

The Senate

Standing
Committee on
Regulations and
Ordinances

Report on the work of the committee
in 2012-13

Report no. 118

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Committee information

Current members (December 2013)

Senator Sean Edwards (Chair)	South Australia, LP
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator the Hon Ron Boswell	Queensland, NAT
Senator Sam Dastyari	New South Wales, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Zed Seselja	Australian Capital Territory, LP

Former members 2012-13

Senator Mark Furner (Chair) (01.07.11 – 11.11.13)	Queensland, ALP
Senator the Hon Richard Colbeck (Deputy Chair) (16.03.12 – 11.11.13)	Tasmania, LP
Senator the Hon Michaelia Cash (02.02.10 – 07.02.13)	Western Australia, LP
Senator Claire Moore (14.2.08 – 11.11.13)	Queensland, ALP
Senator Louise Pratt (21.06.12 – 11.11.13)	Western Australia, ALP
Senator the Hon Scott Ryan (18.11.10 – 11.11.13)	Victoria, LP
Senator the Hon Arthur Sinodinos AO (07.02.13 – 11.11.13)	New South Wales, LP

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Acronyms and abbreviations

AAT	Administrative Appeals Tribunal
AIA	<i>Acts Interpretation Act 1901</i>
(the) alert	Disallowance alert (webpage)
ES	explanatory statement
FRLI	Federal Register of Legislative Instruments
(the) index	Index of matters (webpage)
LIA	<i>Legislative Instruments Act 2003</i>
(the) monitor	<i>Delegated legislation monitor</i>
OLDP	Office of Legislative Drafting and Publishing
OPC	Office of Parliamentary Counsel
PLRC	Public Lending Right Committee
SDIL	Senate disallowable instruments list

Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (the committee) scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of Australians. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.¹

1.3 The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate Standing Order 23, which requires the committee to scrutinise each instrument to ensure:

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

1.4 The committee's work is supported by processes for the registration, tabling and potential disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.²

1.5 This report on the work of the committee covers the 2012-13 financial year period.

Committee membership

1.6 Senate Standing Order 23(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three senators drawn from non-government parties. The committee is chaired by a government senator.

1 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 416.

2 The *Legislative Instruments Act 2003* and the disallowance process are discussed in Chapter 2.

1.7 Current members at 30 June 2013 were as follows:

- Senator Mark Furner (Chair);³
- Senator the Hon Richard Colbeck (Deputy Chair);⁴
- Senator Claire Moore;⁵
- Senator Louise Pratt;⁶
- Senator Scott Ryan;⁷ and
- Senator Arthur Sinodinos AO.⁸

1.8 The following senator was also a member of the committee during the reporting period:

- Senator Michaelia Cash.⁹

Independent legal adviser

1.9 The committee is assisted by an independent legal adviser, who examines and reports on each instrument that comes before the committee, and provides other advice relevant to the committee's scrutiny work. The committee's legal advisers during the reporting period were Professor Stephen Bottomley and Mr Stephen Argument (from January 2013).

The committee's mode of operation

Delivery of instruments

1.10 Legislative instruments must be registered and, within six sitting days of registration, tabled in both Houses of Parliament.¹⁰ Once registered, the instruments are delivered to the two Houses for tabling, and to the committee secretariat.

1.11 In relation to non-legislative disallowable instruments, the individual department administering the authorising Act under which any such instrument is made is responsible for delivering copies to both Houses for tabling, as well as to the committee secretariat.

Scrutiny of instruments

1.12 Instruments received by the committee secretariat are recorded and copies sent to the committee's legal adviser, who provides a report to the committee on the

3 Appointed 01.07.11 (elected Chair on 07.07.11).

4 Appointed 16.03.12 (appointed Deputy Chair on 22.03.12).

5 Committee member from 01.07.02 to 01.07.05; and appointed on 14.02.08.

6 Appointed 21.06.12.

7 Appointed 18.11.10.

8 Appointed 07.02.13.

9 Committee member from 02.02.10 to 07.02.13.

10 *Legislative Instruments Act 2003*, sections 30, 38 and 39.

instruments' compliance with the committee's scrutiny principles. The committee meets regularly, during sittings of Parliament, to consider whether any instruments received may breach its scrutiny principles.

1.13 Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further explanation or information, or seeking an undertaking for specific action to address the issue of concern.

Committee's use of the disallowance process

1.14 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in chapter 2. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. Such disallowance motions based on the recommendation of the committee have, without exception, been adopted by the Senate.¹¹

1.15 In cases where the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question. Such notices are referred to as 'protective notices'.¹²

Undertakings

1.16 In many cases, ministers and other instrument makers provide an undertaking to address the committee's concern through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to primary or delegated legislation. The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without interrupting the administration and implementation of policy by disallowance of the instrument in question.

Committee publications and resources

1.17 The following committee publications and resources may be accessed at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

Senate disallowable instruments list

1.18 The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.¹³ This online resource may be used to ascertain

11 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 424.

12 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

13 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes), there is also a House of Representatives disallowable instruments list. This list is available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.19 The SDIL is updated after each sitting day.

Delegated legislation monitor

1.20 The *Delegated legislation monitor* (the monitor) is the regular report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters raised in relation to disallowable instruments of delegated legislation that are tabled in the Senate and subsequently scrutinised by the committee.

1.21 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period.

Index of matters webpage

1.23 The 'Index of matters' webpage (formerly the 'Scrutiny of Disallowable Instruments' list) is a list, by meeting date and monitor number, of all the disallowable instruments about which the committee has raised a concern. The index contains a shorthand description of the issue of concern which the committee has identified. Full comments on individual matters are contained in the relevant monitor.

'Disallowance Alert' webpage

1.22 The 'Disallowance Alert' webpage (the alert) is a list of all instruments subject to a notice of motion for disallowance (whether at the instigation of the committee or an individual senator or member). The progress and outcome of any such notice is also recorded.

Senate Procedure Office seminar on delegated legislation and the Senate

1.23 The Senate Procedure Office conducts half-day seminars on the Senate's scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.24 Information on seminar dates and booking inquiries may be accessed through the Senate website.¹⁴

Structure of the report

1.25 Chapter 2 provides an overview of delegated legislation and the disallowance process, including discussion of the *Legislative Instruments Act 2003*.

1.26 Chapter 3 reports on the work of the committee during 2012-13.

14 See Parliament of Australia website, 'Seminars for public servants' http://www.aph.gov.au/About_Parliament/Senate/Public_Information_and_Events/Seminars_for_public_servants.

Acknowledgements

1.27 The committee wishes to acknowledge the work and assistance of its legal advisers in the reporting period, Professor Stephen Bottomley and Mr Stephen Argument (from January 2013).

1.28 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislative Instruments Act 2003* (LIA).

What is delegated legislation?

2.2 Many Acts of Parliament delegate to executive government the power to make regulations, ordinances, rules and other instruments (such as determinations, notices, orders and guidelines). Such instruments supplement their authorising Act, and have the same force in law. 'Delegated legislation' is a collective term referring to such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by the Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, any such instrument is usually: (a) required to be registered on the Federal Register of Legislative Instruments (FRLI);¹ (b) required to be tabled in the Parliament; and (c) subject to a disallowance process prescribed by the LIA, which may be initiated by any member of either the Senate or the House of Representatives.

What is a disallowable instrument?

2.4 A 'disallowable instrument' is an instrument of delegated legislation that is subject to the disallowance process prescribed by the LIA (see below for a description of the disallowance process).

Legislative instruments

2.5 The LIA generally requires that disallowable instruments will be those instruments that are 'legislative' in character, meaning those instruments which define the law as opposed to those which apply the law in a specific case (and are therefore 'non-legislative' in character);² and which affect a privilege, interest or right. Specifically, section 5 of the LIA states that a legislative instrument is:

...an instrument in writing:

(a) that is of a legislative character; and

(b) that is or was made in the exercise of a power delegated by the Parliament.

1 FRLI may be accessed at <http://www.comlaw.gov.au/>.

2 An example of this distinction is that an instrument which grants a licence applies the law whereas an instrument that sets out the criteria for the grant of a licence defines or establishes the content of the law (and hence would be a legislative instrument subject to disallowance under the LIA).

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.6 The LIA also declares certain instruments to be legislative instruments, thereby making all such instruments subject to its general scheme. Specifically, subsection 5(3) provides that an instrument registered on FRLI is taken, by virtue of that registration, to be a legislative instrument; and section 6 provides that particular types of instrument, such as regulations and ordinances, are to be classed as legislative instruments. Subsection 5(4) provides that an instrument of mixed character (that is, one that has both a legislative and non-legislative character) is deemed to be a legislative instrument.

Disallowable non-legislative instruments

2.7 An instrument that is non-legislative in character may nevertheless be subject to the scheme of the LIA by virtue of the operation of the *Acts Interpretation Act 1901* (the AIA).

2.8 Subsection 46B of the AIA provides, inter alia, that where an Act confers a power to make a non-legislative instrument, and that Act provides that the instrument is a disallowable instrument, then it is subject to the same procedures for parliamentary scrutiny as a legislative instrument.

Exemptions from disallowance

2.9 The LIA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LIA or is otherwise not subject to disallowance.

2.10 Section 7 declares certain instruments not to be legislative instruments for the purposes of the LIA. This includes legislative instruments listed in the table set out in the provision, and legislative instruments that are declared not to be legislative instruments by the Act or instrument under which they were made.

2.11 Section 44 of the LIA provides that the disallowance process contained in section 42 does not apply to certain legislative instruments, including those instruments listed in the table set out in that provision.

Legislative Instruments Act 2003

2.12 Prior to 2005, the committee's scrutiny of delegated legislation was wholly governed by the AIA, which contained the scheme requiring regulations and other disallowable instruments to be tabled in Parliament and subject to the disallowance regime.

2.13 On 1 January 2005, the AIA scheme was replaced by the scheme set out in the LIA. While the LIA largely replicates the previous scheme, it includes a number of

important innovations, such as the requirement for the registration of instruments on FRLI.

2.14 The main elements of the scheme contained in the LIA are:

- instruments of delegated legislation that are of a legislative character are subject to the disallowance process outlined in the Act;
- such instruments must be registered on FRLI, along with an explanatory statement;
- once registered, such instruments must be delivered within six sitting days to each House of Parliament for tabling;³ and
- any member of the Senate or the House of Representatives may initiate the process to disallow any such instrument within 15 sitting days of it being tabled. Once such a notice has been given, a further period of 15 sitting days is available to resolve the motion.

Disallowance

Purpose

2.15 The ability of the executive—usually ministers and other executive office holders—to make delegated legislation without parliamentary enactment is a 'considerable violation of the principle of the separation of powers, [and] the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.⁴

2.16 The ability of senators and members of the House of Representatives to seek disallowance of legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

The disallowance process

2.17 The disallowance process is set out in subsection 42(1) of the LIA, which provides:

(1) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

3 Under subsection 38(3), an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

4 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 413.

2.18 In summary, subsection 42(1) provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of that instrument. There is then a further 15 sitting days in which the motion may be resolved.

2.19 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days (assuming the maximum available period elapses for both the giving of notice and the resolution of the motion to disallow the instrument or provision).

Unusual disallowance processes

2.20 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made, affecting the period available for giving or resolving a notice of motion for disallowance.

2.21 For example, for a determination made under section 20(1) or (2) of the *Financial Management and Accountability Act 1997*, the time available for both giving and resolving a notice of motion for disallowance is only five sitting days.⁵

Effect of disallowance

2.22 Subsections 42(1) and 45(1) of the LIA provide that, where a motion is passed to disallow a legislative instrument or a provision of an instrument, that instrument or provision ceases to have effect from the time the motion was passed.

2.23 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.⁶

2.24 Subsection 42(2) of the LIA provides that, where a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved after 15 sitting days of being given (for example, where it has not been withdrawn or put to the question), the instrument or provision is deemed to have been disallowed and therefore ceases to have effect from that time. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

Restrictions on re-making legislative instruments

2.25 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve the Parliament's intention in any case where a House has disallowed an instrument, the LIA imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

5 *Financial Management and Accountability Act 1997*, section 22 (this provision was preserved by Schedule 4 to the Legislative Instruments Regulations 2004).

6 LIA, subsection 45(2).

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- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been laid before both Houses of Parliament (or, if it was tabled on different days, seven days after it was last tabled). This prevents the disallowance provisions from being circumvented by an instrument being successively repealed and remade;⁷
 - an instrument may not be made that is the same in substance as an existing instrument that is subject to a notice of motion for disallowance (unless the notice is withdrawn; the instrument is deemed to have been disallowed under subsection 42(2); or the motion is withdrawn, otherwise disposed of or subject to the effect of subsection 42(3)). This prevents an instrument simply being remade in response to notice of a motion for disallowance; and
 - for a period of six months, an instrument may not be made that is the same in substance as an instrument that has been disallowed under section 42 (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument or approves it being made). This prevents an instrument that has been disallowed, or deemed to have been disallowed, from simply being remade.⁸

Senate procedures relating to the disallowance process

2.26 A number of the Senate's procedures are relevant to the disallowance process in the LIA.

2.27 Standing Order 78(3) is a significant example of one such procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.⁹

2.28 Another example is Standing Order 86, which prevents the proposing of a question that is the same in substance as any question that has been determined during the same session (the same question rule). This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.29 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 13th Edition (2012), Chapter 15.

7 LIA, section 46.

8 LIA, sections 46, 47 and 48. For more detail see *Odgers' Australian Senate Practice*, 13th Edition (2012), pp 420, 434-435.

9 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 430.

Chapter 3

Work of the committee in 2012-13

3.1 This chapter discusses the work of the committee and matters of note in the reporting period. Some representative examples of instruments and issues considered by the committee are also provided.

Number of instruments considered

3.2 The committee held a total of 15 private meetings in 2012-13, at which it considered 2084 instruments.

3.3 The number of instruments examined was higher than in 2011-12 (1753) and 2010-11 (1809), but within the normal range of variation across separate years.

3.4 Appendix 1 provides a breakdown of the instruments made in 2012-13 by Act and instrument type. For further detail on specific instruments, the Federal Register of Legislative Instruments (FRLI) should be consulted.¹

Instruments of concern and notices

3.5 Of the 2084 instruments examined by the committee during 2012-13, 283 instruments were identified as raising a concern.²

3.6 The issues raised by those instruments were referable to the committee's scrutiny principles as shown in Table 1, with the previous year's figures provided as a comparison.

Table 1: Issues identified by the committee in 2012-13 and 2011-12

Year	Instruments commented on	Issues against committee's principles			
		(a)	(b)	(c)	(d)
2012-13	283	213 (75%)	56 (20%)	12 (12%)	2 (1%)
2011-12	90	59 (65%)	28 (31%)	2 (2%)	1 (1%)

3.7 As Table 1 shows, the majority of issues raised by the committee were referable to scrutiny principle (a), which requires that instruments of delegated legislation are made in accordance with statute, such as the *Legislative Instruments Act 2003* (LIA) and the *Acts Interpretation Act 1901* (AIA); the general nature of this principle generally captures a wide variety of issues. The spread of issues across the committee's remaining scrutiny principles was broadly comparable with the previous year.

1 FRLI may be found at <http://www.comlaw.gov.au>.

2 Details of these instruments may be found on the 'Index of Matters' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

The relative increase in the number of issues identified in 2012-13 compared to the previous year is attributable to a single issue. This was the failure to identify the relevance of subsection 33(3) of the AIA in relevant ESs, of which there were 104 instances. The next two most frequent issues raised were no or insufficient information on consultation (70), falling under scrutiny principle (a); and insufficient information on the basis for the setting or varying of fees and charges (20), falling under scrutiny principle (b). These issues are discussed further below.

Notices

3.8 The committee gave no notices of motion for disallowance in the reporting period.

3.9 Thirty-one notices of motion for disallowance were given by individual members and senators in their own capacity. Details of these are provided on the committee's 'Disallowance Alert' webpage.³

Undertakings

3.10 During the reporting period:

- one undertaking to amend legislation was provided to address concerns raised by the committee (see table 1 at Appendix 2 for details); and
- four undertakings were implemented (see table 1 at Appendix 2).

3.11 Fifteen undertakings remained outstanding at 30 June 2013 (see table 2 at Appendix 2). The committee continues to monitor the status of outstanding undertakings and, where necessary, to correspond with relevant ministers and instrument-makers regarding their implementation.

Examples of instruments considered

Scrutiny principle (a): ensuring that delegated legislation is in accordance with statute

Explanatory statements: describing consultation

3.12 The LIA requires that instruments of delegated legislation be accompanied by an ES, and section 26 of the LIA prescribes certain information which an ES must contain.⁴ This includes a description of the nature of consultation undertaken or an explanation as to why consultation was considered unnecessary or inappropriate.

3.13 Since the commencement of the LIA in 2005, a failure to address the issue of consultation, or inadequate descriptions and explanations, have been persistent shortcomings in ESs. This continued throughout 2012-13, with the committee seeking

3 The Disallowance Alert is found at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

4 LIA, section 26 (previously LIA section 4). See also sections 17 and 18 regarding consultation requirements.

further information regarding consultation in relation to a large number of instruments.⁵

3.14 In 21 cases, ESs made no reference whatsoever to consultation. Correspondence with relevant ministers generally indicated that this was due to administrative oversight in the preparation of explanatory material, rather than a lack of awareness about the requirements of the LIA. In all such cases, the committee requested from the rule-maker the relevant information regarding consultation, required that the ES for the instrument be updated and sought an assurance that future explanatory material would be prepared in accordance with the requirements of the LIA. An example of this was the **Transport Safety Investigation Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 263] [F2012L02278]**.⁶

3.15 In another 49 cases, ESs did address the question of consultation but contained overly bare or general descriptions of the nature of consultation undertaken, or similarly inadequate explanations as to why consultation was considered unnecessary or inappropriate. While the committee does not usually interpret section 26 of the LIA as requiring a highly detailed description of consultation undertaken, it considers that a bare or very general statement of the fact that consultation has or has not taken place, as in the case above, is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken or explain why it was considered unnecessary or inappropriate. In all such cases during the reporting period, the committee sought from the relevant rule-maker a fuller description or explanation, and generally required that the ES in question be amended to include such further information as was subsequently provided. An example of this was the **Fair Entitlements Guarantee Regulation 2012 [Select Legislative Instrument 2012 No. 326] [F2012L02474]**.⁷

Express power to amend, vary and revoke an instrument

3.16 In 104 cases, instruments appeared to rely on subsection 33(3) of the AIA, which provides:

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.

3.17 The committee considers that, where relevant, an ES should clearly identify the applicability of subsection 33(3), in the interests of promoting the clarity and intelligibility of instruments and ESs. In all such cases during the reporting period, the

5 In September 2011 the committee produced a guideline to assist those responsible for the development of delegated legislation and ESs to properly address the requirements of the LIA in relation to consultation (see Appendix 3).

6 *Delegated legislation monitor*, Monitor No. 5 of 2013 (16 May 2013), p. 324.

7 *Delegated legislation monitor*, Monitor No. 6 of 2013 (20 June 2013), p. 402.

committee drew this issue to the attention of relevant ministers and instrument-makers on an advice-only basis. An example of this was the **Tertiary Education Quality and Standards Agency Act 2011 – Determination of Fees No. 1 of 2013** [F2013L00438].⁸

Scrutiny principle (b): ensuring that delegated legislation does not trespass unduly on personal rights and liberties

3.18 Scrutiny principle (b) requires that instruments of delegated legislation must not trespass unduly on personal rights and liberties. The committee interprets this principle broadly such that it may encompass a range of matters. Accordingly, it is important to ensure that, where an instrument may affect personal rights and liberties, the ES sufficiently describes all limitations and considerations relevant to its operation.

Unclear basis for determining fees, charges and levies

3.19 In 20 cases, ESs failed to indicate the basis on which a new or changed fee, charge or levy had been calculated.⁹ The committee's usual expectation in cases where an instrument of delegated legislation introduces or adjusts a charge, fee or levy is that the relevant ES make clear on its face the basis on which that charge, fee or levy has been calculated (in addition to the quantum of the relative change in those cases where there is an adjustment to an existing charge, fee or levy). In all such cases during the reporting period, the committee sought from the relevant rule-maker an explanation for the basis on which the fees, charges or levies had been set, and generally required that the ES in question be amended to include such further information as was subsequently provided.

3.20 An example of this was the **Public Lending Right Scheme 1997 (Modification No. 1 of 2013)** [F2013L00682] which increased the rates of Public Lending Right payments to eligible creator and publishers for 2012-13 from \$1.86 to \$1.96 and from 46.5 to 49 cents respectively.¹⁰ The ES for the instrument noted that the Minister for the Arts had taken into account the advice of the Public Lending Right Committee (PLRC) but did not set out the substance of that advice and therefore the basis on which the payment rates were adjusted. In response to the committee's inquiry, the Parliamentary Secretary for the Arts advised that the PLRC took into account indexation on the appropriation, and the effect of the rise in the minimum payment to eligible claimants from \$50 to \$100 on the funds available for distribution under the program in 2012-13. The parliamentary secretary further advised that the ES had been amended to include the information provided. On the basis of this advice, the committee concluded its interest in the matter.

8 *Delegated legislation monitor*, Monitor No. 4 of 2013 (21 March 2013), p. 192.

9 The committee applies this requirement to any instrument carrying a financial imposition or implication. This could include, for example, an instrument introducing or altering a scale of fees or deeming rates.

10 *Delegated legislation monitor*, Monitor No. 7 of 2013 (27 June 2013), p. 461.

Offences of strict and vicarious liability

3.21 Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions,¹¹ the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. As a range of jurisdictional, technical and other factors may be relevant to the framing of offences, ESs should be drafted as stand-alone documents with sufficient context and detail to allow the committee to assess offence provisions (particularly strict and vicarious liability offences). In particular, an ES should clearly state the justification for the framing of an offence, and its intended scope and operation.

3.22 An example of this was the **Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No. 1) [Select Legislative Instrument No. 31, 2013] [F2013L00479]** which gave effect to a number of changes to the intellectual property system (essentially flowing from the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*),¹² including the introduction of new offence provisions. Regulation 20A16, for example, established certain offences relating to persons appearing before a Disciplinary Tribunal, including strict liability offences for a refusal by certain persons to be sworn or make an affirmation, and an offence in relation to which a defendant bears the evidential burden in respect of certain matters. The ES accompanying the regulation provided very little information on the justification for, and scope and framing of, the offences.

3.23 In response to the committee's inquiry, the Minister for Industry, Innovation, Science, Research and Tertiary Education advised that the offences complied with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, and were intended to give force to the tribunal's capacity to direct its own proceedings, to ensure a person would not be in a position to argue lack of intent or ignorance of regulation 20A16 as a defence and to ensure deregistered or suspended patent attorneys assisted registered patent attorneys appointed as temporary replacements. The minister advised that the ES would be amended to include the information provided. On the basis of this advice, the committee concluded its interest in the matter.

Scrutiny principle (c) ensuring that delegated legislation does not make rights unduly dependent on administrative decisions that are not subject to independent review of their merits

3.24 Scrutiny principle (c) relates broadly to the natural justice considerations which underpin the field of administrative law. Where delegated legislation authorises the making of administrative decisions, the committee will usually seek to ensure that

11 'Strict liability' is a standard for liability in relation to both civil penalties and criminal offences, in which a person may be found legally responsible for or guilty of an act or omission regardless of culpability or fault. 'Vicarious liability' is a form of strict secondary liability in which a person may be found liable for an act or omission done by another person, such as in cases where an employer may be liable for the conduct of an employee.

12 *Delegated legislation monitor*, Monitor No. 6 of 2013 (20 June 2013), p. 405.

the framing of powers and discretions is in accordance with the tenets of natural justice, such as clearly defined criteria in relation to decision making, the availability of independent review of decisions and appropriate notification of decisions.

3.25 An example of this was the **Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 [F2013L00258]**,¹³ which specified the circumstances and timeframe for Austrade to assess whether a grant application meets the requirements for an extension of the lodgement date. The ES for the instrument stated that review rights existed in relation to a decision made by Austrade to refuse to approve an applicant as a participating consultant or to cancel the approval of a participating consultant. However, the committee noted that, while the instrument clearly provided for the reconsideration of such decisions by the CEO of Austrade, it did not appear to make provision for merits review as stated in the ES.

3.26 In response to the committee's inquiry, the Parliamentary Secretary for Trade confirmed that the decisions in question were subject to merits review by the Administrative Appeals Tribunal (AAT). The parliamentary secretary further advised that, in any instance of refusal or cancellation of approval as a consultant, an affected person would be advised of their review rights, including access to merits review by the AAT. On the basis of this advice, the committee concluded its interest in the matter.

Scrutiny principle (d): ensuring that delegated legislation does not contain matters more appropriate for parliamentary enactment

3.27 Scrutiny principle (d) reflects the view that delegated legislation should not deal with matters which should, by their nature, be subject to the full legislative processes of the Parliament.

3.28 While concerns related to this principle are less commonly raised by the committee (or less commonly characterised in such terms), a specific example in the reporting period was the **Coastal Trading (Revitalising Australian Shipping) Act 2012 – Section 11 exemption for cruise vessels [F2012L02585]**.¹⁴ The instrument allowed a certain class of vessel to engage in carriage of passengers between Australian ports (except Victoria and Tasmania) without a licence, effectively continuing for a further four years an exemption in place since 1998. The committee considered that the exemption could be characterised as a de facto amendment to the Act, and therefore inquired as to whether the exemption would be more appropriately effected through an amendment to the principal Act.

3.29 The Minister for Infrastructure and Transport responded, advising that the extension to the exemption was intended to align with a review of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* to occur five years after its commencement, and that this approach had been accepted by industry stakeholders.

13 *Delegated legislation monitor*, Monitor No. 6 of 2013 (20 June 2013), p. 401.

14 *Delegated legislation monitor*, Monitor No. 4 of 2013 (21 March 2013), p. 209.

The minister noted that the department would continue to consult with industry, and would give consideration to the question of whether the current exemption could be more properly effected through an amendment to the Act. On the basis of this advice, the committee concluded its interest in the matter.

Introduction of sitting-week reports on the committee's work

3.30 At the beginning of 2013, the committee introduced a regular sitting-week report on its scrutiny of delegated legislation. The report, known as the *Delegated legislation monitor* (the monitor), was first tabled in the Senate on 7 February 2013.¹⁵

3.31 The introduction of the monitor as the regular report on the committee's work is a significant change to the reporting of the committee's work. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period, and the committee's correspondence relating to concluded matters was tabled in the Senate twice yearly. The publication of the monitor following each meeting of the committee greatly improves the transparency of the committee's work and processes, and provides a valuable and 'real-time' resource for senators, members, rule-makers and other parties who may have an interest in the committee's work.

3.32 The monitor is complemented by an online 'Index of matters' (the index) which lists, by meeting date and monitor number, those instruments about which the committee has raised a concern. The index also includes a shorthand description of the issue of concern identified by the committee (outlined more fully in the monitors). The index is updated on the Thursday of each sitting week following the committee's regular meeting and the tabling of the monitor.¹⁶

Changes to the *Legislative Instruments Act 2003*

3.33 In September 2012, the *Legislative Instruments Act 2003* (LIA) was amended by the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* (the amending Act).

3.34 The LIA commenced on 1 January 2005, meaning that subordinate legislation will start sunseting from early 2015. The Office of Legislative Drafting and Publishing (OLDP) identified a large number of principal instruments due to sunset in 2016 and 2018.¹⁷ To help government agencies and stakeholders deal with the large number of sunseting instruments, the amending Act was designed to:

15 The monitor is tabled in the Senate on Thursday of each sitting week and published on the committee's webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

16 The index is published on the committee's webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

17 *Legislative Instruments Amendment (Sunsetting Measures) Bill 2012*, *Bills Digest*, No. 177, Parliamentary Library, 27 June 2012, p. 4.

- automatically repeal spent instruments and provisions;
- clarify the sunseting dates of repeal for particular categories of instruments; and
- enable thematic reviews of instruments by enabling the Attorney-General to align sunseting dates of instruments.¹⁸

3.35 The amending Act also contained provisions to clarify the requirements for explanatory statements (ESs), including for those instruments that are remade after review.

Automatic repeal of spent and redundant instruments and provisions

3.36 The amending Act provides for the automatic repeal of new instruments and provisions that are wholly commencing, amending or repealing.¹⁹ In other words, rather than waiting for sunseting arrangements to come into effect, an instrument that has done its job is automatically repealed. Importantly, however, that instrument is still subject to the disallowance process.²⁰

3.37 The amending Act also provides for the repeal by regulation of existing instruments and provisions that are no longer required. Section 48E was inserted into the LIA to support the maintenance of the FRLI by allowing unnecessary instruments to be repealed en masse by regulation. The first regulation made under this section repealed 1005 spent and redundant instruments in the Attorney-General's portfolio.²¹ The committee notes the use of the power to effect mass repeal of redundant instruments of delegated legislation and commends such measures to improve the maintenance of FRLI.

Sunseting of instruments

3.38 The LIA was amended to provide greater certainty about what instruments sunset and when they sunset, as well as incentives for rule-makers to review instruments thematically.²²

3.39 Subsection 50(1) was inserted into the LIA to introduce a new default rule for calculating sunseting dates: the sunseting date for all instruments registered after

18 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Bills Digest*, No. 177, Parliamentary Library, 27 June 2012, p. 2.

19 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Explanatory Memorandum*, p. 4.

20 These instruments are designated on FRLI as 'Repealed/Ceased', with the reason for ceasing given as 'Repealed under Division 1 of Part 5A of the *Legislative Instruments Act 2003*'. Any such instrument still open to disallowance will be listed on the Senate and House of Representatives Disallowable Instruments Lists, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

21 Attorney-General's (Spent and Redundant Instruments) Repeal Regulation 2013 [Select Legislative Instrument No. 49, 2013] [F2013L00604].

22 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Explanatory Memorandum*, p. 8.

1 January 2005 is determined by their date of registration. Subsection 50(2) provides for all instruments made before 1 January 2005, and registered in bulk on that day (the day the LIA came into effect), to sunset over a range of dates based on their year of making, with the oldest sunsetting first.

3.40 The amending Act also inserted section 51A in to the LIA to allow the Attorney-General to declare a common sunsetting date—including a possible extension of up to five years—for instruments that are subject to a single thematic review. Introducing the flexibility to align sunsetting dates and cluster instruments thematically is intended to encourage a more efficient and effective review process for instruments, 'and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument'.²³

3.41 The committee notes the amendments and commends the measures to improve the sunsetting process.

Explanatory statements

3.42 The amending Act clarified the requirements for ESs for instruments, including instruments that are remade following a review. The general requirements for ESs were moved from the definitions section of the LIA and given more prominence in new subsection 26(1A). The committee commends this initiative, which has improved the visibility of the requirements.

3.43 The committee notes also that the amending Act provides for rule-makers to provide a single ES for multiple instruments where they cover related matters,²⁴ and can decide whether or not to provide a new ES when the instrument or provision is substantially the same as an existing instrument or provision.²⁵

3.44 The committee recognises that the new requirements for ESs have been introduced to assist with the re-making of instruments when the sunsetting provisions commence on 1 October 2013. However, it will continue to monitor these changes to ensure that ESs adequately explain the purpose and operation of instruments and their individual provisions.

Committee legal adviser

3.45 The committee was assisted by two legal advisers during the reporting period. Professor Stephen Bottomley was appointed as the committee's legal adviser in July 2000 and ceased his appointment at the end of 2012. The committee notes its appreciation for Professor Bottomley's extensive service to the committee. The committee also welcomes its new legal adviser, Mr Stephen Argument, whose appointment commenced in January 2013.

23 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Explanatory Memorandum*, p. 8.

24 LIA, subsection 26(1D).

25 LIA, subsection 26(1B).

Transfer of the functions of OLDP

3.46 On 1 October 2012, the functions and staff of the OLDP were transferred to the Office of Parliamentary Counsel (OPC).

3.47 On 31 January 2013, OPC advised that the Instrument Drafting Group and the Publications Groups within its organisation moved on to the OPC Information Technology and Communications systems. The committee notes that, as part of this change, the styles and formats used for the drafting of instruments became more consistent with those used for Bills and Acts.

3.48 The committee thanks OPC for timely advice to the committee regarding the transfer of functions and associated changes.

Senator Sean Edwards

Chair

Appendix 1

Breakdown of instruments 2012-13

The table below provides a breakdown of instruments considered in 2012-13 by Act and instrument type. For detail on particular of instruments, the Federal Register of Legislative Instruments (FRLI) should be consulted.

<i>A New Tax System (Australian Business Number) Act 1999</i>	
regulation	1
<i>A New Tax System (Family Assistance) Act 1999</i>	
determination	6
<i>A New Tax System (Goods and Services Tax) Act 1999</i>	
determination	2
legislative instrument	10
regulation	5
<i>Aboriginal and Torres Strait Islander Act 2005</i>	
declaration	1
determination	1
regulation	2
rules	1
<i>Acts Interpretation Act 1901</i>	
regulation	1
<i>Administrative Appeals Tribunal Act 1975</i>	
regulation	1
<i>Aged Care Act 1997</i>	
determination	25
principles	16
<i>Agriculture and Veterinary Chemicals (Administration) Act 1992</i>	
regulation	1
<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	
regulation	1
<i>Airports Act 1996</i>	
regulation	5
Annual Appropriations Acts	
determination to reduce appropriation	8
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	
rules	5

<i>Auditor-General Act 1997</i>	
auditing standard	1
<i>AusCheck Act 2007</i>	
regulation	1
<i>Australian Broadcasting Corporation Act 1983</i>	
regulation	1
<i>Australian Capital Territory (Planning and Land Management) Act 1988</i>	
amendment to National Capital Plan	5
<i>Australian Charities and Not-for-profits Commission Act 2012</i>	
regulation	4
<i>Australian Communications and Media Authority Act 2005</i>	
determination	5
<i>Australian Crime Commission Act 2002</i>	
regulation	2
<i>Australian Film, Television and Radio School Act 1973</i>	
determination	3
<i>Australian Meat and Live-stock Industry Act 1997</i>	
order	4
<i>Australian National Railways Commission Act 1983</i>	
notice	1
<i>Australian National Registry of Emissions Units Act 2011</i>	
regulation	2
<i>Australian Participants in British Nuclear Tests (Treatment) Act 2006</i>	
instrument	2
regulation	1
<i>Australian Passports Act 2005</i>	
determination	1
<i>Australian Prudential Regulation Authority Act 1998</i>	
determination	32
instrument	6
regulation	1
<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>	
regulation	1
<i>Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Act 2011</i>	
determination	1
<i>Australian Securities and Investments Commission Act 2001</i>	
regulation	1

<i>Australian Sports Anti-Doping Authority Act 2006</i>	
regulation	1
<i>Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Act 2011</i>	
determination	1
<i>Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998</i>	
determination	1
<i>Authorised Non-operating Holding Companies Supervisory Levy Imposition Act 1998</i>	
determination	1
<i>Automotive Transformation Scheme Act 2009</i>	
order	1
<i>Autonomous Sanctions Act 2011</i>	
declaration	1
instrument	2
list	3
regulation	1
<i>Aviation Transport Security Act 2004</i>	
regulation	4
<i>Banking Act 1959</i>	
exemption	1
prudential standard	21
regulation	3
<i>Bankruptcy Act 1966</i>	
determination	1
<i>Bankruptcy (Estate Charges) Act 1997</i>	
determination	1
<i>Broadcasting Services Act 1992</i>	
declaration	2
determination	19
licence area plan	29
licence condition	2
notice	15
specification	1
standard	2
<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>	
determination	17
regulation	2

<i>Charter of the United Nations Act 1945</i>	
declaration	2
regulation	3
<i>Child Support (Registration and Collection) Act 1988</i>	
direction	1
<i>Christmas Island Act 1958</i>	
determination	1
list of Acts of the Western Australian Parliament wholly or partly in force in Christmas Island	2
ordinance	1
<i>Christmas Island Act 1958 and Cocos (Keeling) Islands Act 1955</i>	
ordinance	1
<i>Civil Aviation Act 1988</i>	
airworthiness directive	24
approval	5
Australian technical standard	1
authorisation	3
direction	16
exemption	91
instruction	10
manual of standards	3
order	14
permission	2
regulation	5
revocation of airworthiness directive	24
<i>Clean Energy Act 2011</i>	
determination	1
regulation	10
<i>Climate Change Authority Act 2011</i>	
specification	1
<i>Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011</i>	
regulation	1
<i>Coastal Trading (Revitalising Australian Shipping) Act 2012</i>	
exemption	2
regulation	1
<i>Cocos (Keeling) Islands Act 1955</i>	
determination	1
list of Acts of the Western Australian Parliament wholly or partly in force in Cocos (Keeling) Islands	2
ordinance	1

<i>Commonwealth Authorities and Companies Act 1997</i>	
regulation	1
<i>Commonwealth Electoral Act 1918</i>	
regulation	1
<i>Commonwealth Places (Mirror Taxes) Act 1998</i>	
notice	1
<i>Competition and Consumer Act 2010</i>	
consumer protection notice	3
regulation	3
standard	2
<i>Consular Privileges and Immunities Act 1972</i>	
determination	1
<i>Corporations (Fees) Act 2001</i>	
determination	1
regulation	1
<i>Corporations Act 2001</i>	
accounting standard	13
CCP (central counterparties) standard	2
class order	27
class rule waiver	5
determination	1
financial stability standards	2
guidelines	1
market integrity rule	10
regulation	18
<i>Crimes Act 1914</i>	
regulation	3
<i>Crimes (Overseas) Act 1964</i>	
regulation	1
<i>Criminal Code Act 1995</i>	
regulation	6
<i>Currency Act 1965</i>	
determination	14
<i>Customs Act 1901</i>	
amendment of approved statement	7
CEO direction	1
CEO instrument of approval	27
Defence and Strategic Goods List amendment	1

regulation	19
<i>Customs Administration Act 1985</i>	
regulation	1
<i>Customs Tariff (Anti-Dumping) Act 1975</i>	
regulation	1
<i>Defence Act 1903</i>	
determination	76
instrument	1
regulation	4
<i>Defence Home Ownership Assistance Scheme Act 2008</i>	
determination	2
<i>Defence Trade Controls Act 2012</i>	
regulation	1
<i>Dental Benefits Act 2008</i>	
rules	2
<i>Disability Discrimination Act 1992</i>	
regulation	1
<i>Do Not Call Register Act 2006</i>	
determination	1
specification	1
<i>Education Services for Overseas Students Act 2000</i>	
determination	11
regulation	1
<i>Education Services for Overseas Students (TPS Levies) Act 2012</i>	
determination	1
<i>Energy Efficiency Opportunities Act 2006</i>	
regulation	2
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
amendment – list of exempt native specimens	70
amendment – list of specimens taken to be suitable for live import	11
amendment – list of threatened species	16
declaration	5
inclusion – list of key threatening processes	1
inclusion – list of threatened ecological communities	6
plan - management	6
plan - recovery	5
plan – threat abatement	1
regulation	1

<i>European Bank for Reconstruction and Development Act 1990</i>	
regulation	1
<i>Excise Act 1901</i>	
determination	2
regulation	4
<i>Export Control Act 1982</i>	
order	6
<i>Export Inspection (Establishment Registration Charges) Act 1985</i>	
regulation	1
<i>Export Market Development Grants Act 1997</i>	
determination	1
<i>Extradition Act 1988</i>	
regulation	4
<i>Fair Entitlements Guarantee Act 2012</i>	
declaration	2
regulation	1
<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>	
regulation	1
<i>Fair Work Act 2009</i>	
regulation	5
<i>Fair Work (Building Industry) Act 2012</i>	
building code	1
direction	1
regulation	1
<i>Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Act 2012</i>	
determination	1
<i>Family Law Act 1975</i>	
determination	2
regulation	6
rules	1
<i>Federal Circuit Court of Australia Act 1999</i>	
regulation	1
<i>Federal Court of Australia Act 1976</i>	
regulation	1
rules	2
<i>Federal Financial Relations Act 2009</i>	
determination	1

<i>Federal Magistrates Act 1999</i>	
rules	1
<i>Financial Management and Accountability Act 1997</i>	
determination	1
determination – special account	8
guidelines - revocation	1
order	2
regulation	10
<i>Financial Sector (Collection of Data) Act 2001</i>	
determination – reporting standard	104
<i>First Home Saver Account Providers Supervisory Levy Imposition Act 2008</i>	
determination	1
<i>Fisheries Levy Act 1984</i>	
regulation	1
<i>Fisheries Management Act 1991</i>	
determination	20
direction	17
management plan	2
regulation	1
<i>Fishing Levy Act 1991</i>	
regulation	1
<i>Foreign Acquisitions and Takeovers Act 1975</i>	
regulation	1
<i>Foreign Evidence Amendment Act 2010</i>	
regulation	1
<i>Fringe Benefits Tax Assessment Act 1986</i>	
regulation	1
<i>Fuel Quality Standards Act 2000</i>	
determination	2
regulation	1
<i>Fuel Tax Act 2006</i>	
determination	3
<i>General Insurance Supervisory Levy Imposition Act 1998</i>	
determination	1
<i>Governor-General Act 1974</i>	
order	1
<i>Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012</i>	
instrument	1

<i>Greenhouse and Energy Minimum Standards Act 2012</i>	
determination - standards	23
instrument	1
regulation	1
<i>Healthcare Identifiers Act 2010</i>	
regulation	1
<i>Health Insurance Act 1973</i>	
declaration	4
determination	22
guidelines	1
principles	1
regulation	20
<i>Health Workforce Australia Act 2009</i>	
instrument	1
<i>High Court of Australia Act 1979</i>	
rules	1
<i>Higher Education Support Act 2003</i>	
approval – higher education provider	19
approval – VET provider	44
guidelines	9
instrument	3
<i>Horticultural Marketing and Research and Development Services Act 2000</i>	
order	1
<i>Illegal Logging Prohibition Act 2012</i>	
regulation	2
<i>Immigration (Education) Act 1971</i>	
specification	1
<i>Income Tax Assessment Act 1936</i>	
regulation	5
<i>Income Tax Assessment Act 1997</i>	
determination	1
regulation	5
rules	2
<i>Indigenous Education (Targeted Assistance) Act 2000</i>	
regulation	1
<i>Industrial Chemicals (Notification and Assessment) Act 1989</i>	
regulation	1

<i>Insurance Act 1973</i>	
determination – prudential standard	15
<i>Insurance Contracts Act 1984</i>	
regulation	2
<i>Jervis Bay Territory Acceptance Act 1915</i>	
determination	4
<i>Judges and Governors-General Legislation Amendment (Family Law) Act 2012</i>	
order	1
<i>Judges' Pensions Act 1968</i>	
order	1
<i>Judiciary Act 1903</i>	
legal services direction - amendment	1
regulation	1
rules	3
<i>Legislative Instruments Act 2003</i>	
regulation	3
<i>Life Insurance Act 1995</i>	
determination – prudential standard	17
regulation	1
<i>Life Insurance Supervisory Levy Imposition Act 1998</i>	
determination	1
<i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i>	
declaration	1
regulation	1
<i>Maritime Transport and Offshore Facilities Security Act 2003</i>	
regulation	4
<i>Marriage Act 1961</i>	
proclamation	1
<i>Maternity Leave (Commonwealth Employees) Act 1973</i>	
regulation	1
<i>Medical Indemnity Act 2002</i>	
amendment – premium support scheme	1
protocol	1
<i>Migration Act 1958</i>	
regulation	17
specification	16
<i>Military Justice (Interim Measures) Act (No. 1) 2009</i>	
regulation	1

<i>Military Rehabilitation and Compensation Act 2004</i>	
determination	3
treatment principles	4
<i>Motor Vehicles Standards Act 1989</i>	
standard	5
<i>Mutual Assistance in Business Regulation Act 1992</i>	
regulation	1
<i>Mutual Assistance in Criminal Matters Act 1987</i>	
regulation	1
<i>National Consumer Credit Protection Act 2009</i>	
class order	2
regulation	6
<i>National Disability Insurance Scheme Act 2013</i>	
rules	8
<i>National Environment Protection Council Act 1994</i>	
measure	2
<i>National Greenhouse and Energy Reporting Act 2007</i>	
determination	2
instrument	1
regulation	2
<i>National Health Act 1953</i>	
determination	63
instrument – pharmaceutical benefits (PB series)	12
instrument - revocation	2
instrument – special arrangements	32
regulation	4
rules	2
scheme	1
specification	6
<i>National Health Security Act 2007</i>	
determination	1
regulation	1
<i>National Measurement Act 1960</i>	
regulation	2
<i>National Portrait Gallery of Australia Act 2012</i>	
regulation	1
<i>National Rental Affordability Scheme Act 2008</i>	
regulation	1

<i>National Transmission Network Sale Act 1998</i>	
declaration	1
<i>National Vocational Education and Training Regulator Act 2011</i>	
instrument	1
<i>National Vocational Education and Training Regulator (Charges) Act 2012</i>	
determination	1
<i>Native Title Act 1993</i>	
determination	1
guidelines	1
instrument – recognition as Representative Aboriginal/Torres Strait Islander Body	9
<i>Navigation Act 1912</i>	
marine order	12
regulation	1
<i>Nuclear Non-Proliferation (Safeguards) Act 1987</i>	
regulation	1
<i>Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003</i>	
regulation	1
<i>Ombudsman Act 1976</i>	
regulation	1
<i>Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995</i>	
regulation	1
<i>Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995</i>	
regulation	1
<i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>	
regulation	5
<i>Paid Parental Leave Act 2010</i>	
rules	2
<i>Parliamentary Entitlements Act 1990</i>	
determination	1
regulation	3
<i>Patents Act 1990</i>	
instrument	1
regulation	2
<i>Payment Systems (Regulations) Act 1998</i>	
revocation of standard	1
<i>Personally Controlled Electronic Health Records Act 2012</i>	
regulation	1
rules	4

<i>Personal Property Securities Act 2009</i>	
regulation	1
<i>Primary Industries and Energy Research and Development Act 1989</i>	
regulation	1
<i>Primary Industries (Customs) Act 1999</i>	
regulation	4
<i>Primary Industries (Excise) Levies Act 1999</i>	
regulation	1
<i>Primary Industries Levies and Charges Collection Act 1991</i>	
regulation	2
<i>Privacy Act 1988</i>	
regulation	1
<i>Private Health Insurance (Complaints Levy) Act 1995</i>	
rules	1
<i>Private Health Insurance (Council Administration Levy) Act 2003</i>	
rules	1
<i>Private Health Insurance Act 2007</i>	
instrument	1
rules	26
<i>Proceeds of Crime Act 2002</i>	
regulation	1
<i>Product Stewardship Act 2011</i>	
instrument	1
regulation	3
<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	
marine order	1
<i>Public Lending Right Act 1985</i>	
instrument	1
<i>Public Service Act 1999</i>	
direction	2
regulation	2
<i>Public Works Committee Act 1969</i>	
regulation	1
<i>Quarantine Act 1908</i>	
determination	1
<i>Radiocommunications (Receiver Licence Tax) Act 1983</i>	
determination	3

<i>Radiocommunications (Transmitter Licence Tax) Act 1983</i>	
determination	4
<i>Radiocommunications Act 1992</i>	
class licence	4
determination	20
guidelines	13
notice	4
plan	5
standard	2
<i>Remuneration Tribunal Act 1973</i>	
determination	20
regulation	1
<i>Renewable Energy (Electricity) Act 2000</i>	
regulation	7
<i>Resale Royalty Right for Visual Artists Act 2009</i>	
determination	1
regulation	1
<i>Retirement Savings Accounts Act 1997</i>	
regulation	4
<i>Retirement Savings Account Providers Supervisory Levy Imposition Act 1998</i>	
determination	1
<i>Road Safety Remuneration Act 2012</i>	
regulation	1
rules	1
<i>Royal Commissions Act 1902</i>	
regulation	1
<i>Safety, Rehabilitation and Compensation Act 1988</i>	
instrument – workplace rehabilitation provider	4
guidelines	1
notice	1
<i>Schools Assistance Act 2008</i>	
determination	1
guidelines	1
regulation	1
<i>Shipping Reform (Tax Incentives) Act 2012</i>	
regulation	1
specification	1

<i>Shipping Registration Act 1981</i>	
determination	2
regulation	1
<i>Social and Community Services Pay Equity Special Account Act 2012</i>	
specification	1
<i>Social Security (Administration) Act 1999</i>	
determination	12
principle	1
regulation	1
specification	4
<i>Social Security Act 1991</i>	
determination	16
guidelines	1
principle	1
specification	1
<i>Stronger Futures in the Northern Territory Act 2012</i>	
rules	2
<i>Student Assistance Act 1973</i>	
determination	1
<i>Superannuation (Productivity Benefit) Act 1988</i>	
declaration	8
determination	2
<i>Superannuation Act 1976</i>	
declaration	6
regulation	1
<i>Superannuation Act 1990</i>	
declaration	2
deed	2
<i>Superannuation Act 2005</i>	
declaration	1
deed	2
<i>Superannuation Auditor Registration Imposition Act 2012</i>	
regulation	1
<i>Superannuation Industry (Supervision) Act 1993</i>	
class order	1
determination	10
regulation	9

<i>Superannuation (Financial Assistance Funding) Levy Act 1993</i>	
regulation	1
<i>Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991</i>	
regulation	2
<i>Sydney Airport Demand Management Act 1997</i>	
scheme	2
<i>Taxation Administration Act 1953</i>	
instrument	16
regulation	3
<i>Telecommunications (Carrier Licence Charges) Act 1997</i>	
determination	7
<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>	
determination	1
guidelines	1
instrument	1
regulation	1
<i>Telecommunications (Interception and Access) Act 1979</i>	
declaration	1
determination	2
instrument	1
regulation	1
<i>Telecommunications (Numbering Charges) Act 1997</i>	
determination	1
<i>Telecommunications Act 1997</i>	
declaration	1
determination	4
notice	1
plan	1
regulation	2
rules	1
technical standard	3
<i>Telecommunications Universal Service Management Agency Act 2012</i>	
determination	2
regulation	2
<i>Television Licence Fees Act 1964</i>	
regulation	2
<i>Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011</i>	
regulation	1

<i>Tertiary Education Quality and Standards Agency Act 2011</i>	
determination	4
guidelines	3
<i>Textile, Clothing and Footwear Investment and Innovation Programs Act 1999</i>	
scheme	1
<i>Therapeutic Goods (Charges) Act 1989</i>	
regulation	3
<i>Therapeutic Goods Act 1989</i>	
determination	1
notice	5
order	2
regulation	5
specification	9
<i>Tobacco Advertising Prohibition Act 1992</i>	
regulation	1
<i>Tradepersons' Rights Regulation Act 1946</i>	
regulation	1
<i>Transport Safety Investigation Act 2003</i>	
regulation	3
<i>Trans-Tasman Mutual Recognition Act 1997</i>	
regulation	1
<i>Veterans' Entitlements Act 1986</i>	
determination	5
instrument	6
regulation	3
statement of principles	74
<i>Water Act 2007</i>	
plan	1
regulation	1
rules	2
<i>Water Efficiency Labelling and Standards Act 2005</i>	
determination	1
regulation	1
<i>Wine Australia Corporation Act 1980</i>	
regulation	1
<i>Work Health and Safety Act 2011</i>	
code of practice	1
declaration	1

exemption tor regulation	1
notice	1
regulation	2
<i>Workplace Gender Equality Act 2012</i>	
instrument	1
Total number of regulations	357
Total number of other	1727
Total	2084

Appendix 2

Undertakings

Table 1: Undertakings implemented in 2012-13

Instrument	Date of undertaking	Undertaking	Implemented by
Department of Agriculture, Fisheries and Forestry			
Export Control (Poultry Meat and Poultry Meat Products) Orders 2010 [F2010L03051]	14 June 2011	Amend the orders to specify that the scope of an audit is to be determined prior to its commencement	Export Control (Poultry Meat and Poultry Meat Products) Amendment Order 2013 (No. 1) [F2013L00502]; and
Export Control (Wild Game Meat and Wild Game Meat Products) Orders 2010 [F2010L03050]			Export Control (Wild Game Meat and Wild Game Meat Products) Amendment Order 2013 (No. 1) [F2013L00501] [12 March 2013]
Export Control (Poultry Meat and Poultry Meat Products) Orders 2010 [F2010L03051]	24 August 2011	Amend the orders to remove the term 'destroy' from provisions concerning electronic permits and certificates; and to apply the orders only to paper government certificates and permits	(Poultry Meat and Poultry Meat Products) Amendment Order 2013 (No. 1) [F2013L00502]; and
Export Control (Wild Game Meat and Wild Game Meat Products) Orders 2010 [F2010L03050]			Export Control (Wild Game Meat and Wild Game Meat Products) Amendment Order 2013 (No. 1) [F2013L00501] [12 March 2013]
Department of Broadband, Communications and the Digital Economy			
Telecommunications Service Provider (Mobile Premium Services) Determination 2010 No. 1 [F2010L00639]	23 November 2010	Amend section 13 of the determination to clarify compliance timeframes	Telecommunications Service Provider (Mobile Premium Services) Amendment Determination 2012 (No. 1) [F2012L02458] [14 December 2012]

Instrument	Date of undertaking	Undertaking	Implemented by
Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education			
Tertiary Education Quality and Standards Agency (Register) Guidelines 2012 [F2012L01889]	23 October 2012	To amend paragraph 7(a) of the guidelines to include the statement from paragraph 7(b) that will appear against the National Register entry for a registered higher education provider with self-accrediting authority	Tertiary Education Quality and Standards Agency (Register) Guidelines Amendment 2012 [F2012L02152] [23 October 2012]

Table 2: Undertakings outstanding at 30 June 2013

Instrument	Date of undertaking	Undertaking
Department of Agriculture, Fisheries and Forestry		
Export Control (Animals) Amendment Order 2006 (No. 1) [F2006L02383]	13 September 2006	Amend subsection 3.07(4) to clarify that a notice may be subject to conditions Amend sections 3.13 and 2.51 to provide for merits review of a decision concerning the costs that an exporter is required to pay
Export Control (Fees) Amendment Orders 2011 (No. 1) [F2011L01865]	21 November 2011	Amend the orders to include a note in order 55B about the possible applications of order 49 to remit the whole or part of a fee if the Secretary of the Department of Agriculture, Fisheries and Forestry thinks there is sufficient reason to do so
Export Control (Plant and Plant Products) Order 2011 [F2011L02005]	23 November 2011	Amend the order to require that approval holders (for both container and vessel approvals) be notified in a reasonable manner that cancellation of the approval holder's approval has been made, or will occur, in circumstances where conditions relating to the container and/or vessel have changed following the inspection by an authorised officer; and clarify the use of the uncertain term 'forthwith' in the order

Instrument	Date of undertaking	Undertaking
Attorney-General's Department		
AusCheck Regulations 2007 [Select Legislative Instrument 2007 No. 137] [F2007L01570]	4 October 2007	Amend the note to regulation 11 to include a reference to the Cost Recovery Impact Statement that was prepared during the making of the regulations
Department of Defence		
Defence Determination 2011/34, Financial support for legal or financial advice on death of a member under section 58B of the <i>Defence Act 1903</i>	29 November 2011	Amend the determination to specify as a mandatory requirement that the Defence Community Organisation (DCO) social worker be required to inform a potential recipient that this assistance may be accessed if they meet the relevant criteria; to clarify that submissions are to be submitted through the DCO social worker; and to specify an inclusive list of conditions which may cause difficulty with financial literacy
Department of Families, Housing, Community Services and Indigenous Affairs		
Aboriginal Land Grant (Jervis Bay Territory) By-laws 2005 [F2005L04071]	23 March 2006	Amend to: Clarify the position with regard to the return of confiscated items Clarify scope of 'commercial activities' Require wardens to produce an identity card Clarify the provision concerning the keeping of dogs and cats within the community
Disability Services (Eligible Services) Approval (FaHCSIA) 2008 [F2008L01381]	15 August 2008	Amend section 5 to make the delegation powers consistent with those provided for in section 33 of the <i>Disability Services Act 1986</i>
Department of Health and Ageing		
Therapeutic Goods Amendment Regulations 2003 (No. 5) [Statutory Rules 2003 No. 301] [F2003B00315]	11 March 2004	Amend the regulations to clarify the meaning of 'narrowcast transmission' in regulation 5BA; and the terms 'special interest groups' and 'programs of limited appeal'

Instrument	Date of undertaking	Undertaking
Department of Infrastructure and Transport		
Air Navigation Amendment Regulations 2009 (No. 1) [Select Legislative Instrument 2009 No. 23] [F2009L00564]	6 April 2009	Amend regulation 18 to require the Secretary of the Department of Infrastructure and Transport to provide a statement of reasons for a decision to refuse an application for an international airline licence
Civil Aviation Safety Amendment Regulations 2008 (No. 1) [Select Legislative Instrument 2008 No. 192] [F2008L03483]	11 November 2008	Amend regulations 99.115 and 99.120 to clarify the intent of the provisions regarding the need for consent in obtaining a sample for drug and alcohol testing (undertaking subsequently amended to considering the matter further when considering next substantive amendments to regulations)
Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education		
Clean Energy Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 12] [F2012L00417]	12 April 2012	Amend the regulation to revise the definition of ASTM (the American Society for Testing and Materials) to clarify that the reference to those standards are those as updated from time to time, unless a certain date is specified for the standard
Department of Sustainability, Environment, Water, Population and Communities		
Environment Protection and Biodiversity Conservation Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 100] [F2010L01366]	15 November 2010	Review the application of the offence provision in paragraph 12.58(2)(b) (likelihood of a parachutist landing in a Commonwealth reserve); and the apparent duplication of requirements in paragraphs 10.03AD(a) and (b) and clarify the intent of the provision
Department of Veterans' Affairs		
Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (Claims/Dental/Fees) Instrument 2010 (No. R9/2010) [F2010L02630]	23 November 2010	Amend paragraph 3.5.1 (o) to specify that acceptance of an 'other GP' fee must be dependent on the GP complying with the principles

Instrument	Date of undertaking	Undertaking
Military Rehabilitation and Compensation (Weekly Payments - Class of Persons) Specification 2011 [F2011L00238]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase
Veterans' Entitlements (Weekly Payments – Class of Persons) Specification 2011 [F2011L00240]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase

Appendix 3

Guideline on consultation



AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Guideline for preparation of explanatory statements: consultation

Role of the committee

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

Purpose of guideline

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

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

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

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

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

Requirements of the Legislative Instruments Act 2003

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

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

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

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

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

Describing the nature of consultation

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

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

Method and purpose of consultation

An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.

Bodies/groups/individuals consulted

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

Issues raised in consultations and outcomes

An ES should identify the nature of any issues raised in consultations, as well 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

For further advice regarding the requirements of the Act in relation to consultation or any other matters, please consult the *Legislative Instruments Handbook: a practical guide for compliance with the Legislative Instruments Act 2003 and related matters (December 2004)*, published by the Office of Legislative Drafting and Publishing.

Further information is also available through the committee's website at [http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Regulations and Ordinances](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances) or by contacting the committee secretariat at:

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