australian Securities and Investments Commission (ASIC) was also consulted. Targeted consultation was appropriate as the Regulation was minor in nature.
>
> The purpose of the first consultation, undertaken in March 2015, was to seek stakeholders' views on whether the information lodgement periods for the Register of Authorised Representatives and the Register of Financial Advisers should be aligned. All stakeholders supported the proposal to align the information lodgement periods for the two registers. Stakeholders noted that the proposal would reduce licensees' regulatory costs by simplifying the process of notifying ASIC of changes to the information displayed on the registers.
>
> A second round of consultation was undertaken in June 2015 to discuss the technical details of the Regulation. The same group of stakeholders that had been consulted in March 2015 were provided with a draft of the Regulation and the Explanatory Statement. None of the stakeholders raised any concerns with the draft documents or the application date.

The Assistant Treasurer further advised that Treasury has been instructed to:

> ...amend the description of the consultation process in the Explanatory Statement so that it provides further detail about the consultation process and the parties that were consulted.

**Committee's response**

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

| | |
|---|---|
| **Instrument** | **Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015 [F2015L01353]** |
| **Purpose** | Revokes the Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS)) Determination 2014 |
| **Last day to disallow** | 12 November 2015 |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Department** | Health |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 11 of 2015 |

**No description of consultation**

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

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

***The committee 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 Health advised:

> The original Determination updated Medicare item 73338, in accordance with subsection 3C(l) of the *Health Insurance Act 1973*, to allow payments of Medicare benefits to patients for all RAS gene mutations.
>
> As advised in the explanatory statement to the original Determination, on 3 October 2014 a submission was considered by the Medical Services Advisory Committee (MSAC) to expand Medicare access to accommodate expanded RAS mutation testing. The MSAC provides advice to the Australian Government on evidence relating to the safety, effectiveness and

cost-effectiveness of new medical technology and procedures. The MSAC reviews new or existing medical services or technology, and the circumstances under which public funding should be supported through listing on the MBS. As part of the MSAC process, consultation is undertaken with professional bodies, consumer groups, the public and clinical experts. The MSAC recommended to Government that public funding be supported for this expanded RAS mutation testing.

The revocation Determination was required because on 1 September 2015 the *Health Insurance Legislation Amendment (2015 measures No. l) Regulation 2015* inserted Medicare item 73338 into the *Health Insurance (Pathology Services Table) Regulation 2015*. From 1 September 2015 the original Determination was no longer necessary to permit Medicare benefits continuing to be paid for item 73338.

No consultation was undertaken in regard to the revocation Determination as the instrument did not alter current arrangements for patients or medical practitioners.

The minister also advised that the amendments were entirely machinery in nature and provided an updated explanatory statement.

**Committee's response**

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

| | |
|---|---|
| **Instrument** | **Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries 2015 - IMMI 15/108 [F2015L01147]** |
| **Purpose** | Updates the occupations listed as eligible occupations for nominations for Subclass 187 (Regional Sponsored Migration Scheme) visa in the Direct Entry stream |
| **Last day to disallow** | 1 December 2015 |
| **Authorising legislation** | *Migration Regulations 1994* |
| **Department** | Immigration and Border Protection |
| **Scrutiny principle** | Standing Order 23(3)(a) |
| **Previously reported in** | *Delegated legislation monitor* No. 9 of 2015 |

**No description of consultation**

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

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

***The committee 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 Immigration and Border Protection advised:

> The Instrument IMMI 15/108 specifies the skilled occupation, relevant ANZSCO code for an occupation, country (where the application for a skills assessment is made by a resident of that country), and the relevant assessing authority, for the following visas:
>
> • State/Territory nominated visas;
>
> • Temporary Work (Skilled) visa;
>
> • Direct Entry stream of the Employer Nomination Scheme;
>
> • Occupational Trainee stream of the Training and Research visa;
>
> • Occupational Trainee visa.
>
> Consultation was unnecessary because the Instrument was required as a matter of urgency, in accordance with subsection 18(1) of the *Legislative Instruments Act 2003*. The urgency of the Instrument is due to the fact that an occupation, which was intended to be included in the Consolidated Sponsored Occupation List in the Instrument, was omitted from that List. Additionally, the insertion of the omitted occupation to the List is of a minor nature and does not substantially alter [sic] existing arrangements.

The minister also advised that the ES has been updated to reflect the above and will be re-tabled.

**Committee's response**

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

# Appendix 1
## Correspondence

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

REF: MC15-002597

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 11 September 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. 10 of 2015, 10 September 2015, the Committee requested further information about the items for the Mathematics by Inquiry and the Coding Across the Curriculum programmes in the Regulation. This followed my responses on 22 July 2015 and 1 September 2015 to the Committee's initial request for information about these items. The Committee has requested further advice on whether the referenced constitutional powers support the inclusion of these programmes in the Regulation and a copy of the legal advice obtained in relation to this matter.

I can assure the Committee that the Government has obtained legal advice and has considered the constitutional position very carefully. This has included consideration of the constitutional powers identified in the explanatory statement accompanying the Regulation and the provisions of international instruments as advised in my letter to the Committee of 1 September 2015.

Access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. It is important to note the long-standing practice of successive governments not to publish or provide legal advice obtained in the course of developing policy and legislation. The Government considers that it is not in the public interest to depart from a position established and maintained over many years in the interests of conserving the Commonwealth's broader legal and constitutional interests.

This practice was most recently outlined by the Attorney-General, Senator the Hon George Brandis QC, in his letter of 27 August 2015 to the Joint Intelligence and Security Committee (see Appendix D of the *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*):

> It has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation.

It has been stated on other occasions previous to that. As outlined by the Hon Gareth Evans QC:

> …[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle … (*Senate Hansard*, 28 August 1995, page 466);

the Hon Daryl Williams QC:

> … I am going to offer the traditional response. I am not going to speculate about advice that the government may or may not have received nor am I going to provide any of that advice … (*House of Representatives Hansard*, 25 November 1997, page 11165);

the Hon Philip Ruddock MP:

> … It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government … (*House of Representatives Hansard*, 29 March 2004, page 27405); and

Senator the Hon Joe Ludwig:

> To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, *Hansard* of Estimates hearing, 26 May 2011, page 161).

I trust this information is of assistance to the Committee.

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**

16 September 2015

TREASURER

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator Williams

The Senate Standing Committee for the Scrutiny of Bills has requested that, as the responsible minister, I provide further advice on the *Taxation Administration Act 1953 – Pay as you go withholding – PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047]*.

As you are aware, the legislative instrument varies the amount of withholding required by a payer under the pay as you go withholding system for cents per kilometre car allowances commencing 1 July 2015.

I understand that the Committee requested further information regarding the operation of the amendment prior to the enactment of primary legislation to amend the withholding rates as per section 12-35 of the *Taxation Administration Act 1953*.

Section 15-15 of *Taxation Administration Act 1953* gives the Commissioner the discretion to vary the amounts withheld (including to nil) for a class of taxpayers to meet the special circumstances of that class. It has been long standing Australian Taxation Office practice to vary to nil the withholding rates for allowances subject to exceptions under the substantiation rules for employees claiming deductions.

In exercising the discretion under section 15-15, the Commissioner takes into account whether the final tax liability on the allowance will not accord with the withholding schedule rate.

Employers are able to pay car allowances at a rate that is less than or greater than the cents per kilometre rate. The effect of the variation is that if the rate of allowance paid exceeds 66 cents per kilometre, the employer is required to withhold at the scheduled rates. The employee will need to declare the amount of the allowance and can also claim a deduction for expenses incurred. If the employee claims an amount in their tax return equal to or less than the statutory cents per kilometre rates substantiation is not required.

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

Yours sincerely

HON J. B. HOCKEY MP

Parliament House Canberra ACT 2600
Australia
Telephone: 02 6277 7340 Facsimile: 02 6273 3420

# Assistant Treasurer

Ref: MC15-017790

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

18 SEP 2015

Dear Chair

Thank you for your recent correspondence on behalf of the Senate Standing Committee on Regulations and Ordinances regarding the *Corporations Amendment (Financial Services Information Lodgement Periods) Regulation 2015* (the Regulation). The Regulation amends the *Corporation Regulations 2001* to align the information lodgement periods that relate to the Register of Financial Advisers and the Register of Authorised Representatives.

In your letter, you sought further information about the consultation process and, in particular, the parties that were consulted. You also requested an amendment to the description of the consultation process in the Regulation's Explanatory Statement.

Two periods of targeted consultation were undertaken. Both consultation periods were conducted with the key industry and consumer groups in the financial services sector, namely, the Australian Bankers' Association, Industry Superfunds Australia, the Financial Services Council, the Financial Planning Association of Australia, the Association of Financial Advisers and CHOICE. The Australian Securities and Investments Commission (ASIC) was also consulted. Targeted consultation was appropriate as the Regulation was minor in nature.

The purpose of the first consultation, undertaken in March 2015, was to seek stakeholders' views on whether the information lodgement periods for the Register of Authorised Representatives and the Register of Financial Advisers should be aligned. All stakeholders supported the proposal to align the information lodgement periods for the two registers. Stakeholders noted that the proposal would reduce licensees' regulatory costs by simplifying the process of notifying ASIC of changes to the information displayed on the registers.

A second round of consultation was undertaken in June 2015 to discuss the technical details of the Regulation. The same group of stakeholders that had been consulted in March 2015 were provided with a draft of the Regulation and the Explanatory Statement. None of the stakeholders raised any concerns with the draft documents or the application date.

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

I have instructed Treasury to amend the description of the consultation process in the Explanatory Statement so that it provides further detail about the consultation process and the parties that were consulted.

Yours sincerely

JOSH FRYDENBERG

# THE HON SUSSAN LEY MP
## MINISTER FOR HEALTH
## MINISTER FOR SPORT

Ref No: MC15-016173

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to correspondence from the Senate Standing Committee on Regulations and Ordinances dated 17 September 2015 regarding the *Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS) Revocation Determination 2015* – F2015L01353 (the revocation Determination).

The purpose of the revocation Determination is to revoke the *Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS)) Determination 2014* – F2014L01767 (the original Determination). The original Determination updated Medicare item 73338, in accordance with subsection 3C(1) of the *Health Insurance Act 1973*, to allow payments of Medicare benefits to patients for all RAS gene mutations.

As advised in the explanatory statement to the original Determination, on 3 October 2014 a submission was considered by the Medical Services Advisory Committee (MSAC) to expand Medicare access to accommodate expanded RAS mutation testing. The MSAC provides advice to the Australian Government on evidence relating to the safety, effectiveness and cost-effectiveness of new medical technology and procedures. The MSAC reviews new or existing medical services or technology, and the circumstances under which public funding should be supported through listing on the MBS. As part of the MSAC process, consultation is undertaken with professional bodies, consumer groups, the public and clinical experts. The MSAC recommended to Government that public funding be supported for this expanded RAS mutation testing.

The revocation Determination was required because on 1 September 2015 the *Health Insurance Legislation Amendment (2015 measures No.1) Regulation 2015* inserted Medicare item 73338 into the *Health Insurance (Pathology Services Table) Regulation 2015*. From 1 September 2015 the original Determination was no longer necessary to permit Medicare benefits continuing to be paid for item 73338.

No consultation was undertaken in regard to the revocation Determination as the instrument did not alter current arrangements for patients or medical practitioners.

The amendments were entirely machinery in nature. As requested, I have updated the explanatory statement accordingly and I enclose a copy with this letter.

Yours sincerely

**The Hon Sussan Ley MP**

Encl

29 SEP 2015

# EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015*

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by writing, determine that a health service not listed in the Pathology Services Table (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were so listed. The Table is set out in the regulations made under subsection 4(A)(1) of the Act, which is re-made each year. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulation 2015* which commenced on 1 July 2015.

The *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015* revokes the *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Determination 2014.* Revocation is required as the item number (73338) contained in the 2014 Determination will be incorporated into the Table from 1 September 2015 under amendments made in the *Health Insurance Legislation Amendment (2015 Measures No. 1) Regulation 2015*.

Consultation

No consultation was undertaken in regard to the Determination as the instrument does not alter current arrangements for patients or medical practitioners. The amendments are entirely machinery in nature. This Determination is required because on 1 September 2015 the *Health Insurance Legislation Amendment (2015 measures No.1) Regulation 2015* inserted Medicare item 73338 into the *Health Insurance (Pathology Services Table) Regulation 2015*. From 1 September 2015, the 2014 Determination was no longer necessary to permit Medicare benefits continuing to be paid for item 73338.

On 3 October 2014 a submission was considered by the Medical Services Advisory Committee (MSAC) to expand Medicare access to accommodate expanded RAS mutation testing. MSAC provides advice to the Australian Government on evidence relating to the safety, effectiveness and cost-effectiveness of new medical technology and procedures. MSAC reviews new or existing medical services or technology, and the circumstances under which public funding should be supported through listing on the MBS. As part of the MSAC process, consultation is undertaken with professional bodies, consumer groups, and the public and clinical experts. MSAC recommended that public funding be supported.

Details of the Determination are set out in the Attachment.

The Act specifies no conditions which need to be met before the power to make the Determination may be exercised.

This Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

This Determination commences on 1 September 2015.

**ATTACHMENT**

**DETAILS OF THE *HEALTH INSURANCE (PHARMACOGENETIC TESTING – RAS (KRAS AND NRAS)) REVOCATION DETERMINATION 2015***

**Section 1 Name of Determination**

Section 1 provides that the name of the Determination is the *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015*.

**Section 2 Commencement**

Section 2 provides that the Determination commences on 1 September 2015.

**Section 3 Revocation**

Section 3 provides that the Determination revokes the *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Determination 2014.*

## Statement of Compatibility with Human Rights

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

***Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015***

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 *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015* revokes the *Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Determination 2014*. The item listed in the 2014 Determination (73338) is being incorporated into the Pathology Services Table (the Table) to commence on 1 September 2015.

### Human rights implications

The regulations engage Articles 2, 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

*The Right to Health*

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the *'highest attainable standard of health'* takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs and conditions necessary for the realisation of the highest attainable standard of health.

*The Right to Social Security*

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

**Analysis**

The revocation of this Determination does not raise any human rights issues. The item number (73338) is to be incorporated into the Pathology Services Table to commence on 1 September 2015. There is no change in the access to the specified pathology test for providers or patients.

**Conclusion**

The Legislative Instrument is compatible with human rights recognised in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Catherine Rule**
**First Assistant Secretary**
**Medical Benefits Division**
**Department of Health**

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

Ref No: MS15-021614

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

John,

Dear Senator

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 20 August 2015 concerning the *Delegated Legislation Monitor No. 9 of 2015*. In that Monitor, the Committee requested a response regarding the following legislative instrument:

- *Migration Regulations 1994 – Specification of Occupations, a Person or Body, a Country or Countries 2015* – IMMI 15/108 [F2015L01147]

The response in relation to the query is attached to this letter.

Thank you again for bringing these matters to my attention. I trust that the information provide is helpful.

Yours sincerely

PETER DUTTON 06/10/15

**Attachment A**

***Migration Regulations 1994 – Specification of Occupations, a Person or Body, a Country or Countries 2015* – IMMI 15/108 [F2015L01147]**

The Committee noted that the Explanatory Statement for this Instrument did not include a description of the consultation undertaken. The Committee therefore sought further information about the nature of the consultation undertaken for the Instrument, or an explanation as to why no consultation was carried out. The Committee also requested that the Explanatory Statement be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

The Instrument IMMI 15/108 specifies the skilled occupation, relevant ANZSCO code for an occupation, country (where the application for a skills assessment is made by a resident of that country), and the relevant assessing authority, for the following visas:

- State/Territory nominated visas;
- Temporary Work (Skilled) visa;
- Direct Entry stream of the Employer Nomination Scheme;
- Occupational Trainee stream of the Training and Research visa;
- Occupational Trainee visa.

Consultation was unnecessary because the Instrument was required as a matter of urgency, in accordance with subsection 18(1) of the *Legislative Instruments Act 2003*. The urgency of the Instrument is due to the fact that an occupation, which was intended to be included in the Consolidated Sponsored Occupation List in the Instrument, was omitted from that List. Additionally, the insertion of the omitted occupation to the List is of a minor nature and does not substantially later existing arrangements.

I confirm that the Explanatory Statement has been updated to reflect this and I will arrange for it to be re-tabled.

I apologise for the oversight and I thank you for bringing this matter to my attention.

# Appendix 2
# Guideline on consultation

## Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislative Instruments Act 2003* (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

## Requirements of the *Legislative Instruments Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

## Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

## Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Specific examples listed in the Act**: Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

## Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances or by contacting the committee secretariat at:

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